A TREATISE

ON

CRIMINAL PLEADING

AND

PRACTICE.

BY

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PREFACE.

THE materials for the following pages, so far as concerns the law prior to 1874, are to be found, in a large measure, in the seventh edition of my work on Criminal Law. In this volume I have confined myself to the subject of Pleading and Practice. In a fourth volume, to be issued in a few weeks, the topic of Criminal Evidence will be considered.

F. W.

May 1, 1880.

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Page 27. Note, first column, at end of note 1, add, "Infra, § 993."

On same page, second column of note, 5th line, after "Bull, in re," add, "4 Dill. 323."

Page 28. End of note 3, add, "Infra, § 993."

Page 50. End of note 1, add, "R. *v.* Carden, L. R. 5 Q. B. D. 1. Infra, § 361."

Page 54. End of note 1, add, "Infra, § 1007."

Page 56. End of note 5, first paragraph, add, "See infra, §§ 1007 *et seq.*, where this topic is discussed at large."

Page 59. Second column, 4th line, strike out "must follow" and insert "and."

Page 85. Note 7, for "25 Ind." read "26 Ind."

Page 108. Note 3, after "5 A. & E." add "N. S. (5 Q. B.)"

Page 112. Note 13, for "Kaisler" read "Raisler."

Page 167. Note 7, for "15 Vt." read "14 Vt."

Page 199. Note 1, last line, for "637" read "327."

Page 219. Note 1, add, "Infra, § 450."

Page 257. Note 5, for "Garaway *v.* State, 23 Ala." read "Ganaway *v.* State, 22 Ala."

Page 271. Note 4, change "1 Ld. Ray." to "2 Ld. Ray."

Page 362. Note 7, for "100 Mass. 339" read "109 Mass. 333."

Page 397. End of first paragraph of note, for "2 Watts" read "7 Watts."

Page 427. Note 2, last line, for "4 Crum." read "3 Crum."

Page 437. Note 9, for "9 Iowa, 18," read "9 Iowa, 188."

Page 590. Note 1, for "2 Yeates, 479," read "3 Yeates, 407."

Page 603. First column, opposite to § 911, change "But not" to "But only."

Page 609. Side note, change "But not" to "But only."

" " After note 1 add, "See Walter *v.* Com. 88 Penn. St. 137."

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I. ARREST GENERALLY.

Criminal procedure usually commences with oath before magistrate.

§ 1. THE usual commencement of a criminal procedure is a preliminary oath before a magistrate, upon which, if it appear on the face of such oath that a criminal offence has been committed by the defendant within the magistrate's jurisdiction,[1] a warrant is issued for his arrest. Under the common law practice, this warrant is addressed to a constable, or officer, or other person whose name is specified;[2] the usual and best course being to name the constable of the ward or precinct. When addressed to the sheriff

[1] See Housh *v.* People, 75 Ill. 487; Woodall *v.* McMillan, 38 Ala. 622.

[2] See R. *v.* Whalley, 7 C. & P. 245; Meek *v.* Pierce, 19 Wis. 300.

of the county, the latter may act by deputy. Whether a constable may act through deputy has been doubted; and in England the negative seems to be held.[1]

Officer may be described by office.

§ 2. In English practice a warrant may be directed to officers by the description of their office. When addressed by name, the officer named may execute the warrant anywhere within the jurisdiction of the magistrate granting the warrant. When addressed to officers designating them only by the description of their office, the officer acting can execute the warrant only within the precincts of his office.[2]

To arrest, corporal control and notice is essential.

§ 3. To constitute an arrest, so as to make the defendant guilty of escape in case he does not submit and follow, it is enough that there should be some degree, however slight, of corporal control. Thus to inform a defendant that he is arrested, and to lock the door,[3] or to touch him with only a finger, provided he be informed at the time that he is arrested,[4] constitutes an arrest. And corporal touch is not necessary, provided it be waived by the defendant, which can be done by his submission to the process, and placing himself in the power of the officer.[5] But it is essential that there should be notice of arrest given either expressly or by implication; and without such notice no amount of physical restraint can constitute an arrest.[6] The amount of force justifiable in arresting is discussed elsewhere.[7]

[1] 1 Chit. Crim. Law, 48.

[2] 1 B. & C. 288; 2 D. & R. 44.

[3] Williams *v.* Jones, Cas. temp. Hardwicke, 284.

[4] Genner *v.* Sparks, 1 Salk. 79.

[5] Emery *v.* Chesley, 18 N. H. 198; Russen *v.* Lucas, 1 Car. & P. 153; George *v.* Radford, Moody & M. 244; Searls *v.* Viets, 2 Th. & C. 224. See Whart. Crim. Law, 8th ed. §§ 402–444, 1672–4.

[6] Whart. Crim. Law, 8th ed. §§ 395–444; Mackalley's case, 9 Coke, 65; Yates *v.* People, 32 N. Y. 509; R. *v.* Howarth, 1 Moody C. C. 207; R. *v.* Gardener, Ibid. 390; R. *v.* Payne, Ibid. 378; State *v.* Belk, 76 N. C. 10.

[7] In Whart. Crim. Law, 8th ed., the topic in the text is discussed as follows: —

Killing is justifiable when necessary to effect an arrest, § 402.

Murder for officer intentionally to kill a person flying from arrest, § 403.

Otherwise in respect to felonies, § 405.

Killing by officer in prevention of escape justifiable, § 406.

So when necessary to preserve peace, § 407.

Lawful arrest unlawfully executed imposes responsibility, § 408.

Legal warrant necessary, § 409.

Private persons interfere at their own risk, § 410.

§ 4. But this notice may be given by implication.[1] If, as has been seen, a constable command the peace,[2] or show his badge or staff of office,[3] this is a sufficient intimation of his authority. In such a case it is not necessary to prove the officer's appointment as constable; proof that he was accustomed to act as constable is sufficient.[4] Where he shows his warrant,[5] or where it appears that he is known to the

But notice may be given by implication.

So as to military and naval officers, § 411.

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Intentional killing of lawfully arresting officer is murder, § 413.

But manslaughter when arrest is illegal, § 414.

Constables and policemen have authority to arrest when public order is threatened, § 415.

Bailiff's powers limited to arrest, § 416.

Officer executing process must be within jurisdiction, § 417.

Notice may be inferred from facts, § 418.

If there be no notice, killing in self-protection is not murder, § 419.

Warrant must be executed by party named or his assistant, § 420.

Warrant continues in force until executed, § 421.

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Falsity of charge no alleviation, § 423.

Warrant without seal is void, § 424.

But not so as to informality not amounting to illegality, § 425.

Warrant need not be shown, § 426.

Arrest on charge of felony unlawful without warrant, § 427.

Arrest may be made during offence without warrant, § 428.

For past offences limited to felonies and breaches of the peace, § 429.

Killing of officer arresting on probable felony is murder, § 430.

Military and naval officers subject to same rule, § 431.

Persons aiding officers entitled to protection of officers, § 432.

So as to private person lawfully arresting independently of officer, § 433.

Pursuer must show that felony was committed, § 434.

Private person may interfere to prevent crime, § 435.

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As to the right to resist officers see Whart. Crim. Law, 8th ed. §§ 647–9.

[1] People *v.* Pool, 27 Cal. 572. See Whart. Crim. Law, 8th ed. §§ 402, 444, 1672.

[2] 1 Hale, 561.

[3] Foster, 311; Yates *v.* People, 32 N. Y. 509; R. *v.* Woolmer, 1 Moody C. C. 334; Whart. Crim. Law, 8th ed. § 1646.

[4] 1 East P. C. 315; Whart. Crim. Evid. § 833.

[5] 1 Hale, 461.

defendant to be an officer; as, for instance, when the defendant says: "Stand off; I know you well enough; come at your peril;" [1] this is notice enough.[2]

II. BY OFFICERS.

1. *With Warrant.*

§ 5. It is elsewhere shown [3] that there is a distinction between a warrant that is illegal and one that is irregular. When a warrant is *illegal*, — *e. g.* when the magistrate has no jurisdiction,[4] or when on its face the offence charged is not the subject of arrest, — then the officer is not protected by the warrant, and acts on his own peril.[5] He is liable, if it appear that there was no reasonable ground for arresting the defendant, to an action of trespass; and if the defendant kill the officer, there being no such reasonable ground, this is only manslaughter.[6]

Officer not protected by illegal warrant.

§ 6. A warrant is illegal, in the sense above specified, which does not state the specific offence with which the party to be arrested is charged;[7] or which does not aver that information was duly made thereof by oath before a magistrate having jurisdiction.[8] And it is fatal to the efficacy of such warrant for it to omit to specify the defendant's name oth-

Warrant omitting essentials is illegal.

[1] R. *v.* Pew, Cro. Car. 183.

[2] 1 Hale, 438. See People *v.* Pool, 27 Cal. 572. Infra, § 8.

[3] Whart. Crim. Law, 8th ed. §§ 402–444.

[4] Hence an arrest, out of the jurisdiction of the magistrate issuing the warrant is illegal. State *v.* Bryant, 65 N. C. 327; State *v.* Shelton, 79 N. C. 605.

[5] See Whart. Crim. Law, 8th ed. § 648; 20 Alb. L. J. 215.

[6] See Whart. Crim. Law, 8th ed. §§ 414–7; Hale P. C. 465; R. *v.* Curvan, 1 Mood. C. C. 132; Com. *v.* Drew, 4 Mass. 391; Com. *v.* Carey, 12 Cush. 246; State *v.* Belk, 76 N. C. 10; Rafferty *v.* People, 69 Ill. 111; S. C., 72 Ill. 37; Galvin *v.* State, 6 Cold. (Tenn.) 283.

[7] Nisbitt, ex parte, 8 Jur. 1071; Money *v.* Leach, 1 W. Bl. 555. In People *v.* Phillips, 1 Parker C. R. 104, Judge Edmonds said: "In describing the offence, a mere compliance with the terms of the statute will not suffice, for if a magistrate merely states the facts of the offence, in the words of the act, when the evidence does not warrant the conclusion, he subjects himself to a criminal prosecution. R. *v.* Thompson, 2 T. R. 18; R. *v.* Pearse, 9 East, 358; R. *v.* Davis, 6 T. R. 178; Avery *v.* Hoole, Coop. 825."

It must therefore be shown that the offence was duly verified by oath, and charged on the defendant by name. 2 Rob. Jus. 54.

[8] Caudle *v.* Seymour, 1 G. & D. 454; 1 Q. B. 889.

erwise than as "John Doe or Richard Roe, whose other or true name is to the complainant unknown;" [1] or if it omit the Christian name.[2] Yet if the warrant substantially comply with the requisites specified above, it will not be avoided by merely formal or clerical errors.[3] But the filling up of a blank warrant, after it is issued, by an unauthorized person, does not cure the defect.[4] And the warrant must have a seal to it,[5] if required by statute or local usage, though at common law it seems that the signature of the magistrate is enough,[6] or, at all events, a wafer or scroll.[7]

Not necessary for officer to show warrant.

§ 7. It is not necessary at common law for a bailiff or constable to show his warrant in making an arrest, even though it be demanded, provided he state its substance to the party arrested.[8] And, indeed, to show and read such warrant before arrest might make an arrest impossible. The defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the wrong.[9] But in Massachusetts, by statute, the officer is bound, if requested, to exhibit the warrant.[10]

2. *By Officers without Warrant.*

Peace officers may arrest without warrant

§ 8. Sheriffs, constables, officers of the police, are not only authorized to arrest public offenders without warrant, but are required to do so, if there be reasonable ground for suspicion. For all offences committed in the pres-

[1] Com. *v.* Crotty, 10 Allen, 403.

[2] R. *v.* Hood, 1 Moody, 281.

[3] Whart. Cr. Law, 8th ed. §§ 402–444; Com. *v.* Martin, 98 Mass. 4. See Pratt *v.* Bogardus, 49 Barb. 89; State *v.* Rowe, 8 Rich. 17.

[4] Rafferty *v.* People, 69 Ill. 111.

[5] Stockley's case, 1 East P. C. c. 5, s. 58; State *v.* Drake, 36 Me. 366; Welch *v.* Scott, 5 Ired. 72.

[6] Davis *v.* Clements, 2 N. H. 390; State *v.* Vaughn, Harper S. C. 313.

[7] State *v.* McNally, 34 Me. 210; Dewling *v.* Williamson, 9 Watts, 311; State *v.* Thompson, 49 Mo. 188; R. *v.* St. Paul's Cov. Gar. 9 Jur. 442; 7 Q. B. 232. In New York, by statute, "public seals may be made by a mere stamp on paper." Whart. on Ev. § 693.

[8] 2 Hawk. P. C. c. 13, § 28; though see State *v.* Garrett, 1 Wins. (N. C.) No. 1, 144; and Gen. Stat. Mass. c. 158, § 1. Infra, § 10.

[9] See R. *v.* Allen, 17 L. T. N. S. 222; R. *v.* Woolmer, *ut supra;* Com. *v.* Cooley, 6 Gray, 350; Drennan *v.* People, 10 Mich. 169; Arnold *v.* Steeves, 10 Wend. 514; State *v.* Townsend, 5 Harring. 487; Boyd *v.* State, 17 Ga. 194; Whart. Crim. Law, 8th ed. § 647.

[10] Gen. Stat. c. 158.

ence of an officer, this power exists;[1] though for past offences the power is limited to cases of felony and breaches of the peace.[2] In the latter cases, however, it is the duty of the officer to begin immediately the pursuit of the person charged with the offence, provided only that there be at the time reasonable ground of suspicion.[3] And the better view is, that the right, even as to offences committed in the officer's presence, is limited to felonies, breaches of the peace, and such misdemeanors as cannot be stopped or redressed except by immediate arrest.[4] Why, if the misdemeanor is completed, and the offender is not likely to escape, should the check and safeguard of a warrant be waived? Constables and

for offences in their presence, and for past felonies and breaches of the peace.

[1] Fost. 310, 311; R. *v.* Mabel, 9 C. & P. 474; Derecourt *v.* Corbishley, 5 El. & Bl. 188; Com. *v.* Deacon, 8 S. & R. 47; State *v.* Brown, 5 Harring. 505; Wolf *v.* State, 19 Oh. St. 248; State *v.* Ferguson, 2 Hill S. C. 619. By the English practice, the officer is not limited, even in misdemeanors, to the actual moment of the commission of the misdemeanor. He may arrest after the misdemeanor (*e. g.* an assault) is committed, if all danger of continuance of the misdemeanor has not ceased. R. *v.* Light, 7 Cox C. C. 389; Dears. & B. 332. See Shanley *v.* Wells, 71 Ill. 78. As limiting power see Donovan *v.* Jones, 36 N. H. 246.

In an English case a man was arrested for non-payment of arrears due on account of his bastard child. The warrant at the time of making the arrest was not in the possession of the arresting officer (though it had previously been so), but in that of his superior; but its production was not required. It was held that the officer was not justified in making the arrest, and that a conviction for assault on the officer while making the arrest could not be sustained. Galliard *v.* Laxton, 2 B. & S. 363. For offences against license laws arrests cannot be made without warrant. Meyer *v.* Clark, 41 N. Y. Sup. Ct. 105.

A constable may be resisted for attempts to arrest without warrant except in the cases above mentioned. R. *v.* Spencer, 3 F. & F. 857; R. *v.* Lockley, 4 F. & F. 155. As to arrests generally see Whart. Crim. Law, 8th ed. §§ 404–5–429; R. *v.* Marsden, L. R. 1 C. C. R. 131; R. *v.* Chapman, 12 Cox C. C. 4; State *v.* Oliver, Houst. 585; Tiner *v.* State, 44 Tex. 128. As to Massachusetts statute of 1876 see Phillips *v.* Fadden, 125 Mass. 198.

[2] See Com. *v.* Carey, 12 Cush. 246; Com. *v.* McLaughlin, 12 Cush. 615; Shanley *v.* Wells, 71 Ill. 78.

[3] Butolph *v.* Blust, 5 Lansing, 84.

Where an officer, authorized by statute to make arrests without a warrant, finds a person in the act of committing a criminal offence, it is not necessary to the lawfulness of an attempt to arrest him to first inform him of the charge upon which the attempted arrest is made, where the officer and cause of arrest are known to the offender. Wolf *v.* State, 19 Oh. St. 248. See Whart. Crim. Law, 8th ed. § 428.

[4] R. *v.* Spencer, 3 F. & F. 859; R. *v.* Lockley, 4 F. & F. 155.

other minor officials are apt enough to abuse their powers; and the policy of the law not only requires that they should be kept under strict control,[1] but that in prosecutions for private misdemeanors there should be responsible private prosecutors. In conformity with this view, it was rightly held in New York, in 1871, that neither a justice of the peace nor a constable can, at common law, arrest without warrant, a person committing an illegal act in his presence, unless such act be a felony or involve a breach of the peace; and that cruelty to an animal, though a statutory misdemeanor, is not such an offence as authorizes arrest without warrant.[2] Nor can a police officer who arrests without proper cause, and is violently resisted, treat this violent resistance as a substantive offence which will justify an arrest.[3]

Reasonable suspicion convertible with probable cause.

§ 9. What is reasonable ground of suspicion? The fact that an indictment is found against an individual is in itself sufficient justification for an officer to arrest him, though without warrant.[4] But the question before us goes beyond this, and may be treated as convertible with that of probable cause, as laid down in civil actions of malicious prosecution. Had the officer good grounds to believe a

[1] Whart. Crim. Law, 8th ed. § 648.

[2] Butolph *v.* Blust, 5 Lansing, 84. See also Boyleston *v.* Kerr, 2 Daly (N. Y.), 220.

[3] The law on this point is well stated in the following: —

"Where the policeman attempts to arrest, unless he is legally justified in arresting, resistance to him, to any extent necessary, will be lawful and justifiable, and so cannot form the subject of a criminal charge. On the same principle it is manifest that, if the policeman, having no power to arrest, offer any force or violence to the person, as by pushing, this will justify resistance, or so far excuse it that he will not be justified in arresting the party for the resistance; and, if he attempts to arrest, the man may resist apprehension, and the policeman, if assaulted, will not be 'assaulted in the execution of his duty,' but, on the contrary, will be guilty of illegal violence while being lawfully resisted. This is the class of cases of most common occurrence, and in which misapprehension of the law, by the police and by the magistrates, leads to great illegalities on the part of the police, which provokes violence in resistance, and sometimes leads to fatal consequences. The police have a notion, for instance, that if any one is drunk, or is making a little noise, the person may be at once arrested and dragged to prison; and daily persons are thus treated, and, if they resist, are charged with assaulting the police in the execution of their duty, and probably convicted summarily or on a trial, and visited with severe punishment." London Law Rev. quoted 20 Alb. L. J. 216.

[4] Whart. Crim. Law, 8th ed. §§ 402–444. Infra, § 920.

felony has been, or is about to be committed? If so, it is his duty to arrest the offender, nor has the latter a cause of action against the officer, if the officer acted without malice, and upon such probable cause.[1] Thus in a remarkable English case, a constable was held not to be justified in shooting at a man whom he had seen stealing wood growing in a copse (which is, when a first offence, only a misdemeanor, though for a second offence, after conviction, a felony), although the constable had no means of arresting the culprit without firing, and although the latter had been previously convicted of the same offence, the constable not being aware of such prior conviction. The question here was whether the constable had to his own mind probable cause; and as he had not, the attempt to arrest without warrant was held illegal.[2] Mere *manner* in a party when accused of crime is not probable cause.[3]

III. BY PERSONS NOT OFFCERS.

1. *Persons called on by Officers, Pursuers, &c.*

Peace officer may require aid from private persons.

§ 10. At the outset it must be noticed that a constable, sheriff, or police officer has the right to call in the aid of private individuals,[4] either to arrest persons charged with past felony, or to prevent impending violation of the law. To refuse to render such assistance is an indictable offence.[5]

Officers may have special assistants.

§ 11. It has been seen that private persons thus acting must be either actually or constructively under an officer's command.[6] But the officer may have special

[1] See R. *v.* Woolmer, 1 Moody, 634; Lawrence *v.* Hedgar, 3 Taunt. 140; Com. *v.* Presby, 14 Gray, 65; Eames *v.* State, 6 Humph. 53.

[2] R. *v.* Dadson, T. & M. 385; 2 Den. C. C. 35.

[3] Somerville *v.* Richards, 37 Mich. 299.

The officer must follow the statute as to the magistrate to whom the defendant is to be taken; and in default of so doing is a trespasser. Papineau *v.* Bacon, 110 Mass. 319.

[4] As to how far the officer must be present in command of his unofficial assistants see Coyles *v.* Hurtin, 10 Johns. 85.

[5] Infra, § 16; Whart. Crim. Law, 8th ed. §§ 402–444, 1555; R. *v.* Sherlock, L. R. 1 C. C. 20.

[6] See R. *v.* Patience, 7 C. & P. 775; People *v.* Moore, 2 Douglass (Mich.), 1; State *v.* Shaw, 3 Ired. 20; Mitchell *v.* State, 7 Eng. 50.

private assistants temporarily in charge, especially when he goes for further aid.[1]

Pursuers of felon are protected.

§ 12. By the common law, when a felony has been committed arrest may be attempted by pursuers, the county being raised, who start with hue and cry after the felon. In such case, though there be no warrant of arrest, nor any constable in the pursuit, yet, the felony being proved, it is murder for one of the defendants to kill one of the pursuers.[2]

2. *Powers of such as to Arrests.*

Private person may interfere on probable cause.

§ 13. Indeed, in cases of felonies, or breaches of the peace, if a private person, though not an officer, and though acting without warrant, has reasonable ground to suspect another of being a guilty party, he may, if acting without malice, and in good faith, arrest such other; and for such arrest he cannot be made either criminally or civilly responsible, though the arrested person be shown to have been innocent.[3] It has been said, however, that in order to excuse such arrest, and to protect the arresting person, it must appear that the offence was in fact committed, and that there was reasonable ground to suspect the arrested person;[4] though if there be probable cause of the commission of the offence, this would seem enough. But when the question arises, whether it is murder for an innocent person to kill the person arresting him on an untrue charge (though the person arresting have probable ground), we are to consider the hot blood naturally aroused in an innocent person believing himself to be unjustly arrested. In such case the killing would be but manslaughter.[5]

§ 14. Certainly a person endeavoring to prevent the consum-

[1] Coyles *v.* Hurtin, 10 Johns. 85; 1 Chitty C. L. 16.

[2] Jackson's case, 1 East P. C. 298; Brooks *v.* Com. 61 Penn. St. 352. See Galvin *v.* State, 6 Cold. (Tenn.) 283; Whart. Crim. Law, 8th ed. § 433.

[3] Reuck *v.* McGregor, 3 Vroom (N. J.), 70; Holly *v.* Mix, 3 Wend. 350; Com. *v.* Deacon, 8 S. & R. 47; citing Wakly *v.* Hart, 6 Binn. 316; Smith *v.* Donelly, 66 Ill. 464; State *v.* Roane, 2 Dev. 58; Brockway *v.* Crawford, 3 Jones N. C. 434. See Whart. Crim. Law, 8th ed. §§ 405–40.

[4] Burns *v.* Erben, 40 N. Y. 463; Brooks *v.* Com. 61 Penn. St. 352; Hawley *v.* Butler, 54 Barb. 490; Adams *v.* Moore, 2 Selw. N. P. 934.

[5] Whart. Crim. Law, 8th ed. §§ 433–4.

mation of a felony by others may properly use all necessary force for that purpose,[1] and resist all attempts to inflict bodily injury upon himself, and may lawfully, according to the law, as expressed in New York in 1870, detain the felons and hand them over to the officers of the law. The law, it is said, will not be astute in searching for such line of demarcation in this respect as will take the innocent citizen, whose property and person are in danger, from its protection, and place his life at the mercy of the felon.[2]

May use force necessary to prevent perpetration of felony.

§ 15. It is also ruled that a private person may arrest a felon who, after conviction upon his plea of guilty, has without actual breaking or force escaped from the house of reformation to which he was sentenced.[3]

May arrest felon after escape.

3. *Prevention of Offences.*

§ 16. Is, however, a private person justified in interfering to prevent or suppress a misdemeanor? This question has been not infrequently considered in cases of riotous homicide; and the law undoubtedly is that every good citizen, when a breach of the peace is threatened, is bound to intervene, and to take proper measures to compel order.[4] When, however, the riot has ceased, and order is restored, the right of arrest without warrant by private individuals ceases.[5]

May interfere to prevent riot.

[1] Keenan *v.* State, 8 Wis. 132. To refuse to interfere to prevent the execution of a felony may even subject the party refusing to indictment. See Whart. Crim. Law, 8th ed. §§ 241 *et seq.*

[2] Ruloff *v.* People, 45 N. Y. 213. See Com. *v.* Deacon, 8 S. & R. 47; Ryan *v.* Donelly, 71 Ill. 100; State *v.* James, 80 N. C. 370; Whart. Crim. Law, 8th ed. § 495.

[3] State *v.* Holmes, 48 N. H. 377 (Smith, J., 1868).

[4] R. *v.* Wigan, 1 W. Bl. 47; Res. *v.* Montgomery, 1 Yeates, 419; Whart. on Homicide, Trial of Kensington Rioters, &c., Appendix; Phillips *v.* Trull, 11 Johns. 486; Pond *v.* People, 8 Mich. 150; Whart. Crim. Law, 8th ed. §§ 1544, 1555; and see Price *v.* Seeley, 10 Cl. & F. 28.

[5] See Whart. Crim. Law, 8th ed. § 410.

The following exposition of the law in this respect, given by Judge King, of Philadelphia, on the occasion of the Philadelphia Riots of 1844, is as accurate as it is lucid: —

"Having, I conceive, sufficiently remarked on the nature and consequences of unlawful, riotous, and treasonable assemblies, I will proceed to point out the powers vested in the public authorities and in private citizens, to disperse such assemblies and arrest their perpetrators. They will be found so ample and efficient as to leave nothing but surprise that their

§ 17. In respect to other misdemeanors, the rule is that while it is not the *duty* of non-official persons to arrest offenders, yet a *right* so to arrest exists, when the act cannot be otherwise stopped. Thus it has been held that a

And so as to other offences.

adequacy should be questioned. An unlawful assembly, such as I have described, may be dispersed by a magistrate whenever he finds a state of things existing calling for interference, in order to the preservation of the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous results, by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. The magistrate has not only the power to arrest the offenders and bind them to their good behavior, or imprison them if they do not offer adequate bail, but he may authorize others to arrest them by a bare verbal command, without any other warrant; and all citizens present whom he may invoke to his aid are bound promptly to respond to his requisition, and support him in maintaining the peace. And a magistrate, either present or called on such an occasion, who neglects or refuses to do his utmost for the suppression of such unlawful assemblies, subjects himself to an indictment and conviction for a criminal misdemeanor." (See further to this effect State *v.* Shaw, 3 Ired. 20. Compare cases cited in Whart. Crim. Law, 8th ed. § 1555.) "When, however, an unlawful assembly assumes a more dangerous form, and becomes an actual riot, particularly when life or property is threatened by the insurgents, measures more decisive should be adopted. Citizens may, of their own authority, lawfully endeavor to suppress the riot and for that purpose may even arm themselves, and whatever is honestly done by them in the execution of that object will be supported by the common law. In the great London riots of 1780, this matter was much misunderstood, as it clearly was with us, and a general persuasion prevailed that no indifferent person could interfere without the authority of a magistrate, in consequence of which much mischief was done, which might otherwise have been prevented. But, as was observed two hundred and fifty years ago, by the judges who decided as to the right of citizens to arm on their own motion in suppression of dangerous riots, 'It would be more discreet for every one in such a case to be assistant to the justices and sheriffs in doing so.' This is equally prudent and sound advice at this time. For on sheriffs and justices is the duty specially cast of conserving the public peace. The very name of sheriff indicates his duties, being derived from two Saxon words, *scyre*, that is, shire or county, and *reve*, keeper or guardian. He is both by the common law and special commission the keeper of the peace of the Commonwealth within the county, and any neglect or omission on his part in the performance of this great duty, to the utmost of his power and ability, subjects him to heavy legal liabilities, both civil and criminal. Of course, to execute such duties and encounter such responsibilities, he must have the means of commanding adequate physical force. For this purpose every

private person may without warrant arrest a notorious cheat, or person using false weights or tokens.[1] But this is supposing

citizen capable of bearing arms, of every rank, description, and denomination, is bound to yield a prompt obedience to his command, and repair to meet him at any appointed place of rendezvous within the county. This duty of the citizen is absolute. He has no discretion in the matter, and if he neglect or refuse obedience to the command of the sheriff requiring his aid in the suppression of a dangerous riot or other insurrectionary tumult, he may be fined and imprisoned for such contumacy, at the discretion of the court. His obligation to come to the aid of the sheriff is just as imperative as that imposed on the latter to see the community suffer no harm from lawless licentiousness." (See Whart. Crim. Law, 8th ed. § 652 *a*.) "But unless the citizen promptly responds to his call, how is the sheriff to act with effect? His title and wand of office carry no magic with them by which he can overcome an armed mob. Those who love law and order should not shrink or hesitate in striking an honest blow for their protection, when threatened by lawless violence. When such a timid and feeble spirit prevails, the days of the republic are numbered. This general duty, this universal obligation, extends to the citizen soldiers, who, in common with all other members of the community, are required to be assistant in the maintenance of the public peace on the call of the civil magistrate. They are subject to the same penalties, in case of neglect or refusal to appear, as any other citizen summoned by the sheriff. They do not, on such occasions, act in their technical character as military. When assembled, they are but part of the sheriff's posse, and act in subordination to, and in aid of, that officer, who is the true and responsible chief of all forces summoned under his authority. If the soldiers act in any manner not authorized by law, they are amenable for such acts, not to the military but the civil law. In brief, as to all rights and authorities, they stand on the same footing with the other citizens summoned by the sheriff, and composing with them his posse.

"It is said that on the occasion of the recent riots, when the sheriff had summoned numerous citizens to his aid, his command was, with but few honorable exceptions, treated with neglect and disregard. If bills are laid before you, charging such a violation of social duty on private citizens or volunteer soldiers, officers or privates, sustained by sufficient proof, you should without hesitation find them, that the recusants may be dealt with according to law. It would be unreasonable that such duties and liabilities should be imposed on sheriffs, justices, and citizens, by the common law, and no corresponding authority given them to act equal to any emergency that might arise, or that they should not be protected against lawless resistance in the execution of their public functions. But both authority and protection, to those who are doing the first duty of citizens, against those who are violating it, are amply afforded by the common law. When engaged in the suppression of dangerous riots, the sheriff and his assistants are authorized to resort to every necessary means to restore the public peace, and prevent

[1] 2 Hawk. P. C. c. 12, § 301.

there is no opportunity to obtain a warrant. If there be, the right of a private person to arrest without warrant may be ques-

the commission of criminal outrages against person or property. They may arrest the rioters, detain and imprison them. If they resist the sheriff and his assistants in their endeavor to apprehend them, and continue their riotous actions, under such circumstances, the killing them becomes justifiable. In a case where the danger is pressing and immediate; where a felony has been actually committed, or cannot otherwise be prevented, the sheriff and his assistants not only may but are bound to do their utmost to put down riot and tumult, and to preserve the lives and property of the people.

"If one man sees another in the act of burning a church or dwelling-house, or attempting to commit a murder, he has not only the right, but it is his duty to endeavor to prevent him; if the perpetrator resists, so as to make violence necessary in order to the prevention, the circumstances are a sufficient sanction and exculpation for the consequence of the violence, to whatever degree it may extend. This doctrine is undoubtedly sound, both in reason and law, in a case of individual criminality, and individual intervention to arrest it. It is, if possible, clearer when similar enormities are attempted by vast and riotous assemblies, and when the known officers of the law are engaged in the endeavor to prevent their consummation.

"The protection given to officers of justice engaged in enforcing the laws is in like manner full and unequivocal, and such are the sheriff and his assistants, civil and military, engaged in the suppression of a great and dangerous riot, such as occurred in Kensington in May, and in Southwark in July last. It may be premised, generally, that where persons having authority to arrest or imprison, or otherwise to execute the public justice of the Commonwealth, and using the proper means for that purpose, are resisted in so doing, and the party resisting is killed in the struggle, such homicide is justifiable; and on the other hand, if the party having such authority, and executing it properly, happen to be killed, it will be murder *in all who take a part in such resistance;* this being considered by the law as one of the strongest indications of malice, an outrage of the highest enormity committed in defiance of public justice against those under its special protection. Ministers of justice, says a great criminal law authority, while in the execution of their offices, are under the peculiar protection of law. This special protection is founded in great wisdom and equity, and on every principle of political justice. And the rule is not confined to the instant the officer is on the spot, and at the scene of action engaged in the business which brought him thither, for he is under the same protection going to, remaining at, or returning from the same; and therefore if he cometh to do his office, and meeting great opposition, retireth, and in the retreat is killed, this will amount to murder. He went in obedience to the law and in the execution of his office, and his retreat was necessary to avoid the danger which threatened him. And upon the same principle, if he meeteth with opposition by the way, and is killed before he cometh to the place, such opposition being intended to prevent his doing his duty, which is a fact to be collected from

tioned, as this right is based exclusively on the failure of justice that would otherwise occur. This is the only safe ground, in view of the fact that in many jurisdictions the distinction between felonies and misdemeanors has ceased to exist.[1]

the circumstances appearing in evidence, this will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him. It follows from these premises that if such an officer successfully resists those who seek to obstruct and hinder him from proceeding to the lawful execution of his duty, he is justified, even should the lives of the assailants, their aiders and abettors, be taken, from the necessary extent of the resistance so made. Surely the way of the transgressor is hard. For it is thus seen that while felonious rioters resisting the lawful authorities may be slain with impunity, if any one of the associates engaged in such common resistance slays an officer of justice, all are involved in the common guilt of murder. And this is perfectly just; for all engaged in such an outrage are aware that their acts are unlawful, and that murder may result from such resistance. Where, however, the resistance is carried on with the use of deadly weapons; where cannon charged with every species of offensive missile, and small arms loaded with ball are used, there is no room for doubt as to all engaged in such resistance being guilty of murder, whether the proof establishes the particular individual on trial to have actually fired the cannon and musketry or not. Being engaged in a riot, the avowed object of which was the killing of the ministers of justice while engaged in the execution of their duty, every man concerned is just as guilty of a murder committed by any one of such a combination, as if he actually struck the fatal blow himself. How can such a man escape this conclusion? Did he not array himself with a lawless band, armed with the most dangerous and deadly weapons, and having for their direct object the attack and destruction of the officers of the law? If the deaths of the officers follow, that is the intention with which the assault is made. And surely there is neither hardship nor severity in holding all the members of an illegal combination responsible for the acts of each done in furtherance of their common design. In one class of the cases likely to come before you, this clear doctrine both of law and morals is most material to be considered by you. It is a doctrine whose adoption as the basis of your deliberations, in the cases alluded to, is of the deepest moment to the common security. Any other would tend to give impunity to riotous murder." Charge to Grand Jury, in 1844. See Whart. Crim. Law, 8th ed. §§ 1542–1555. And see this topic viewed historically in Gneist, Englische Communalver-fassung, § 44.

[1] See Com. v. Carey, 12 Cush. 246; and see Mr. Greaves's note, published in Cox's Crim. Consolid. Acts, p. lxii.

IV. BREAKING DOORS, AND SEARCH-WARRANTS.

1. *Right to search in general.*

House may be broken open to execute warrant in felonies, &c.

§ 18. The first point to be here noticed is the right, when a warrant has duly issued for the arrest of a person, to break open the door of his house. The law in this respect is, that this may be done, if the offender cannot otherwise be taken, in cases of felony, of imminent breach of the peace, or of the reception of stolen goods; and in such cases a warrant is a justification, if there be no malice.[1] Admittance into the house, however, must be first asked and refused; but the officer cannot be treated as a trespasser because he failed to notify the owner who the person to be arrested was, no inquiry having been made in relation thereto.[2] In cases of misdemeanors, unaccompanied with breach of the peace, this power, according to the old law, cannot be exercised.[3] But when there is probable immediate danger of a felony or breach of the peace, or other grave offence, the officer, giving notice of his character, may enter without warrant.[4]

2. *Its Exercise by Private Persons.*

In felonies this may be done by even private person without warrant.

§ 19. When a felony has been committed, or there is good reason to believe it to have been committed, then, if the offender take refuge in his own house, even a private individual may, without warrant, break into the house and arrest the offender. In case of the party arrested proving innocent, however, an action of trespass is held to lie against the party so breaking open doors without warrant. But the probability of the commission of a felony must be very strong to justify this extreme remedy being used by a private person. Mere suspicion will not justify its being employed by such.[5] As will be seen,[6] after indictment found, no place is a sanctuary for the offender.

[1] 4 Bl. Com. 290; Foster, 320; 1 East P. C. 322; 2 Hale P. C. 117; 2 Hawk. P. C. c. 13, § 11. For a full statement of authorities see Whart. Crim. Law, 8th ed. § 439.

[2] Com. *v.* Reynolds, 120 Mass. 190.

[3] As to practice in issuing warrant see Elsee *v.* Smith, 1 D. & R. 97; 2 Chit. 304.

[4] Whart. Crim. Law, 8th ed. § 439.

[5] 4 Bl. Com. 292; 2 Hale P. C. 82, 83.

[6] Infra, § 23.

3. *Its Exercise by Constables or Peace Officers.*

§ 20. *A constable or peace officer* may, on reasonable suspicion and without warrant, break open doors; and he has this additional protection, that it is his duty, in the case of a felony being committed, so to act.[1] Certainly, if he has reason to believe a felony or an affray is impending, he has a right to break into a house to prevent it.[2] Whether, in cases of felony, he must first demand entrance, has been doubted. It is always best, however, to take this precaution; and in misdemeanors it has been considered requisite.

Peace officer may on reasonable suspicion break open doors without warrant.

4. *What is "Suspicion."*

§ 21. It should be kept in mind that a "bare suspicion" is to be distinguished from what is called by Blackstone a "probable suspicion."[3] To act officiously and intrusively on "bare suspicion" implies recklessness if not malice; and even a peace officer (*a fortiori* a private individual) cannot shelter himself from the consequences if he break into the house of a private person on such bare suspicion. Here, again, we strike at the reason of the distinction between a peace officer and a private person in such respects. There are degrees of suspicion which would justify a peace officer in thus interfering which would by no means justify a private person. It is the duty of the former to ferret out crime; such duty is not assigned to the latter. What, therefore, in the peace officer is a meritorious though distasteful service, in the performance of which the law would save him harmless, may be in the private person an officious impertinence, for which damages in a civil action will be awarded.

Private person requires stronger grounds for interference.

5. *Search-warrants; their Issue and Effect.*

§ 22. *Search-warrants* may be granted by justices of the peace on oath made before them that certain goods feloniously acquired are probably in the defendant's possession, or that certain articles, necessary to the course of

Search-warrant may be issued on oath.

[1] 1 Hale P. C. 583.

[2] So, also, he may break doors to arrest a person who has escaped from arrest. Com. *v.* McGahey, 11 Gray, 194.

[3] See supra, § 8.

public justice, are secreted in such a way as to make such a procedure essential to obtain them.[1] When legal in form, such warrant is a justification to the officer using it, though it was granted on evidence that subsequently appeared inadequate, and though there were other latent defects in its concoction. But a prosecutor who maliciously and without probable cause resorts to such instruments is liable for damages in an action of malicious prosecution.[2] And a warrant must accurately specify the building to be searched.[3]

Houses of third persons may be broken to secure offender or stolen goods.

§ 23. *Houses of third persons* may be broken into, after the usual demand, to secure the offender, or his alleged spoils; though the probable cause necessary to justify such an invasion of private rights should be of a higher degree than that which is sufficient to justify a breaking into the offender's own house. After indictment found, however, the defendant may be pursued and seized wherever he takes refuge; no house being a sanctuary to him.[4]

Keys ought to be first demanded.

§ 24. *In executing search-warrants*, it is proper, before breaking open boxes or trunks, to demand the keys. Not until these have been refused is it lawful to force a lock.[5] But the right to such a preliminary demand, on the part of the owner or custodian, is considered as waived, when there is no person left in charge on whom the demand could be made.[6]

Warrant must be strictly followed.

§ 25. The warrant must be strictly followed. If it authorizes the searching of a specified building, no other building can be searched under such warrant.[7] So, when the officer is directed to seize a particular article, he can under the warrant seize no other article, without being exposed

[1] See Elsee *v.* Smith, 1 D. & R. 97; 2 Chit. 304.

[2] 2 Hale P. C. 151.

[3] Com. *v.* Intox. Liquors, 109 Mass. 371–373; Ibid. 118 Mass. 145; Flaherty *v.* Longley, 62 Me. 420; State *v.* Whiskey, 54 N. H. 164. See Santo *v.* State, 2 Iowa, 165.

To open letters, a warrant in the nature of a search-warrant is required. Jackson, ex parte, 96 U. S. 727.

[4] 2 Hale P. C. 117; 5 Co. 91; 4 Inst. 131; 2 Hawk. P. C. c. 14, § 3.

[5] 2 Hale P. C. 157; and see Entick *v.* Carrington, 19 St. Tr. 1067.

[6] Androscoggin *v.* Richard, 41 Me. 234.

[7] State *v.* Spencer, 38 Me. 30; Jones *v.* Fletcher, 41 Me. 254; McGlinchy *v.* Barrows, 41 Me. 74; State *v.* Thompson, 44 Iowa, 399; Reed *v.* Rice, 2 J. J. Mar. 44. See Dwinnels *v.* Boynton, 3 Allen, 310.

to an action of trespass, unless such other article appear necessary to substantiate the proof of the felony.[1]

The practice as to searching the person in this respect will be hereafter specifically discussed.[2]

6. *Constitutionality of Search-warrants.*

§ 26. Search-warrants, by the constitutions and bills of rights of the several States of the American Union, are strictly limited, it being generally provided that they cannot issue except upon oath setting forth probable cause; and in some instances it being required that they should specify the place, person, or things to be searched. But this is in substance what is required at common law.[3]

Search-warrant limited by Constitution.

7. *Illegality of Arrest as ground for Release.*

§ 27. Suppose a party, charged with crime, is brought before the court by an illegal arrest? If the court is one having the jurisdiction of justices of the peace, its duty will be to commit the offender, on due proof of guilt on his part, irrespective of the question of the illegality of the arrest. And an indictment on its face valid will be sufficient proof of such guilt.[4] But while a defend-

That arrest was illegal is irrelevant on questions of *habeas corpus* when crime is shown.

[1] Crosier *v.* Cundy, 9 D. & R. 224; 6 B. & C. 232.

[2] Infra, § 60.

[3] See State *v.* Spencer, 38 Me. 30; Allen *v.* Colby, 47 N. H. 544; Com. *v.* Dana, 2 Met. (Mass.) 329; Dwinnels *v.* Boynton, 3 Allen, 310; Com. *v.* Cert. Intox. Liquors, 6 Allen, 596; Ibid. 13 Allen, 52; Downing *v.* Porter, 8 Gray, 539; Robinson *v.* Richardson, 13 Gray, 454; Grumon *v.* Raymond, 1 Conn. 40; Santo *v.* State, 2 Iowa, 165.

[4] The authorities on this point are thus lucidly exhibited by Nixon, J., in Noyes, in re, U. S. Dist. Ct. N. J. 1878, 17 Alb. L. J. 407: —

"The earliest cases in England, to which the attention of the court has been called, are R. *v.* Marks, 3 East, 157, before the King's Bench in 1802, and ex parte Kraus, 1 B. & C. 258, in the same court in 1823, in both of which it was held that when a party was liable to be detained on a criminal charge, the court would not inquire on *habeas corpus* into the manner in which the capture had been effected.

"The case of Susannah Scott, 9 B. & C. 446, before the King's Bench in 1829, was thus: A rule *nisi* had been obtained for a *habeas corpus* to bring the body of the prisoner in the custody of the marshal, in order that she might be discharged on the ground that she had been improperly apprehended in a foreign country.

"It appeared on the return that an indictment for perjury had been found against her in London; that a

ant, thus illegally arrested, will not be discharged on *habeas corpus*, yet he will be relieved from arrest in civil suits instituted by parties who were concerned in the illegal arrest.[1]

V. FUGITIVES.

1. *As between the several United States.*

Under federal Constitution and statute fugitives

§ 28. By the second section of the fourth article of the Constitution of the United States, "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall,

warrant for her arrest to appear and plead had been granted; that the police officer having the warrant went beyond his jurisdiction, and followed her to Brussels and then arrested her, conveyed her to Ostend against her will, and thence back to England. Chief Justice Tenterden, on discharging the rule, said: 'The question is this, whether if a person charged with a crime is found in his country it is the duty of the court to take care that such a party shall be answerable to justice, or whether we have to consider the circumstances under which she was brought here.' I thought, and still continue to think, that we cannot inquire into them.

"The courts of South Carolina in the same year were considering the same question, as appears in the case of The State *v.* Smith, reported in 1 Bailey, 283.

"In the case of The State *v.* Brewster, 7 Vt. 118, before the Supreme Court of Vermont, in 1835, an attempt had been made in the court below to have the proceedings in an indictment against the defendant dismissed, on the ground that he was forcibly and against his will, and without the assent of the authorities of Canada, brought from that province. The court held that the matter set up could not avail the prisoner.

"Dow's case, reported in 18 Penn. St. 37, is in many of its features quite similar to the one under consideration, but the illegality of the capture could not be set up by the fugitive."

See, to same effect, U. S. *v.* Lawrence, 13 Blatch. 306, Blatchford, J.; People *v.* Rowe, 4 Parker C. R. 253.

In Dow's case, 18 Penn. St. 37 (S. C., 1 Phila. 234), it was held that a defendant, in prison on charge of forgery, was not entitled to discharge because he had been arrested in Michigan, without warrant, and was brought from thence forcibly to Pennsylvania. "The prisoner," said Gibson, C. J., "in Brewster's case, 7 Vt. 121, insisted that he had been kidnapped abroad, but he was held to answer. That case has not been overruled or doubted. And the English courts hold the same doctrine. It was enforced in Scott's case, 9 B. & C. 446; and in Marks' case, 3 East, 157, as well as in Kraus' case 1 B. & C. 258, the broad principle was established that want of authority for the prisoner's arrest cannot protect him from prosecution."

[1] Wells *v.* Gurney, 8 B. & C. 769; Adriance *v.* Lagrave, 59 N. Y. 110; Fry *v.* Oatley, 6 Wis. 42. But see Wanzer *v.* Bright, 52 Ill. 35; and other cases cited Townsend *v.* Smith, S. Ct. Wis. 1879; 21 Alb. L. J. 43.

on demand of the executive authority of the State from which he fled, be delivered up, and be removed to the State having jurisdiction."

may be arrested when fleeing from State to State.

By the Act of February 12, 1793, § 1,[1] "Whenever the executive authority of any State in the Union, or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the executive authority of any such State or territory to which such person shall have fled, and shall moreover produce the copy of an indictment found or an affidavit made before a magistrate of any State or territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or territory from which the person so charged fled, it shall be the duty of the executive authority of the State or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear; but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or territory making such demand, shall be paid by such State or territory.

"Sec. 2. Any agent appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or territory from which he or she shall have fled. And if any person or persons shall by force set at liberty, or rescue the fugitive from such agent, while transporting as aforesaid the person or persons so offending, shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year."[2]

[1] U. S. Rev. Stat. § 5278.

[2] The history of this statute will be found in Spear on Extradition, 226 *et seq.*; Rorer on Inter. State Law, 218; and in an article in 13 American Law Rev. 181. See, generally, Briscoe, in re, 51 How. Pr. 422; People *v.* Brady, 56 N. Y. 184; Hibler *v.* State, 43 Tex. 197; Cubreth, ex parte, 49 Cal. 436; White, ex parte, 49 Cal. 442; Rosenblat, ex parte, 51 Cal. 285.

A requisition may be maintained for

§ 29. In several States statutes have been passed authorizing the arrest of fugitives in advance of the reception of a requisition. In other States the practice is to sustain, on grounds of comity, such arrests, although there be no local enabling statute.[1]

Arrest may be had in anticipation of requisition.

But in either case, where, instead of an indictment, an affidavit is taken as the basis of application, in proceedings in anticipation of demand, it must be as explicit and full as would justify a magistrate in issuing a warrant of arrest. It must specify the crime, aver its commission in the requiring State, and state that the party required is a fugitive.[2]

In any view, there can be no technical surrender without a formal requisition.[3]

an offence in the District of Columbia. Buell, in re, 3 Dill. 116.

The rulings in cases of international extradition are not necessarily in point. "The supposed analogy between a surrender under a treaty providing for extradition, and the surrender here in question, has been earnestly pressed upon our attention. There, the act is done by the authorities of the nation — in behalf of the nation — pursuant to a national obligation. That obligation rests alike upon the people of all the States. A national exigency might require prompt affirmative action. In making the order of surrender, all the States, through their constituted agent, the general government, are represented and concur, and it may well be said to be the act of each and all of them. Not so here." Swayne, J., Taylor *v.* Taintor, 16 Wall. 366.

[1] Hurd Hab. Corp. § 636; Ross, ex parte, 2 Bond, 252; People *v.* Schenck, 2 Johns. R. 470; Heyward, in re, 1 Sandf. (N. Y.) 701; Leland, in re, 7 Abb. Pr. (N. S.) 64; Fetter, in re, 3 Zabr. 311; Com. *v.* Deacon, 10 S. & R. 125; State *v.* Buzine, 4 Harring. 572; State *v.* Howell, R. M. Charlt. 120; Rosenblat, ex parte, 51 Cal. 285. See *contra*, People *v.* Wright, 2 Caines, 213. That such statutes are constitutional see Smith, ex parte, 3 McLean, 121; Com. *v.* Tracy, 5 Met. 536; Com. *v.* Hall, 75 Mass. 262.

[2] See Smith, ex parte, 3 McLean, 121; People *v.* Brady, 56 N. Y. 184; Solomon's case, 1 Abb. Prac. (N. S.) 347; Rutter's case, 7 Ibid. 67; Heyward, in re, 1 Sandf. (N. Y.) 701; Fetter's case, 3 Zabr. 311; Degant *v.* Michael, 2 Carter, 396; Pfitzer's case, 28 Ind. 450; Romaine, in re, 23 Cal. 585; White, ex parte, 49 Cal. 442.

[3] Botts *v.* Williams, 17 B. Monr. 687. The practice, however, of permitting extra-territorial arrests, and even of captures and removals, has been permitted in several States.

"It was formerly the practice," says Gibson, C. J. (Dow's case, 18 Penn. St. 37), "of the executive of this State to act in the matter by the instrumentality of the judiciary; and though I have issued many warrants, none of them has been ever followed by an arrest. The consequence of the inefficiency of the constitutional provision has been, that extra-territorial arrests have been winked at in every State; but an arrest at sufferance would be useless if its illegality could

§ 30. It is sufficient, to sustain a requisition, that the offence is one that is indictable in the State in which it was alleged to have been committed, and from which the requisition proceeds. Nor is it necessary that it should be an offence at common law. It is sufficient if it be such by statute. The constitutional provision includes every offence punishable in the State making the requisition.[1]

Sufficient if offence is penal in demanding State.

§ 31. It has been argued that unless the party demanded was in the demanding State at the time of the commission of the offence no requisition would lie. If this rule rests on the ground that the place of the commission of a crime is the place where the offender was at the time, it cannot be sustained. Many crimes, as we have elsewhere seen, may be committed by a person at the time in another State; and such person may be made responsible in the State of commission.[2] But the rule may be placed on another ground, which is unassailable. The Constitution provides only for the extradition of persons who "flee" from justice. None can be, therefore, demanded who have not "fled" from or left the demanding State "in flight."[3] It is not necessary, indeed, that the "flight" should have been after indictment found. It is enough if the party left after the commission of the crime.[4] That he was at the time domiciled in the asylum State is no defence.[5] But the

Requisition lies only for fugitives.

be set up by the culprit." See supra, § 27.

[1] Kentucky *v.* Dennison, 24 How. 66; Taylor *v.* Taintor, 16 Wall. 366; Opinion of Judges in Maine, 24 Am. Jurist, 233; 18 Alb. L. J. 156; Com. *v.* Green, 17 Mass. 515; Brown's case, 112 Mass. 409; Davis's case, 122 Mass. 324; Clark's case, 9 Wend. 212; People *v.* Brady, 56 N. Y. 182; Fetter's case, 3 Zabr. 311; Voorhees' case, 3 Vroom, 141; Wilcox *v.* Nolze, 34 Oh. St. 520; Morton *v.* Skinner, 48 Ind. 123; Hughes, in re, Phill. N. C. (L.) 57; Johnston *v.* Riley, 13 Ga. 97; Opinions of Governor Mifflin and Atty. Gen. Randolph, 20 State Papers U. S. 39; 13 Am. Law Rev. 192.

As denying the position in the text, see Governor Seward's Opinion, ii. Seward's Works, 452. With the latter opinion coincides the action of Governor Dennison in Lago's case, 18 Alb. L. J. 149; Spear on Extrad. 234.

[2] Whart. Crim. Law, 8th ed. § 278.

[3] Jackson's case, 12 Am. L. Rev. 602; Greenough, in re, 31 Vt. 279; Adams, in re, 7 N. Y. Law Rep. 386; Voorhees, in re, 3 Vroom, 141; Wilcox *v.* Nolze, 34 Oh. St. 520; Jones *v.* Leonard, Sup. Ct. Iowa, 1878; Hughes, in re, Phill. N. C. 57. To this effect is a Pennsylvania statute of 1878.

[4] U. S. *v.* O'Brian, 3 Dill. 381. See remarks of Withey, J., quoted 13 Am. Law Rev. 205.

[5] Kingsbury's case, 106 Mass. 223.

law is that he must have "fled," or left, to avoid a criminal charge. It is not enough if he was called away by public duty: *e. g.* attendance on Congress.[1]

Federal courts cannot compel governor to surrender.

§ 32. We have elsewhere seen that it is a question of grave moment, whether the federal legislature can impose upon state magistrates any duties not assigned to them by the Constitution.[2] It may be well argued that if one duty, not specified by the Constitution, be so imposed, another may be added, until at last the state executives become the subordinates of the federal legislature, their time controlled by it, and their office absorbed. This, however, would break down the line between federal and state sovereignty; and for this as well as for other reasons, it has been held by the Supreme Court of the United States, that a mandamus cannot be granted to compel a state governor to execute a requisition. The duty is imposed not by the Constitution, but by act of Congress, and Congress has no power to impose upon a State a duty which is not imposed by the Constitution.[3] In most States, however, the difficulty is obviated by statutes making the performance of the duty obligatory on the executive;[4] in other States it is accepted as one of those discretionary courtesies that it is usual for one sovereign to render to another. Were this not the uniform practice, it would be the duty of Congress, as it is indubitably within its power, to provide a distinctively federal agency for the effectuating of the constitutional provision.[5]

No objection that fugitive is amenable to asylum State.

§ 33. It has been said that the executive of the asylum State is not bound to deliver a person amenable to the penal law of such State.[6] But the better opinion is that the mere fact that the offender is so amenable (no proceedings against him having been commenced) is no bar to a requisition.[7] On the other hand, if a prosecution has

[1] Patterson's case, cited 18 Alb. L. J. 190.

[2] Whart. Crim. Law, 8th ed. § 265.

[3] Kentucky *v.* Dennison, 24 How. 66. See Taylor *v.* Taintor, 16 Wall. 366; People *v.* Brady, 56 N. Y. 182; Voorhees, in re, 3 Vroom, 146; Hughes, in re, Phill. N. C. 57; Johnston *v.* Riley, 13 Ga. 97.

[4] For an analysis of these statutes see 13 Am. L. R. 235 *et seq.*

[5] Kentucky *v.* Dennison, 24 How. 66.

[6] Briscoe, in re, 51 How. Pr. 422; State *v.* Allen, 2 Humph, 258. See Taylor *v.* Taintor, 16 Wall. 366.

[7] Work *v.* Corrington, 34 Oh. St. 64; Ex parte Sheldon, 34 Oh. St.

already commenced in the asylum State, then this State has jurisdiction of the person of the fugitive for this particular purpose, and the proceedings should go on until their judicial determination.[1] If the offence is the same as that for which the requisition has issued, then the first State commencing proceedings, if both have jurisdiction, has precedence.[2]

Governor of asylum State cannot impeach requisition.

§ 34. We have already had occasion to observe that there is nothing in the Constitution of the United States to require a governor of a State to issue his warrant for the arrest of a fugitive; and that if he does so, it is either in obedience to local law, or in the exercise of a discretion which the courts cannot compel. It is otherwise, however, when the governor accepts the office proposed to him by the statute, for in this case he is bound to execute the commission he undertakes. It is, indeed, a prerequisite to his action, that it should be proved to his satisfaction that the person against whom he is asked to issue a warrant is the same as the one charged in the requisition, and that such person is a fugitive from the demanding State. But beyond this he cannot go. If the requisition is duly backed by indictment or affidavit, a certified copy of which is attached, he has no right to inquire whether the person demanded was guilty of the offence charged,[3] or whether the object of the requisition was other than it apparently seemed. The only cases in which the requisition can be assailed are those in which judgments of sister States, under an analogous provision of the Constitution, can be assailed. It may be shown that the requisition fails from want of jurisdiction,[4] or was fraudulently obtained, and hence void. But when once its existence and validity as a requisition is settled, its averments cannot be disputed. A requisition can no more be impeached on the ground that improper collateral motives coöperated in obtaining it, than can a judgment of a sister State be impeached on the same grounds. If there was jurisdiction; if the governor in the one case, or the

319. See Briscoe, in re, 51 How. Pr. 422; Compton v. Wilder, 7 Am. Law Record, 212.

[1] Taylor v. Taintor, 16 Wall. 366; 36 Conn. 242; Briscoe, in re, 51 How. (N. Y.) Pr. 422; Troutman's case, 4 Zab. 634; State v. Allen, 2 Humph. 258. See 13 Am. Law Rev. 227.

[2] See Whart. Crim. Law, 8th ed. 293.

[3] Infra, § 35; Clark, in re, 9 Wend. 212.

[4] Supra, § 31.

judgment court in the other, were not fraudulently imposed upon, then the averments of the record in either case cannot be assailed in the State in which execution is sought.[1]

[1] "The executive has no general power to issue warrants of arrest, and when he proceeds to do so in these cases, his whole authority comes from the Constitution and the act of Congress, and he must keep within it." Judge Cooley, in Princeton Rev., Jan. 1879, p. 165.

It may be added that if he accepts the commission he must hold to it. He cannot accept it, and then, on the ground that he is the executive of a sovereign State (he undertaking at the time to act as a federal commissioner), dispute its facts.

In opposition to the text may be noticed Kimpton's case, Aug. 1878 (18 Alb. L. J. 298; Spear on Ex. 329), in which the governor of Massachusetts, on the advice of the attorney general, held that he was justified in refusing a warrant on the grounds that the prosecution had been long delayed, and that an offer had been made to the defendant to enter a *nolle prosequi* in case he would turn state's evidence. It was not disputed that the defendant had fled the State of South Carolina, from which the requisition came, or that the indictment was for a crime indictable in South Carolina. This decision practically nullifies the constitutional and statutory provision under which the governor of Massachusetts undertook to act. He might have said (supposing there was no Massachusetts statute in the way), "I will not undertake to exercise an office not imposed on me." But undertaking to execute the office, he was bound to execute it in obedience to the law he undertook to carry out. He could no more inquire into the motives of the governor of South Carolina than could a state court, when acting on a judgment of a sister State, under the parallel constitutional provision as to judgments of other States, hold that it was entitled to inquire what were the motives of the plaintiff in the judgment, or of the court by whom the decision was made. As concurring in this conclusion, see reasoning of Ch. J. Cooley, in Princeton Rev. for Jan. 1879; Cooley's Const. Lim. 16, n. 1; Walker's Am. Law, § 64; and article in 13 Am. Law Rev. 181; Kentucky *v.* Dennison, 24 How. 66; Compton *v.* Wilder (Sup. Ct. Cin.), 7 Am. Law Record, 212; Johnston *v.* Riley, 13 Ga. 97; Romaine, in re, 23 Cal. 585.

The question in the text, it should be remembered, is very different from that which arises when it is attempted to use extradition process to enforce the collection of a debt. No doubt the courts will refuse their aid to such a perversion of justice, when the attempt is made to enforce such debt. See supra, § 27. Rorer on Inter-State Law, 222. But such collateral motive, extortionate as it may be, is no more a bar to extradition process than it would be a bar to ordinary proceedings of arrest for a crime.

It should be added that the position in the text is in no respect inconsistent with the position that a governor may revoke his warrant after it has been issued. This he may undoubtedly do, for the reason that he is at liberty to decline to accept the agency in this respect that the federal government tenders him. See Wyeth *v.* Richardson, 10 Gray, 240; Work *v.* Corrington, 34 Oh. St. 319. But if

§ 35. To examine the grounds of imprisonment in this, as well as in other cases of arrest, a writ of *habeas corpus* may be obtained. The points which may be thus raised are as follows: —

Habeas corpus cannot go behind warrant.

Arrest prior to requisition. If there be a local statute authorizing this, and if proper ground be laid, the prisoner will be remanded, and the same course will be taken when the arrest, under the local practice, is sustainable on grounds of comity.[1]

Defects in warrant. The first point is, is there a warrant on which the court can act? To the legality of the warrant there are the following prerequisites: —

(1.) The prisoner must have been a *fugitive*.[2] If not, the governor had no jurisdiction, and on proof that the prisoner was not a "fugitive," and had not been in the State from which the requisition issues, there must be a discharge.[3]

(2.) The identity of the prisoner as the party charged must appear.[4]

(3.) The warrant must be based on an indictment or affidavit, which is essential to the validity of the requisition.[5] But behind indictment and affidavit the court will not go, nor can their averments be contradicted by parol.[6] And the warrant of the gov-

he undertakes the agency he must execute it according to the terms of the mandate.

[1] Supra, § 29.

[2] Supra, § 31.

[3] Wilcox *v.* Nolze, 34 Oh. St. 520; Jones *v.* Leonard, Sup. Ct. Iowa, 1878; 18 Alb. L. J. 271.

Parol evidence is admissible to show where crime was committed. Wilcox *v.* Nolze, supra.

[4] In Butler, ex parte, Luzerne Co. C. P., it was held that the Pennsylvania statute authorizing examination for identification was not unconstitutional. 18 Alb. L. J. 369.

[5] People *v.* Brady. 56 N. Y. 182.

[6] Kingsbury's case, 106 Mass. 223; Davis's case, 122 Mass. 324; Clark, in re, 9 Wend. 212; People *v.* Pinkerton, N. Y. Ct. Ap. 1879; Com. *v.* Daniel, 6 Penn. L. J. 417, 4 Clark, 49; State *v.* Buzine, 4 Harring. 572; State *v.* Schlemm, Ibid. 577; Norris *v.* State, 25 Oh. St. 217; Work *v.* Corrington, 34 Oh. St. 64, 319. See Bull, in re, Cent. L. J. for 1877, p. 255; 4 South. L. Rev. N. S. 676, 702; Sedg. Const. Law, 395; Hurd on Hab. Corp. §§ 327–38, 606; Cooley's Const. Lim, 16.

The certificate of the demanding governor, that a copy of a complaint, made before a justice, is authentic, sufficiently authenticates the capacity of the justice to receive the complaint. Kingsbury's case, 106 Mass. 223; Donaghey, ex parte, 2 Pitts. L. J. 166. See Manchester, in re, 5 Cal. 237.

A fortiori when a warrant of surrender is issued by the governor of the

ernor "is *primâ facie* evidence, at least, that all necessary legal prerequisites have been complied with, and, if previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the State from which he fled." [1]

Whether the federal courts can discharge in such cases on *habeas corpus* is elsewhere discussed.[2]

Bail not to be taken.

§ 35 *a*. It has been held that bail cannot be taken in extradition process, even when the state Constitution provides that all prisoners shall be bailable by sufficient sureties.[3]

asylum State, upon an indictment found in the demanding State, the courts of the asylum State will not, on *habeas corpus*, inquire into formal defects of the indictment. Davis's case, 122 Mass. 324.

It has been held enough if the warrant recite the affidavit or indictment. It is not necessary that a copy of the affidavit or indictment should be annexed. Robinson *v.* Flanders, 29 Ind. 10; aff. Nichols *v.* Cornelius, 7 Ind. 611.

[1] Davis's case, 122 Mass. 324.

[2] Whart. Crim. Law, 8th ed. 288.

[3] Erwin, ex parte, S. C. Tex. 1879; 21 Alb. L. J. 87.

"If an appeal," said Clark, J., "by a party arrested on a warrant of extradition is within the purview of the statute, the law makes no such exception in his favor as to authorize him to go at large pending the action of this court, and in a situation to defy its mandate and to treat its judgment with contempt. The analogies of the law cannot be appealed to in aid of an order allowing bail. The charge being a felony, if a resort to analogy was permissible, and the judge was authorized to consider his order remanding the applicant as in the nature of a conviction, to follow a just analogy, he should have been committed, pending his appeal. Nor can that provision in our bill of rights, which provides that 'all prisoners shall be bailable by sufficient sureties,' be invoked, because, as said by the Supreme Court, by the terms 'all prisoners,' it was not meant to require all prisoners, under all circumstances, to be bailed, but it must refer to a class of prisoners each and all of whom shall be bailed, except as therein provided. Ex parte Ezell, 40 Texas, 451. This provision in our organic law must be construed with and be controlled by that provision in the Constitution of the United States, which is the supreme law of the land, that 'a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.' Const. U. S. art. 4, § 2. If upon arrest under a warrant of extradition bail is allowable, the federal Constitution is set at naught, and delivery in the State having jurisdiction of the offence would have its price regulated generally by the amount of the bail bond, where one could be given at all; and a fundamental provision, which was intended to apply to all classes of citizens, would be restricted to the poor and unfortunate who were not able to furnish bail. Such cannot be the proper construction of the two Constitutions."

§ 36. We have just seen that a court, on *habeas corpus*, will not inquire as to formal defects of the indictment on which the requisition is based.[1] It is otherwise when the indictment or affidavit fails to set forth a crime in the demanding State,[2] though the fact that an indictment is found is sufficient *primâ facie* proof that the offence was indictable in such State.[3]

Indictment or affidavit must set forth a crime.

§ 37. It will be noticed[4] that in cases where a fugitive is arrested on a demand from a foreign State, he can only, according to the better view, be tried for the offence for which the demand has been made. It is otherwise under the clause of the federal Constitution now before us. The Constitution in this respect is supreme over the whole country, and hence when a fugitive is transferred from State to State under its provisions, he is open in the second State to any prosecutions that may be brought against him in such State.[5] And it has been held that he may be arrested and delivered on a requisition from another State.[6]

Fugitive may be tried for other than requisition offence.

§ 37 *a*. Officers executing extradition process under the Constitution of the United States are officers of the United States, and will be released by the federal courts on *habeas corpus* if they are unduly interfered with by process from state courts.[7] Nor is the officer liable to

Officers executing such process protected by federal courts.

[1] Davis's case, 122 Mass. 324; Briscoe's case, 57 How. (N. Y.) Pr. 422.

[2] Smith, ex parte, 3 McLean, 121; People *v.* Brady, 56 N. Y. 182; People *v.* Brady, 1 Abb. Pr. (N. S.) 347; Rutter's case, 7 Ibid. 67; Heyward, in re, 1 Sandf. (N. Y.) 701; Fetter's case, 3 Zabr. 311; Degant *v.* Michael, 2 Carter, 396; Pfitzer's case, 28 Ind. 450; Romaine, in re, 23 Cal. 585; White, ex parte, 49 Cal. 442.

[3] Opinion of Maine Judges, 24 Am. Jur. 233; 18 Alb. L. J. 150; Brown's case, 112 Mass. 409; Davis's case, 122 Mass. 324; Morton *v.* Skinner, 48 Ind. 123; White, ex parte, 49 Cal. 434.

[4] Infra, § 49.

[5] Noyes, in re, U. S. Dist. Ct. N. J. May, 1878, 17 Alb. L. J. 407. Supra, § 27; Ham *v.* State, 4 Tex. App. 645. See also State *v.* Brewster, 7 Vt. 118; Dow's case, 18 Penn. St. 37, cited supra, § 27. Compare, however, *contra*, remarks of Judge Cooley, Princeton Rev. 1879, p. 176.

[6] Sydam *v.* Senott, 20 Alb. L. J. 230. In this case Judge McAllister's ruling was afterwards approved by Judge Drummond. Chic. Leg. News, Dec. 13, 1879. *Contra*, Daniel's case, cited 1 Brightly's Fed. Dig. 294.

[7] Bull, in re, 4 Centr. L. J. 1877, 255. See Prigg *v.* Com. 16 Pet. 608; Clark, in re, 9 Wend. 212; People *v.* Pinkerton, N. Y. Ct. App. 1879.

an action of false imprisonment, unless in cases of undue delay or violence.[1]

For federal offences warrants may be issued in all districts.

§ 37 *b*. Under the Act of Congress of September 24, 1789, it is made the duty of judges, when offences against the United States are charged, to issue, under certain conditions, warrants for the arrest and transmission of the offender to the place of the commission of the offence.[2]

State has no power of international extradition.

§ 37 *c*. A State is not authorized, under the Constitution of the United States, to deliver fugitives to a foreign sovereign. The exclusive cognizance of international extradition is given to the government of the United States.[3]

2. *As between the Federal Government and Foreign States.*

Limited to treaty.

§ 38. Extradition, as a general rule, as between foreign States, is limited to cases provided for by treaty;[4] nor, as will hereafter be seen, when there is a treaty, will a requisition be sustained for an offence which the treaty does not include.[5] It has, however, been held by eminent jurists that, independently of the cases provided for by treaty, it is by the law of nations within the discretion of the executive to surrender a fugitive from another land when there is reasonable proof showing such fugitive to be guilty of any offence regarded *jure gentium* as a gross crime.[6] This jurisdiction was assumed by the President of the United States, in 1864, though without the opportunity of judicial revision.[7] But the weight of authority is against such a course.[8]

[1] Pettus *v.* State, 42 Ga. 358.

[2] See 2 Burr's Trial, 483; U. S. *v.* Hamilton, 3 Dall. 17; Rhodes, ex parte, 2 Wh. Cr. Cas. 550. In a case determined in 1873 (Dana's case, 7 Ben. 1), Judge Blatchford declined to issue in New York a warrant, under the Act of September 24, 1789, for the arrest of Mr. Dana, editor of the Sun, to answer an information filed in the Police Court of Washington, that court being authorized by act of Congress to try without juries, which act the court held unconstitutional.

[3] People *v.* Curtis, 50 N. Y. 321; and see Holmes *v.* Jennison, 14 Pet. 540; Read *v.* Bertrand, 4 Wash. C. C. 556.

[4] Whart. Confl. of L. § 941, and authorities there cited. In the same work the treaties are given.

[5] Infra, § 47.

[6] Washburn, in re, 4 Johns. Ch. R. 106; British Privateers, 1 Wood. & M. 66.

[7] Arguelles' case, Whart. Confl. of L. 941.

[8] See Clarke's Extradition, 2d ed.;

§ 39. Even supposing that extradition is to be granted, irrespective of treaty, it only lies for offences *jure gentium*, and which are therefore punishable alike in the country granting the arrest and that making the requisition.[1] The extradition treaties executed by the United States contain generally the provision that the surrender "shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed."[2] Under this provision it has been held that it is sufficient if the offence charged be a crime in the asylum State at the

Offence must be one recognized by asylum State.

Spear on Extradition, 1 *et seq.*; Letters from Mr. Lawrence in 15 Alb. L. J. 44; 16 Alb. L. J. 365; 19 Alb. L. J. 329; Article by Mr. Lawrence in Revue de Droit Inter. x. 285. In Stupp's case, in 1873, the U. S. refused to surrender to Belgium on the ground of want of treaty stipulation. Infra, § 46. As coinciding with this conclusion see U. S. *v.* Davis, 2 Sumn. 482; Dos Santo's case, 2 Brock. 493; Adrian *v.* Lagrave, 59 N. Y. 110; State *v.* Hawes, 13 Bush, 697; 14 Cox C. C. 135. By treaty between Switzerland and Great Britain, extradition is provided between those countries. R. *v.* Wilson, L. R. 3 Q. B. D. 42.

In England, by the third section of the extradition act, a fugitive criminal is not to be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to the Queen's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. A clause embodying this principle is contained in the English extradition treaties concluded since 1870 with Germany, Belgium, Austria, Italy, Denmark, Brazil, Switzerland, Honduras, and Hayti. The treaty of 1842 with the United States contains no such restriction.

It was on the ground of the above rule that the British government refused, in 1876, to deliver Winslow. For report of the Royal Commission on Extradition, in 1878, reviewing the position, see a comprehensive review by Mr. Lawrence, 19 Alb. L. J. 329. For English practice see Terraz's case, L. R. 4 Ex. D. 63; 14 Cox C. C, 153.

Compare discussion in 11 Revue de Droit Int. (1879) 88; Ducrocq, Théorie de l'Extradition; Faustin Hélie, t. 1, § 964.

For notice of decision of Mexican Supreme Court, sustaining extradition from Mexico to the United States, see 18 Alb. L. J. 141.

[1] Whart. Confl. of L. § 946. See Bar, § 149; Berner, p. 188. Sir R. Phillimore speaks positively to this effect. Int. Law, i. 413.

[2] Whart. Confl. of L. § 942.

time of its commission, though it was not so at the time of the execution of the treaty.[1]

Treaties are retrospective.

§ 40. An extradition treaty, it has been held, covers cases of crimes committed before its adoption, so that under it process may issue to arrest fugitives charged with such crimes.[2]

Extradition refused when there can be no fair trial.

§ 41. The sole object of extradition being to secure the due and effective administration of justice, a surrender cannot be rightfully made, apart from treaty obligation, to a State in which a fair trial cannot be had; nor will treaties in this respect be executed when the demanding State proposes to subject the fugitive to an oppressive trial not within the contemplation of the parties at the time of the adoption of the treaty.[3]

A surrender will also be refused when the effect is to expose the fugitive to a barbarous punishment, or one revolting to a civilized jurisprudence.[4] And the surrendering sovereign may impose conditions as to the way in which the surrendered fugitive may be tried.[5]

And so for political offences.

§ 42. Notwithstanding the authority of Grotius,[6] there is a general consent of modern jurists to the effect that between independent sovereignties there should be no extradition for political offences.[7]

It is important, however, to remember that there may be cases nominally political, which, nevertheless, are essentially distinguishable from those in which the gist of the offence is opposition to government, and as to which extradition is to be refused.

[1] Müller's case, 5 Phil. Rep. 289; 10 Opin. Att'y Gen. 501.

[2] Giacomo, *alias* Ciccariello, in re, 12 Blatch. C. C. 391.

A contrary view is taken by Bar, an eminent German jurist, in an article in the Revue de Droit International for 1877.

[3] Whart. Confl. of L. 947.

[4] Whart. Confl. of L. 947. See Dana's case, 7 Benedict, 1.

[5] Ibid.

[6] II. c. 21, §§ 4–6.

[7] Lawrence's Wheaton, 245, note; Woolsey, § 79; Lewis, p. 44; Phil. i. 407; Heffter, § 63; Fœlix, ii. No. 609; Mohl, p. 705; Marquardsen, p. 48; Bar, § 150; Geyer, in Holtzendorff's Ency. Leipzig, 1870, p. 540; Kluit, p. 85, cited Whart. Confl. of L. § 948.

In the extradition treaties negotiated by the United States political offences are either implicitly excluded, by non-specification among those for which extradition will be granted, or are excepted in express terms. Nor can an independent extraditionable offence be used as a mask to cover a reserved political prosecution. No government, independent of treaty provisions,

§ 43. "The delivering up by one State," says Mr. Wheaton,[1] "of deserters from the military or naval service of another, also depends entirely upon mutual comity, or upon special compact between different nations;" but so far as concerns the extension of such surrender to any cases not provided for by convention, this may now be viewed as too broad a statement of the law. With regard to the extradition of the persons flying from threatened conscription, it is now conceded that no surrender should be made by the State of refuge.[2] So far as concerns deserters, no doubt cartel conventions for mutual extradition may, in some cases, be effective. But without such conventions, such surrenders are not now made; and under any circumstances there should be satisfactory proof that the deserter to be surrendered was not led to enlist by wrong means, and will not be subjected, on his return, to a barbarous punishment. In the United States, conventions of this kind are rare.[3]

And so for persons escaping from military service.

§ 44. The practice in the United States and in England has been not to refuse the extradition of a subject when demanded by the sovereign of a foreign State, for a crime committed in such State.[4] It is otherwise in Germany;[5] and an exception to this effect exists in our treaties with Prussia and the North German States, with Bavaria, with Baden, with Norway and Sweden, with Mexico, and with Hayti. No such exception appears in the treaties with Great Britain, France, Hawaiian Islands, Italy, Nicaragua, or with the Dominican Republic. The true rule is, that

But not because the person demanded is a subject of the asylum State.

should surrender a fugitive without a guarantee that he is to be tried only for the offence specified in the demand. Infra, § 49.

[1] Lawrence's Wheaton, p. 237.

[2] Rotteck, in Staatslex. ii. p. 40; Mohl, die Völkerrechtliche Lehre vom Asyl., cited Whart. Confl. of L. § 951.

[3] Dana's Wheaton, § 121, note 79.

[4] See Robbins's case, Wharton's St. Tr. 392; Bee, 266; Jour. Jur. 13. See Kingsbury's case, 106 Mass. 223.

This subject is discussed by the commission on extradition, appointed by the British government in 1877, which concludes as follows: —

"On the whole, the commission unanimously were of opinion that it is inexpedient that the State should make any distinction in this respect between its own subjects and foreigners; and stipulations to the contrary should be omitted from all treaties." Central Law Journal, 1878, 40; 19 Alb. L. J. 329.

[5] Dana's Wheaton, § 120, note; Lawrence's Wheaton, p. 237, note.

wherever, by the jurisprudence of a particular country, it is capable of trying one of its subjects for an offence alleged to have been committed by such subject abroad, the extradition in such case should be refused; the asylum State then having the right of trying its own subject by its own laws. When, however, it does not assume jurisdiction of extra-territorial crimes committed by its subjects, then extradition should be granted.

Where asylum State has jurisdiction there should be no surrender.

§ 45. Supposing that the State in which the defendant has sought an asylum, has, with the prosecuting State, admiralty jurisdiction of the offence, as where the offence was committed on the high seas, ought a surrender to be made? For several reasons, to pursue the argument of the last section, it should not. In the first place, by refusing to surrender, a needless circuity of process involving great cost is arrested. In the second place, a defendant's personal rights would be needlessly imperilled by his forcible removal to a foreign forum. And again, if a surrender could be made in one case of admiralty jurisdiction, it could be made in another; and if the rule be admitted at all, there would be few admiralty prosecutions that might not, at executive discretion, be removed to a foreign land under a foreign law. Even, therefore, should a surrender of such a party, in a case of admiralty jurisdiction, be granted, a court under the English common law, on a writ of *habeas corpus*, would direct his discharge.[1]

Conflict of opinion as to whether a foreign State can claim a subject who has committed

§ 46. A cognate question arises when the offence was committed by a subject of the demanding State in the territory of an independent foreign State. The only admissible interpretation, it has been argued, of the term "jurisdiction," is to treat it as convertible with country, so as to make it necessary for the offence, in order to sustain a requisition, to have been committed within

[1] As sustaining this view, see R. *v.* Tivnan, 5 B. & S. 645; S. C. under name of "Turnan," 12 W. R. 848. On the other hand, in Sheazle, in re, 1 Wood. & Min. 66, it was held that the extradition treaty with England required the surrender by the U. S. of a British subject who committed, on a British ship, on the high seas, piracy which was such by act of parliament, but not by the law of nations. Compare Bennett, in re, 11 Law T. R. 488.

[2] It is stated by Sir R. Phillimore, that "the country demanding the criminal must be the country in which the crime is committed." 1 Phil. Int. Law, 413.

the territory of the demanding State. Such is the view, as has been noticed, of Sir R. Phillimore, and so, also, was it held in England in 1858, by the eminent law officers of the crown, when consulted by the government as to whether the American government could be asked to surrender to England a British subject who had been guilty of homicide in France.[1] In 1873 the question arose in the United States on the following case: Joseph Stupp, alias Carl Vogt, a Prussian subject, was charged with having committed, in October, 1871, at Brussels, in Belgium, the crimes of murder and arson, and a demand for his arrest was made on the United States by Prussia. The proceedings were in the usual form, consisting of a complaint before a United States commissioner in New York, accompanied by the usual executive warrant, which was followed by a warrant of arrest by the commissioner, under which the accused was arrested on the 10th day of April, 1873, and brought before the commissioner. The counsel for the prisoner thereupon sued out writs of *habeas corpus* and *certiorari*, which were granted, and made returnable in the Circuit Court on the 16th day of April, 1873. The returns to these writs set forth the mandate, complaint, and warrant aforesaid, as the cause of arrest and detention, and thereby the sole question presented for the consideration of the court was, whether Prussia could demand the extradition of the prisoner for the alleged crimes committed out of the territory of Prussia, but punishable by its laws. The prisoner was remanded by Judge Blatchford to the custody of the marshal, after an opinion by that learned judge in which it was elaborately argued that the term "jurisdiction" in the treaty covers cases such as that before the court.[2] When, however, the question of issuing a warrant of surrender came before the Secretary of State, he called upon Attorney General Williams for an opinion on the question as to whether the surrender could be lawfully made. The question was answered in the negative by the attorney general, on the ground that, so far as concerns the extradition treaties, "jurisdiction" by the demanding State cannot be held to exist over the territory of an

a crime in a third State.

[1] Allsop's case, cited by Atty. Gen. Williams, 14 Opin. Atty. Gen. 281; 11 Blatch. 129; given more fully infra.

[2] Stupp, in re, 11 Blatch. 124.

independent civilized State.[1] Restricting the opinion of the attorney general to this narrow statement, it may be accepted as a suitable rule for the guidance of the federal executive in the delicate question of determining to which of two foreign civilized States a fugitive, in case of conflict, is to be surrendered.[2] But so far as concerns the meaning of the term "jurisdiction" the reasoning of Judge Blatchford is unanswerable. "Jurisdiction" cannot, in our international dealings with other States, be restricted to "territory," without abandonment, not only of our right to punish for offences on the high seas, and in barbarous lands, but of that authority over American citizens in foreign lands which we have uniformly claimed,[3] and which our imperial position as one of the leading powers of Christendom demands.[4]

Extradition does not lie for a case not included in a treaty.

§ 47. We have already noticed that, as a rule, there can be no extradition without treaty.[5] Where a treaty exists making certain offences the subject of extradition, this must be regarded as declaring that only such offences shall be the subject of extradition between the countries in question, and that consequently extradition is not to be granted for other offences.[6] Thus in Vogt's case, which has been just discussed, the attorney general, after arguing that the case was not within the treaty with Prussia, properly held that if the

[1] This is the only point necessarily involved, and it is just to the attorney general to limit his argument to this point, though some expressions used by him have a wider scope.

[2] From the opinion we take the following: —

"Thomas Allsop, a British subject, was charged as an accessary before the facts to the murder of a Frenchman in Paris, in 1858, and escaped to the United States, and as he was punishable therefor by the laws of Great Britain, the question as to whether he could be demanded by Great Britain of the American government, under the extradition treaty of 1842, was submitted to Sir J. D. Harding, the queen's advocate, the attorney and solicitor general, Sir Fitzroy Kelly, since chief baron of the exchequer, and Sir Hugh Cairns, since lord chancellor, and they recorded their judgment as follows: —

"'We are of the opinion that Allsop is not a person charged with the crime of murder committed within the jurisdiction of the British crown, within the meaning of the treaty of 1842, and that his extradition cannot properly be demanded of the United States under that treaty.' Forsyth's case, p. 268." 11 Blatch. 128.

See also opinion of Atty Gen. Cushing, 8 Opin. Atty. Gen. 215.

[3] See Whart. Crim. Law, 8th ed. §§ 273 *et seq.*

[4] Wh. Crim. Law, 8th ed. §§ 273 *et seq.*

[5] Supra, § 38.

[6] See Windsor's case, 34 L. J. M. C. 163; 13 W. R. 655; 12 L. T. N. S.

claim was not within that treaty, it could not be based generally on the law of nations.[1]

Whether there can be extradition under a treaty without legislation has been much discussed. That there can be was affirmed under the British treaty, before an act of Congress was passed prescribing the mode of procedure.[2]

Nor where the defendant is in custody for another offence.

§ 48. Where the defendant is already in custody, or under recognizances for trial in the State on which the requisition is made, the requisition will be refused, at least until the defendant's discharge.[3]

Should be restricted to the particular offence charged.

§ 49. The sole object of extradition is to secure the presence of a fugitive in the demanding State for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to criminal prosecutions other than that specified in the demand. Provisions guaranteeing to the fugitive the right to leave the demanding country after his trial for the offence for which he is surrendered, in case of acquittal, or in case of conviction, after his endurance of the punishment, are incorporated in many treaties. When not, they should be made the subject of executive pledge. It is an abuse of this high process and an infringement of those rights of asylum which the law of nations rightly sanctions, to permit the charge of an offence for which extradition lies to be used to cover an offence for which extradition does not lie, or which it is not considered politic to invoke.[4]

307; Counhaye, ex parte, L. R. 8 Q. B. 410.

[1] On this point the attorney general said: "Able writers have contended that there was a reciprocal obligation upon nations to surrender fugitives from justice; though now it seems to be generally agreed that this is altogether a matter of courtesy. But it is to be presumed where there are treaties upon the subject that fugitives are to be surrendered only in cases and upon the terms specified in such treaties." Vogt, in re. See supra, § 46, for the other questions arising in this case.

[2] Robbins's case, Whart. St. Tr. 392; Bee's R. 266. This ruling was defended by Judge Marshall, when in the House of Representatives, on reasoning which Mr. Gallatin thought unassailable. Adams's Gallatin, 231–2. See *contra*, Spear on Extrad. 53.

[3] Whart. Confl. of L. § 959. Supra, § 33.

[4] See Bouvier, ex parte, 27 L. T. R. 844; 12 Cox C. C. 303. See supra, § 42.

The question noticed in the text has been the subject of much recent (1878) discussion. In Caldweld's case, 8 Blatch. 131, Benedict, J., denied "That the fact that the defendant was brought within the juris-

§ 50. In several treaties it is provided that *after* the requisition made on the President, he may issue a mandate of arrest, so that the fugitive may be subjected to a judicial examination.[1] But unless so provided by treaty or statute, the present practice is that an executive mandate is not to be regarded a condition precedent of a judicial examination.[2]

Courts may hear case before mandate.

§ 51. *The complaint* should set forth the substantial and material features of the offence, though it need not aver personal knowledge on the part of the affiant.[3]

Complaint should be special.

§ 52. *The warrant of arrest may be returnable* before the

diction by virtue of a warrant of extradition for the crime of forgery affords him any legal exemption from prosecution for other crimes by him committed." This view was accepted by the N. Y. Court of Appeals, in Adriance *v.* Lagrave, 59 N. Y. 110; S. P., U. S. *v.* Lawrence, 13 Blatch. 295.

In Lawrence's case, it should be observed, there was an abandonment, by the United States authorities, of the attempt to try for any offence except that specified in the demand. As holding that the prisoner may be detained for other offences have been cited several Canada rulings; U. S. Foreign Relations, 1876, p. 235; Clarke on Extrad. 2d ed. 90–93. This is the case in inter-state extradition. Supra §§ 29–37.

In 1878, the English Royal Commission on Extradition, including Cockburn, C. J., and Lord Selborne, C., reported (in opposition to the rule embodied in the act of parliament), that "If there be another accusation against him (the prisoner), in respect of a crime which would properly be the subject of extradition, we see no reason why he should not be called upon to answer it." See Comments by Mr. Lawrence, 19 Alb. L. J. 330.

The question is discussed with much ability by Mr. Lawrence, in 14 Alb. L. J. 96; 19 Alb. L. J. 329; holding that the defendant can be tried only for the offence recited in the requisition, and showing that the great preponderance of foreign authority is to the same effect. So is the argument of Cairns, Lord Chancellor, on the Winslow case, as given in the Foreign Relations of the United States for 1876, pp. 286, 296. To the same effect see Spear on Extradition, chap. i., where the authorities are given at large. As sustaining the same view may be cited an opinion by the Court of Appeals of Kentucky; Com. *v.* Hawes, 13 Bush, 697; 14 Cox C. C. 135; and the argument of Professor Renault's Étude sur l'Extradition, Paris, 1879. Compare Clarke on Extradition, 2d ed. 107–8; Bouvier, in re, 27 L. T. (N. S.) 844; 42 L. J. Q. B. 17; 12 Cox, 303.

[1] See 6 Opin. Atty. Gen. 91; Henrich, in re, 5 Blatch. 425; Farez's case, 7 Blatch. 34.

[2] Thomas, in re, 12 Blatch. 370; Ross, ex parte, 2 Bond, 252; Calder's case, 6 Opin. Atty. Gen. 91; and see remarks of Lowell, J., in Kelley's case, 2 Lowell, 339; Spear on Extrad. 211. See Macdonnell, in re, 11 Blatch. 79.

[3] Farez's case, 2 Abbott, U. S. 346; 7 Blatch. 34. See Macdonnell, in re, 11 Blatch. 79.

judge issuing it, or before a commissioner previously designated under the act of Congress, by the Circuit Court for that purpose.[1]

Warrant may be returnable to commissioner.

§ 53. Documentary evidence from abroad "should be accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country."[2]

Evidence should be duly authenticated.

The commissioner should keep a record of the oral evidence, with the objections made to it or to the documentary evidence, briefly stating the grounds of such objections.

The parties seeking the extradition should be required by the commissioner to furnish an accurate translation of every foreign document, said translation to be verified by affidavit.[3] According to the practice under the United States statute, depositions, on a hearing for extradition, are to be allowed the same weight as if the witness were present at the hearing.[4]

§ 54. When in a treaty a particular crime is specified, this crime must be construed in the general sense in which it is used in the asylum country. Thus it was held by the English Queen's Bench in 1866, that the term fraudulent bankruptcy, in the French treaty, would be sustained by general evidence indicating what would be fraudulent bankruptcy in England.[5] On the other hand, the same court ruled in 1865, that "forgery," in the treaty with the United States, did not include embezzlement.[6] And it is admissible

Terms to be construed as in asylum State.

[1] Kaine, in re, 14 Howard, 142; though see Farez's case, 2 Abbott U. S. 346; 7 Blatch. U. S. 34. See Macdonnell, in re, 11 Blatch. 79. As to duty of judge in issuing warrant, see Kelley, in re, 2 Low. 339; Dugan, in re, 2 Low. 367.

[2] U. S. Rev. Stat. § 5271; Kaine, in re; Farez's case, *ut supra;* and 10 Opin. of Atty. Gen. 501. As to English practice see Counhaye, ex parte, L. R. 8 Q. B. 410; Terraz's case, 14 Cox C. C. 161; L. R. 4 Ex. D. 63.

[3] Heinrich, in re, 5 Blatch. 425.

[4] Farez's case, 7 Blatch. 491; 2 Abb. U. S. 346.

[5] Widermann's case, 12 Jurist N. S. 536; Clark on Extrad. 87; Whart. Confl. of L. § 972. In Terraz, ex parte, L. R. 4 Ex. D. 63, 14 Cox C. C. 161, the rule as to bankruptcy offences is further discussed.

[6] Windsor's case, 34 L. J. M. C. 163; 13 W. R. 655.

for the defence to show that the case is not one included in the treaty.[1]

Evidence must show probable cause.

§ 55. As to the degree of evidence required the law is well stated by Judge Blatchford as follows:[2] "It was urged at the hearing, on the strength of an observation made by Mr. Justice Nelson, in the case of Ex parte Kaine,[3] that the evidence must be so full as in his judgment, if he were sitting on the final trial of the case, to warrant a conviction of the prisoner. While I always hesitate to differ with Mr. Justice Nelson in opinion, I am not prepared to adopt this view. It seems to me to be in conflict with the decision in the case of Burr. In that case Chief Justice Marshall sat as a committing magistrate on the question as to whether Burr should be committed for trial for the crime of setting on foot an expedition against the territories of a nation at peace with the United States. The Chief Justice said:[4] 'On an application of this kind, I certainly should not require the proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof, furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it.' The chief justice acted upon that view, and committed Colonel Burr for trial. The convention, in the present case, says that the commission of the crime must be so established as to justify the commitment of the accused for trial, if the crime had been committed here. The question before Chief Justice Marshall, in the case of Burr, was merely the question as to the extent to which the fact of the commission of the crime must be established. To say that the evidence must be such as to require the conviction of the prisoner if he were on trial before a petit jury would, if applied to cases of extradition, work great injustice. The theory on which treaties for extradition are made is, that the place where a crime was committed is the proper place to try the

[1] Supra, § 47.

[2] 2 Abbott U. S. 351; 7 Blatch. 481.

[3] 3 Blatch. 1, 10.

[4] 1 Burr's Trial, 11. Infra, § 73.

person charged with having committed it; and nothing is required to warrant extradition except that sufficient evidence of the fact of the commission of the crime shall be produced to justify a commitment for trial for the crime. In acting under section 33 of the Judiciary Act of 1789, in regard to offences against the United States, a committing magistrate acts on the principle that, in substance, after an examination into the matter, *and proper opportunity for the giving of testimony on both sides*, there is reasonable ground to hold the accused for trial. The contrary view would lead to the conclusion that the accused should not be given up to be tried in the country in which the offence was committed, the country where the witnesses on both sides are presumptively to be found, but should be tried in the country in which he may happen to be found. Such a result would entirely destroy the object of such treaties." [1]

Evidence may be heard from defence.

§ 56. It may, therefore, be accepted as the practice both of England and of the United States, for the asylum State, through its proper tribunals, to hear evidence for the defence. Where the local laws allow it, he is entitled to be personally examined.[2] And the better opinion would seem to be that where, on the whole case, there is probable cause that the defendant was guilty of an offence under the provisions of a treaty, he should be surrendered.[3] Such appears to be the rule in England, under the Extradition Act of 1870.[4]

Circuit Court has power of review.

§ 57. The Circuit Court has power to review the decision of the commissioner on questions of law, but not of fact;[5] and the court will not reverse the commissioner's action upon trifling grounds or matters of form; and

[1] See also same case before Judge Woodruff, 7 Blatch. 491; where the requisite evidence is spoken of as *primâ facie;* and see infra, § 71.

[2] Farez's case, 2 Abb. U. S. 346.

[3] Dugan, in re, 2 Low. 367. The accused is not entitled, under the treaty with England, to be confronted with the adverse witnesses. Ibid.

[4] 1 Phil. Int. Law, ed. 1871, App. ix. 39; Law Jour. 1870, N. S. Stat. 786; Whart. Confl. of L. App. D.

[5] Kaine's case, 3 Blatch. 1; Henrich's case, 5 Blatchf. C. C. 414; overruled Veremaitre's case, 9 N. Y. Leg. Obs. 137, where Judge Judson held that he had no power to revise the judgment of the commissioner on questions of fact; Heilbronn's case, 12 N. Y. Leg. Obs. 65; and Van Aernam's case, 3 Blatch. C. C. 160, where the same view was expressed by Judge Betts.

On the other hand, in Stupp's case, 12 Blatch. 501, Judge Blatchford held that there could be no reviewal on the

only for substantial error in law, or for such manifest error in procedure as would warrant a court of appeals in reversing.[1] And, as was subsequently ruled, it is not enough to charge a conclusion at law, *e. g.* "forgery." The time and place, and nature of the crime, and its subject matter, should be set out.[2] Nor will the court discharge absolutely on account of an error of the commissioner in admission or rejection of evidence.[3] The practice is, in such case, simply to discharge from the first commitment, leaving the examination to proceed anew.[4]

No *habeas corpus* lies in such case to the Supreme Court of the United States.[5]

effect of the evidence when legally admitted. This is affirmed in Vandervelpen's case, 14 Blatch. 137. In Wiegand's case, 14 Blatch. 370, Blatchford, J., said: "In a case of extradition before a commissioner, when he has before him documentary evidence from abroad, properly authenticated under the act of Congress, and such is made evidence by such act, it is the judicial duty of the commissioner to judge of the effect of such evidence, and neither the duty nor the power to review his action thereon is imposed on any judicial officer. This province of the commissioner extended to a determination as to whether the embezzlement was a continuing embezzlement."

[1] Henrich, in re, 5 Blatch. C. C. 425.

[2] Farez's case, 7 Blatch. U. S. 35.

[3] Macdonnell, in re, 11 Blatch. 79.

[4] Farez's case, *ut supra*.

[5] Kaine, ex parte, 14 How. 103; 1 Robins. Pr. 430.

"It was held, and held successively for many years (In re Veremaitre, 9 N. Y. Leg. Obs. 129; In re Kaine, 10 Ibid. 257; In re Heilbronn, 12 Ibid. 65; Ex parte Van Aernam, 3 Blatch. C. C. R. 160), that if it appeared to the judge or to the court issuing the writs that the commissioner had acquired jurisdiction, by a conformity of the proceeding to the requirements of the treaty and the acts of Congress, and that he had not exceeded his jurisdiction, that was an end to inquiry; that whether the evidence received by him was sufficient or insufficient was a question to be determined by him; that no tribunal had been provided by the treaty, and no jurisdiction had been given by any act of Congress to any judge, magistrate, or court, to review that decision; that the only review possible was a review by the executive, to whom the proceedings had before the commissioner were to be returned; that the executive had power to examine for himself, and determine whether a case had been made within the treaty, and whether a case had been made which called upon him, as the executive of the government of the United States, to surrender the fugitive; and that as this special jurisdiction in a special proceeding not theretofore within the jurisdiction, original or appellate, of any court or magistrate of the United States, had been conferred by law upon the magistrate acting under the act of Congress, and as it was made his duty to certify his conclusions as the basis of executive action, without giving any right of appeal, in any form, to any

Final Surrender by Executive.

§ 58. Yet even after the final commitment by the commissioner, and the remanding, in case of a *habeas corpus* before the Circuit Court, of the prisoner to the custody of the marshal, the final warrant of the executive must

Surrender at discretion of executive.

other magistrate or to any court, there was no appeal and no supervisory authority to be exercised, except by the executive.

"The next stage in the history contained an opinion which is supposed to go one step further. We may say, without disrespect to the decision itself, in any wise, that the decision in which the opinion was pronounced (In re Kaine, 3 Blatch. C. C. R. 1, 4), had other grounds upon which it was deemed to be called for. The decision was, that the commissioner never acquired jurisdiction; but the opinion, nevertheless, went further, and held that, in the case under consideration, there was no competent evidence before the commissioner, that is to say, there was no legal evidence upon which the commissioner could act, for, if the evidence was not competent, it was not legal; that, if there was no competent evidence before the commissioner, the proceedings before the commissioner were to be treated, whenever presented to any other tribunal, as an arbitrary act of commitment, upon mere complaint; and that the question became, therefore, a question of law, not a question of fact, before the court, on *habeas corpus*, whether a commissioner could, upon complaint, issue a warrant of arrest, and, upon the appearance of the prisoner before him, commit him for surrender. With that view of the subject, and with the assertion of the right to inquire, upon *habeas corpus*, whether the proceedings of the commissioner had been, in that sense, legal, or, in other words, whether he had not departed from his jurisdiction, which was a jurisdiction to inquire into and ascertain facts, and not to declare facts without any evidence before him, we are not disposed, at present, to raise any controversy.

"The next step in the consideration of this subject elicited the opinion (In re Henrich, 5 Blatch. C. C. R. 414) that the court, acting in the proceedings instituted by *habeas corpus* and *certiorari*, was not confined to the mere inquiry whether there was any evidence; but that, if it could see that there was a substantial defect of evidence, it might and ought, not necessarily to discharge the prisoner, but to hold that the warrant of commitment was illegally granted.

"That view of the subject was followed, in its next step, or perhaps in its consequence, by the holding (In re Farez, 7 Blatch. C. C. R. 345, 491), that it was not the duty of the court to discharge when an error in rejecting evidence for the prisoner had been committed, but to remand, that the error might be corrected, and the proofs be continued, if it was so desired, to the end that the facts might be ascertained, and that, if the prosecuting government were able, it might yet establish a case against the prisoner. Indeed, in the previous case to which we have referred, to wit, where the judge was of opinion that there was no legal evidence (In re Kaine, 3 Blatch. C. C. 1–4), he offered, upon

be obtained before the prisoner is surrendered to the custody of the demanding State. This warrant the executive may refuse to issue, on grounds of law as well as of policy.[1] Such was the course taken by the President in 1873, in Vogt's case.[2] In England, the surrender, after remander on *habeas corpus*, may be made without such final executive warrant.[3]

announcing the conclusion he had reached, to detain the prisoner, to the end that the inquiry might proceed, the defects be supplied, and proper and competent evidence be produced before him." Woodruff, J., In re Macdonnell, 11 Blatch. 79.

[1] Stupp, in re, 12 Blatch. 501; 14 Opin. Atty. Gen. 281.

[2] Supra, § 46.

[3] The following statement of the English practice is taken from the London Times of Feb. 17, 1873: —

"In the case of a Belgian accused of crime, whose surrender is demanded from this country, the procedure is as follows: The Belgian minister, or diplomatic agent, presents to our principal secretary of state for foreign affairs a requisition for the surrender, accompanied by the proofs deemed necessary in Belgium to establish the fugitive's guilt, or, at least, sufficient presumption of his guilt to justify his arrest. This requisition the foreign secretary is bound to transmit to the home secretary. He has no discretionary power in the matter. It does not appear to us quite clear whether the home secretary is then bound to put the affair into the hands of a police magistrate, or whether he may exercise his own discretion as to the necessity for such a course. The treaty states that the home secretary "shall then signify to some police magistrate in London that such requisition has been made, and require him, if there be due cause, to issue his warrant for the apprehension of the fugitive." If it be here meant, in accordance with the strictly grammatical construction, that the home secretary may decide whether 'there be due cause,' why should he have been already ordered unconditionally to make a 'signification' to the magistrate, which would be utterly superfluous and useless whenever he decided there was no due cause? But if the clause, 'if there be due cause,' refer to the issuing of a warrant by the magistrate, then it is worthy of remark, that upon a simple police magistrate, with no other proviso than that he be a London magistrate, is in the first instance thrown the responsibility of deciding whether a foreign fugitive ought to be given up, — a responsibility which, in cases easily imaginable, might become exceedingly grave. In any case, it rests ultimately with the magistrate to determine whether the documents presented to him justify his issuing a warrant for the fugitive's arrest; and again, when the fugitive is brought before him, he determines whether the evidence is such as would justify commitment for trial according to English law, if the alleged crime had been perpetrated in England. In case of commitment, the fugitive is sent to prison, and, after a certain period, not to be less than fifteen days, is surrendered on an order from the secretary of state to any duly authorized person the Belgian government may appoint, unless the prisoner meantime choose to apply for a writ of *habeas corpus*, in which case 'his surrender must be deferred until after the decision of the court upon the return of

VI. PRIVILEGE FROM ARREST.

§ 59. The privilege from arrest belonging to certain officers of our own government, in civil proceedings, does not extend to criminal prosecutions.[1] Foreign ministers and their families are, however, privileged from even criminal arrest.[2] But this privilege does not extend to consuls.[3]

Foreign ministers privileged from arrest.

VII. RIGHT TO TAKE MONEY FROM THE PERSON OF THE DEFENDANT.

§ 60. Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offence with which the defendant is charged. These articles are properly to be deposited with the committing magistrate, to be retained by him with the other evidence in the case, until the time comes for their return to the prosecuting authorities of the State. Sometimes, however, they are by local usage given at once to the prosecuting authorities. However this may be, they should be carefully preserved for the purposes of the trial; and after its close returned to the person whose property they lawfully are.

Proofs of crime may be taken from person.

§ 61. The right of the arresting officer to remove money from the defendant's person is limited to those cases in which the money is connected with the offence with which the defendant is charged. Any wider license would not only be a violation of his personal rights, but would

But not money unless connected with offence.

the writ.' If the decision is in his favor, he cannot be surrendered; but if it is against him, he 'may be surrendered immediately, without any order from the secretary of state.' In the case of a fugitive convicted, the procedure is the same, *mutatis mutandis*, as in the case of a fugitive accused. The procedure is naturally very much the same in the case of an English fugitive whose surrender is demanded from Belgium. The only important point of difference, perhaps, is, that after the fugitive has been arrested, tried, and committed, the minister of justice decides in the last resort, from the judicial documents submitted to him, whether the prisoner should be given up." See Terraz's case, 14 Cox C. C. 161.

[1] See U. S. *v.* Kirby, 7 Wall. 482; Penny *v.* Walker, 64 Mo. 430.

[2] Comte de Garden, Traité complet de diplomatie; Holtzend. Encycl. i. 798; Cabrera, ex parte, 1 Wash. C. C. 232; U. S. *v.* Benner, Bald. 234; U. S. *v.* Lafontaine, 4 Cranch, 173.

[3] U. S. *v.* Ravara, 3 Dall. 299, note.

impair his means for preparing for his defence.[1] When money is taken in violation of this rule, the court will order its restoration to the defendant.[2] That where property is identified as stolen, or is in any way valuable as proof, it may be sequestrated, is nevertheless plain.[3]

VIII. RIGHT OF BAIL TO ARREST PRINCIPAL.

Bail may arrest and surrender principal.

§ 62. The bail has the right, at his own discretion, to arrest his principal, and to deliver him to the custody of the magistrate before whom the bail was entered, or to the court to whom the case is returned.[4] It is sometimes

[1] R. v. McKay, 3 Cr. & Dix, 205; R. v. O'Donnell, 7 C. & P. 138; R. v. Kinsey, 7 C. & P. 447; R. v. Jones, 6 C. & P. 343; R. v. Burgiss, 7 C. & P. 488; R. v. Frost, 9 C. & P. 129.

[2] R. v. Bass, 2 C. & K. 822; R. v. Coxon, 7 C. & P. 651.

[3] See Houghton v. Bachman, 47 Barb. 388.

[4] Harp v. Osgood, 2 Hill N. Y. 216; State v. Lazarre, 12 La. An. 166; State v. Le Cerf, 1 Bailey, 410; Com. v. Bronson, 14 B. Monr. 361. See Milburn, ex parte, 9 Pet. 704. The practice is the same in the Roman law. L. 4. D. de custodia reor. Feuerbach's Pein. Recht, § 533.

"When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. 3 Blackstone's Commentaries, 290; Nicolls v. Ingersoll, 7 Johnson, 152; Ruggles v. Corry, 3 Conn. 84, 421; Respublica v. Gaoler, 2 Yeates, 263; 8 Pick. 140; Boardman v. Fowler, 1 Johns. Cas. 443; Com. v. Riddle, 1 Serg. & R. 311; Wheeler v. Wheeler, 7 Mass. 169. In 6 Modern (page 231, case 339, Anon.) it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same. Harp v. Osgood, 2 Hill, 218. They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee. Devine v. State, 5 Sneed, 625; U. S. v. Van Fossen, 1 Dillon, 410; Resp. v. Gaoler, 2 Yeates, 265, cited supra.

"In the case of Devine v. State, 5 Sneed, 625, the court, speaking of the principal, say, 'The sureties had the control of his person; they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded. . . . . In the case before

the practice for the bail, when he desires to so arrest, to apply to the magistrate, or to any other justice, for a warrant; but the right to arrest exists without such a warrant. The principal is supposed to be in the bail's constant custody, and the former being the latter's jailer may at any time surrender him to the custody of the law.[1] That a bail can arrest his principal in a foreign State, to which the principal has fled, has been sometimes asserted; but there is no ground for this opinion, as the bail only represents the court from which his authority emanates, and where the court has no power to arrest the bail has no power to arrest. The proper course in such case is to apply for a warrant for extradition.[2]

us, the failure of the sureties to surrender their principal was, in the view of the law, the result of their own negligence or connivance, in suffering their principal to go beyond the jurisdiction of the court and from under their control.' The other authorities cited are to the same effect." Swayne, J., Tailor *v.* Taintor, 16 Wall. 366.

[1] State *v.* Mahon, 3 Harring. 568.

[2] This question arose in Canada, on the arrest, in Canada, of "Lord" Gordon, by the agents of persons who had gone his bail in the United States. The persons so arresting were themselves arrested, and applied in July, 1873, before Judge McKenzie, of the Queen's Bench, for release on bail. This was refused, in the following opinion: "It has been abundantly established in evidence, and admitted by at least two of the prisoners, Hoy and Keegan, that they, with the active coöperation of Fletcher and Blakely, forcibly seized and confined against his will one Gordon, with intent to take him out of Canada. Our statute declares this offence felony, — the maximum punishment of which is seven years in the penitentiary. The accused have sought to justify their action by stating that they held a power of attorney from a person in New York authorizing the capture of Gordon, and that having only acted under this power they had infringed no law; that by common law a bail might follow his principal even into the British dominions, and take and forcibly carry him away without a warrant. I do not subscribe to this doctrine, which, in my opinion, is most dangerous to our national independence; but assuming this opinion to be sound, it would not meet the present case, as the power of bail to take its principal is a personal right confined to himself alone, and cannot be delegated to another. Now, with these data before us what remains: —

"First, that the offence charged against the prisoners is a most serious one.

"Second, that the evidence sustains the charge, and leaves little doubt as to the guilt of the prisoners.

"Third, the plea of justification is, in my opinion, untenable.

"Let us, in conclusion, apply our discretion to these facts, not forgetting our definition that discretion in this sense means to discern according to law. It is laid down in books that when the offence charged is of a serious nature, and proof of guilt strong,

the judge ought to refuse bail. Under the facts of the case, and taking into consideration all the circumstances connected therewith, I feel bound by law and by precedent to refuse bail in the case of Hoy, Keegan, Fletcher, and Blakely. Merriman's case is different. In committing him for trial I was, I think, justified by law; but this being an application to rule as a judge of the Queen's Bench, and there being doubts in my mind as to his guilt, I think he ought to be admitted to bail, himself to be bound in the sum of $4,000, for his appearance at the ensuing term of the Court of Queen's Bench."

But, as has been seen, arrests of this class, however irregular, do not entitle the prisoner, when brought to a court having jurisdiction of the crime, to a release. See supra, § 27.

CHAPTER II.

HEARING BEFORE MAGISTRATE.

I. COMMITMENT FOR FURTHER HEARING.
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II. EVIDENCE REQUISITE.
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Exception in cases of identity, or of one-sidedness in prosecution's case, § 72.
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At common law bail to be taken in all but capital cases, § 74.
Excessive bail not to be required, § 75.
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And so in cases of sickness, § 78.
Bail to keep the peace may be required, § 79.
IV. VAGRANTS, DISORDERLY PERSONS, AND PROFESSIONAL CRIMINALS.
Magistrates have power to hold vagrants, &c., to bail, § 80.
V. BAIL AFTER HABEAS CORPUS.
On *habeas corpus* court may adjust bail, § 81.
VI. BAIL AFTER VERDICT.
In exceptional cases bail permissible after verdict, § 82.

I. COMMITMENT FOR FURTHER HEARING.

§ 70. THE delinquent having been arrested, the next step is to have the case heard before a magistrate or justice of the peace.[1] It is not essential that the hearing should take place at once. The arresting officer may, if requisite, put the person arrested in the county prison, or other place of temporary confinement, until a hearing can be secured. But this should be with all possible dispatch; should there be any undue delay, a justice of the Supreme or of any Superior Court having jurisdiction for the purpose may, by a writ of *habeas corpus*, exact an immediate examination before himself. And the issue of such a writ, on due cause shown, is obligatory.[2]

Hearing may be adjourned from time to time.

[1] The statute in this respect must be strictly followed. Papineau *v.* Bacon, 110 Mass. 319.

In Virginia, in cases of felony, a preliminary examination is not necessary. Jackson *v.* Com. 23 Grat. 919.

[2] See State *v.* Kruise, 3 Vroom N. J. 313.

It has been also said that if the commitment be for an indefinite or unreasonable time, the warrant is virtually void, and an action for trespass lies for the imprisonment.[1] If requisite, the hearing, on due cause shown, may be adjourned from day to day.[2]

II. EVIDENCE REQUISITE.

§ 71. *Must the magistrate hear the case of the defence as well as for the prosecution, so far as it may be tendered?*

Practice not usually to hear witnesses for defence.

The English practice, as stated by Blackstone, was for the justice, "by statute 2 & 3 Ph. & M. c. 10, to take in writing the examination of such prisoner, and the information of those who bring him." This statute was repealed by 7 Geo. 4, which provides that the justices at the preliminary hearing "shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or so much thereof as shall be material, in writing," &c. In several of the United States, among which Pennsylvania may be mentioned, the statute 2 & 3 Ph. & M. has not been viewed as in force; nor has the practice of taking the prisoner's examination been generally adopted. In New York, by the Revised Statutes,[3] it is the duty of a magistrate, when a party arrested on a warrant is brought before him, forthwith to proceed to examine the *complainant* and the *witnesses* produced in support of the prosecution on oath, in the presence of the accused. After which the prisoner may be examined in relation to the offence charged. Previous to his examination he must be informed of the charge made against him, be allowed a reasonable time to send for and advise with counsel, and must be told that he is at liberty to refuse to answer any question put to him. His examination is not on oath. After it is completed, he is allowed to have witnesses sworn and examined on his part; and in such examination is entitled to the assistance of counsel. His answers are reduced to writing, and certified and signed by the magistrate; so, also, the evidence given by the several witnesses.[4] But the

[1] Davis *v.* Capper, 10 B. & Cr. 28; Cave *v.* Mountain, 1 Man. & Gr. 257; S. C., 1 A. & E. N. S. 18. See Reese *v.* U. S. 9 Wall. 13.

[2] Hamilton *v.* People, 29 Mich. 173.

[3] 2 R. S. 709, §§ 22–24.

[4] Wendell's Black. iv. 296.

practice at common law has been, as a rule, to hear only the case of the prosecution.

§ 72. Yet it must be conceded that there are cases in which, to avoid circuity and oppression, a magistrate should hear evidence for the defence. Suppose, for instance, the prosecution calls only a part of the witnesses to the *res gestae*, and the defendant offers to call the other witnesses, could the magistrate rightfully refuse to require the other witnesses of this class to be called?[1] Or suppose the defendant, in a liquor prosecution, tenders a license, would it not be an absurdity as well as an oppression to refuse to receive it? Such a distinction, indeed, has not been unrecognized by the courts;[2] nor is it inconsistent with the principles above stated that it should be definitely accepted. If so, we may state it to be law, that when the defendant offers testimony to explain or to divert from himself the case of the prosecution, such testimony should be received; and the magistrate, to the whole case, should apply the test of probable cause.[3] And the same distinction is applicable to questions of identity.[4]

Exception in cases of identity, or of one-sidedness in prosecution's case.

Aside from this view, it is proper, should the prosecution call only a portion of the witnesses to the *res gestae*, for the magistrate, at the instance of the defendant, to call the remainder.[5]

§ 73. As has already been stated,[6] the better opinion is that on a preliminary hearing the magistrate is to hold the defendant for trial in case there is made out a probable case of guilt; nor is it necessary, at common law, that the binding over shall be for the specific charge for which the warrant issued, if, on the hearing, the offence takes another

Probable cause only need be shown.

[1] See infra, § 565; U. S. *v.* White, 2 Wash. C. C. 29.

[2] See R. *v.* Tivnan, 5 Best & Smith, 645; Whart. Confl. of L. § 967. Supra, §§ 45 *et seq.*

[3] See remarks of Lord Denman, C. J., 2 C. & K. 845.

[4] See, as to the uncertainty of evidence on this point, Whart. Crim. Ev. §§ 20, 27, 806.

[5] See infra, § 565.

In New York, as we have just seen, this rule is so far modified as to enable the defendant to have witnesses sworn and examined on his part. The magistrate, however, is required to hold the defendant for trial, if *upon examination of the whole matter* it appears to the magistrate that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty thereof.

[6] See supra, § 54.

shape.[1] By Blackstone it is stated,[2] that if "it manifestly appears *either* that no such crime was committed, *or* that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail, that is, put in securities to answer the charge against him." By Chief Justice Marshall, on a great historical occasion, in which his judicial sympathies were certainly not enlisted for the prosecution, the doctrine that probable cause is sufficient was declared with still greater precision;[3] and indeed the view that the case is to be fully heard by the magistrate, and that he is then to decide on its entire merits, would be really prejudicial to those personal rights which this view is sometimes supposed to favor. For if we accept this, the defendant, instead of being subject to one trial, would be subject to two. The rule *ne bis idem* — no man to be tried twice for the same offence — would be overridden. The defendant would go to the jury oppressed by the presumption that upon his whole case he had already been condemned. Nor is this all. It is proper, in view of the immense power a government is capable of exercising in the influencing and intimidating of witnesses, as well as of the importance on other grounds to the defendant of keeping his case in reserve until the period of its final disclosure, that he should not be compelled to exhibit it at a preliminary hearing, subject to the mercies of whatever magistrate the prosecution might select. And then, again, it would lead to many complications to adopt at preliminary hearings before magistrates a rule as to the volume of proof different from that which obtains on *habeas corpus* and before grand juries. But both on *habeas corpus* and on hearings before grand juries, it is on all sides agreed, probable cause is the test.[4] And the rule has to the defendant this double advantage. It enables him, first, to inspect and prepare for the case of the prosecution without disclosing his own. It enables him, secondly, when the case comes on to be tried by a jury, to say, "I come before you as an innocent man, against whom no judicial con-

[1] See Redmond *v.* State, 12 Kans. 172. *Contra*, under Michigan statute, Yaner *v.* People, 34 Mich. 286.

[2] Vol. iv. p. 296, Wendell's ed.

[3] Burr's Trial, 11, 15; and to same point U. S. *v.* Walker, 1 Crumr. (Pitts.) 437. See infra, §§ 361–2.

[4] See infra, §§ 360–1.

demnation is on file." For, on this hypothesis, the holding of a defendant to trial by a magistrate is not a decision that he is guilty, but only that on the prosecution's testimony there is probable cause that he should be tried.[1]

III. FINAL COMMITTAL AND BINDING OVER.

§ 74. The common law rule is stated by Blackstone to be, that "wherever bail will answer the same intention" (that of safe custody), "it ought to be taken, as in most of the inferior crimes; but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life? And what satisfaction or indemnity is it to the public to seize the effects of those who have bailed a murderer, if the murderer himself be suffered to escape with impunity?"[2] Pushing this rule to its practical consequences, it has been the practice of American courts to take bail in all cases not capital. And indeed the enactment of extradition treaties should lead, in all cases of doubt, to a still further liberalization of the rule. For no longer exist those strong temptations to break bail and fly which existed when Blackstone wrote. A fugitive from justice, if his bail bonds are forfeited, is pursued to his place of refuge, not merely by government, which may be languid, but also by his sureties, who may be incensed and determined. At all events, through the ubiquitousness of extradition police, the probabilities of eventual escape are much diminished.

At common law bail to be taken in all but capital cases.

§ 75. By the eighth amendment to the Constitution of the United States, "excessive bail shall not be required;" and by the Act of September 24, 1789, "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the Supreme or a Circuit Court, or by a justice of the Supreme Court or a judge of the District Court, who shall exercise their discretion therein, regarding the nature and

Excessive bail not to be required.

[1] See Cox *v.* Coleridge, 1 B. & C. 37; State *v.* Hartwell, 35 Me. 129; U. S. *v.* Bloomgart, 2 Benedict, 356; Van Campen, ex parte, Ibid. 419; State *v.* Roth, 17 Iowa, 336; Yaner *v.* People, 34 Mich. 286.

[2] Blackstone, *ut supra.*

circumstances of the offence, and of the evidence, and the usages of law."

Similar provisions exist in most of the several States.[1]

Proper course is to require such bail as will secure attendance.

§ 76. It has been sometimes argued that bail should be arbitrarily graded to meet the heinousness of the offence. But this is a dangerous principle, as it tends to show that for the rich, who can find bail and afford to forfeit it, there is no necessary corporal punishment imposed. Far wiser is it to adopt the principle, that, in determining and adjusting bail, the test to be adopted by the court is the probability of the accused appearing to take his trial.[2] This probability is to be tested in part by the strength of the evidence against the defendant; in part by the nature of the crime charged, and by the severity of the punishment which may be imposed; and in part by the character and means of the defendant. What to one is oppressive bail, to another is light; and of this the court is to judge.[3] As a general rule, the action of the court in

[1] See State *v.* James, 37 Conn. 355.

The general test is, is the offence with which the defendant is charged punishable with death? If so, and if the proof of guilt is strong, bail will be refused. See U. S. *v.* Stewart, 2 Dall. 343; State *v.* McNab, 20 N. H. 160; Dunlap *v.* Bartlett, 10 Gray, 282; Tayloe, ex parte, 5 Cow. 39; People *v.* Dixon, 4 Parker C. R. 651; People *v.* Godwin, 5 City Hall Rec. (N. Y.) 11; People *v.* Perry, 8 Abb. (N. Y.) Pr. N. S. 27; State *v.* Rockafellow, 1 Halst. 332; Lynch *v.* People, 38 Ill. 494; Heffren, ex parte, 27 Ind. 87; Beall *v.* State, 39 Miss. 715; Thompson *v.* State, 25 Tex. (Supp.) 395; Zembrod *v.* State, 25 Tex. 519; Mosby, ex parte, 31 Tex. 566; Bird, ex parte, 24 Ark. 275; Carroll, ex parte, 36 Ala. 300; Bryant, ex parte, 34 Ala. 270; R. *v.* Scaife, 9 D. P. C. 553; R. *v.* Williams, 8 D. P. C. 301. In most States the limits as to bail are fixed by Constitution or statute.

Bail was refused in England after a commitment under a coroner's verdict of wilful murder in a duel, although there were strong affidavits to the effect that the "duel was fair," as the question of the capital crime was to be settled, on the ultimate proof given, by the court and jury alone. Barronet, in re, 1 El. & Bl. 1; Dears. C. C. 51; Barthelemy, in re, Dears. C. C. 60; 1 El. & Bl. 1.

If after protracted trials a jury is unable to agree, the court, at its discretion, may permit him to be discharged on bail. People *v.* Perry, *ut supra*, where there had been two abortive trials. And bail will be taken even in capital cases where there is a well founded doubt of guilt. Bridewell, ex parte, 56 Miss. 39; People *v.* Perry, *ut supra*.

[2] See Tayloe, ex parte, 5 Cow. 39; People *v.* Dixon, 4 Parker C. R. 651; People *v.* Lohman, 2 Barb. 450; Com. *v.* Keeper of Prison, 2 Ash. 227; Com. *v.* Lemley, 2 Pitts. 362; Bryant, ex parte, 34 Ala. 270; Perry, in re, 19 Wis. 676.

[3] R. *v.* Badger, 4 Q. B. 468. See

this respect, unless great oppression is shown, is not revisable in error.[1] Even where there can be no question as to facts, there may be capital cases in which the government may consent to a discharge on bail. A striking illustration of this is the admission to bail of Jefferson Davis, when under indictment for treason, with the consent of the President of the United States.[2]

§ 77. *Continuances* on the part of the prosecution, especially after two sessions, will lead the court, even in capital cases, to admit to bail.[3] But a single continuance, necessitated by absence of witnesses, does not have this effect.[4]

After continuance bail may be granted.

§ 78. *Danger to life* from sickness caused by imprisonment has been held sufficient cause to justify the defendant's release on bail, under proper and peculiar sanctions.[5]

And so in cases of sickness.

§ 79. *After conviction*, and indeed in extraordinary cases of threatened crime after acquittal, the court may hold the defendant, in addition to other penalties prescribed by law, over to keep the peace, and commit him on default of bail.[6] When an indictment is quashed on technical grounds, the court, *a fortiori*, will direct that the defendant be held on the original charge.[7]

Bail to keep the peace may be required.

IV. VAGRANTS, DISORDERLY PERSONS, AND PROFESSIONAL CRIMINALS.

§ 80. By statutes which may now be viewed as part of Anglo-American common law, justices of the peace have power to hold to bail for their good behavior, or in default to commit, for definite periods, vagrants and disorderly

Magistrates have power to hold va-

remarks of Coleridge, J., in Robinson, in re, 23 L. J. Q. B. 286; People *v.* Dixon, 4 Park. C. R. 651; People *v.* Van Horne, 8 Barb. 158; People *v.* Smith, 1 Cal. 9.

[1] People *v.* Perry, 8 Abb. (N. Y.) Pr. N. S. 27; Lester *v.* State, 33 Ga. 192. See infra, § 777. Otherwise where there is a constitutional right. Wray, ex parte, 30 Miss. 673.

[2] As to bail after conviction, and before sentence, see infra, § 82.

[3] Fitzpatrick's case, 1 Salk. 103; Crosby's case, 12 Mod. 66; People *v.* Perry, *ut supra*. See State *v.* Hill, 3 Brev. 89.

[4] U. S. *v.* Jones, 3 Wash. C. C. 224; R. *v.* Andrews, 2 D. & L. 10; 1 New Cas. 199.

[5] R. *v.* Wyndham, 1 Strange, 2; R. *v.* Aylesbury, Holt, 84; 1 Salk. 103; Harvey's case, 10 Mod. 334; U. S. *v.* Jones, 3 Wash. C. C. 224.

[6] Infra, §§ 82, 941; State *v.* Coughlin, 19 Kans. 537.

[7] Nichols *v.* State, 2 South. 539; Young *v.* Com. 1 Robt. Va. 744.

grants, &c., to bail.

persons.[1] Similar statutes have been adopted in the United States, and have frequently been held constitutional, though with the caution that the defendant should be duly summoned, and should have a fair hearing,[2] and that the statutes should be strictly construed.[3] In several States analogous power has been given in respect to professional thieves and other habitual criminals; and these statutes have been held constitutional in New York and Pennsylvania. Sureties to keep the peace can also be required at common law from a person against whom oath is made that by him another person is put in fear or danger of life. In all these cases the sureties or commitment must be for a limited time.[4]

V. BAIL AFTER HABEAS CORPUS.

On *habeas corpus* court may adjust bail.

§ 81. The writ of *habeas corpus* may be appealed to for the purpose, not only of determining the liability of the defendant to prosecution at all, but of settling the question of bail, supposing there be probable cause against him. The court, on fixing the amount of bail, is guided by the considerations we have just noticed as governing the practice before magistrates.[5]

[1] Whart. Crim. Law, 8th ed. § 442; Paley on Convictions, chap. 1; Com. Dig. Just.; Burn's Just. Vagrant. "Idle and disorderly persons, vagrants, are terms often occurring in the old statutes. They have been from time immemorial, in England, subject to the summary jurisdiction of justices of the peace." Earle, J., in State *v.* Maxcy, 1 McMullen, 503. The history of the law is well given in Gneist, Englische Communalverfassung (3d ed. 1871), p. 225, and the power traced to 34 Ed. 3, c. 1. See also Blackstone iv. c. 18.

Arrests are not allowable unless when the offence was committed in the officer's presence. Shanley *v.* Wells, 71 Ill. 78. See infra, § 942.

[2] People *v.* Phillips, 1 Park. C. R. 95; People *v.* Gray, 4 Park. C. R. 616; People *v.* Forbes, 4 Park. C. R. 611; State *v.* Maxcy, 1 McMull. 501; Roberts *v.* State, 14 Mo. 138.

[3] R. *v.* Waite, 4 Burr. 780; 2 Ld. Ken. 511, and other cases cited in Fisher's Crim. Dig. tit. "Practice." See infra, § 942.

[4] Prickett *v.* Gratrex, 8 Q. B. 1021.

[5] Mohun's case, 1 Salk. 104; R. *v.* Barronet, Dears. 51; 1 E. & B. 2; Com. *v.* Keeper of Prison, 2 Ashm. 227; Com. *v.* Lemley, 2 Pitts. 362; Com. *v.* Rutherford, 5 Rand. 646; Com. *v.* Semmes, 11 Leigh, 665; State *v.* Hill, 3 Brev. 89; State *v.* Everett, Dudley S. C. 296; Lumm *v.* State, 3 Ind. 293.

As to the practice of looking into the coroner's or magistrate's depositions see R. *v.* Pepper, Comb. 298; R. *v.* Horner, 1 Leach, 270; People *v.* Beigler, 3 Park. C. R. 316. In this country the practice is for the court

VI. BAIL AFTER VERDICT.

§ 82. In cases involving no high degree of turpitude, and in cases in which the court has serious doubts as to the question of the rightfulness of the verdict, or of the sufficiency of the proceeding in point of law, bail may be taken after verdict of conviction,[1] or even after sentence, while the case is under review in a superior court.[2]

In exceptional case bail may be permitted after verdict.

to hear the witnesses afresh. Com. *v.* Keeper of Prison, 2 Ashm. 227. See People *v.* Dixon, 4 Park. C. R. 651.

[1] Archb. C. P. 187; R. *v.* Barronet, Dears. 51; 1 E. & B. 2; Com. *v.* Field, 11 Allen, 788; McNiel's case, 1 Caines, 72; Res. *v.* Jacob, 1 Smith's Laws (Penn.), 57; Com. *v.* Lowry, 14 Leg. Int. 332; State *v.* Levy, 24 Minn. 362; Dyson, ex parte, 25 Miss. 356; though see R. *v.* Waddington, 1 East, 143. Supra, § 79.

[2] Supra, § 79; Anon. 3 Salk. 68; though see R. *v.* Bird, 5 Cox C. C 11; Corbett *v.* State, 24 Ga. 391.

CHAPTER III.

FORM OF INDICTMENT.

I. INDICTMENT AS DISTINGUISHED FROM INFORMATION.
Under federal Constitution trials of all capital or infamous crimes must be by indictment, § 85.
Presentment is an information by grand jury on which indictment may be based, § 86.
Information is *ex officio* proceeding by attorney general, § 87.
Is not usually permitted as to infamous crimes, § 88.
"Infamous crimes" are such as preclude person convicted from being a witness, § 89.
II. STATUTES OF JEOFAILS AND AMENDMENT.
By statutes formal mistakes may be amended and formal averments made unnecessary, § 90.
III. CAPTION AND COMMENCEMENT.
Caption is no part of indictment, being explanatory prefix, § 91.
Substantial accuracy only required, § 92.
Caption may be amended, § 93.
Commencement must aver office and place of grand jurors and also their oath, § 94.
Each count must contain averment of oath, § 95.
IV. NAME AND ADDITION.
1. *As to Defendant.*
Name of defendant should be specifically given, § 96.
Omission of surname is fatal, § 97.
Mistake as to either surname or Christian name may be met by abatement, § 98.
Surname may be laid as *alias*, § 99.
Inhabitants of parish and corporations may be indicted in corporate name, § 100.
Middle names to be given when essential, § 101.
Initials requisite when used by party, § 102.
Party cannot dispute a name accepted by him, § 103.
Unknown party may be approximately described, § 104.
At common law, addition is necessary, § 105.
Wrong addition to be met by plea in abatement, § 106.
Defendant's residence must be given, § 107.
"Junior" must be alleged when party is known as such, § 108.
2. *As to Parties injured and Third Parties.*
Name, only, of third person need be given, § 109.
Corporate title must be special, § 110.
Third person may be described as unknown, § 111.
But this allegation may be traversed, § 112.
The test is, whether the name was unknown to grand jury, § 113.
Immaterial misnomer may be rejected as surplusage, § 114.
Sufficient if description be substantially correct, § 115.
Variance in third party's name is fatal, § 116.
Name may be given by initials, § 117.
Reputative name is sufficient, § 118.
Idem sonans is sufficient, § 119.

V. Time.
Time must be averred, but not generally material, § 120.
When "Sunday" is essence of offence, day must be specified, § 121.
Videlicet may introduce a date tentatively, § 122.
Blank as to date is fatal, § 123.
Substantial accuracy is enough, § 124.
Double or obscure dates are inadequate, § 125.
Date cannot be laid between two distinct periods, § 126.
Negligence should have time averred, § 127.
Time may be designated by historical epochs, § 128.
Recitals of time need not be accurate, § 129.
Hour not necessary unless required by statute, § 130.
Repetition may be by "then and there," § 131.
Other terms are insufficient, § 132.
"Then and there" cannot cure ambiguities, § 133.
Repugnant, future, or impossible dates, are bad, § 134.
Record dates must be accurate, § 135.
And so of dates of documents, § 136.
Time should be within limitation, § 137.
In homicide death should be within a year and a day, § 138.
VI. Place.
Enough to lay venue within jurisdiction, § 139.
When act is by agent, principal to be charged as of place of act, § 140.
When county is divided, jurisdiction is to be laid in court of *locus delicti*, § 141.
When county includes several jurisdictions, jurisdiction must be specified, § 142.
Name of State not necessary to indictment, § 143.
Sub-description in transitory offences immaterial, § 144.
But not in matters of local description, § 145.
"County aforesaid" is enough, § 146.
Title, when changed by legislature, must be followed, § 147.
Venue must follow fine, § 148.
In larceny venue may be laid in place where goods are taken, § 149.
Omission of venue is fatal, § 150.
VII. Statement of Offence.
Offence must be set forth with reasonable certainty, § 151.
Omission of essential incidents is fatal, § 152.
Terms must be technically exact, § 153.
Not enough to charge conclusion of law, § 154.
Excepting in cases of "common barrators," "common scolds," and certain nuisances, § 155.
Matters unknown may be proximately described, § 156.
Bill of particulars may be required, § 157.
Surplusage need not be stated, and if stated may be disregarded, § 158.
Videlicet is the pointing out of an averment as a probable specification, § 158 *a*.
Assault may be sustained without specification of object, § 159.
Act of one confederate may be averred as act of the other, § 159 *a*.
Descriptive averment must be proved, § 160.
Alternative statements are inadmissible, § 161.
Disjunctive offences in statute may be conjunctively stated, § 162.
Otherwise as to distinct and substantive offences, § 163.
Intent when necessary must be averred, § 163 *a*.
And so of guilty knowledge, § 164.
Inducement and aggravation need not be detailed, § 165.
Particularity is required for identification and protection, § 166.
VIII. Written Instruments.
1. *Where, as in Forgery and Libel, Instrument must be set forth at full.*

When words of document are material, they should be set forth, § 167.
In such cases the indictment should purport to set forth the words, § 168.
"Purport" means effect; "tenor" means contents, § 169.
"Manner and form," "purport and effect," "substance," do not impart verbal accuracy, § 170.
Attaching original paper is not adequate, § 171.
When exact copy is required, mere variance of a letter is immaterial, § 173.
Unnecessary document need not be set forth, § 174.
Quotation marks are not sufficient, § 175.
Document lost or in defendant's hands need not be set forth, § 176.
And so of obscene libel, § 177.
Prosecutor's negligence does not alter the case, § 178.
Production of document alleged to be destroyed is a fatal variance, § 179.
Extraneous parts of document need not be set forth, § 180.
Foreign or insensible document must be explained by averments, § 181.
Innuendoes can explain but cannot enlarge, § 181 *a*.
2. *Where, as in Larceny, general Designation is sufficient.*
Statutory designations must be followed, § 182.
Though general designation be sufficient, yet if indictment purport to give words, variance is fatal, § 183.
3. *What general Designation will suffice.*
If designation is erroneous, variance is fatal, § 184.
"Receipt" includes all signed admissions of payment, § 185.
"Acquittance" includes discharge from duty, § 186.
"Bill of exchange" is to be used n its technical sense, § 187.
"Promissory note" is used in a arge sense, § 188.
"Bank notes" includes notes issued by bank, § 189.
"Treasury notes and federal currency," § 189 *a*.
"Money" is convertible with currency, § 190.
"Goods and chattels" include personalty exclusive of *choses in action*, § 191.
"Warrant" is an instrument calling for payment or delivery, § 192.
"Order" implies mandatory power, § 193.
"Request" includes mere invitation, § 194.
Terms may be used cumulatively, § 195.
Defects may be explained by averments, § 196.
A "deed" must be a writing under seal passing a right, § 197.
"Obligation" is a unilateral engagement, § 198.
And so is "undertaking," § 199.
A guarantee and an "I. O. U." are undertakings, § 200.
"Property" is whatever may be appropriated, § 201.
"Piece of paper" is subject of larceny, § 202.
"Challenge to fight" need not be specially set forth, § 202 *a*.
IX. WORDS SPOKEN.
Words spoken must be set forth exactly, though substantial proof is enough, § 203.
In treason it is enough to set forth substance, § 204.
X. PERSONAL CHATTELS.
1. *Indefinite, Insensible, or Lumping Descriptions.*
Personal chattels, when subjects of an offence, must be specifically described, § 206.
When notes are stolen in a bunch, denominations may be proximately given, § 207.
Certainty must be such as to individuate offence, § 208.
"Dead" animals must be averred to be such; "living" must be specifically described, § 209.
When only specified members of a class are subjects of offence, then specifications must be given, § 210.

Minerals must be averred to be severed from realty, § 211.
Variance in number or value is immaterial, § 212.
2. *Value.*
Value must be assigned when larceny is charged, § 213.
Larceny of "piece of paper" may be prosecuted, § 214.
Value essential to restitution, and also to mark grades, § 215.
Legal currency need not be valued, § 216.
When there is lumping valuation, conviction cannot be had for stealing fraction, § 217.
3. *Money and Coin.*
Money must be specifically described, § 218.
When money is given to change, and change is kept, indictment cannot aver stealing change, § 219.
XI. OFFENCES CREATED BY STATUTE.
Usually sufficient and necessary to use words of statute, § 220.
Otherwise when statute gives conclusion of law, § 221.
And so if indictment professes but fails to set forth statute, § 222.
Special limitations are to be given, § 223.
Private statute must be pleaded in full, § 224.
Offence must be averred to be within statute, § 225.
Section or title need not be stated, § 226.
Where statute requires two defendants, one is not sufficient, § 227.
Disjunctions in statute to be averred conjunctively, § 228.
At common law defects in statutory averment not cured by verdict, § 229.
Statutes creating an offence are to be closely followed, § 230.
When common law offence is made penal by title, details must be given, § 231.
When statute is cumulative, common law may be still pursued, § 232.
When statute assigns no penalty, punishment is at common law, § 233.
Exhaustive statute absorbs common law, § 234.
Statutory technical averments to be introduced, § 235.
But equivalent terms may be given, § 236.
Where a statute describes a class of animals by a general term, it is enough to use this term for the whole class; otherwise not, § 237.
Provisos and exceptions not part of definition need not be negatived, § 238.
Otherwise when proviso is in same clause, § 239.
Exception in enacting clause to be negatived, § 240.
Question in such case is whether the statute creates a general or a limited offence, § 241.
XII. DUPLICITY.
Joinder in one count of two offences is bad, § 243.
Exception when larceny is included in burglary or embezzlement, § 244.
And so where fornication is included in major offence, § 245.
When major offence includes minor, conviction may be for either, § 246.
"Assault" is included under "assault with intent," § 247.
On indictment for major there can be conviction of minor, § 248.
Misdemeanor may be enclosed in felony, § 249.
But minor offence must be accurately stated, § 250.
Not duplicity to couple alternate statutory phases, § 251.
Several articles may be joined in larceny, § 252.
And so of double overt acts, § 253.
And so of double batteries, libels, or sales, § 254.
Duplicity is usually cured by verdict, § 255.
XIII. REPUGNANCY.
Where material averments are repugnant, indictment is bad, § 256.
XIV. TECHNICAL AVERMENTS.
In treason, "traitorously" must be used, § 257.

"Malice aforethought" essential to murder, § 258.
"Struck" essential to wound, § 259.
"Feloniously" essential to felony, § 260.
"Feloniously" can be rejected as surplusage, § 261.
In such cases conviction may be had for attempt, § 262.
"Ravish" and "forcibly" are essential to rape, § 263.
"Falsely" essential to perjury, § 264.
"Burglariously" to burglary, § 265.
"Take and carry away" to larceny, § 266.
"Violently and against the will" to robbery, § 267.
"Piratical" to piracy, § 268.
"Unlawfully" and other aggravative terms not necessary, § 269.
"Forcibly" and with a strong hand essential to forcible entry, § 270.
Vi et armis not essential, § 271.
"Knowingly" always prudent, § 272.

XV. CLERICAL ERRORS.
Verbal inaccuracies not affecting sense are not fatal, § 273.
Numbers may be given by abbreviations, § 274.
Omission of formal words may not be fatal, § 275.
Signs cannot be substituted for words, § 276.
Erasures and interlineations not fatal, § 277.
Tearing and defacing not necessarily fatal. Lost indictment, § 278.
Pencil writing may be sufficient, § 278 *a*.

XVI. CONCLUSION OF INDICTMENTS.
Conclusions must conform to Constitution, § 279.
Where statute creates or modifies an offence, conclusion must be statutory, § 280.
Otherwise when statute does not create or modify, § 281.
Conclusion does not cure defects, § 282.
Conclusion need not be in plural, § 283.
Statutory conclusion may be rejected as surplusage, § 284.

XVII. JOINDER OF OFFENCES.
Counts for offences of same character and same mode of trial may be joined, § 285.
Assaults on two persons may be joined, § 286.
Conspiracy and constituent misdemeanor may be joined, § 287.
And so of common law and statutory offences, § 288.
And so of felony and misdemeanor, § 289.
Cognate felonies may be joined, § 290.
And so of successive grades of offence, § 291.
Joinder of different offences no ground for error, § 292.
Election will not be compelled when offences are connected, § 293.
Object of election is to reduce to a single issue, § 294.
Election is at discretion of court, § 295.
May be at any time before verdict, § 296.
Counts should be varied to suit case, § 297.
Two counts precisely the same are bad, § 298.
One bad count cannot be aided by another, § 299.
Counts may be transposed after verdict, § 300.

XVIII. JOINDER OF DEFENDANTS.
1. *Who may be joined.*
Joint offenders can be jointly indicted, § 301.
But not when offences are several, § 302.
So as to officers with separate duties, § 303.
Principals and accessaries can be joined, § 304.
In conspiracy at least two must be joined, § 305.
In riot three must be joined, § 306.
Husband and wife may be joined, § 306 *a*.
Misjoinder may be excepted to at any time, § 307.
Death need not be suggested on the record, § 308.

2. *Severance.*
Defendants may elect to sever, § 309.
Severance should be granted when defences clash, § 310.
In conspiracy and riot no severance, § 311.
3. *Verdict and Judgment.*
Joint defendants may be convicted of different grades, § 312.
Defendants may be convicted severally, § 313.
Sentence to be several, § 314.
Offence must be joint to justify joint verdict, § 315.
XIX. Statutes of Limitation.
Construction to be liberal to defendant, § 316.
Statute need not be specially pleaded, § 317.
Indictment should aver offence within statute or exclude exceptions, § 318.
Statute, unless general, operates only on specified offences, § 319.
Statute is retrospective, § 320.
Statute begins to run from commission of crime, § 321.
Indictment or information saves statute, § 322.
In some jurisdictions statute saved by warrant or presentment, § 323.
When flight suspends statute, it is not revived by temporary return, § 324.
Failure of defective indictment does not revive statute, § 325.
Courts look with disfavor on long delays in prosecution, § 326.
Statute not suspended by fraud, § 327.
Under statute indictment unduly delayed may be discharged, § 328.
Statutes have no extra-territorial effects, § 329.

I. INDICTMENT AS DISTINGUISHED FROM INFORMATION.

§ 85. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without compensation." [1]

Under federal Constitution trials of all capital or infamous crimes must be by indictment.

§ 86. "The first clause," to adopt the language of Judge Story, in commenting on this article, "requires the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer to any capital and infamous crime charged against him. This is regularly true, at the common law, of all offences above the grade of common misdemeanor. A grand jury, it is well known, are selected in a man-

Presentment is an accusation by grand jury, on which indictment may be based.

[1] Const. U. S. Amend. art. 5.

ner prescribed by law, and duly sworn to make inquiry, and present all offences committed against the authority of the state government, within the body of the county for which they are empanelled. In the national courts they are sworn to inquire and present all offences committed against the authority of the national government within the State or district for which they are empanelled, or elsewhere, within the jurisdiction of the national government. A presentment, properly speaking, is an accusation made *ex mero motu* by a grand jury, of an offence, upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment laid before them at the suit of the government. An indictment is a written accusation of an offence preferred to and presented upon oath as true, by a grand jury at the suit of the government. Upon a presentment, the proper officer of the court must frame an indictment, before the party accused can be put to answer to it." [1]

Information is *ex officio* procedure by attorney general.

§ 87. Informations are official criminal charges presented usually by the prosecuting officers of the State, without the interposition of a grand jury.[2] An information, it is said, resembles not only an indictment, in the correct and technical description of the offence, but also an action *qui tam*, in which the informer must show the forfeiture, and its appropriation, or at least the proportion given him by the statute.[3] So far as the structure of an information is concerned, the same rules apply as obtain in cases of indictment.[4] In respect to *amendment*, however, there is a difference at common law, arising from the fact that an information emanates exclusively from the attorney general, without the interposition of a grand jury; and hence he alone, with leave of court,

[1] Story on the Constitution, 657.

[2] The district attorney may proceed by information, although an indictment for the same offence has been quashed. U. S. *v.* Nagle, U. S. C. Ct. N. Y. 1879; 8 Rep. 772.

[3] 1 Ch. C. L. 841; Archbold's C. P. by Jervis, 66; Burn's Justice, 20th ed. by Ch. Bears, title Information; Com. *v.* Messenger, 4 Mass. 462, 465; Com. *v.* Cheney, 6 Mass. 347; Hill *v.* Davis, 4 Mass. 137; Brimmer *v.* Long Wharf, 5 Pick. 131; Evans *v.* Com. 3 Met. 453; Welde *v.* Com. 2 Met. Mass. 408. See also Vanatta *v.* State, 31 Ind. 220; Vogel *v.* State, 31 Ind. 64.

[4] R. *v.* Steel, L. R. 2 Q. B. D. 40; Thomas *v.* State, 58 Ala. 365; State *v.* Anderson, 30 La. Ann. 557; Antle *v.* State, 6 Tex. Ap. 202; Leatherwood *v.* State, Ib. 244.

is authorized to amend it, the assent of a grand jury not being required.[1]

Is not usually permitted as to infamous crimes.

§ 88. The limitation in the federal Constitution restricting prosecutions for infamous crimes to presentments or indictments by a grand jury applies distinctively to federal prosecutions.[2] In Pennsylvania there is a constitutional provision against proceeding by information in any case where an indictment lies;[3] and the same restriction exists in several of the other States.[4] In the United States courts, as has been seen,[5] in New York,[6] and in Virginia,[7] the limitation is confined to cases of infamous crime. In New Hampshire, it obtains in all cases where the punishment is death or confinement at hard labor.[8] In Vermont, a distinction of the same character is made.[9] It may, in fact, be stated as a general rule, that the provision in the federal Constitution, given at the head of this chapter, applies only to cases in the United States Courts.[10] In Massachusetts, it was at one time held that all public misdemeanors which may be prosecuted by indictment may be prosecuted by information on behalf of the Commonwealth, unless the prosecution be restricted by the statute to indictment.[11] But now by the Gen. Stat. c. 158, § 3, all criminal prosecutions must be by indictment, except (1.) When informations are expressly authorized by statute; (2.) In cases before police justices; and (3.) In courts-martial. In Connecticut all offences not punished by death or by imprisonment for life are prosecuted by information.[12] In the United States courts, crimes

[1] R. v. Seawood, 2 Ld. Ray. 1472; R. v. Stedman, Ibid. 1307; State v. Rowley, 12 Conn. 101; State v. Stebbins, 29 Conn. 463; State v. Weare, 38 N. H. 314; Com. v. Rodes, 1 Dana, 595.

[2] Story on Const. 653.

[3] Const. art. 9, § 10.

[4] State v. Mitchell, 1 Bay, 267; Clearly v. Deliesseline, 1 McCord, 35.

[5] U. S. v. Shepard, 1 Abb. U. S. 431.

[6] Const. art. 7, § 7.

[7] Davis's C. Law, 422.

[8] Rev. Stat. N. Hamp. 457.

[9] Rev. Stat. Verm. chap. cii.

[10] State v. Keyes, 8 Vt. 57; Rowan v. State, 30 Wis. 129; State v. Shumpert, 1 Richards. (S. C.) N. S. 85; Noles v. State, 24 Ala. 672. As to Louisiana see State v. Jackson, 21 La. An. 574; State v. Anderson, 30 La. An. 557; State v. Woods, 31 La. An. 267. As to Illinois see Parris v. People, 76 Ill. 274. As to Michigan, McNamee v. People, 31 Mich. 473; Turner v. People, 33 Mich. 363.

[11] Com. v. Waterborough, 5 Mass. 257, 259.

[12] 2 Swift's Dig. 371.

against the elective franchise may be prosecuted by information filed by the district attorney.[1]

"Infamous" crimes are such as preclude a person convicted from being a witness.

§ 89. In the United States courts the conclusion is that, for misdemeanors, which do not preclude the person convicted from being a witness, there can be a proceeding by information,[2] and hence a person may be prosecuted by information for a violation of the revenue laws.[3] Severity of imprisonment does not by itself make a crime infamous.[4]

II. STATUTES OF JEOFAILS AND AMENDMENT.

By statutes formal mistakes may be amended, and formal averments made unnecessary.

§ 90. No inconsiderable portion of the difficulties in the way of the criminal pleader, at common law, have been removed in England by the 7 Geo. 4, c. 64, ss. 20, 21; 11 & 12 Vict. c. 46; and 14 & 15 Vict. c. 100, and in most of the States in the America Union, by statutes containing similar provisions.[5] In some jurisdictions, also, it is provided that as to certain offences certain

[1] Rev. Stat. 1022.

[2] U. S. *v.* Mann, 1 Gall. C. C. 3; U. S. *v.* Isham, 17 Wall. 496; U. S. *v.* Bozzo, 18 Wall. 125; U. S. *v.* Waller, 1 Sawyer C. C. 701; U. S. *v.* Ebert, 1 Cent. L. J. 205. See also Stockwell *v.* U. S. 13 Wall. 531; U. S. *v.* Maxwell, 3 Dill. 275; U. S. *v.* Block, 15 Bank. Reg. 325.

[3] U. S. *v.* Maxwell, 21 Int. Rev. Rec. 148.

[4] R. *v.* Hickman, 1 Mood. C. C. 34; People *v.* Whipple, 9 Cow. 707; Com. *v.* Shaver, 3 W. & S. 338.

[5] In the U. S. courts no indictment "shall be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This does not include any essential description. Lowell, J., U. S. *v.* Conant, 9 Report. 36.

Under the English statutes the following rulings are noticed in Roscoe's Cr. Ev. p. 206: —

"In R. *v.* Frost, 1 Dears. C. C. R. 427; S. C., 24 L. J. M. C. 61, the prisoners were charged in an indictment with having by night, in pursuit of game, entered the lands of George William Frederick Charles Duke of Cambridge; on the trial a witness proved that George William were two of the duke's Christian names, and that he had others; no proof was given what they were. The prosecutor prayed an amendment of the indictment by striking out the names 'Frederick Charles.' This the court refused, and left the case to the jury, who, being satisfied as to the identity of the duke, convicted the prisoners. On a case reserved, the Court of Criminal Appeal quashed the conviction. Parke, B., said: 'The Court of Quarter Sessions have a power of amending given them by the statute 14 & 15 Vict. c. 100, s. 1, but they have a discretion, they are not bound to allow an amendment. Having omitted to amend at the trial, they cannot amend now. If they had asked us

prescribed forms shall be sufficient.[1] Whether such statutes conflict with constitutional provisions providing that the indictment should notify the defendant of the character of the offence depends in part upon the words of the Constitution, in part upon the degree in which the rights of the defendant are abridged by the indictment as to which the question arises. Supposing that the constitutional provision, as is usually the case, is simply a

whether they ought to have done so, it is clear that, upon the evidence before them, they were perfectly right in refusing to make the amendment prayed for; but that they would have been equally wrong in refusing to amend had the amendment asked for been to strike out all the Christian names of the Duke of Cambridge, who was described in the indictment as George William Frederick Charles Duke of Cambridge. According to the usual rule, the prosecutor must prove all matter of description alleged, though it was not necessary to allege it. The proper course would have been for them to have found that the person mentioned was a person who had the title of Duke of Cambridge, and to have omitted all the Christian names.'

"It has been held that an indictment for an attempt to murder A. W. may be amended by substituting for A. W. 'a certain female child whose name is to the said jurors unknown,' although the act refers only to variances in the name, or Christian or surname. R. *v.* Welton, 9 Cox C. C. 297.

"An indictment charged D. T. as a receiver of stolen goods, 'he, the said A. B., knowing them to have been stolen;' upon verdict of guilty he moved in arrest of judgment, but the Court of Quarter Sessions struck out the words, A. B.' and substituted 'D. T.' It was held by the Court of Criminal Appeal that the court had no power to amend after verdict, so as to alter the finding of the jury, and that the prisoner was entitled to move in arrest of judgment. R. *v.* Larkin, Dears. C. C. 365; 23 L. J. M. C. 125.

"On an indictment against the defendant for obstructing a footway leading from A. to G., it appeared that the so-called footway was for half a mile from its commencement, as described in the indictment, a carriage-way; the obstruction was in the part beyond. The Court of Queen's Bench held that this was a misdescription, which ought to be amended under the 14 & 15 Vict. c. 100, s. 1. R. *v.* Sturge, 3 E. & B. 734; 77 E. C. L. R.; S. C., 23 L. J. M. C. 172.

"On an indictment for stealing 19*s.* 6*d.* the court held that the indictment might be amended by altering the words, 'nineteen and sixpence' to 'one sovereign.' R. *v.* Gumble, 42 L. J. M. C. 7; 12 Cox C. C. (C. C. R.) 248; and see R. *v.* Bird, 12 Cox C. C. (C. C. R.) 257."

As to how far verdict cures see infra, § 759.

Merely clerical errors, as will be seen, may be disregarded in error, or in motions of arrest of judgment. Infra, § 273.

[1] See, as to liquor prosecutions, Whart. Crim. Law, 8th ed. § 1530; and see State *v.* Comstock, 27 Vt. 553; Hewitt *v.* State, 25 Tex. 722.

As to waiver of constitutional rights see Whart. Crim. Law, 8th ed. § 145 *a*. Infra, § 733.

presentation of the common rule, that the defendant is entitled to notice in the indictment of the charge against him,[1] we can adopt the following conclusions:

1. Statutes which merely facilitate the pleading in a case, such as those providing that technical objections are to be taken by demurrer, or that defects of process must be met by motion to quash, or that formal statements as to time, place, tenor, name, and value, are open to amendment on trial, are constitutional.[2]

2. Statutes which authorize forms which give no substantial notice of the offence, or which permit radical amendments after bill found, are unconstitutional.[3]

III. CAPTION AND COMMENCEMENT.

§ 91. The caption is no part of the indictment;[4] its office is to state the style of the court, the time and place of its meeting, the time and place where the indictment was

Caption is no part of indict-

[1] See, to this effect, Com. *v.* Phillips, 16 Pick. 211; Com. *v.* Holley, 3 Gray, 458.

[2] State *v.* Comstock, 27 Vt. 553; Com. *v.* Holley, 3 Gray, 458; Brown *v.* Com. 78 Penn. St. 122; Com. *v.* Seymour, 2 Brewst. 567; Cochrane *v.* State, 9 Md. 400; Trimble *v.* Com. 2 Va. Cas. 143; Lasure *v.* State, 19 Oh. St. 44; People *v.* Cook, 10 Mich. 164; Marvin *v.* People, 26 Mich. 298; McLaughlin *v.* State, 45 Ind. 338; Rowan *v.* State, 30 Wis. 129; State *v.* Schricker, 29 Mo. 265; State *v.* Craighead, 32 Mo. 561; Noles *v.* State, 24 Ala. 672; Thompson *v.* State, 25 Ala. 41; Rocco *v.* State, 37 Miss. 357; State *v.* Hart, 4 Ired. 246; State *v.* Mullen, 14 La. An. 570; People *v.* Kelly, 6 Cal. 210; State *v.* Manning, 14 Tex. 402.

[3] State *v.* Learned, 47 Me. 426; People *v.* Campbell, 4 Parker C. R. 386; Com. *v.* Buzzard, 5 Grat. 694; State *v.* Wilburn, 25 Tex. 738; State *v.* Daugherty, 30 Tex. 360.

This question, supposing the constitutional provisions are mere expressions of the common law in this respect, will be found elaborately discussed in Bradlaugh *v.* R., L. R. 3 Q. B. D. 607; 14 Cox C. C. 68; cited infra, § 760.

As to effect of verdict in curing formal errors, see infra, §§ 400, 759.

In Pennsylvania it is said that the name of the owner in larceny can be stricken out, and "persons unknown" inserted. Com. *v.* O'Brien, 2 Brewster 566. See Phillips *v.* Com. 44 Penn. St. 197. And see, to same general effect, Mulrooney *v.* State, 26 Oh. St. 326. As to other amendments, see State *v.* Arnold, 50 Vt. 731; People *v.* Mott, 34 Mich. 80; Garvin *v.* State, 52 Miss. 207.

[4] 1 East P. C. 113; Fost. 2; Ch. C. L. 327; 1 Saund. 250 d, n. 1; 1 Stark. C. P. 238; R. *v.* Marsh, 6 A. & E. 236; State *v.* Gary, 36 N. H. 359; State *v.* Gilbert, 13 Vt. 647; State *v.* Thibeau, 30 Vt. 100; People *v.* Jewett, 3 Wend. 319; People *v.* Bennett, 37 N. Y. 117; State *v.* Price, 6 Halst. 203; Berrian *v.* State, 2 Zab. 9; State *v.* Smith, 2 Harring. 532; State *v.*

found, and the jurors by whom it was found; and these particulars it must set forth with reasonable certainty for the use, as will presently be seen, of a superior or appellate court to which it may be removed.[1] It must show that the *venire facias* was returned, and from whence the jury came, or it will be fatal on demurrer.[2]

ment, being an explanatory prefix.

When the indictment is returned from an inferior court, in obedience to a writ of *certiorari*, the statement of the previous proceedings sent with it is termed the *schedule*, and from this instrument the caption is extracted.[3] When taken from the schedule it is entered upon the record, and prefixed to the in-

Brickell, 1 Hawks, 354; State *v.* Haddock, 2 Hawks, 261; Noles *v.* State, 24 Ala. 672. See other cases infra, § 93. In Wh. Prec. vol. i. pp. 1 *et seq.* several forms of captions are given. See Caldwell *v.* State, 3 Baxter, 429.

[1] U. S. *v.* Thompson, 6 McLean, 56; State *v.* Conley, 39 Me. 78; McClure *v.* State, 1 Yerg. Tenn. R. 206, per White, J.; English *v.* State, 4 Tex. 125; Reeves *v.* State, 20 Ala. 33.

[2] State *v.* Hunter, Peck's Tenn. R. 166. See State *v.* Fields, Ibid. 140; State *v.* Williams, 2 McCord, 301.

In England, the caption in general does not appear until the return to a writ of *certiorari*, or a writ of error; yet, in cases of high treason, the defendant is entitled to a copy of it in the first instance, after the finding of the indictment, in order that he may be acquainted with the names of the jurors by whom it was presented. 1 East P. C. 113; Fost. 2; Ch. C. L. 327. As it forms no part of the indictment, it has been held no ground for arresting judgment that the indictment does not show, in its caption, that it was taken in the State; for, it is said, while it stood on the records of the court below, it appeared to be an indictment of that court, and, when sent to the Supreme Court, the caption of the record, of which it is a part, officially certified, renders it sufficiently certain. State *v.* Brickell, 1 Hawks, 354; 1 Saunders, 250 d, n. 1. If wholly omitted in the court below, it is said the indictment may nevertheless be sufficient, as the minute of the clerk upon the bill, at the time of the presentment, and the general records of the term, will supply any defect in such preface. State *v.* Gilbert, 13 Vt. 647; State *v.* Smith, 2 Harring. 532.

In North Carolina, it was held that a caption to an indictment is only necessary where the court acts under a special commission. State *v.* Wasden, N. C. Term, 163.

Giving only the initials of the first names of the grand jurors is no defect. Stone *v.* State, 30 Ind. 115.

In Massachusetts practice, it seems, each indictment is framed with its own special caption, instead of leaving the caption to be made up, as is the usual and better course, from the records of the court, by the clerk, when the record is taken into another court. Yet even in Massachusetts, this "caption," if it is so to be called, is purely formal, and is amendable. See Com. *v.* Edwards, 4 Gray, 1. See also State *v.* Conley, 39 Me. 78.

[3] 1 Saund. 309.

dictment, of which, however, it forms no part, but is only the preamble which makes the whole more full and explicit.[1] When there has been a removal by *certiorari*, its principal object, as we have seen, is to show that the inferior court had jurisdiction, and, therefore, a certainty in that respect is particularly requisite. Care must be taken duly to set it forth, for if there be no caption, or one that is defective, the error, in England, may be taken advantage of on arrest.[2]

Substantial accuracy only required.

§ 92. A formal statement in the indictment that it was found by the authority of the State is not necessary, if it appear, from the record, that the prosecution was in the name of the State.[3] The caption must set forth the court where the indictment was found, as a "General Session of the Peace," "the Court of Oyer and Terminer," &c., "for N. Y. County," &c., so that it may appear to have jurisdiction.[4] Next to the statement of the court follows the name of the *place* and *county* where it was holden, and which must always be inserted;[5] and though it may be enough, after naming a place, to refer to "the county aforesaid," yet, unless there be such express reference to the county in the margin, or it be repeated in the body of the caption, it will be insufficient.[6] This is necessary in order to show that the place is within the limits of the jurisdiction;[7] and, therefore, whether the caption wholly omit the place, or do not state it with sufficient certainty, the proceedings will be alike invalid, though amendable;[8] as if it state it to be taken only at the town, without adding "*the county aforesaid*," the omission will vitiate.[9] But though the name of the

[1] 2 Hale, 165; Bac. Ab. Indictment, J.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv.

[2] 2 Sessions Cases, 316; 1 Ch. C. L. 327. See State *v.* Wasden, 2 Taylor N. C. 163; State *v.* Haddock, 2 Hawks, 461.

[3] Greeson *v.* State, 5 Howard's Miss. 33.

[4] 2 Hale, 165; 2 Hawk. c. 25, ss. 16, 17, 118, 119, 120; Burn's Justice, 29th ed. by Chitty & Bears, Indict. ix.; Dean *v.* State, Mart. & Yer. 127; State *v.* Zule, 5 Halst. 348.

[5] Dyer, 69, A.; Cro. Jac. 276; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bacon Ab. Indictment, i.

[6] 2 Hale, 180; 3 P. Wms. 439; 1 Saund. 308, n.; Cro. Eliz. 137, 606, 738.

[7] R. *v.* Stanbury, L. & C. 128. As to venue see fully infra, § 139.

[8] Cro. Jac. 276; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bac. Ab. Indictment, i.

[9] Cro. Eliz. 137, 606, 738, 751; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bac. Ab. Indictment, i.; Williams, J., In-

county be left blank in the margin of an indictment for misdemeanor, it is enough, in Virginia, if the county be stated in the body of the indictment.[1]

dictment, iv.; U. S. *v.* Wood, 2 Wheel. C. C. 336.

[1] Teft *v.* Com. 8 Leigh, 721.

The omission of North Carolina, in an indictment found in a court in that State, where the name of the county is inserted in the margin or body of the indictment, is not a cause for arresting the judgment. State *v.* Lane, 4 Ired. 113. An indictment in the same State, containing in its caption a statement of the term in these words: "Fall Term, 1822," and, in the body of the indictment, charging the time of the offence in these words: "On the first day of August in the present year," was held good; and it was said that there was no necessity for stating any time in the caption of an indictment found in the county or supreme courts. State *v.* Haddock, 2 Hawks, 461.

In Massachusetts, an indictment with this caption: "Commonwealth of Massachusetts, Essex, to wit: At the Court of Common Pleas, begun and holden at Salem, within and for the county of Essex," on a certain day, sufficiently shows that it was found at a court held in this Commonwealth. Com. *v.* Fisher, 7 Gray, 492. See also Jeffries *v.* Com. 12 Allen, 145; Com. *v.* Mullen, 13 Allen, 551. In the same State, an indictment which purports by its caption to have been found at a Court of Common Pleas for the county of Hampshire, and in the body of which "the jurors of said Commonwealth on their oath present," sufficiently shows that it was returned by the grand jury for the county of Hampshire. Com. *v.* Edwards, 4 Gray, 1. Infra, § 134. And in Maine, where the record commenced: "State of Maine, Cumberland, ss. At the Supreme Court begun and holden at Portland, within the county of Cumberland," it was held that this was sufficient to show that the court at which the indictment was found was holden for that county in the State of Maine. State *v.* Conley, 39 Me. 78. Infra, § 139. For other rulings on captions see Davis *v.* State, 19 Oh. St. 270; Lovell *v.* State, 45 Ind. 550; Woodsides *v.* State, 2 How. Miss. 655; Reeves *v.* State, 20 Ala. 33.

A party was indicted for murder in the Circuit Court for Carroll County, was arraigned, pleaded not guilty, and was put upon his trial; the jury failing to agree were discharged, and at the suggestion of the prisoner, the record of proceedings was transmitted to the Circuit Court for Washington County. The transcript of the record so transmitted stated that the grand jurors who found the presentment were "good and lawful men of *Baltimore* County." All the proceedings prior and subsequent to this statement were properly recorded as of *Carroll* County. It was ruled that this did not vitiate the indictment. Davis *v.* State, 39 Md. 353.

In England it was once held that the indictment must, in all cases, be shown to have been taken *upon oath*, and if this allegation be omitted, the caption cannot be supported. 2 Keb. 676; 1 Keb. 329; 1 Sid. 140; 3 Mod. 202; 2 Hale, 167; 2 Hawk. c. 25, s. 126; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv. It is otherwise, however, under statutes permitting affirmations. And an indictment purport-

§ 93. Defects in the caption of the indictment, as not naming the judges, the jurors, and the county, which would be fatal if the indictment were removed into a superior court, may be supplied in the court in which it is taken,

Caption may be amended.

ing to be presented by the grand jurors "upon their oath and affirmation" need not state the reasons why any of the jurors affirmed instead of being sworn. Mulcahy *v.* R. 3 L. R. H. L. Cas. 306; Com. *v.* Brady, 7 Gray (Mass.), 320. See, however, *contra*, State *v.* Harris, 2 Halst. 361.

Whether "oath" or "oaths" is averred is immaterial. Com. *v.* Sholes, 11 Allen, 554; State *v.* Dayton, 3 Zab. 49. Infra, § 277.

It must appear on the face of the record, that the bill was found by at least twelve jurors, or it will be insufficient. Cro. Eliz. 654; 2 Hale, 167; 2 Hawk. c. 25, ss. 16, 126; 1 Saund. 248, n. 1; 4 East, 175, 176; Andr. 230; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv. Where the statute requires more than twelve, the requisite number must be averred. Fitzgerald *v.* State, 4 Wis. 395. They are usually described, also, as "good and lawful men," which is sufficient; 2 Hale, 167; Cro. Eliz. 751; 1 Keb. 629; Cro. Jac. 635; State *v.* Price, 6 Halst. 203. See State *v.* Jones, 4 Halst. 357; but this is not in England absolutely essential, especially when the indictment is found in a superior court, because all men shall be so regarded until the contrary appear. 2 Keb. 366; 2 Hawk. c. 25, ss. 16, 126; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv.; Stark. C. P. 236–7; R. *v.* Butterfield, 2 M. & R. 522. See Jerry *v.* State, 1 Blackf. 395; Beauchamp *v.* State, 6 Blackf. 299; Bonds *v.* State, Mart. & Yerg. 143; State *v.* Glasgow, Conf. 38; State *v.* Yancy, 1 Tread. 237. The caption then must state that they are "*of the county aforesaid*," or other vill or precinct for which the court had jurisdiction to inquire; and if these words are omitted the whole will be vicious. Tipton *v.* State, Peck's R. 8; Cornwell *v.* State, Mart. & Yerg. 147; Cro. Eliz. 667; 2 Keb. 160; 2 Hale, 167; 2 Hawk. c. 25, ss. 16, 126; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv. The caption, by implication at least, must show that the grand jury were of the county where the indictment was taken. Tipton *v.* State, Peck's Tenn. R. 308; per Haywood and Beck, JJ., *contra*, White, J.; Woodsides *v.* State, 2 How. (Miss.) 655. It is not, under the present practice, requisite to give the names of the grand jurors. R. *v.* Aylett, 6 A. & E. 247; R. *v.* Marsh, 6 A. & E. 236. If the names are given, a variance as to one of them is not fatal. State *v.* Norton, 3 Zab. 33; State *v.* Dayton, Ibid. 49.

Where it appeared by the record that a foreman was appointed, and the indictment was returned, signed by him, and the caption stated that the grand jury returned the bill into court by their foreman, it was held sufficient evidence that the bill was returned by the authority of the grand jury. Greeson *v.* State, 5 How. Miss. R. 33. See infra, § 368.

When an indictment purports to be on the affirmation of some of the grand jurors, it is said, in New Jersey, that it must appear that they were persons entitled by law to take affirmations in lieu of oaths, or it will be fatally defective; State *v.* Harris, 2

by reference to other records there,[1] since when the indictment remains in the court of finding a caption is unnecessary.[2] And it is also held that the caption may be amended in the Supreme Court, on proper evidence of the facts; or the *certiorari* may be returned to the court below, and the amendment made there.[3]

Commencement must aver office and place of grand jurors, and also their oath.

§ 94. It is ordinarily sufficient for the commencement to state that the grand jurors of the State or Commonwealth, inquiring for the particular county or city, as the case may be, on their oaths or affirmations respectively, find the special facts making up the charge.[4]

Halsted, 361; but such is not the usual practice; the indictment going no further, than to aver the fact of its being made on the oaths and affirmations of the grand jurors. Com. *v.* Fisher, 7 Gray, 492.

If the caption omit to state the grand jury were sworn, it will be presumed they were sworn; at least the recital in the record that "the grand jury were elected, empanelled, sworn, and charged," will be sufficient. McClure *v.* State, 1 Yerg. 206, per Catron, J.

In New York, it was ruled that an indictment taken at the sessions must, in the caption, state that the grand jury were, then and there, sworn and charged; the omission of the words "then and there" being fatal on motion in arrest of judgment; People *v.* Guernsey, 2 Johns. Cas. 265; but the contrary was held in Mississippi, where it was said that, if it appear from the record that the grand jurors were sworn, it will be presumed that they were then and there sworn. Woodsides *v.* State, 2 How. Miss. R. 655.

[1] Faulkner's case, 1 Saund. 249; R. *v.* Davis, 1 C. & P. 470; Broome *v.* R. 12 Q. B. 838; U. S. *v.* Thompson, 6 McLean, 156; State *v.* Brady, 14 Vt. 353; Com. *v.* Mullen, 13 Allen, 551; Com. *v.* Hines, 101 Mass. 33; Dawson *v.* People, 25 N. Y. 399; Pennsylvania *v.* Bell, Add. 173; Com. *v.* Bechtell 1 Am. L. J. 414; Brown *v.* Com. 78 Penn. St. 122; Mackey *v.* State, 3 Oh. St. 362; State *v.* Creight, 1 Brev. 169; State *v.* Murphy, 9 Port. 487; Reeves *v.* State, 20 Ala. 33; Kirk *v.* State, 6 Mo. 469; State *v.* Freeman, 21 Mo. 481; Cornelius *v.* State, 7 Eng. 782; Allen *v.* State, 5 Wis. 329. As to Massachusetts practice see Com. *v.* Gee, 6 Cush. 174; Com. *v.* Stone, 3 Gray, 453; Com. *v.* Cullon, 11 Gray, 1. As to particularity required in Indiana see State *v.* Connor, 5 Blackf. 325. As to Wisconsin see Fitzgerald *v.* State, 4 Wis. 395; and see cases cited supra, § 91.

[2] Wagner *v.* People, 4 Abb. App. Dec. 509.

[3] State *v.* Jones, 4 Halst. 357; State *v.* Norton, 3 Zabr. 33; State *v.* Williams, 2 McCord, 301; Vandyke *v.* Dare, 1 Bailey, 65. See infra, § 368.

[4] The commencement of an indictment in these words, "The grand jurors for the people of the State of Vermont, upon their oath, present," &c., is sufficient, on motion, in arrest of judgment. State *v.* Nixon, 18 Vt. 70. So when "oaths" and not "oath" is used. Com. *v.* Sholes, 13 Allen, 554; State *v.* Dayton, 2 Zabr. 49.

§ 95. It must appear in the commencement of each count of an indictment that it was found by the jurors of the particular jurisdiction, on their oaths or affirmations,[1] and a want of such allegation in a subsequent count will not be aided by such allegations in a former count, where there is no reference to such former count for the finding of that fact.[2] It is not necessary that the commencement should use the term "grand" before jurors, when the rest of the record shows that it was "grand jurors" that was meant.[3]

Each count must contain averment of oath.

The indorsement upon an indictment is no part of it.[4]

IV. NAME AND ADDITION OF DEFENDANT AND NAME OF PROSECUTOR AND THIRD PARTIES.

1. *As to Defendant.*

§ 96. The indictment must be certain as to the defendant's name.[5] The name should be repeated to every distinct allegation; but it will suffice to mention it once as the nominative case in one continuing sentence.

Name of defendant should be specifically given.

When once given in full, the name need only be re-

[1] 2 Hale, 167; 2 Hawk. c. 25, s. 126; Burns, J., Indictment, ix.; State *v.* Conley, 39 Me. 78; State *v.* Nixon, 18 Vt. 70; Com. *v.* Fisher, 7 Gray, 492; Young *v.* State, 6 Ohio, 435; Burgess *v.* Com. 2 Va. Cas. 483; Clark *v.* State, 1 Carter, Ind. 253; State *v.* Williams, 2 McCord, 301; Morgan *v.* State, 19 Ala. 556; Byrd *v.* State, 1 How. (Miss.) 163; Abram *v.* State, 25 Miss. 589. As to inserting "good and lawful men" see Weinzorpflin *v.* State, 7 Blackf. 186.

The usual form is, "The grand jurors for the State (or Commonwealth) of A., inquiring for the city (or town) of B., upon their oaths and affirmations respectively do present." To this, as a title, is prefixed the statutory name of the court. See, for forms in full, Whart. Prec. vol. i. pp. 8 *et seq.*

"Oath" may supply the place of "oaths." State *v.* Dayton, 3 Zab. 49; Jerry *v.* State, 1 Blackf. 395. That the *commencement* may be amended see Com. *v.* Colton, 11 Gray, 1; State *v.* Mathis, 21 Ind. 277; State *v.* England, 19 Mo. 481.

The distinction between "caption" and "commencement" is not maintained by some of our courts, both, by such courts, being called "caption." But as both are purely formal, and are open to amendment by the record, they should be so amended when faulty.

[2] R. *v.* Waverton, 17 Q. B. 562; 2 Den. C. C. 347; State *v.* McAllister, 26 Me. 374.

[3] U. S. *v.* Williams, 1 Cliff. C. C. 5; Com. *v.* Edwards, 4 Gray, 1; State *v.* Pearce, 14 Fla. 153.

[4] Collins *v.* People, 39 Ill. 233.

[5] Bac. Abr. Misn. B.; 2 Hale, 175; Chitty's C. L. 167; Enwright *v.* State, 58 Ind. 567.

peated by the Christian title as "the said John" or "James," as the case may be.[1] But each count must describe the defendant by his full name.[2]

§ 97. If the surname of the defendant be omitted in the presenting portion of an indictment, the defect is fatal, though the full name be mentioned in subsequent allegations referring to the name as their antecedent.[3]

Omission of surname is fatal.

§ 98. A plea in abatement, in the language of Mr. Chitty, has always been allowed when the Christian name of the defendant is mistaken,[4] but it seems formerly to have been supposed that an error in the surname was not thus pleadable.[5] But it is now the settled law that a mistake in the latter is equally fatal with one in the former.[6] A plea in abatement is the proper way to meet the misnomer of the defendant, and after verdict the objection is too late.[7]

Mistake as to either surname or Christian name may be met in abatement.

When the issue is tried on plea in abatement, if the sound of the name is not affected by the misspellings, the error will not be material.[8] If two names are, in original derivation, the same, and are taken promiscuously in common use though they differ in sound, yet there is no variance.[9]

A *blank* in either Christian name or surname is ground for a motion to quash, or plea in abatement.[10]

§ 99 The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one

[1] State *v.* Pike, 65 Me. 111.

[2] R. *v.* Waters, 1 Den. C. C. 356; Com. *v.* Sullivan, 6 Gray, 478.

An indictment against "Edward Toney Joseph Scott," laborers, intended for Edward Toney and Joseph Scott, is bad. State *v.* Toney, 13 Tex. 74.

[3] State *v.* Hand, 1 Eng. (Ark.) 165.

[4] 2 Hale, 176, 237, 238; 2 Hawk. c. 25, s. 68; Bac. Ab. Ind. G. 2, Misn. B.; Burn, J., Indict.; Gilb. C. P. 217. Infra, § 423.

[5] 2 Hale, 176; 2 Hawk. c. 25, s. 69; Burn, J., Indict.; Williams, J., Misn.; Bac. Ab. Misn. B.; Com. *v.* Demain, Brightly R. 441.

[6] 10 East, 83; Kel. 11, 12.

[7] Infra, §§ 106, 423; State *v.* Bishop, 15 Me. 122; State *v.* Nelson, 29 Me. 329; Smith *v.* Bowker, 1 Mass. 76; Com. *v.* Lewis, 1 Met. 151; Com. *v.* Fredericks, 119 Mass. 199; Com. *v.* Cherry, 2 Va. Cas. 20; State *v.* White, 32 Iowa, 17; Miller *v.* State, 54 Ala. 155; Foster *v.* State, 1 Tex. Ap. 531.

[8] 10 East, 84; 16 East, 110; 2 Hawkins, c. 27, s. 81. Infra, § 119; Whart. Crim. Ev. §§ 94 *et seq.*

[9] 2 Rol. Ab. 135; Bac. Ab. Misn., where the instances of this principle are stated at large.

[10] Infra, §§ 385, 425.

of two names is his real surname, the second may be added in the indictment after an *alias dictus*,[1] thus, "Richard Wilson, otherwise called Richard Layer." Proof of either will be enough.[2]

Surname may be laid as an *alias*.

§ 100. The inhabitants of a parish, in England, may be indicted for not repairing a highway, or the inhabitants of a county, for not repairing a bridge, without naming any of them.[3] And in Pennsylvania it was determined, that where an act of assembly directed "the president, managers, and company" of a certain turnpike road to remove a gate on the road, that an indictment would not lie against the president and managers, *individually*, for not removing the gate.[4] In Maine, however, it is said, that where an offence is committed by virtue of corporate authority, the individuals concerned in its commission, in their personal capacity, and not as a corporation, must be indicted;[5] and in Virginia it has been ruled, still more broadly, that a corporation cannot be impleaded *criminaliter* by its artificial name at common law.[6] But for all disobedience to statutes and derelictions of duty, the better opinion is that a corporation aggregate may be indicted by its corporate name; which name must, as a rule, be correctly alleged as it existed at the time of the offence.[7]

Inhabitants of parish and corporation may be indicted in corporate name for disobedience.

[1] Bro. Misn. 37.

[2] State *v.* Graham, 15 Rich. (S. C.) 310.

It was once doubted whether there could be an *alias* of the Christian name. 1 Ld. Raym. 562; Willes, 554; Burn, J., Indict.; 3 East, 111. This doctrine, Mr. Chitty well argues, is not well founded; for, admitting that a person cannot have two Christian names at the same time, yet he may be *called* by two such names, which is sufficient to support a declaration or indictment, baptism being immaterial. R. T. H. 26; 6 Mod. 116; 1 Camp. 479. And Lord Ellenborough said that for all he knew, on a demurrer, "Jonathan, otherwise John," might be all one Christian name. Scott *v.* Soans, 3 East, 111.

[3] 2 Roll. Abr. 79; Archbold's C. P. 25.

[4] Com. *v.* Demuth, 12 Serg. & Rawle, 389.

[5] State *v.* Great Works, 20 Me. R. 41.

[6] Com. *v.* Swift Run Gap Turnpike Co. 2 Virg. C. 362. See Whart. Crim. Law, 8th ed. §§ 91–2.

[7] Whart. Crim. Law, 8th ed. §§ 91–2; R. *v.* Great North of England R. R. Co. 9 Q. B. 315; R. *v.* Mayor, &c. of Manchester, 7 El. & Bl. 453; R. *v.* Birm. & Glou. Railway Co. 3 Ad. & El. Q. B. 223; 9 C. & P. 478; State *v.* Vermont C. R. R. 28 Vt. 583; Com. *v.* Phillipsburg, 10 Mass. 78; Com. *v.* Dedham, 16 Ibid. 142; Com. *v.* Demuth, 12 S. & R. 389. See McGary *v.* People, 45 N. Y. 153, and cases

§ 101. In several jurisdictions it has been determined that the law does not recognize more than one Christian name, and, therefore, when the middle names of the defendant are omitted, the omission is right.[1] And the same view is taken in Ohio and Tennessee, with the qualification that if a middle name is nevertheless set out, it must be proved as laid.[2] It was held a misnomer, however, in Massachusetts, when T. H. P. was indicted by the name of T. P.[3] The omission of the first name, giving only the middle, is fatal, unless the party is only known by the middle name.[4] The better view is that when a party is known by a combination of names, by these he should be described; though it is otherwise when he is only known by a single name.[5]

Middle names to be given when essential.

§ 102. Where names are ordinarily written with an abbreviation, this will be sufficient in an indictment.[6] And where a man is in the habit of using initials for his Christian name, and he is so indicted, and the fact whether he was so known is put in issue, and he is convicted, the court will not interfere on that ground.[7] Even a

Initials sufficient when used by party himself.

cited Whart. Crim. Law, 8th ed. §§ 91–2.

[1] R. *v.* Newman, 1 Ld. Raym. 562; Roozevelt *v.* Gardiner, 2 Cow. 463; People *v.* Cook, 14 Barb. 259; Edmondson *v.* State, 17 Ala. 179; State *v.* Manning, 14 Texas, 402; State *v.* Williams, 20 Iowa, 98. See State *v.* Smith, 7 Eng. 622; West *v.* State, 48 Ind. 483; State *v.* Martin, 10 Mo. 391.

[2] Price *v.* State, 19 Oh. 423; State *v.* Hughes, 1 Swan (Tenn.), 261; but see *contra*, People *v.* Lockwood, 6 Cal. 205; Miller *v.* People, 39 Ill. 457.

[3] Com. *v.* Perkins, 1 Pick. 388. See, to same effect, State *v.* Homer, 40 Me. 438; Com. *v.* Hall, 3 Pick. 362.

[4] State *v.* Hughes, 1 Swan, 266; State *v.* Martin, 10 Mo. 391. See Hardin *v.* State, 26 Tex. 113.

[5] Whart. Crim. Ev. § 100.

[6] State *v.* Kean, 10 N. H. 347. See Com. *v.* Kelcher, 3 Metc. (Ky.) 484, where "Mrs. —— Kelcher" was held sufficient on demurrer. See *contra*, Gatty *v.* Field, 9 Ad. & El. (N. S.) 431.

[7] R. *v.* Dale, 17 Q. B. 64; Tweedy *v.* Jarvis, 27 Conn. 42; Vandermark *v.* People, 47 Ill. 122; City Coun. *v.* King, 4 McCord, 487; State *v.* Anderson, 3 Rich. 172; State *v.* Bell, 65 N. C. 313; State *v.* Johnson, 67 N. C. 58; State *v.* Black, 31 Tex. 560; and cases cited infra, §§ 115–7.

"Lord Campbell, when an objection was made to a recognizance taken before Lee B. Townshend, Esq., and I. H. Harper, Esq., that only the initials of the Christian names of the justices were mentioned, remarked: 'I do not know that these are initials; I do not know that they (the justices) were not baptized with those names; and I must say that I cannot acquiesce in the distinction that was made in Lomax *v.* Tandels, that a vowel may

motion to quash will be refused when based simply on the adoption of initials for Christian names.[1]

Party cannot dispute a name accepted by him.

§ 103. If a man, by his own conduct, renders it doubtful what his real name is, he cannot defend himself on the ground of misnomer, if he be indicted by a name commonly accepted by him.[2]

Unknown party may be approximately described.

§ 104. Where the name of the defendant is unknown, and he refuses to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison;[3] but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, will be insufficient.[4] The practice is to indict the defendant by a specific name, such as John

be a name but a consonant cannot. I allow that a vowel may be a Christian name, and why may not a consonant? Why might not the parents, for a reason good or bad, say that their child should be baptized by the name of B., C., D., F. or H.? I am just informed, by a person of most credible authority, that within his own knowledge a person has been baptized by the name of T.' And in this opinion of the chief, Justices Patterson, Wightman, and Erle, concurred. R. *v.* Dale, 15 Jur. 657; 5 E. L. & E. 360." 18 Alb. L. J. 127; S. P., Tweedy *v.* Jarvis, 27 Conn. 42.

In Kinnersley *v.* Knott, 7 C. B. 980, Mr. Sergeant Talfourd contended that a defendant called "John M. Knott" was not legally and properly designated, saying that the letter M, standing by itself, could not be pronounced and meant nothing, but that in this connection it meant something, and that that something ought to be stated, for the law forbade the use of initials in pleadings. The court, however, held that M. was not a name. Maule, J., said, that vowels might be names, and that in Sully's Memoirs a Monsieur D'O is spoken of; but that consonants could not be so alone, as they require in pronunciation the aid of vowels; and the chief justice said that the courts had decided that they would not assume that a consonant expresses a name, but that it stood for an initial only, and that the insertion of an initial instead of a name was a ground of demurrer. In this country, as we have seen, single consonants may be names. 18 Alb. L. J. 127. See Mead *v.* State, 26 Oh. St. 505; State *v.* Brite, 73 N. C. 26. But if the record show that the initial is not the full name, the variance may be fatal. State *v.* Webster, 30 Ark. 166.

In Gerrish *v.* State, 53 Ala. 476, the defendant was indicted by the name of F. A. Gerrish, and he pleaded that his name was not F. A. Gerrish, but Frank Augustus Gerrish, and that he was generally known as Frank A. Gerrish, and that this was known to the grand jury that indicted him. The plea was held good.

[1] U. S. *v.* Winter, 13 Blatch. 276.

[2] Newton *v.* Maxwell, 2 Crompt. & Jer. 2 15; State *v.* Bell, supra; Whart. Crim. Ev. § 95.

[3] State *v.* Angell, 7 Iredell, 27.

[4] R. *v.* ——, R. & R. 489.

No-name, and if he pleads in abatement, to send in a new bill, inserting the real name which he then discloses, by which he is bound. This course is in some States prescribed by statute.[1]

A known party cannot be indicted as unknown.[2]

The *Christian* name may, if necessary, be averred to be unknown.[3]

The pleading as to unknown co-conspirators is elsewhere discussed.[4]

§ 105. Stat. 1 Henry 5, c. 5, in force in most of the United States, specifies the following additions: "Estate, or degree, or mystery;" and also the addition of the "towns, or hamlets, or places, and counties of which they were or be, or in which they be or were conversant."[5] The construction given to the statute in England has been, that the words "estate or degree" have the same signification, and include the titles, dignities, trades, and professions of all ranks and descriptions of men.[6] The omission of the addition is at common law fatal,[7] but in most jurisdictions additions are no longer necessary.[8]

At common law addition is necessary.

§ 106. Though, when there is no addition, the correct course at common law is to quash, yet, when there is a misnomer, the only method of meeting the error is by plea

Wrong addition to be

[1] See Geiger *v.* State, 5 Iowa, 484, where, under such a statute, it was held necessary to give a fictitious name.

[2] Infra, § 211; Whart. Crim. Ev. 8th ed. § 97. Geiger *v.* State, 5 Iowa, 484. See, as to Christian name, Stone *v.* State, 30 Ind. 115; Wilcox *v.* State, 31 Tex. 586.

[3] Kelley *v.* State, 25 Ark. 392; Bryant *v.* State, 36 Ala. 270; Smith *v.* Bayonne, 23 La. An. 78.

[4] Whart. Crim. Law, 8th ed. § 1393.

[5] See, as to Pennsylvania, Roberts's Dig. 2d ed. 374.

[6] 2 Inst. 666. This statute is in force in Pennsylvania. Com. *v.* France, 3 Brewster, 148.

[7] State *v.* Hughes, 2 Har. & McH. 479; Com. *v.* Sims, 2 Va. Cases, 374. As to Indiana see State *v.* McDowell, 6 Blackf. 49.

[8] Mystery means the defendant's trade or occupation; such as merchant, mercer, tailor, schoolmaster, husbandman, laborer, or the like. 2 Hawk. c. 33, s. 111. Where a man has two trades, he may be named of either. 2 Inst. 658. But if a man who is a "gentleman" in England be a tradesman, he should be named by the addition of gentleman. 2 Inst. 669. In all other cases he may be indicted by his addition of degree or mystery, at the option of his prosecutor. See Mason *v.* Bushel, 8 Mod. 51, 52; Horspoole *v.* Harrison, 1 Str. 556; Smith *v.* Mason, 2 Str. 816; 2 Ld. Raym. 1541.

met by plea in abatement.

in abatement.[1] The error, however, must be one of substance; hence a plea in abatement that James Baker is a husbandman, and not a laborer, being demurred to, was adjudged bad.[2]

Defendant's residence must be given.

§ 107. The defendant must be described as of the town *or* hamlet, *or* place *and* county, of which he was or is, or in which he is or was, conversant.[3] In most States, the forms in common use give the addition of place, as "late of the said county," or "of the county of ——." The place may be averred to be that of the commission of the crime.[4]

"Junior" must be alleged when party is known as such.

§ 108. Where a father and son have the same name, and are both indicted, the English rule was to distinguish them by naming one as the elder, the other as the younger;[5] though such seems no longer requisite;[6] and the general rule in this country is that *junior* is no necessary part of the name,[7] though it has been held that when L. W. and

[1] State *v.* Bishop, 15 Me. 122; State *v.* Nelson, 29 Me. 329; Smith *v.* Bowker, 1 Mass. 76; Com. *v.* Lewis, 1 Met. 151; Com. *v.* Demain, Brightly R. 441; Lynes *v.* State, 5 Port. 236; Com. *v.* Cherry, 2 Va. Cas. 20; State *v.* White, 32 Iowa, 17. Infra, §§ 385, 423.

[2] Haught *v.* Com. 2 Va. Cas. 3. See, however, Com. *v.* Sims, 2 Va. Cas. 374.

In ordinary cases it has been held sufficient to give the addition of yeoman or laborer. 8 Mod. 51, 52; 1 Str. 556; 2 Str. 816; 2 Ld. Raym. 1541. Or to tradesmen, &c., the addition of the mystery; to widows, the addition of widows; to single women, the addition of spinster or single woman; to married women, usually thus: "Jane, the wife of John Wilson, late of the parish of C., in the county of B., laborer," though "matron" is not fatal. State *v.* Nelson, 29 Me. (16 Shep.) 329. Laborer (R. *v.* Franklyn, 2 Ld. Raym. 1179), or yeoman (2 Inst. 668), is not a good addition for a woman. Servant is not a good addition in any case. R. *v.* Checkets, 6 M. & S. 88.

Any addition calculated to cast contempt or ridicule on the defendant is bad; and it has been held, in Maine, that the addition "lottery *vender*," when the defendant was, in fact, a lottery *broker*, is bad on abatement. State *v.* Bishop, 15 Me. 122.

Where, in an indictment against a woman, she is described as A. B., "wife of C. D.," these latter words are mere additions, or *descriptio personae*, and need not be proved on trial. Com. *v.* Lewis, 1 Met. 151.

[3] Arch. C. P. 27.

[4] Com. *v.* Taylor, 113 Mass. 1.

[5] 1 Bulst. 183; 2 Hawk. c. 25, s. 70; Salk. 7.

[6] Hodgson's case, 1 Lewin C. C. 236; Peace's case, 3 Barn. & Ald. 579 But see R. *v.* Withers, 4 Cox C. C. 17.

[7] State *v.* Grant, 22 Me. 171; State *v.* Weare, 38 N. H. 314; Allen *v.* Taylor, 26 Vt. 599; Com. *v.* Perkins, 1 Pick. 388; Com. *v.* Parmenter, 101 Mass. 211; People *v.* Cook, 14 Barb. 259; People *v.* Collins, 7 Johns. 549; McKay *v.* State, 8 Tex. 376. See

L. W., Junior, being father and son, lived in the same place, and the indictment avers certain acts to be done by L. W., evidence is inadmissible to show that they were done by L. W., *Junior*, it being presumed L. W. in the indictment meant L. W., *Senior*.[1] In New York, in an early case, it was said that if a man be known by the addition of "*junior*" to his name, an indictment against him, without that addition, is not conclusive that he was the person indicted.[2] The question is one of usage. If a party is commonly known as "Junior" or as "2d," as such he must be indicted; otherwise not.[3]

2. *Description of Parties Injured and Third Parties.*

§ 109. The statute of additions extends to the defendant alone, and does not at all affect the description either of the prosecutor, or any other individuals whom it may be necessary to name;[4] and therefore no addition is in such case necessary, unless more than two persons are referred to whose names are similar.[5] It is enough to state a party injured, or any person except the defendant, whose name necessarily occurs in the bill, by the Christian and surname; as, for instance, "on John Slycer did make an assault," or, the "goods of John Nokes did steal." The name thus given must be the name by which the person is generally known,[6] including Christian as well as surname.[7]

Name only of third person need be given.

Coit *v.* Starkweather, 8 Conn. 289; Com. *v.* East Boston Ferry Co. 13 Allen, 589.

[1] State *v.* Vittum, 9 N. H. 519; R. *v.* Bailey, 7 C. & P. 264; *contra*, R. *v.* Peace, 3 Barn. & Ald. 579. In Com. *v.* Parmenter, 101 Mass. 211, it was held that "W. R., Jr.," might be indicted as "W. R.," the second of that name.

[2] Jackson ex dem. Pell *v.* Provost, 2 Caines, 165.

[3] Whart. Crim. Ev. § 100.

[4] 2 Leach, 861; 2 Hale, 182; Burn, J., Indictment; Bac. Ab. Indictment, G. 2; R. *v.* Graham, 2 Leach, 547; R. *v.* Ogilvie, 2 C. & P. 230; Com. *v.* Varney, 10 Cush. 402; though see R. *v.* Deeley, 1 Mood. C. C. 303; 4 C. & P. 578.

[5] Ibid.

[6] Infra, §§ 116, 119; R. *v.* Norton, Rus. & Ry. 510; R. *v.* Berriman, 5 C. & P. 601; R. *v.* Williams, 7 C. & P. 298; State *v.* Haddock, 2 Hayw. 162; Walters *v.* People, 6 Park. C. R. 16.

[7] Morningstar *v.* State, 52 Ala. 405; State *v.* Taylor, 15 Kans. 420; Collins *v.* State, 43 Tex. 577. But when an addition is stated descriptively, a variance may be fatal. R. *v.* Deeley, 1 Mood. C. C. 303; 4 C. & P. 579; Whart. Crim. Ev. § 100.

Corporate title must be special.

§ 110. When the name of a corporation is given, the corporate title must be strictly pursued, unless specification is made unnecessary by local statute.[1]

Third persons may be described as "unknown."

§ 111. Where a third person cannot be described by name, it is enough to charge him as a "certain person to the jurors aforesaid unknown,"[2] which, as will presently be seen, is correct, if the party was at the time of the indictment unknown to the grand jury, though he became known afterwards.[3] A deceased person may thus be described as "unknown," when the grand jury have no knowledge of his name;[4] and so may the owner of stolen property.[5]

[1] Supra, § 100; Whart. Crim. Law, 8th ed. § 941; R. *v.* Birmingham R. R. 3 Q. B. 223; State *v.* Vt. R. R. 28 Vt. 583; Fisher *v.* State, 40 N. J. L. 169; McGary *v.* People, 45 N. Y. 153; Lithgow *v.* State, 2 Va. Cas. 296; Smith *v.* State, 28 Ind. 321; Wallace *v.* People, 63 Ill. 481.

Whether at common law, in an indictment for stealing the goods of a corporation, it is requisite to aver that the corporation was incorporated, has been much disputed. That it is necessary is ruled in State *v.* Mead, 27 Vt. 722; Cohen *v.* People, 5 Parker C. R. 330; Wallace *v.* People, 63 Ill. 451; People *v.* Schwartz, 32 Cal. 160. That it is unnecessary, unless made so by statute, is ruled in R. *v.* Patrick, 1 Leach, 253; Com. *v.* Phillipburg, 10 Mass. 70; Com. *v.* Dedham, 16 Mass. 141; People *v.* McCloskey, 5 Parker C. C. 57, 334; People *v.* Jackson, 8 Barb. 637; McLaughlin *v.* Com. 4 Rawle, 464; Fisher *v.* State, 40 N. J. L. 169; Johnson *v.* State, 65 Ind. 204. See Whart. Crim. Law, 8th ed. § 716. The question depends upon whether the court takes judicial notice of the charter. Whart. on Ev. §§ 292–3.

[2] 2 Hawk. c. 25, s. 71; 2 East P. C. 651, 781; Cro. C. C. 36; Plowd. 85, b; Dyer, 97, 286; 2 Hale, 181; Com. *v.* Tompson, 2 Cush. 551; Com. *v.* Hill, 11 Cush. 137; Com. *v.* Stoddard, 9 Allen, 280; Goodrich *v.* People, 3 Parker C. R. 622; Com. *v.* Sherman, 13 Allen, 248; Willis *v.* People, 1 Scam. 399; State *v.* Irvin, 5 Blackf. 343; Brooster *v.* State, 15 Ind. 190; State *v.* McConkey, 20 Iowa, 574; State *v.* Bryant, 14 Mo. 340. See Whart. Prec. (2) n. (*i*).

A Christian name may be averred to be unknown. Bryant *v.* State, 36 Ala. 270; Smith *v.* Bayonne, 23 La. An. 68.

[3] Stra. 186, 497; Com. *v.* Hendrie, 2 Gray, 503; Com. *v.* Intoxicating Liquors, 116 Mass. 21. See, as to vendee in liquor sales, Whart. Crim. Law, 8th ed. § 1511.

[4] R. *v.* Campbell, 1 Car. & K. 82; State *v.* Haddock, 2 Hayw. 348; Reed *v.* State, 16 Ark. 499.

[5] 2 East P. C. 651, 781; 1 Ch. C. L. 212; 1 Hale, 181; 2 B. & Ald. 580; Com. *v.* Morse, 14 Mass. 217; Com. *v.* Manley, 12 Pick. 173; Whart. Crim. Law, 8th ed. § 949. To support the description of "unknown," remarks Mr. Sergeant Talfourd, "it must appear that the name could not well have been supposed to have been known to the grand jury." R. *v.* Stroud, 1 C. & K. 187. A bastard is sufficiently identified by showing the name of its parent, thus: "A certain illegitimate male child then lately born

§ 112. But if the owner be really known to the grand jury, the allegation will be improper, and the prisoner must be acquitted on that indictment, and tried upon a new one, in which

of the body of A. B. (the mother)." R. *v.* Hogg, 2 M. & Rob. 380. See R. *v.* Hicks, 2 Ibid. 302, where an indictment for child-murder was held bad for not stating the name of the child, or accounting for its omission. A bastard must not be described by his mother's name till he has acquired it by reputation. R. *v.* Clark, R. & R. 358; Wakefield *v.* Mackey, 1 Phill. R. 134, *contra.* A bastard child, six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptism and mother's surname, was held by Erskine, J., to be properly described by both those names in an indictment for its murder; R. *v.* Evans, 8 C. & P. 765; but where a bastard was baptized "Eliza," without mentioning any surname at the ceremony, and was afterwards, at three years old, suffocated by the prisoner, an indictment, styling it "Eliza *Waters*," that being the mother's surname, was held bad by all the judges, as the deceased had not acquired the name of Waters by reputation. R. *v.* Waters, 1 Mood. C. C. 457; 2 C. & K. 862. (N. B. No baptismal register, or copy of it, was produced at either trial. *Semb.:* "Eliza" would have sufficed. See R. *v.* Stroud, 1 C. & K. 187, and cases collected; Williams *v.* Bryant, 5 M. & W. 447.) In the previous case of R. *v.* Clark, R. & R. 358, an indictment stated the murder of "*George Lakeman Clark*, a base-born infant male child, aged three weeks," by the prisoner, its mother. The child had been christened *George Lakeman*, being the name of its reputed father, and was called so, and not by any other name known to the witnesses. Its mother called it so. There was no evidence that it had been called by or obtained its mother's name of *Clark*. The court held him improperly laid *Clark*, and as nothing but the name identified him in it, the conviction was held bad. See also R. *v.* Sheen, 2 C. & P. 634. However, in R. *v.* Bliss, 8 C. & P. 773, an indictment against a married woman for murder of a legitimate child, which stated "that she, in and upon a certain *infant male child of tender years*, to wit, of the age of six weeks, and not baptized, feloniously and wilfully, &c., did make an assault," &c., was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." It is, however, sufficient to describe the child "as a certain male child, &c., of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of C. B." See 2 C. & P. 635, n.; R. *v.* Willis, 1 C. & K. 722; see also R. *v.* Sheen, 2 C. & P. 634; Dickins, Q. S. 6th ed. 213. *Junior* and *Senior.* The law as to defendants on this point has been already stated, § 108. In England, it is said that where the party injured has a mother or father of the same name, it is better to style the prosecutor "the younger," as it may be presumed that the parent is the party meant; for George Johnson means G. J. the elder, unless the contrary is expressed. Singleton *v.* Johnson, 9 M. & W. 67. But this was held immaterial when it is sufficiently proved who Elizabeth Edwards, the party described assaulted, was, viz., the daughter of another Elizabeth Edwards. R. *v.* Peace, 3 B. & Ald. 579.

the mistake is corrected.[1] Discovery of the name *subsequently* to the finding of the bill, however, is no ground for acquittal,[2] or arrest of judgment.[3] But the allegation that co-defendants are "unknown" is material, and may be traversed under the plea of not guilty.[4] Thus an indictment will be bad against an accessary, stating the principal to be unknown to the grand jury, contrary to the truth, and the judge will direct an acquittal.[5]

But this allegation may be traversed.

§ 113. The test is, had the grand jury notice, actual or constructive, of the name; for if so, the name must be averred.[6] But it is not enough to defeat the bill, that the same grand jury found another bill specifying the "person unknown" as "J. L.,"[7] and the burden is on the defendant to prove knowledge at the time by the grand jury.[8] It is the approved practice, in cases of doubtful

The test is whether the name was unknown to the grand jury.

Where the defendant was indicted for the murder of her bastard child, whose name was to the jurors unknown, and it appeared that the child had not been baptized, but that the mother had said she would like to have it called Mary Ann, and little Mary, the indictment was held good. R. *v.* Smith, 1 Mood. C. C. 402; 6 C. & P. 151.

An indictment for the murder of "a certain Wyandott Indian, whose name is unknown to the grand jury," is valid, and sufficiently descriptive of the deceased, without an allegation that the words "Wyandott Indian" mean a human being. Reed *v.* State, 16 Ark. 499.

[1] 2 East P. C. 561, 781; 3 Camp. 265, note; 1 Hale, 512; 2 Hawk. c. 25, s. 71; 2 Leach, 578; R. *v.* Robinson, 1 Holt, 595; R. *v.* Stroud, 2 Mood. 270; State *v.* Wilson, 30 Conn. 500; White *v.* State, 35 N. Y. 465. See Buck *v.* State, 1 Ohio St. 61; Jorasco *v.* State, 6 Tex. Ap. 283; Whart. Crim. Ev. § 97. As to unknown co-conspirators, see Whart. Crim. Law, 8th ed. §§ 1393, 1511.

[2] Whart. Crim. Ev. § 97; R. *v.* Campbell, 1 C. & K. 82; R. *v.* Smith, 1 Mood. C. C. 402; Com. *v.* Hill, 11 Cush. 137; Com. *v.* Hendrie, 2 Gray, 503; Zellers *v.* State, 7 Ind. 659; Cheek *v.* State, 38 Ala. 227; State *v.* Bryant, 14 Mo. 340.

[3] People *v.* White, 55 Barb. 606; S. C., 32 N. Y. 465; Whart. Crim. Ev. § 97.

[4] Barkman *v.* State, 8 Eng. (13 Ark.) 703; Cameron *v.* State, Ibid. 712; Reed *v.* State, 16 Ark. 499. See Whart. Crim. Ev. § 97; Whart. Crim. Law, 8th ed. § 948.

[5] 3 Camp. 264, 265; 2 East P. C. 781.

[6] R. *v.* Stroud, 1 C. & K. 187; R. *v.* Robinson, Holt N. P. 595; Com. *v.* Sherman, 13 Allen, 249; Com. *v.* Glover, 111 Mass. 401; Blodget *v.* State, 3 Ind. 403.

[7] R. *v.* Bush, R. & R. 372. See 1 Den. C. C. 361; Com. *v.* Sherman, 13 Allen, 250.

[8] Whart. Crim. Ev. § 97; Com. *v.* Hill, 11 Cush. 137; Com. *v.* Gallagher, 126 Mass. 54. As to liquor cases see Whart. Crim. Law, 8th ed. §§ 1510, 1511.

ownership, to lay the ownership in one count in persons unknown, and in other counts in several persons tentatively.

Immaterial misnomer may be rejected as surplusage.

§ 114. If the allegation in which the misnomer appears is material, it may be rejected as surplusage.[1]

Sufficient if description be substantially correct.

§ 115. A mere statement of the Christian name, without any addition to ascertain the precise individual, is bad, because uncertain.[2] But if there is enough to explain who the party was, it will be sufficient.[3] Thus an indictment for an assault on John, parish priest of D., is sufficiently certain, and if the defendant, after verdict of not guilty, be indicted again, with the addition of the prosecutor's surname, he may plead his former acquittal;[4] and an indictment for larceny, laying the goods stolen to be the property of Victory Baroness Tuckheim, by which appellation she had always acted and was known, was held good, though her real name was Selima Victoire.[5] So an indictment for forgery of a draft addressed to Messrs. Drummond and Company, Charing Cross, by the name of Mr. Drummond, Charing Cross, without stating the name of Mr. Drummond's partners, was held sufficient.[6] But where the pleader undertakes to set out the names of a firm, a variance in the proof of these names is fatal.[7]

§ 116. A variance or an omission in the name of the person aggrieved is much more serious than a mistake in the name or

[1] Com. *v.* Hunt, 4 Pick. 252; U. S. *v.* Howard, 3 Sumner, 12; State *v.* Farrow, 48 Ga. 30; Whart. Crim. Ev. § 138. Infra, § 158.

[2] 2 Hawk. c. 25, s. 71; Bac. Ab. Indictment, G. 2. But see Starkie, 171, 172; 6 St. Tr. 805; Moore, 466.

[3] Martin *v.* State, 6 Humph. 204. Infra, § 118.

[4] Dyer, 285 a; Keilw. 25; 2 Hawkins, c. 25, s. 72; Bac. Ab. Indictment, G. 2. See Stockton *v.* State, 25 Tex. 772.

[5] 2 Leach, 861.

[6] 1 Leach, 248; 2 East P. C. 990.

In a Maryland case, an indictment alleged "that Allen Harne, on the twenty-fourth day of August, in the year of our Lord eighteen hundred and seventy-two, with force and arms, at the county of Washington aforesaid, in and upon one ———, in the peace of God and the said State then and there being, did make an assault, and him the said John Delosier did then and there beat, bruise, wound, &c., to the great damage of the said John Delosier, and against the peace, government, and dignity of the State." On demurrer to this count, it was ruled that the count was sufficiently certain to inform the accused of the offence with which he was charged, and of the party upon whom it was committed; and the demurrer was therefore overruled. Harne *v.* State, 39 Md. 552.

[7] Doane *v.* State, 25 Ind. 495; Whart. Crim. Ev. §§ 94 *et seq.*

addition of the defendant, as the latter can only be taken advantage of by plea in abatement, while the former will be ground for arresting the judgment when the error appears on the record, or for acquittal, when a variance arises on the trial.[1]

Variance in third party's name is fatal.

§ 117. *Initials*, it seems, are a sufficient designation of the Christian name, if the party uses and is known by such initials;[2] and at all events cannot be excepted to after verdict.[3]

Name may be given by initials.

§ 118. As has been already incidentally noticed, a description of a person in legal proceedings by the name acquired by reputation has been held sufficiently certain.[4] Thus where, in a case of homicide, an indictment charges the name of the person slain as Marie Gardiner, *alias* Maria Bull, and the proof shows her real name to have been Maria Frances Bull, though generally known by the name in the indictment, it is sufficient.[5]

Reputative name is sufficient.

§ 119. Should the name proved be *idem sonans* with that stated in the indictment, and different in spelling only, the variance will be immaterial.[6] Thus, Segrave for Seagrave;[7] McLauglin for McGloflin;[8] Chambles for Chambless;[9] Usrey for Userry,[10] Authron for Autrum,[11] Benedetto for Beniditto;[12] Whyneard for Winyard, pronounced

Idem sonans is sufficient.

[1] 1 East P. C. 514, 651, 781; 2 Leach, 774; 1 Ch. C. L. 217; Graham *v.* State, 40 Ala. 659; Haworth *v.* State, Peck. 89. See fully Whart. Crim. Ev. §§ 94 *et seq.*

[2] Mead *v.* State, 26 Oh. St. 505; State *v.* Bell, 65 N. C. 313; State *v.* Brite, 73 N. C. 26; Thompson *v.* State, 48 Ala. 165; State *v.* Seely, 30 Ark. 162; State *v.* Anderson, 3 Rich. 172; State *v.* Black, 31 Tex. 560; Vandermark *v.* People, 47 Ill. 122. See supra, § 102. As to variance see Whart. Crim. Ev. §§ 94 *et seq.*

[3] Smith *v.* State, 8 Ohio, 294.

[4] R. *v.* Norton, R. & R. 509; R. *v.* Berriman, 5 C. & P. 601; Anon. 6 C. & P. 408; State *v.* Bundy, 64 Me. 507; Waters *v.* People, 6 Parker C. R. 16; Com. *v.* Trainor, 123 Mass. 414; State *v.* Bell, 65 N. C. 313; McBeth *v.* State, 50 Miss, 81; Whart. Crim. Ev. § 95.

[5] State *v.* Gardiner, Wright's Ohio R. 392. See also R. *v.* Willis, 1 Car. & K. 722; O'Brien *v.* People, 48 Barb. 274; Kriel *v.* Com. 5 Bush (Ky.), 362.

[6] Whart. Crim. Ev. § 96. See R. *v.* Wilson, 2 C. & K. 527; 1 Den. C. C. 284; 2 Cox C. C. 426; State *v.* Bean, 19 Vt. 530; Point *v.* State, 37 Ala. 148; State *v.* Lincoln, 17 Wis. 579.

[7] Williams *v.* Ogle, 2 Str. 889.

[8] McLauglin *v.* State, 52 Ind. 476.

[9] Ward *v.* State, 28 Ala. 53.

[10] Gresham *v.* Walker, 10 Ala. 370.

[11] State *v.* Scurry, 3 Rich. 68.

[12] Ahibol *v.* Beniditto, 2 Taunt. 401.

Winnyard;[1] Petris for Petries, the pronunciation being the same;[2] Hutson for Hudson,[3] form no variance. But it has been decided that M'Cann and M'Carn,[4] Shakespear and Shakepear,[5] Tabart and Tarbart,[6] Shutliff and Shirtliff,[7] Comyns and Cummins;[8] are not the same in sound. In a case in Pennsylvania it was even held that Burrall was a fatal variance from Burrill.[9]

What is *idem sonans* is for the jury.[10]

V. TIME.

1. TIME MUST BE AVERRED, BUT NOT GENERALLY MATERIAL, § 120.
2. WHAT PRECISION IS NECESSARY IN ITS STATEMENT, § 123.
3. INITIALS AND NUMERALS, § 124.
4. DOUBLE AND OBSCURE DATES; CONTINUANDOS, § 125.
5. HISTORICAL EPOCHS, § 128.
6. HOUR, § 130.
7. "THEN AND THERE," § 131.
8. REPUGNANT, FUTURE, OR IMPOSSIBLE DATES, § 134.
9. CASES WHERE DATE IS MATERIAL, § 136.

§ 120. Time and place must be attached to every material fact averred,[11] but the time of committing an offence (except where the time enters into the nature of the

Time must be averred but not

[1] R. *v.* Foster, R. & R. 412.

[2] Petrie *v.* Woodworth, 3 Caines, 219. See State *v.* Upton, 1 Dev. 513.

[3] State *v.* Hutson, 15 Mo. 512.

[4] R. *v.* Tannett, R. & R. 351.

[5] R. *v.* Shakespear, 10 T. R. 83.

[6] Bingham *v.* Dickie, 5 Taunt, 814.

[7] 1 Chit. C. L. 216; 3 Chit. Burn, 341.

[8] Cruickshank *v.* Comyns, 24 Ill. 602.

[9] Com. *v.* Gillespie, 7 Serg. & R. 469.

[10] R. *v.* Davis, 2 Den. C. C. 231; T. & M. 557; 5 Cox C. C. 238; Com. *v.* Donovan, 13 Allen, 571; Com. *v.* Jennings, 121 Mass. 47. See People *v.* Cooke, 6 Park. C. R. 31. See fully Whart. Crim. Ev. §§ 94 *et seq.*

It may be stated in brief: —

1st. A *variance* in defendant's name or addition can only be taken advantage of by plea in abatement. Supra, § 106.

2d. A *blank* in either Christian name, surname, or addition of defendant can be taken advantage of by plea in abatement, though the proper course is by motion to quash. Ibid.

3d. Any variance in *sound* in the name of material third parties is fatal at common law, it being the duty of the court to order an acquittal, though such acquittal is no bar to a second and correct indictment. Supra, §§ 116, 119.

The court will determine by inspection what is the name as written in the indictment. O'Neil *v.* State, 48 Ga. 66.

[11] 1 Chit. on Pleading, 4th ed. Index, tit. Time; R. *v.* Hollond, 5 T. R. 607; R. *v.* Aylett, 1 T. R. 69; Stand. 95 a; R. *v.* Haynes, 4 M. & S. 214; State *v.* Baker, 4 Reding. 52; State *v.* Hanson, 39 Me. 337; Crichton *v.* People, 6 Park. C. R. 363; Roberts *v.* State, 19 Ala. 526; State *v.* Walker,

generally material.

offence) may be laid on any day previous to the finding of the bill, during the period within which it may be prosecuted.[1]

To assign the day as that of the finding of the bill, or subsequent thereto, is bad.[2]

If a day certain be laid before the finding, other insensible dates may be rejected as surplusage.[3]

Where there is a statute authorizing amendments of formal errors, dates when formal may be amended.[4]

When "Sunday" is the essence of offence, the day must be specified.

§ 121. The statement of the day of the month, in an indictment for an offence on Sunday, though the doing of the act on that day is the gist of the offence, is not more material than in other cases; and hence, if the indictment charge the offence to have been committed on Sunday, though it names the day of the month which does not fall on Sunday, it is good.[5] But "Sunday" or "Sabbath" must be averred.[6]

"Sabbath" for "Sunday" is said to be no variance.[7]

"*Videlicet*" may introduce a date tentatively.

§ 122. A *videlicet* (*i. e.* "that afterwards, to wit," &c.) was used by the old pleaders when they wished to aver a date or other fact tentatively, for information, without binding themselves to it as a matter of essential de-

14 Mo. 398; State *v.* Beckwith, 1 Stewart, 318; Sanders *v.* State, 26 Tex. 119; State *v.* Slack, 30 Tex. 354; People *v.* Littlefield, 5 Cal. 355; though see State *v.* Barnett, 3 Kans. 250.

[1] Whart. Crim. Ev. § 102; U. S. *v.* Bowman, 2 Wash. C. C. 328; Com. *v.* Dillane, 1 Gray, 483; People *v.* Van Santvoord, 9 Cow. 660; Turner *v.* People, 33 Mich. 363; Cook *v.* State, 11 Ga. 53; Wingard *v.* State, 13 Ga. 396; Shelton *v.* State, 1 Stew. & Por. 208; M'Dade *v.* State, 20 Ala. 81; McBryde *v.* State, 34 Ga. 202; State *v.* Magrath, 19 Mo. 678.

[2] State *v.* Munger, 15 Vt. 291; State *v.* Litch, 33 Vt. 67; Com. *v.* Doyle, 110 Mass. 103; Jacobs *v.* Com. 5 S. & R. 316; State *v.* Noland, 29 Ind. 212; Joel *v.* State, 28 Tex. 642. Infra, § 134.

[3] Wells *v.* Com. 12 Gray, 326; State *v.* Woodman, 3 Hawks, 384; Cook *v.* State, 11 Ga. 53. Infra, § 125.

[4] Myers *v.* Com. 79 Penn. St. 308.

[5] R. *v.* Trehearne, 1 Mood. C. C. 298; Com. *v.* Harrison, 11 Gray, 308; People *v.* Ball, 42 Barbour, 324; State *v.* Eskridge, 1 Swan (Tenn.), 413; State *v.* Drake, 64 N. C. 589. But see Werner *v.* State, 51 Ga. 426. For proof see Whart. Crim. Ev. § 106.

[6] See R. *v.* Trehearne, 1 Mood. C. C. 298; Com. *v.* Harrison, 11 Gray, 308; McGowan *v.* Com. 2 Metc. (Ky.) 3; Frazier *v.* State, 19 Mo. 678. See State *v.* Land, 42 Ind. 311.

[7] State *v.* Drake, 64 N. C. 589.

scription, a variance in respect to which would be fatal. Hence it has been held in England (though there is some confusion in the authorities in this respect) that the *videlicet* can, if repugnant, be stricken out as surplusage, when there is enough remaining to make out the charge.[1] And as a rule the *videlicet* relieves the pleader from the necessity of proving a non-essential descriptive averment.[2]

After verdict, to support an indictment, and to show that the provisions of a statute have been complied with, dates laid under a *videlicet* may be taken to be true.[3]

Before verdict, however, and at common law, dates laid in a *videlicet*, when time is material, may be traversed; and hence, if laid insensibly, will vitiate the context. In other words, when an allegation is material, accuracy in stating it cannot be dispensed with by thrusting it into a *videlicet*.[4]

§ 123. It is requisite, with some exceptions, to name both the day and year. The month without the year is insufficient,[5] and so when the month is given but the day is left blank.[6] If the date be laid in blank the judgment will be arrested.[7] But in Pennsylvania, it has been determined that where the commencement of the indictment was "December Session, 1818," and the offence was charged to have been committed on the twelfth day of August, in *the year aforesaid*, the time was sufficiently expressed.[8] And it was said in another case that it was not fatal to aver the "first March," instead of the first day of March.[9] On the other hand, an indictment, not containing the year, but referring to the caption (which does

Blank as to date is fatal.

[1] Infra, § 158 *a*; Ryalls *v.* R. (in error) 11 Q. B. 781; 18 L. J. M. C. 69 — Exch. Cham. But see People *v.* Jackson, 3 Denio, 101; and Mallett *v.* Stevenson, 26 Conn. 428; where the *videlicet* was held to narrow the preceding averment. Whart. Crim. Ev. § 141.

[2] 1 Green. Ev. § 60; 1 Ch. Pl. 317; State *v.* Heck, 23 Minn. 551.

[3] Infra, § 158 *a*; R. *v.* Scott, D. & B. C. C. 47.

[4] See State *v.* Phinney, 32 Me. 440; Paine *v.* Fox, 16 Mass. 129; State *v.* Haney, 1 Hawks, 460; 2 Saund. 291; 1 Ch. C. L. 226.

[5] Com. Dig. Ind. s. 2; Com. *v.* Griffin, 3 Cush. 523.

[6] Clark *v.* State, 34 Ind. 436.

[7] State *v.* Beckwith, 1 Stew. 318; State *v.* Roache, 2 Hayw. 352; Jane *v.* State, 3 Mo. 45.

[8] Jacobs *v.* Com. 5 S. & R. 315; though see Com. *v.* Hutton, 5 Gray, 89.

[9] Simmons *v.* Commonwealth, 1 Rawle, 142.

contain the year) in this manner, "in the year of our Lord aforesaid," has been held to be bad, as the caption is no part of the indictment.[1]

Substantial accuracy is enough.

§ 124. It has been said that the omission of the phrase, "the year of our Lord," is fatal,[2] though it is ruled that A. D., in initials, will be sufficient;[3] and the better opinion is that both may be dispensed with.[4] The dates may be given in Arabic figures.[5] It should be averred which figures designate the year. It is not enough to say "the fifteenth of June 1855."[6]

In Massachusetts, a complaint which charges, in words at length, the time of the commission of an offence, is not affected by the addition, in figures, of the date when the complaint is made.[7]

Double or obscure dates are inadequate.

§ 125. To aver that the defendant, on divers days, committed an offence, is bad; and so where two distinct days are averred;[8] but it is sufficient to state that on a day specified, as well as on certain other days, he kept a gaming-

[1] State *v.* Hopkins, 7 Blackf. 494.

[2] Whitesides *v.* People, 1 Breese, R. 4; though see State *v.* Haddock, 2 Hawks, 461; State *v.* Dickens, 1 Hayw. 406. Infra, § 274.

[3] State *v.* Reed, 35 Me. 489; State *v.* Hodgeden, 3 Vt. 481.

[4] Broome *v.* R. 12 Q. B. 834; State *v.* Gilbert, 13 Vt. 647; Hall *v.* State, 3 Kelly, 18; Engleman *v.* State, 2 Carter (Ind.), 91; State *v.* Munch, 22 Minn. 67. Infra, § 274.

[5] Infra, § 274; State *v.* Reed, 35 Me. 489; State *v.* Hodgeden, 3 Vt. 481; State *v.* Jericho, 40 Vt. 121; Com. *v.* Hagarman, 10 Allen, 401; Com. *v.* Adams, 1 Gray, 48; Lazier *v.* Com. 10 Grat. 708; Cady *v.* Com. 10 Grat. 776; State *v.* Dickens, 1 Hayw. 406; State *v.* Haddock, 2 Hawks, 461; State *v.* Lane, 4 Ired. 113; State *v.* Raiford, 7 Port. 101; State *v.* Smith, Peck, 165; State *v.* Egan, 10 La. An. 699; Kelly *v.* State, 3 Sm. & M. 518; State *v.* Seamons, 1 Iowa, 418; though see *contra*, at common law in New Jersey and Indiana, Berrian *v.* State, 2 Zabriskie, 9; State *v.* Voshall, 4 Ind. 590; Finch *v.* State, 6 Blackf. 533. In both States this is corrected by statute. Johnson *v.* State, 2 Dutch. (N. J.) 313. See also as to Indiana, Hizer *v.* State, 12 Ind. 330.

[6] Com. *v.* McLoon, 5 Gray, 91.

[7] Commonwealth *v.* Keefe, 7 Gray, 332.

[8] 1 Ld. Raym. 581; 10 Mod. 249; 2 Hawk. c. 25, s. 82; Cro. C. C. 36; 4 Mod. 101; Com. *v.* Adams, 1 Gray, 481; State *v.* Brown, 3 Murph. 224; State *v.* Weller, 3 Murph. 229; State *v.* Hayes, 24 Mo. 358, corrected by statute, 1852, p. 368; Hampton *v.* State, 8 Ind. 336; State *v.* Hendricks, Conf. 369. *Aliter* under N. Y. statute. New York *v.* Mason, 4 E. D. Smith, 142. And to aver a series of blows on successive days, resulting in death, is not bad. Com. *v.* Stafford, 12 Cush. 619.

house, a tippling-house, or a common nuisance; the allegation, "certain other days," being rejected as surplusage.[1]

Continuando.

In cases in which it is necessary that a *continuando* should be averred (*e. g.* in cases of continuous bigamy or continuous nuisance) the periods between which the offence is charged to continue should be specifically averred. In such cases it is enough to say that the offence was committed on a day named, and on certain other days between two days named, or (when the statute requires) that the offence continued between two named days.[2]

Without the allegation of a *continuando*, or a tantamount allegation of continuance, there can, on indictments for nuisance, be no abatement.[3]

Date cannot be laid between

§ 126. As a general rule it is incorrect to lay the offence between two days specified;[4] and, therefore, an indictment for battery, setting forth that the defendant beat

[1] Starkie's C. P. 60; U. S. *v.* La Costa, 2 Mason, 129; State *v.* Cofren, 48 Me. 365; Com. *v.* Pray, 13 Pick. 359; Wells *v.* Com. 12 Gray, 326; People *v.* Adams, 17 Wend. 475; State *v.* Jasper, 4 Dev. 323; State *v.* May, 4 Dev. 328; Cook *v.* State, 11 Ga. 53.

[2] See 2 Hawk. P. C. c. 25, s. 62; U. S. *v.* Fox, 1 Low. 301; U. S. *v.* La Costa, 2 Mason, 140; State *v.* Munger, 15 Vt. 290; State *v.* Temple, 38 Vt. 37; Wells *v.* Com. 12 Gray, 326; Com. *v.* Tower, 8 Met. 527; Com. *v.* Travers, 11 Allen, 260; People *v.* Adams, 17 Wend. 475. The limit may be fixed at the day of finding the bill. Com. *v.* Stone, 3 Gray, 453; compare Com. *v.* Adams, 4 Gray, 27.

[3] Whart. Crim. Law, 8th ed. § 1426; R. *v.* Stead, 8 T. R. 142.

An allegation that the offence therein charged was committed on a certain specified "day of September *now passed*," is not stated with sufficient certainty; Com. *v.* Griffin, 3 Cush. 523; and so of an indictment which charges the defendant with being a common seller of spirituous and intoxicating liquors from a day named "to the day of the finding presentment and filing of this indictment." Com. *v.* Adams, 4 Gray, 27.

In some jurisdictions, when the offence is stated to have been committed on a particular day, the words "on or about" are treated as mere surplusage. They could have made no difference, it has been argued, in the proof required, and could in no way have prejudiced the defendant's rights. State *v.* Tuller, 34 Conn. 280; Hampton *v.* State, 8 Ind. 336. This, however, cannot be accepted at common law. U. S. *v.* Crittenden, Hemp. 61; U. S. *v.* Winslow, 3 Sawyer, 337; State *v.* O'Keefe, 41 Vt. 691; State *v.* Land, 42 Ind. 311; Effinger *v.* State, 47 Ind. 256; Barnhouse *v.* State, 31 Oh. St. 39; Morgan *v.* State, 13 Florida, 671.

[4] 1 Ld. Raym. 581; 10 Mod. 249; 2 Hawk. c. 25, s. 82; Cro. C. C. 36; Burn, J., Indict.; Williams, J., Indict. iv.; State *v.* Temple, 38 Vt. 37.

two distinct periods.

so many of the king's subjects between two specified days, is insufficient.[1]

Negligences should have time averred.

§ 127. In alleging a mere neglect or non-performance, it has been held to be unnecessary to specify either time or place.[2] But this, as a general principle, cannot be sustained. The proper course is to aver that the defendant, at an assigned time, had a particular duty imposed on him, and that he, at that time, neglected to discharge that duty.[3]

Time may be designated by historical epoch.

§ 128. In England, it is the practice to specify the year of the king's reign, but it is enough if the time be designated by the calendar date.[4] And by the common law either the year of the reign, or the calendar date, has been sustained.[5] With us the uniform practice is to give the day and year of the Christian era according to the calendar rendering.[6]

Recitals of time need not be accurate.

§ 129. The wrong recital of the date of a statute is immaterial;[7] and such is the case with all erroneous recitals except those of written or printed documents.

Hour not necessary unless required by statute.

§ 130. As a rule, it is unnecessary to state the hour at which the act was done, unless rendered so by the statute upon which the indictment is framed.[8] In burglary, indeed, it is usual to state it; but alleging the offence to have been committed "*in the night*," without mentioning the hour, has been held to be sufficient,[9] though at common law the prevalent opinion is that the hour should be averred.[10] In an indictment upon stat. 9 G. 4, c. 69, for unlawfully entering, or

[1] 4 Mod. 101; 2 Hawk. c. 25, s. 82; Burn, J., Indict.; Williams, J., Indict. iv.; 1 Chitty's C. L. 216.

[2] 2 Hawk. c. 25, s. 79; Starkie's C. P. 61. But see Archbold's C. P. 34; Com. *v.* Sheffield, 11 Cush. 178.

[3] See Whart. Crim. Law, 8th ed. §§ 125, 329, for cases.

[4] Kel. 10, 11; 2 Hawk. c. 25, s. 8; Burn, J., Indict.; Williams, J., Indict. iv.

[5] Com. Dig. Indict. G. 2; 2 Hawk. cc. 25, 26, s. 78.

[6] Bac. Ab. Indict. G. 4.

[7] People *v.* Reed, 47 Barb. 235.

[8] 2 Hawk. c. 25, s. 76. And see Combe *v.* Pitt, 3 Burr. 1434; R. *v.* Clarke, 1 Bulst. 204; 2 Inst. 318.

[9] Com. *v.* Williams, 2 Cush. 582 (under statute); People *v.* Burgess, 35 Cal. 115.

[10] 1 Hale, 549; R. *v.* Waddington, 2 East P. C. 513; 2 Hawk. c. 25, ss. 76, 77; State *v.* G. S. 1 Tyler, 295. And see Whart. Crim. Law, 8th ed. § 817; Whart. Crim. Ev. § 106.

being in a close by night for the purpose of taking game, armed, it is not necessary to state the hour of the night.[1]

§ 131. When the time has been once named with certainty, it is afterwards sufficient to refer to it by the words *then* and *there*, which have the same effect as if the day and year were actually repeated.[2] It is said, however, that the mere conjunction *and* without adding *then* and *there* will in many cases be insufficient. Thus, in an indictment for robbery, the allegation of time must be attached to the robbery, and not merely to the assault;[3] and in a case of murder, it is not sufficient to allege that the defendant on a certain day made an assault and struck the party killed, but the words *then and there* must be introduced before the averment of the stroke, which will suffice.[4]

Repetition may be by "then and there."

If the words "then and there" precede every material allegation, it is sufficient, though these words may not precede the conclusions drawn from the facts.[5] But "then and there" have

[1] R. *v.* Davis, 10 B. & C. 89; Archbold's C. P. 35.

[2] 2 Hale, 178; 2 Stra. 901; Keil. 100; 2 Hawk. c. 23, s. 88; c. 25, s. 78; Bac. Ab. Indict. G. 4; Williams, J., Indict. iv.; Comyns, 480; Stout *v.* Com. 11 S. & R. 177; State *v.* Cotton, 4 Foster, 143; State *v.* Bailey, 21 Mo. 484; State *v.* Williams, 4 Ind. 235. "There situate" is a good description. State *v.* Reid, 20 Iowa, 413.

[3] Ibid.; 2 Hale, 178; 2 Hawk. c. 23, s. 88; Cro. Eliz. 739. See State *v.* Johnson, 12 Minn. 476; State *v.* Slack, 30 Tex. 354.

[4] 2 Hale, 173; Dyer, 69; 2 Hawk. c. 23, s. 88; Cro. C. C. 35; 1 East P. C. c. 5, s. 112; Whart. Crim. Law, 8th ed. § 529. Though see Com. *v.* Bugbee, infra; Resp. *v.* Honeyman, 2 Dall. 228; State *v.* Price, 6 Halst. 210.

[5] 1 Leach, 529; Dougl. 412; State *v.* Johnson, 1 Walker, Miss. R. 392.

If the indictment allege that the defendant feloniously and of malice aforethought made an assault, and with a certain sword, &c., *then and there* struck, the previous omission will not be material, for the words *feloniously and with malice aforethought*, previously connected with the assault, are by the words *then and there* adequately applied to the murder. See 4 Co. 41, b; Dyer, 69, a; 1 East P. C. 346; 1 Ch. C. L. 221. Whart. Crim. Law, 8th ed. § 529.

In an indictment for breaking a house with intent to ravish, "then and there" is not necessary to the intent. Com. *v.* Doharty, 10 Cush. 52.

An indictment which avers that the defendant, at a time and place named, feloniously assaulted A. B., and being then and there armed with a dangerous weapon, did actually strike him on his head with said weapon, is sufficient, without repeating the words "then and there" before the words "did actually strike;" the court rejecting the English rule above stated requiring such repetition. Com. *v.* Bugbee, 4 Gray, 206. So generally

been held only to relate to the day and place first stated, and not to a *noctanter* afterwards introduced.[1] And "then and there" is insufficient where it is necessary to prove, as part of the description of the offence, an act at some specific portion of a day, as where it is necessary to aver the possession of ten or more counterfeit bills *at one time*.[2]

Other terms insufficient.

§ 132. The word *being* (*existens*) will, unless necessarily connected with some other matter, relate to the time of the indictment rather than of the offence; and, therefore, an indictment for a forcible entry, on land *being* the prosecutor's freehold, without saying "then being," was held insufficient.[3] It is otherwise when part of an independent adequate averment.[4]

Neither "instantly,"[5] nor "immediately,"[6] nor "whilst,"[7] being ambiguous terms, can supply the place of "then and there."

"Then and there" cannot cure ambiguities.

§ 133. If, however, two times or places have been previously mentioned, and afterwards comes the reference "then and there," or if the antecedent averment is in any way ambiguous as to time or place, the indictment is defective, because it is uncertain to which it refers.[8]

§ 134. If the fact be stated, as to the time or place, with repugnancy or uncertainty, the indictment will be bad.[9] "The

in Indiana by statute. Thayer *v.* State, 11 Ind. 287.

In North Carolina it has been held that an indictment may contain enough to induce the court to proceed to judgment, if the time and place of making the assault be set forth, though they be not repeated as to the final blow. State *v.* Cherry, 3 Murph. 7. See Jackson *v.* People, 18 Ill. 264.

[1] Davis *v.* R. 10 B. & C. 89.

[2] Edwards *v.* Com. 19 Pick. 124.

[3] Bac. Ab. Indict. G. 1; Cro. Jac. 639; 2 Lord Raymond, 1467, 1468; 2 Rol. Rep. 225; Com. Dig. Indict. G. 2.

[4] R. *v.* Boyall, 2 Burr. 832.

[5] 1 Leach, 4th ed. 529; Chitty C. L. 221; R. *v.* Brownlow, 11 A. & E. 119; Lester *v.* State, 9 Mo. 666; State *v.* Lakey, 65 Mo. 217; State *v.* Testerman, 68 Mo. 408. See Com. *v.* Ailstock, 3 Grat. 650; State *v.* Cherry, 3 Murph. 7.

[6] R. *v.* Francis, Cunning. 275; 2 Strange, 1015.

[7] R. *v.* Pelham, 8 Q. B. 959.

[8] R. *v.* Devett, 8 C. & P. 639; State *v.* Jackson, 39 Me. 291; Edwards *v.* Com. 19 Pick. 124; Com. *v.* Butterick, 100 Mass. 12; Com. *v.* Goldstein, 114 Mass. 272; Storrs *v.* State, 3 Mo. 9; Jane *v.* State, 3 Mo. 61; State *v.* Hayes, 24 Mo. 358.

[9] See Jeffries *v.* Com. 12 Allen, 145; Hutchinson *v.* State, 62 Ind. 556;

tenth of September last past," as we have seen, is inadequate, where there is nothing in the indictment designating the year.[1] And an indictment charging the offence to have been committed in November, 1801, and in the twenty-fifth year of American Independence, has been held defective, and the judgment arrested, because the offence was charged to have been committed in two different years.[2] And an indictment alleging the offence to have been committed on an impossible day,[3] or a day subsequent to the finding of the bill,[4] is defective. But an indictment may be found for a crime committed after the term commenced to which it is returned.[5]

Repugnant, future, or impossible dates are bad.

Serpentine *v.* State, 1 How. (Miss.) 260; McMath *v.* State, 55 Ga. 303.

[1] Com. *v.* Griffin, 3 Cush. 523. Supra, § 123.

[2] State *v.* Hendricks, Con. (N. C.) 369.

In a case in Mississippi, where the crime was alleged to have been committed in the year of our Lord 1033, the allegation, in an opinion of some quaintness, was held to be bad, as contradicting one of the known laws of nature. "A third objection," it was said, "not embraced by the special assignment of errors, but which is properly presented under the general assignment, merits the consideration of the court. The objection is, that the indictment does not show any crime to have been committed against the State of Mississippi, and that the assumption of the truth of the allegations contained therein is inconsistent with a known law of nature. The crime charged against the prisoner is alleged to have been committed the 30th day of September, A. D. one thousand and thirty-three; whether it is a mistake which occurred in the indictment, or was made by the transcribing clerk, I think now cannot be inquired into. The record, in this respect, appears not to be imperfect, and a presumption cannot be entertained which contradicts it. An allegation in an indictment, which substantially contradicts a known law of nature, regulating the duration of human life, is clearly defective, and cannot constitute the legitimate foundation of a judgment of a court. All knowledge of the laws of nature which govern the material world is primarily derived from experience, and our belief in their permanency rests upon the same foundation. An allegation which presupposes the life of the accused to have endured for upwards of eight hundred years, as it contradicts the experience of the whole world, must be considered as impossible." Serpentine *v.* State, 1 How. Miss. R. 260.

[3] People *v.* Mather, 4 Wend. 229; Markley *v.* State, 10 Mo. 291.

[4] State *v.* Munger, 15 Vt. 291; State *v.* Litch, 33 Vt. 67; Com. *v.* Doyle, 110 Mass. 103; Penns. *v.* McKee, Add. 36; Jacobs *v.* Com. 5 S. & R. 316; State *v.* Noland, 29 Ind. 212; State *v.* Davidson, 36 Tex. 325. See supra, § 120.

[5] Allen *v.* State, 5 Wis. 329.

§ 135. When, as in case of perjury, the time of the alleged false oath enters into the essence of the offence, and is to be shown by the records of the court where the oath was taken, a variance in the day is fatal;[1] thus, if the perjury is averred to have been committed at the Circuit Court on the 19th of May, and the record shows the court to have been holden on the 20th day of May, the indictment is bad;[2] and so where the assignment is pointed at an offence on a specific date.[3]

Record dates must be accurate.

§ 136. *Dates of bills of exchange, and other written instruments*, must be truly stated when necessarily set out.[4]

Dates of documents must be correctly given.

Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered.[5]

Sunday, as a designation, has been already noticed.[6]

§ 137. Where a time is limited by general statute for preferring an indictment, the time laid should ordinarily appear to be within the time so limited.[7] Whether, when an exception takes the case out of the statute, this should be averred, will be hereafter discussed.[8]

Time should be within limitation.

In homicide death should be within a year and a day.

§ 138. As is noticed more fully in another work,[9] the death in homicide should be laid on a day within a year and a day from the time at which the stroke is alleged to have been given.

[1] Whart. Crim. Law, 8th ed. § 103 *a*; Green *v.* Rennett, 1 T. R. 656; Freeman *v.* Jacob, 4 Camp. 209; Pope *v.* Foster, 4 T. R. 590; Woodford *v.* Ashley, 11 East, 508; Restall *v.* Stratton, 1 H. Bl. 49.

[2] U. S. *v.* M'Neal, 1 Gallis. 387; U. S. *v.* Bowman, 2 Wash. C. C. R. 328.

[3] Com. *v.* Monahan, 9 Gray, 119.

[4] Whart. Crim. Ev. § 103 *a*; Archbold's C. P. 9th ed. § 90.

[5] Ibid.

[6] Supra, § 121.

[7] Whart. Crim. Ev. § 105. See R. *v.* Brown, M. & M. 163; U. S. *v.* Winslow, 3 Sawy. 337; State *v.* Hobbs, 39 Me. 212; State *v.* J. P. 1 Tyler, 283; State *v.* Rust, 8 Black. 195; State *v.* Robinson, 9 Foster, 274; Hatwood *v.* State, 18 Ind. 492; People *v.* Gregory, 30 Mich. 371; People *v.* Miller, 12 Cal. 291; McLane *v.* State, 4 Ga. 335; Shelton *v.* State, 1 St. & P. 208; State *v.* McGrath, 19 Mo. 678.

[8] Infra, § 318. See Whart. Crim. Ev. § 105.

[9] See Whart. Crim. Law, 8th ed. § 577.

VI. PLACE.

[*As to conflict in cases of venue, see Whart. Crim. Law, 8th ed. §§ 269 et seq.; and as to whether the venue is to be in the place where the offence was consummated, or in the place where the offender was at the consummation, see particularly, Ibid., § 284, note. As to change of venue, see infra, § 602.*]

§ 139. In England, at common law, it was held necessary to lay as the place of the commission of the offence, beside the county, some particular vicinage, of such dimensions that all living in it might be supposed to have knowledge of the transaction to be inquired into.[1] By statute, however, it is now enough to aver the county as the place of the commission.[2] In the United States, the latter practice is generally accepted wherever the county is conterminous with the jurisdiction of the court,[3] though it is otherwise when the jurisdiction of the court embraces but a fraction of the county.[4]

Enough to lay venue within jurisdiction of court.

It is sufficient if the place stated correspond with the jurisdiction of the court.[5]

In several jurisdictions, by statute, when an offence is committed near the boundary line between two counties, it may be averred to be in either county.[6]

The jurisdiction of the federal courts, where crimes have been committed at sea or abroad, is discussed at large in another work.[7]

In such cases the trial of the offence is, by Act of April 30, 1790, to be "in the district where the offender is apprehended, *or* into which he may first be brought." Under this statute a

[1] 2 Hawk. c. 22.

[2] Stat. 6 Geo. 4; 14 & 15 Vict.

As to venue in caption see supra, § 92.

[3] Infra, § 146; Whart. Crim. Ev. § 107; People *v.* Lafuente, 6 Cal. 202. Supra, §§ 92, 107. That "county" is necessary see People *v.* Gregory, 30 Mich. 371.

[4] Infra, §§ 141–2; 2 Hale, P. C. 166; McBride *v.* State, 10 Humph. 615. So, *mutatis mutandis*, as to towns. Com. *v.* Springfield, 7 Mass. 9.

[5] R. *v.* Stanbury, L. & C. 128; People *v.* Barrett, 1 Johnson R. 66; State *v.* G. S. 1 Tyler, 295; State *v.* Jones, 4 Halsted, 357. Supra, § 92.

[6] People *v.* Davis, 56 N. Y. 95; Whart. Crim. Law, 8th ed. § 290.

[7] Whart. Crim. Law, 8th ed. §§ 269 *et seq.*

person is triable in the Southern District of New York who, on a vessel owned by citizens of the United States, has committed on the high seas an offence made penal by act of Congress; has been then put in irons for safe keeping; has, on the arrival of the vessel at anchorage at the lower quarantine in the Eastern District of New York, been delivered to officers of the State of New York, in order that he may be forthcoming on trial; and has been by them carried into the Southern District, and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was first issued.[1] But where the indictment charged that an assault with a dangerous weapon was committed on board a vessel in the harbor of Guantanamo, in the Island of Cuba, but there was no allegation that the place was out of the jurisdiction of any of the States, it was ruled that the omission of such an allegation was fatal, as whether the place of the offence was without the jurisdiction of any State was material in determining the question of jurisdiction, and was a question of fact for the jury.[2] "In Jackson's case, 1 Black, 484," said Benedict, J., it was held by the Supreme Court of the United States that the question whether a particular place be out of the jurisdiction of any State, when material in determining the question of the jurisdiction of a court, is a question of fact to be passed on by the jury. In that case the Supreme Court set aside a special verdict, which found the offence to have been committed 'in the water adjoining the State of Connecticut, between Norwalk harbor and Westchester County in the State of New York, at a point five miles eastward of Lyons Point, which is the boundary between the States of New York and Connecticut, and one mile and a half from the Connecticut shore at low-water mark;' on the ground that, in the absence of a finding by the jury that the place so described was out of the jurisdiction of any State, it was impossible for the court to determine such to be the fact."

When act is by agent, principal

§ 140. We have discussed, in another volume,[3] the important question whether it is necessary to jurisdiction that the offender, at the time of the offence, should have been

[1] U. S. v. Arwo, 19 Wall. 486.

[2] U. S. v. Anderson, 8 Reporter, 278, 284.

[3] Whart. Crim. Law, 8th ed. §§ 677 (1879).

within the jurisdiction. We may here notice that where an offence is committed within a State by means of an agent, the employer is guilty as a principal, though he did not act in that State, and at the time the offence was committed was in another State. In such case, the *forum delicti commissi* has jurisdiction of the offence, and, if the offender comes within the limits of the State, has also jurisdiction of his person, and he may be arrested and brought to trial.[1] And the better opinion is that the place of the commission of the offence, as distinguished from the place where the offender at the time stood, is, in cases of conflict, the proper venue.[2]

to be charged as of place of such act.

§ 141. Where an offence is committed within the county of A., and after the commission of the offence the county is divided, and the part of the county in which the offence was committed is created a new county called B., the latter county has jurisdiction over the offence.[3] In such case, however, the indictment may charge the perpetration in the former county while the trial is in the latter.[4]

When county is divided jurisdiction to be laid in court of *locus delicti*.

§ 142. Where there are distinct judicial districts in the county, it is not sufficient that the indictment names the county. Therefore, where the offence in a District Court in North Carolina was laid to have been committed in Beaufort County, without adding in the District of Newbern, judgment was arrested.[5] And when several counties are in the *town*, it is not enough to allege the *town*.[6] And so in all cases where the jurisdiction is less than the county.[7]

When county includes several jurisdictions particular jurisdiction must be specified.

The court will take judicial notice of statutory subdivisions of counties.[8]

[1] See Whart. Crim. Law, 8th ed. §§ 278 *et seq.*, 282.

[2] See this fully discussed, Whart. Crim. Law, 8th ed. § 284, note.

[3] State *v.* Jones, 4 Halst. 357; Searcy *v.* State, 4 Tex. 450. See U. S. *v.* Dawson, 15 How. U. S. 467; State *v.* Jackson, 39 Me. 291; State *v.* Fish, 4 Ired. 219. Infra, § 147. As differing from text see McElroy *v.* State, 13 Ark. 708.

[4] Jordan *v.* State, 22 Ga. 545; McElroy *v.* State, 13 Ark. 708. See infra, § 146.

[5] State *v.* Adams, 2 Battle's Dig. 729.

[6] Com. *v.* Springfield, 7 Mass. 9.

[7] Taylor *v.* Com. 2 Va. Cas. 94; McBride *v.* State, 10 Humph. 615. Supra, § 139.

[8] Ibid.; Com. *v.* Springfield, 7 Mass. 9; State *v.* Powers, 25 Conn. 48. But it is said that averring a place to be at "W.," and not at the "city"

§ 143. Where the caption gives the name of the State, it need not be repeated in the indictment. And a complaint made "in behalf of the State," alleging an offence in a particular city and county (corresponding in name to a city and county of the State), against a statute the title and date of which are stated, and rightly describing a statute passed by the legislature of the State, sufficiently shows that the offence was committed within the State, without any caption, or venue in the margin.[1] And, generally, as the name of the State is assumed, in all the proceedings, it need not be given in the indictment.[2]

Name of State not necessary in indictment.

§ 144. Of *transitory* offences, as they are called (*e. g.* offences of which the object is not necessarily attached to a particular spot), a variance as to specification is not fatal if jurisdiction be correctly given.[3]

Sub-description in transitory offences immaterial.

§ 145. But where the case is stated by way of local description and not as a venue merely, a variance in what are called *local* offences (*e. g.* where the object is necessarily attached to a place) is fatal;[4] as where, in an indictment for arson, the tenement was averred to be in the sixth ward, whereas it was in the fifth.[5] The same particularity is required in cases of stealing in a dwelling-house, of burglary,[6]

But not as to matters of local description.

or "town" of "W.," is not enough. Com. *v.* Barnard, 6 Gray, 488. See, however, Tower *v.* Com. 111 Mass. 117, where it was held that it was enough, in error, to aver the *town;* the court taking notice that the town was in a particular county. Compare comments in Heard's Pleading, 81.

[1] Commonwealth *v.* Quin, 5 Gray, 478.

[2] State *v.* Wentworth, 37 N. H. 196; State *v.* Lane, 4 Ired. 113.

[3] In the city of New York, the practice is to charge the ward as part of the venue: thus: "In the First Ward of the city of New York;" in New Orleans, to name the parish. The same practice obtains elsewhere. If, however, the offence is shown to be within the jurisdiction of the court, the special place averred, if unnecessary, need not, when the offence is transitory, be proved. 2 Hale, 179, 244, 245; 4 Bla. Com. 306; 2 Hawk. c. 25, s. 84; c. 46, ss. 181, 182; 1 East P. C. 125; Holt, 534; R. *v.* Woodward, 1 Mood. C. C. 323; Com. *v.* Gillon, 2 Allen, 502; Carlisle *v.* State, 32 Ind. 55; Heikes *v.* Com. 26 Penn. St. 531. Whart. Crim. Ev. § 109.

[4] State *v.* Cotton, 4 Foster (N. H.), 143; Moore *v.* State, 12 Ohio St. 387; State *v.* Crogan, 8 Iowa, 523. Whart. Crim. Ev. § 109.

[5] Infra, § 148; People *v.* Slater, 5 Hill N. Y. R. 401.

[6] R. *v.* St. John, 9 C. & P. 40.

of forcible entry and detainer, of arson, and in all cases where a statute makes a special locality essential. In such cases, where the situation of the premises is specially laid, the description must be strictly proved.[1] Under the same head are to be included injuries to machinery permanently fixed, and buildings;[2] nuisances, when emanating from local sites;[3] houses of ill-fame.[4] Such specifications, though unnecessary, must be proved.[5]

§ 146. It is sufficient if the place be averred simply as "the county aforesaid," when the county is named in the commencement, for which the grand jurors were sworn.[6] It is otherwise when two counties are named.[7]

"County aforesaid" generally enough.

Even "county" may be left out in the statement of place, when it can be presumed from prior averments.[8] Thus it has been held enough, in an indictment against A. B., of the town of C., County of D., to aver that the offence was committed at C.[9]

"County" or "town" or "city," however, must somewhere appear; and it is not enough to aver the offence to have been committed in *C.* The indictment must say, either directly or by reference to the caption, that *C.* is a town or city or county.[10]

[1] R. *v.* Redley, Russ. & R. 515; Archbold's C. P. 38; State *v.* Cotton, 4 Foster N. H. 143; Grimme *v.* Com. 5 B. Mon. 263. See Chute *v.* State, 19 Minn. 271; Norris *v.* State, 3 Greene (Iowa), 513.

[2] R. *v.* Richards, 1 M. & R. 177.

[3] Com. *v.* Heffron, 102 Mass. 148.

[4] State *v.* Nixon, 18 Vt. 70.

[5] Whart. Crim. Ev. § 109.

[6] Com. *v.* Edwards, 4 Gray, 1; State *v.* Smith, 5 Harring. 490; Wingard *v.* State, 13 Ga. 396; State *v.* Ames, 10 Mo. 743; State *v.* Simon, 50 Mo. 370; State *v.* Shull, 3 Head (Tenn.), 42; Evarts *v.* State, 48 Ind. 422; Noe *v.* People, 39 Ill. 96. See, to same effect, State *v.* Baker, 50 Me. 45; State *v.* Roberts, 26 Me. 263; State *v.* Conley, 39 Me. 78; Haskins *v.* People, 16 N. Y. 344; State *v.* Lamon, 3 Hawks, 175; State *v.* Bell, 3 Ired. 506; State *v.* Tolever, 5 Ired. 452. Compare 1 Wms. Saund. 308.

[7] State *v.* McCracken, 20 Mo. 411.

[8] See State *v.* Walter, 14 Kans. 375. Where it was alleged that the defendant broke and entered "the city hall of the city of Charlestown;" this was held a sufficient averment that the property of the building alleged to be broken and entered is in the city of Charlestown. Com. *v.* Williams, 2 Cush. 583.

[9] Com. *v.* Cummings, 6 Gray, 487.

[10] Com. *v.* Barnard, 6 Gray, 488. Supra, § 142.

An indictment for burning a barn situate at a certain place, which was within the jurisdiction of the court, and alleged to be "within the curtilage of the dwelling-house of A.," need not also aver that the dwelling-house was at that place. Commonwealth *v.* Barney, 10 Cush. 480.

In an indictment for wounding, the time and place of the assault and stroke were formally laid, but no

§ 147. *A change of local title*, when enacted by the legislature, must be followed by the pleader. Thus in North Carolina, by an act of assembly, passed in 1842, a part of the county of Burke, and a part of the county of Rutherford were constituted a new county, by the name of M'Dowell; and by a supplemental act, jurisdiction of all criminal offences committed in that part of M'Dowell taken from Burke was given to the Superior Court of Burke. It was held that an indictment for a criminal offence, alleging it to have been committed in Burke County, could not be supported by evidence showing the offence to have been committed in M'Dowell, after the establishment of the latter county.[1] By the same rule, it is not error to describe a county within which the offence was committed by the name belonging to it at the time of trial, even though it went by another name at the time when the act was committed.[2]

Title, when changed by legislature, must be followed.

§ 148. *Where a fine is payable, or penalty is special, to a subdivision of county*, it has been said that the pleading should aver such subdivision, so as to guide the court in the application of the fine or penalty.[3] But it has been held in Pennsylvania, with better reason, that in an indictment for adultery, it is not necessary to mention the township in which the defendant resided, though of moment in the sentence, because the court may ascertain the place of the defendant's residence otherwise than by the verdict of the jury.[4]

Venue need not follow fine.

§ 149. *In larceny*, the venue may be laid in any county in which the thief was possessed of the stolen goods.[5]

In larceny venue may be in place where goods are taken.

§ 150. Where an indictment omits to lay a venue of the offence charged, it is a fatal defect, on motion to quash, or in arrest of judgment.[6]

Omission of venue is fatal.

venue was alleged as to the wounding, the result of the stroke. It was held that the venue was sufficiently laid. State *v.* Freeman, 21 Mo. 481; State *v.* Bailey, 21 Mo. 484.

[1] State *v.* Fish, 4 Ired. 219.

[2] McElroy *v.* State, 8 Eng. (13 Ark.) 708; and see Jordan *v.* State, 22 Ga. 545. Supra, § 141.

[3] Botto *v.* State, 26 Miss. 108. See Legori *v.* State, 8 Sm. & M. 697; State *v.* Smith, 5 Harring. 490, and cases cited supra, § 145.

[4] Duncan *v.* Com. 4 S. & R. 449.

[5] See Whart. Crim. Law, 8th ed. §§ 391, 930; and see R. *v.* Peel, 9 Cox C. C. 220; Whart. Crim. Ev. § 111.

[6] Infra, § 385; Thompson *v.* State, 51 Miss. 353; Searcy *v.* State, 4 Tex. 450; Morgan *v.* State, 13 Flor. 671.

In another volume the proof of place is discussed at large; and it is shown that the place of the offence must be proved to be within the jurisdiction of the court,[1] though the proof of this is inferential.[2] It will also be seen that when a place is stated as matter of description, a variance may be fatal.[3] The venue in homicide may be placed by statute in the place of death;[4] and that of conspiracy in the place of any overt act.[5]

VII. STATEMENT OF OFFENCE.

1. Offence must be made Judicially to appear, § 151.
2. Statement must be Technically Exact, § 153.
3. Not enough to charge a Conclusion of Law, § 154.
4. Common Barrator and Common Scold, etc., § 155.
5. Matters Unknown, § 156.
6. Bill of Particulars, § 157.
7. Surplusage need not be stated, § 158.
8. Alternate or Disjunctive Statements, § 161.
9. Knowledge and Intent, § 164.
10. Inducement and Aggravation, § 165.
11. Objects for which Particularity is required, § 166.

§ 151. It is a general rule that the special matter of the whole offence should be set forth in the indictment with such certainty, that the offence may judicially appear to the court.[6] When special facts are an essential part of an offence, they must be set out. Thus, in indictments for murder or manslaughter, it is necessary to state that the death ensued in consequence of the act of the prisoner,[7] and in

Offence must be set forth with reasonable certainty.

[1] Whart. Crim. Ev. § 107.

[2] Ibid. § 108.

[3] Ibid. § 109.

[4] Ibid. § 110. See Whart. Crim. Law, 8th ed. § 292.

[5] Whart. Crim. Ev. § 111; Whart. Crim. Law, 8th ed. § 1397.

[6] U. S. *v.* Cruikshank, 92 U. S. 542; U. S. *v.* Simmons, 96 U. S. 360; Com. *v.* Perry, 114 Mass. 263; State *v.* Stiles, 40 Iowa, 148; State *v.* Murray, 41 Iowa, 580.

Thus in U. S. *v.* Cruikshank, 92 U. S. 542, it was held that an indictment under the Act of May 31, 1870, prohibiting the intimidation of citizens, must contain the averment that the right hindered was one secured by the Constitution and laws of the United States.

An indictment for procuring another to do a particular thing must give the name of such other person, or aver that the name was unknown. U. S. *v.* Simmons, 96 U. S. 360.

See, to same effect, People *v.* Taylor, 3 Denio, 91; Biggs *v.* People, 8 Barb. 547; State *v.* Philbrick, 31 Me. 401; Kit *v.* State, 11 Humph. 167.

The doctrine of this branch of pleading is well stated by Judge Kane, in U. S. *v.* Almeida, Wh. Prec. 1061–2.

[7] State *v.* Wimberly, 3 McCord, 190.

perjury it is necessary to set out the oath as an oath taken in a judicial proceeding, and before a proper person, in order to see whether it was an oath which the court had jurisdiction to administer.[1] And in the prosecution of a constable for not serving, it is requisite to set out the mode of his election, because if he was not legally elected to the office, he cannot be guilty of a crime in refusing to execute his duties.[2] Certainty to common intent, it is said, is what is required; perfect certainty is unattainable, and the attempt to secure it would in almost every case lead to a variance. An illustration of the degree of certainty required may be found in indictments for bigamy. In such indictments a variance as to the second wife's name is fatal, it being necessary to individuate her, in order to determine the offence.[3] But the weight of authority is that it is not necessary to set forth the name of the first wife.[4] And if we lean on the analogy of indictments for receiving stolen goods, we should hold that the more general statement is enough. If we are forced to state in detail the marital relations of the parties, it would be necessary to go still further, and aver that the first wife or husband of the defendant was capable of consenting to marriage, and was not bound by other matrimonial ties. As, however, the first marriage in all its relations is simply matter of inducement, it is enough to state it in general terms, without specifying the details. If these are needed for justice, they can be supplied by a bill of particulars.[5] Where, however, the details of the first marriage are given, a variance in the name is fatal.[6] The certainty, in other words, must be such, so far as concerns the substance of the offence, as exhibits the truth according to its ordinary general acceptation; not the truth with its *differentia* scientifically and exhaustively displayed.[7]

Omission of essential incidents is fatal.

§ 152. We may hold it to be a general rule that, where the act is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality con-

[1] Cro. Eliz. 137; Cowp. 683; Whart. Crim. Law, 8th ed. §§ 1245 *et seq.*

[2] Cowp. 683; 5 Mod. 196.

[3] R. *v.* Deeley, 4 C. & P. 579; 1 Mood. C. C. 303.

[4] Hutchins *v.* State, 28 Ind. 34; Com. *v.* Whaley, 6 Bush, 266; State *v.* Loftin, 2 Dev. & Bat. 31.

[5] *Contra*, State *v.* La Bore, 26 Vt. 265.

[6] R. *v.* Gooding, C. & M. 297.

[7] See Buller, J., R. *v.* Lyme Regis, 1 Doug. 159.

sists.[1] Hence, the omission of any fact or circumstance necessary to constitute the offence will be fatal; as, in an indictment for obstructing an officer in the execution of process, without showing that he was an officer of the court out of which the process issued, and the nature of the official duty and of the process.[2] An indictment, also, for contemptuous or disrespectful words to a magistrate is defective without showing that the magistrate was in the execution of his duty at the time;[3] and an indictment against a public officer for non-performance of a duty without showing that he was such an officer as was bound by law to perform that particular duty.[4] It is necessary, also, in an indictment for obtaining money under false pretences, to show whose money it was;[5] and in an indictment for stealing a horse, to aver that the defendant "took" the horse.[6]

At the same time it is not necessary, when a minor offence is enclosed in a greater, to introduce the averments showing the defendant to have been guilty of the greater offence, though these should be proved by the evidence. The defendant, however, on such an indictment, can be convicted only of the minor offence.[7]

Terms must be technically exact.

§ 153. Not only must all the circumstances essential to the offence be averred, but these averments must be so shaped as to include the legal characteristics of the offence. Thus, an indictment charging the defendant with forging a receipt against a book account is defective when

[1] 2 Hawk. c. 25, s. 57; Bac. Ab. Indictment, G. 1; Cowp. 683; People v. Martin, 52 Cal. 201.

[2] R. v. Osmer, 5 East, 304. See R. v. Everett, 8 B. & C. 114; State v. Burt, 25 Vt. 373; McQuoid v. People, 3 Gilman, 76; Cantrill v. People, Ibid. 356.

[3] R. v. Lease, Andr. 226.

[4] 5 T. R. 623.

[5] R. v. Norton, 8 C. & P. 196.

[6] 2 Hale, 184. See R. v. Cheere, 7 D. & R. 461; 4 B. & C. 902; 1 B. & Adol. 861.

In New York, where an attorney of the Court of Common Pleas was charged with extortion, and the indictment averred that on ——— he obtained a judgment in favor of one J. R. v. A. C., and that he did extort and receive from the said A. C. $11 over and above the fees usually paid for such service, and due in the suit aforesaid, &c., it was held that the indictment was not sufficiently precise, it not specifying how much he received on his own account, and how much on that of the officers and members of the court. People v. Rust, 1 Caines' R. 133.

[7] See State v. Bowling, 10 Humph. 52; Whart. Crim. Law, 8th ed. § 27.

it does not bring the facts up to the definition of forgery.[1] So an indictment for fornication and bastardy must use the technical expressions which the statutes prescribe.[2]

Not enough to charge conclusion of law.

§ 154. As the indictment must contain a specific description of the offence, it is not enough to state a mere conclusion of law.[3] Thus, it would be insufficient to charge the defendant with "stealing" or "murdering."[4] So it is bad to accuse him of being a common defamer, vexer, or oppressor of many men,[5] or a common disturber of the peace, and having stirred up divers quarrels,[6] or a common forestaller,[7] or a common thief,[8] or a common evil doer,[9] or a common champertor,[10] or a common conspirator, or any other such vague accusation.[11] On the same reasoning, in an indictment for obtaining money by false pretences, it will not suffice merely to state that the defendant falsely pretended certain allegations, but it must also be stated by express averment what parts of the representation were false, for otherwise the defendant will not know to what circumstances the charge of falsehood is intended to apply.[12] It is also not sufficient, generally, to charge "malicious mischief" or "malicious injury;" the facts of the injury must be given.[13] An indictment, on the same principle, charging a man with being a common cheat, or a common swindler or defrauder, is bad, and is not helped by an averment that, by divers false pretences and false tokens, he deceived and defrauded divers good citizens of the said State.[14] A count, also, in an indictment charging that the de-

[1] Infra, §§ 154, 220; State *v.* Dalton, 2 Murph. 379.

[2] Com. *v.* Pintard, 1 Browne, 59; Simmons *v.* Com. 1 Rawle, 142.

[3] Infra, § 230; and see U. S. *v.* Cruikshank, 92 U. S. 544; State *v.* Record, 56 Ind. 107.

[4] 1 Roll. Rep. 79; 2 Roll. Ab. 79; 2 Stra. 699; 2 Hawk. c. 25, s. 59; Com. Dig. Indictment, G. 3; Bac. Ab. Indictment, G. 1. Infra, § 230.

[5] 2 Roll. Ab. 79; 1 Mod. 71; 2 Stra. 848, 1246, 1247; 2 Hale, 182; 2 Hawk. c. 25, s. 59; Com. Dig. Indict. G. 3; Bac. Ab. Indict. G. 1.

[6] Ibid. Infra, §§ 230, 231.

[7] Moore, 302; 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1.

[8] Ibid.; 2 Roll. Ab. 79; 2 Hale, 182; Cro. C. C. 37.

[9] 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1. Infra, §§ 230, 231.

[10] 2 Hale, 182; 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1.

[11] Ibid; Com. *v.* Wise, 110 Mass. 181. See Whart. Crim. Law, 8th ed. §§ 1429, 1442–8.

[12] 2 M. & S. 379. See Whart. Crim. Law, 8th ed. § 1213.

[13] Whart. Crim. Law, 8th ed. § 1080; and see Ibid. § 1841.

[14] Whart. Crim. Law, 8th ed. §§ 1129, 1442–8, 1450; U. S. *v.* Royall, 3 Cranch C. C. R. 618.

fendant sold a lottery ticket, and tickets in a lottery not authorized by the laws of the Commonwealth, is bad, not being sufficiently certain;[1] and so of a count charging the defendant with voting without having the legal qualifications of a voter.[2] And so of a count which charges the defendant with unlawfully and fraudulently adulterating "a certain substance intended for food, to wit, one pound of confectionery."[3]

§ 155. There are, however, several marked exceptions to the rule requiring the offence, in each case, to be specifically set forth. Thus, an indictment charging one with being a "common barrator;"[4] or, a "common scold;"[5] or, a "common night-walker;"[6] is good. The same rule applies to certain lines of nuisance, to describe which generic terms are adequate, as is the case with a "house of ill-fame;" a "disorderly house,"[7] and a "tippling-house."[8] So an indictment for betting at faro bank need not set out the particular nature of the game, nor the name of the person with whom the bet was made.[9] But an indictment, as has just been seen, charging the defendant as a common cheat, is bad.[10]

Exceptions in case of "common barrators," "common scolds," and certain nuisances.

§ 156. If a particular fact which is matter of description and not vital to the accusation cannot be ascertained, the indictment will be good, if it state that such fact is unknown to the grand jury, provided that the fact in question be described as accurately as possible.[11] But

Matters unknown may be proximately described.

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

[2] People v. Wilber, 4 Parker C. R. 19; Pearce v. State, 1 Sneed, 63; Quinn v. State, 35 Ind. 485; but see State v. Lockbaum, 38 Conn. 400; and see infra, §§ 230, 231.

[3] Com. v. Chase, 125 Mass. 202.

[4] 6 Mod. 311; 2 Hale, 182; 1 Russell, 185; 1 Ch. C. L. 230; Whart. Crim. Law, 8th ed. §§ 1442–8, 1450; State v. Dowers, 45 N. H. 543; Com. v. Davis, 11 Pick. 432. See Penn. Rev. Act, 1860, tit. ii.

[5] 6 Mod. 311; 9 Stra. 1246; 2 Keb. 409; 1 Russell, 302; U. S. v. Royall, 3 Cranch C. C. 618; Com. v. Pray, 13 Pick. 362; James v. Com. 12 Serg. & Rawle, 220; Whart. Crim. Law, 8th ed. §§ 1442–8, 1450.

[6] State v. Dowers, 45 N. H. 543.

[7] State v. Patterson, 7 Ired. 70; Whart. Crim. Law, *ut supra*.

[8] State v. Collins, 48 Me. 217. See Com. v. Pray, 13 Pick. 359; 1 Term R. 754; 1 Russell, 301.

[9] State v. Ames, 1 Mo. 372. See Whart. Crim. Law, 8th ed. § 1466.

[10] Supra, § 154; infra, §§ 230, 231; Whart. Crim. Law, 8th ed. §§ 1128, 1129, 1442.

[11] State v. Wood, 53 N. H. 484; Com. v. Ashton, 125 Mass. 384; Com. v. Fenno, 125 Mass. 387; Com. v. Martin, 125 Mass. 394; Com. v. Web-

"this allegation, that the name or other particular fact is 'unknown to the grand jury,' is not merely formal; on the contrary, if it be shown that it was, in fact, known to them, then, the excuse failing, it has been repeatedly held that the indictment was bad, or that the defendant should be acquitted, or the judgment arrested or reversed." [1]

Bill of particulars may be required.

§ 157. As will hereafter be more fully seen, whether a bill of particulars or specification of facts shall be required is exclusively within the discretion of the presiding judge.[2] In many cases of general charges (*e. g.* conspiracy, where the indictment merely avers a general conspiracy to cheat), such a specification on the part of the prosecution will be exacted.[3] As a general rule, the counsel for the prosecution are to be restricted, after such an order, to proof of the particulars stated in the bill, though this limitation may, in extraordinary cases, be relaxed at the discretion of the court.[4]

Surplusage need not be stated; and if stated may be disregarded.

§ 158. It is not requisite to charge in the indictment anything more than is necessary to accurately and adequately express the offence; and when unnecessary averments or aggravations are introduced, they can be considered as surplusage, and as such disregarded.[5]

The following may be given as illustrations of surplusage: —

The averment of "goods and chattels," when used to describe

ster, 5 Cush. 295; People *v.* Taylor, 3 Denio, 91. As to instrument of death see Whart. Crim. Law, 8th ed. § 525; Com. *v.* Webster, *ut supra;* State *v.* Williams, 7 Jones (N. C.), 446. As to lost writings see infra, § 175; Com. *v.* Martin, 125 Mass. 394. As to names see supra, § 104.

[1] Christiancy, J., in Merwin *v.* People, 26 Mich. 298, citing R. *v.* Walker, 3 Camp. 264; 1 Chitty's Cr. Law, 213; R. *v.* Robinson, Holt N. P. 595, 596; Blodget *v.* State, 3 Ind. 403; and see Com. *v.* Hill, 11 Cush. 137; Hays *v.* State, 13 Mo. 246; Reed *v.* State, 16 Ark. 499.

[2] Com. *v.* Snelling, 15 Pick. 321; Com. *v.* Giles, 1 Gray, 466. See Wh. Prec. 615, n. for form. See more fully infra, §§ 702 *et seq.* As to embezzlement, see Whart. Crim. Law, 8th ed. § 1048. As to conspiracy see Ibid. § 1386; and see, generally, Com. *v.* Davis, 11 Pick. 432; Com. *v.* Wood, 4 Gray, 11.

[3] R. *v.* Kendrick, 5 A. & E. (Q. B.) 49; R. *v.* Hamilton, 7 C. & P. 448; R. *v.* Brown, 8 Cox C. C. 69; People *v.* McKinney, 10 Mich. 54.

[4] R. *v.* Esdaile, 1 F. & F. 213; R. *v.* Brown, 8 Cox C. C. 69.

[5] See Whart. Crim. Ev. §§ 138 *et seq.;* U. S. *v.* Claflin, 13 Blatch. 178; State *v.* Ballard, 2 Murph. 186; State *v.* Munch, 22 Minn. 67.

ownership of *choses in action*, when this ownership is independently described;[1]

Ownership when immaterial;[2]

Intent, when unnecessary to the offence;[3]

Conclusions of law, summing up the offence unnecessarily; as where an indictment for taking a voluntary false oath, not amounting to perjury, concludes, and "so the said A. B. did commit perjury," &c.;[4]

Unnecessary aggravation;[5]

Falsity of the charge, in cases where the indictment is for conspiracy to charge with an indictable offence, and when the question of falsity is not at issue;[6]

Unnecessary terms of art, such as "feloniously;"[7]

Difference between a greater and a lesser offence, when the defendant is convicted of the latter;[8]

Specifications of ways of resisting an officer;[9]

All but a particular article in larceny, when this is relied on to the exclusion of others stated;[10]

Unnecessary predicates if divisible;[11]

All superfluous assignments in perjury and false pretences;[12]

All redundant cumulative intents;[13]

All cumulative descriptions of a person.[14]

Surplusage is not ground for demurrer.[15] But even though an averment is more particular than it need be, yet if it cannot be stricken out without removing an essential part of the case, it cannot be regarded as surplusage; and if there be a variance in proving it, the prosecution fails.[16]

[1] R. *v.* Radley, 1 Den. C. C. 450; Com. *v.* Bennett, 118 Mass. 452. Infra § 191.

[2] Pye's case, East P. C. 983; U. S. *v.* Howard, 3 Sumn. 19.

[3] R. *v.* Jones, 2 B. & Ad. 611.

[4] R. *v.* Hodgkiss, L. R. 1 C. C. 212.

[5] Com. *v.* Randall, 4 Gray, 36; Scott *v.* Com. 6 S. & R. 224.

[6] R. *v.* Hollingberry, 4 B. & C. 329; 6 D. & R. 345.

[7] Infra, § 261.

[8] Whart. Crim. Ev. § 144. Infra, §§ 455 *et seq.*

[9] State *v.* Copp, 15 N. H. 212.

[10] Whart. Crim. Ev. 135, 145. See infra, § 470.

[11] Whart. Crim. Ev. § 134.

[12] Whart. Crim. Ev. § 131.

[13] R. *v.* Hanson, 1 C. & M. 334.

[14] Supra, §§ 96 *et seq.*

[15] Steph. Pl. 376,

[16] R. *v.* Deeley, 1 Mood. C. C. 303; U. S. *v.* Foye, 1 Curt. C. C. 364; State *v.* Noble, 15 Me. 476; Com. *v.* Wellington, 7 Allen, 299; Whart. Crim. Ev. §§ 109, 146.

§ 158 *a*. A *videlicet*, in reference to statement of time, has been already considered.[1] The object of the *videlicet*, which may be extended to allegations of quantity, of distance, of localization, of differentiation, is to introduce a specification, by way of definition, to a clause immediately preceding, and thus to separate, by a kind of bracketing, this specification from other clauses.[2] This "is a precaution which is totally useless when the statement placed after the *videlicet* is material, but which, in other cases, prevents the danger of a variance by separating the description from the material averment, so that the former, if not proved, may be rejected, without mutilating the sentence which contains the latter."[3]

Videlicet is the pointing out of an averment of probable specification.

§ 159. Where an assault is duly averred, then the intent with which this assault was committed is matter of surplusage, and need not be proved in order to secure a conviction of the assault.[4] Even an assault with intent need not specify the facts necessary to constitute an offence whose actual and complete shape was not at the time matured. Thus an indictment for an assault with an intent to steal from the pocket, without stating the goods or money intended to be stolen, is good;[5] nor is it necessary to aver that the prosecutor had anything in his pocket to be stolen.[6] In an indictment, also, for an assault with intent to murder, it is not necessary to state the instrument, or means made use of by the assailant, to effectuate the murderous intent.[7] So in an indictment

Assault may be sustained without specification of object.

[1] Supra, § 122.

[2] 1 Stark. C. P. 251-2; Ryalls *v.* R. 11 Q. B. 781, 797; Com. *v.* Hart, 10 Gray, 468; People *v.* Jackson, 3 Denio, 101; Crichton *v.* People, 6 Park. C. R. 363; State *v.* Heck, 23 Minn. 551. See supra, § 123.

[3] Heard's Pl. 141; citing 1 Smith's Lead. Cas. (16th Eng. ed.) 592.

[4] R. *v.* Higgins, 2 East, 5; though see R. *v.* Marsh, 1 Den. C. C. 505; Whart. Crim. Law, 8th ed. § 637.

[5] Com. *v.* Rogers, 5 S. & R. 463; Whart. Crim. Law, 8th ed. § 637.

[6] Com. *v.* McDonald, 5 Cush. 365. See Com. *v.* Doherty, 10 Cush. 52.

[7] U. S. *v.* Herbert, 5 Cranch C. C. 87; State *v.* Daley, 41 Vt. 564; State *v.* Dent, 3 Gill & John. 8; Rice *v.* People, 15 Mich. 9; Kilkelly *v.* State, 43 Wis. 604; but see State *v.* Johnson, 11 Tex. 22; State *v.* Jordan, 19 Mo. 213; Trexler *v.* State, 19 Ala. 21; State *v.* Chandler, 24 Mo. 371; State *v.* Hubbs, 58 Ind. 415. See fully Whart. Crim. Law, 8th ed. § 644. The question, it is to be observed, depends on the statute constituting the offence. See State *v.* Munch, 22 Minn. 67.

for breaking and entering a dwelling-house, with intent to commit a rape, it need not be alleged that the defendant "then and there" intended to commit the rape, nor need the offence of rape be fully and technically set forth.[1] The means of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment,[2] though when an *attempt* is averred, it is necessary that some act constituting such attempt (*e. g.* an assault) should be laid.[3] The *attempt* is not *per se* indictable, and needs extraneous facts to make it the subject of an indictment, while it is otherwise with an *assault*. In such cases the term feloniously must ordinarily be used when the object is felonious.[4]

Act of one confederate may be averred as act of the other.

§ 159 *a*. As we shall have occasion to see at length when the proof of variance is discussed,[5] the act of an agent may be averred as the act of the principal, and that of one confederate as the act of the other.[6]

Descriptive averment must be proved.

§ 160. When an averment is descriptive, it may so far enter into the designation of the offence that it must be specifically proved.[7]

[1] Com. *v.* Doherty, 10 Cush. 52.

An indictment for an assault with intent to commit a rape need not allege that the intent was to "carnally and unlawfully know." Singer *v.* People, 13 Hun, 418; aff. 75 N. Y. 608.

[2] Mackesey *v.* People, 6 Park. C. R. 114; State *v.* Dent, 3 Gill & J. 8; approved in U. S. *v.* Simmons, 96 U. S. 360; citing also U. S. *v.* Gooding, 12 Wheat. 473; U. S. *v.* Ulriel, 3 Dillon, 535.

[3] Randolph *v.* Com. 6 S. & R. 398; Clark's case, 6 Grat. 675. See State *v.* Wilson, 30 Conn. 503. See, as tending to a laxer view, U. S. *v.* Simmons, 96 U. S. 360; People *v.* Bush, 4 Hill N. Y. 132. As to precision necessary in indictments for attempts, &c., see Whart. Crim. Law, 8th ed. §§ 173 *et seq.*, 190.

In U. S. *v.* Simmons, 96 U. S. 360, it was held that where a defendant is not charged with using a still, boiler, or other vessel himself, but with causing and procuring some person to use them, the name of such person must be given in the indictment.

The indictment, when for distilling vinegar illegally, must set out that the apparatus was used for that purpose, and in the premises described, and the vinegar manufactured *at the time* the apparatus described was being used. The averment that defendant caused and procured the apparatus to be used for distilling implies with sufficient certainty that it was so used; it is not essential that its actual use shall be set out. See U. S. *v.* Claflin, 13 Blatch. 178.

[4] Infra, § 260.

[5] Whart. Crim. Ev. § 102.

[6] Supra, § 140.

[7] Supra, § 158; Whart. Crim. Ev. §§ 109, 146.

§ 161. The certainty required in an indictment precludes the adoption of an alternative statement.[1] Thus, if the indictment charge the defendant with one or other of two offences, in the disjunctive, as that he murdered *or* caused to be murdered, forged *or* caused to be forged,[2] burned *or* caused to be burned,[3] sold spirituous *or* intoxicating liquors;[4] *levavit*, vel *levari causavit*,[5] conveyed *or* caused to be conveyed, &c., it is bad for uncertainty;[6] and the same, if it charge him in two different characters, in the disjunctive, as *quod* A. *existens servus* sive *deputatus*, took, &c.;[7] and so where the defendant is charged with having administered a poison *or* drug.[8] So, generally, an indictment which may apply to either of two different offences, and does not specify which, is bad.[9] On the other hand, alternatives have been permitted when they qualify an unessential description of a particular offence, and do not touch the offence itself.[10] Thus, in Vermont, it was held not to be a fatal objection, that an indictment charged the defendant with the larceny of a horse, described as being either of a "brown or bay color."[11] In Pennsylvania, indictments averring certain trees cut down not to be the property of the defendants "*or* either of them,"[12] and laying a nuisance to be in the "highway *or* road," &c., have been held good, the alternative being rejected as surplusage.[13] In several precedents in Massachusetts,

Alternative statements are inadmissible.

[1] See State *v.* Charlton, 11 W. Va. 332.

[2] 2 Hawk. c. 35, s. 58; R. *v.* Stocker, 1 Salk. 342, 371; Com. *v.* Perrigo, 3 Metc. (Ky.) 5; People *v.* Tomlinson, 35 Cal. 503. As to averment of such disjunctive allegations see infra, § 228. That such averments are divisible see infra, §§ 228, 251.

[3] People *v.* Hood, 6 Cal. 236.

[4] Com. *v.* Grey, 2 Gray, 501.

[5] R. *v.* Stoughton, 2 Str. 900.

[6] R. *v.* Flint, Hardw. 370. See R. *v.* Morley, 1 Y. & J. 221; State *v.* Gary, 36 N. H. 359; State *v.* Drake, 1 Vroom, 422; Noble *v.* State, 59 Ala. 73.

[7] Smith *v.* Mall, 2 Roll. Rep. 263.

[8] State *v.* Drake, 1 Vroom, 422; Com. *v.* France, 2 Brewst. 568; State *v.* Green, 3 Heisk. 131; Whiteside *v.* State, 4 Cold. 183. See Wingard *v.* State, 13 Ga. 396.

[9] R. *v.* Marshall, 1 Mood. C. C. 158; State *v.* Harper, 64 N. C. 129; Johnson *v.* State, 32 Ala. 583; Horton *v.* State, 60 Ala. 73.

[10] Barnett *v.* State, 54 Ala. 579; State *v.* Newsom, 13 W. Va. 859.

[11] State *v.* Gilbert, 13 Vt. 647. Infra, § 228.

[12] Moyer *v.* Com. 7 Barr, 439. See McGregor *v.* State, 16 Ind. 9.

[13] Res. *v.* Arnold, 3 Yeates, 417; and see State *v.* Corrigan, 24 Conn. 286; Kaisler *v.* State, 55 Ala. 64; State *v.* Ellis, 4 Mo. 474.

the expression "as an innholder *or* victualler" formally occurs.[1] And in the U. S. Circuit Court for Michigan, it has been held that "cutting *or* causing to be cut" is not fatal.[2] The principle seems to be, that "or" is only fatal when it renders the statement of the offence uncertain, and not so when one term is used only as explaining or illustrating the other.[3] "Or," also, may be introduced in enumerating the negative averments required to exclude the exceptions of a statute.[4] And ordinarily the objections, if good, cannot be taken after verdict.[5]

Disjunctive offences in statute may be conjunctively stated.

§ 162. Even where a statute disjunctively enumerates offences, or the intent necessary to constitute such offences, the indictment cannot charge them disjunctively.[6] Thus where a statute against unlawful shooting affixes a penalty when the act is done with intent to maim, disfigure, disable, or kill (in the disjunctive), the disjunctive statement of intent is bad.[7] Under statutes, also, describing the several phases of forgery disjunctively, it is held fatal to say that the defendant forged, or caused to be forged, an instrument,[8] or that he carried and conveyed, or caused to be carried and conveyed, two persons having the small-pox, so as to burden a certain parish.[9] It is therefore error to state the successive gradations of statutory offences disjunctively; and

[1] Com. *v.* Churchill, 2 Metcalf, 119, 125; Com. *v.* Thayer, 5 Metcalf, 246. The paragraph also, "did cause to be published, &c., in a certain paper or publication," seems to have escaped the vigilance of counsel who were concerned in the great case of People *v.* Crosswell, 3 Johnson's Cases, 338.

[2] U. S. *v.* Potter, 6 McLean C. C. 186. See also State *v.* Ellis, 4 Mo. 474. Infra, § 228.

[3] Com. *v.* Grey, 2 Gray, 501; Brown *v.* Com. 8 Mass. 59; People *v.* Gilkinson, 4 Park. C. C. 26; State *v.* Ellis, 4 Mo. 474. Infra, § 228. See Morgan *v.* Com. 7 Grat. 592. It has been held not error to charge the offence of selling spirituous liquors, wines, &c., without a license, in the disjunctive, instead of the conjunctive, by using the word "or" in lieu of "and," in describing the various kinds of liquors and drinks charged in the indictment to have been sold without a license. Cunningham *v.* State, 5 W. Va. 508.

[4] Ibid; State *v.* Burns, 20 N. H. 550.

[5] Johnson *v.* State, 50 Ala. 456.

[6] U. S. *v.* Armstrong, 5 Phil. Rep. 273; State *v.* Colwells, 3 R. I. 284; State *v.* Price, 6 Halst. 203; Jones *v.* State, 1 McMullan, 236; Whiteside *v.* State, 4 Cold. 183. Infra, § 228.

[7] Angel *v.* Com. 2 Va. Cas. 231.

[8] 1 Burr. 399; 1 Salk. 342, 371; 8 Mod. 32; 5 Mod. 137.

[9] 1 Sess. Cases, 307.

to state them conjunctively, when they are not repugnant, is allowable.[1]

Otherwise as to distinct and substantive offences.

§ 163. When a statute in one clause makes several distinct and substantive offences indictable, neither of which is included in the other, it is better to specify particularly the actual offence committed.[2] Thus, where the language of the statute was, "any person who shall presume to keep a tippling-house, or sell rum, brandy, whiskey, tafia, or other spirituous liquors, &c., shall be liable," &c.; and the indictment charged the defendant with selling the particular liquors in the aggregate without a license, it was held that the indictment was deficient in not defining the offence with sufficient precision.[3] Whether different designations of an *object* (*e. g.* "warrant," "order," "request") can be coupled will be hereafter noticed.[4]

Intent when necessary must be averred.

§ 163 *a*. The cases in reference to intent may be grouped under the following heads: —

(1.) Where the intent is to be proved in order to illustrate the character of the act, as when there is an attempt or assault to commit an offence, in which cases the intent must be averred;[5] and must be attached to all the material allegations.[6]

(2.) Where the intent is to be *primâ facie* inferred from the facts stated, in which case intent, unless part of the statutory definition, need not be specifically averred. Thus, while intent must be averred in an indictment for an attempt to steal, it need not be averred in an indictment for larceny.[7]

[1] Infra, § 251; R. *v.* North, 6 D. & R. 143; U. S. *v.* Armstrong, 5 Phil. Rep. 273; Com. *v.* Grey, 2 Gray, 501; State *v.* Price, 6 Halst. 203; Angel *v.* Com. 2 Va. Cas. 231; Rasnick *v.* Com. Ibid. 356; Jones *v.* State, 1 McMullan, 236; State *v.* Meyor, 1 Speers, 305; Wingard *v.* State, 13 Ga. 396; State *v.* McCollum, 44 Mo. 343; Keefer *v.* State, 4 Ind. 246; People *v.* Ah Woo, 28 Cal. 205; and cases cited, supra. For other cases see infra, § 251.

[2] But see Com. *v.* Ballou, 124 Mass. 26; State *v.* Locklear, Busbee, 205. Supra, § 151; infra, § 228.

[3] State *v.* Raiford, 7 Porter, 101; and see R. *v.* Middlehurst, 1 Burr. 400; Miller *v.* State, 5 How. (Miss.) 250.

[4] Infra, §§ 195, 251.

[5] Com. *v.* Hersey, 2 Allen, 173; State *v.* Garvey, 11 Minn. 154; State *v.* Davis, 26 Tex. 201; People *v.* Congleton, 44 Cal. 92.

[6] R. *v.* Rushworth, R. & R. 317; Com. *v.* Boynton, 12 Cush. 500; Com. *v.* Dean, 110 Mass. 64.

[7] Ibid.

(3.) Where intent is part of the statutory definition of the offence it must be averred, though it is otherwise in cases where it is not part of such statutory definition, and when the offence is punishable, no matter what was the intent.[1]

(4.) In negligent offences, to allege intent is a fatal error, unless the allegation be so stated as to be capable of discharge as surplusage.[2]

§ 164. Where guilty knowledge is not a necessary ingredient of the offence, or, where the statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge is necessary.[3] It is otherwise where guilty knowledge is not so implied and is a substantive ingredient of the offence.[4] Thus in an indictment for selling an obscene book, a *scienter* is necessary,[5] and so in an indictment for selling unwholesome water;[6] and in indictments for assaulting officers;[7] though it has not been held necessary in an indictment for adultery.[8]

And so of guilty knowledge.

Under a statute, where the guilty knowledge is part of the statutory definition of the offence, it must be averred.[9] But in the large and important class of cases elsewhere particularly dis-

[1] Infra, § 220.

[2] See Whart. Crim. Law, 8th ed. §§ 125 *et seq.* As to surplusage see supra, § 158.

[3] 1 Hale P. C. 561; 2 East P. C. 51; 6 East, 474; 1 B. & P. 86; Com. *v.* Elwell, 2 Met. (Mass.) 190; Com. *v.* Boynton, 12 Cush. 499; Com. *v.* Stout, 7 B. Monr. 247; Turner *v.* State, 1 Ohio St. 422; State *v.* Freeman, 6 Blackf. 248. Infra, § 272.

[4] U. S. *v.* Buzzo, 18 Wall. 125; State *v.* Card, 34 N. H. 510; Com. *v.* Dean, 110 Mass. 64; People *v.* Lohman, 2 Barb. S. C. 216; Com. *v.* Blumenthal, Whart. Prec. 528, n.; Gabe *v.* State, 1 Eng. (Ark.) 519; Norman *v.* State, 24 Miss. 54; Stein *v.* State, 37 Ala. 123.

[5] Com. *v.* McGarrigall, cited 1 Bennett & Heard's Lead. Cas. 551. See also State *v.* Carpenter, 20 Vt. 9; Com. *v.* Kirby, 2 Cush. 577; State *v.* Brown, 2 Speers, 129.

[6] Stein *v.* State, 37 Ala. 123.

[7] Whart. Crim. Law, 8th ed. § 649.

[8] Com. *v.* Elwell, 2 Met. 190; Whart. Crim. Law, 8th ed. § 1731.

[9] R. *v.* Jukes, 8 Term R. 625; R. *v.* Myddleton, 6 Term R. 739; 1 Starkie C. P. 196; State *v.* Gove, 34 N. H. 510; People *v.* Lohman, 2 Barb. 216; State *v.* Stimson, 4 Zabr. 478; State *v.* Bloedow, 45 Wis. 279. See U. S. *v.* Schuler, 6 McLean, 28. As to receiving stolen goods see Whart. Crim. Law, 8th ed. § 999. As to false pretences, Ibid. § 1225. As to adultery, Ibid. § 1731. As to incest, &c., Ibid. § 1752. As to poisoning, Ibid. § 524. As to offences on the high seas, Ibid. §§ 1871, 1886. As to perjury, Ibid. § 1286.

cussed,[1] in which an act is made indictable irrespective of the *scienter*, the *scienter* is not to be averred in the indictment, since if it were, it might be regarded as a descriptive allegation, which it is necessary to prove.[2]

Inducement and aggravation need not be detailed.

§ 165. Matters of inducement or aggravation, as a general rule, do not require so much certainty as the statement of the gist of the offence.[3] And where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. We have this rule illustrated in cases of assaults already noticed. And in conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods" has been holden sufficient.[4]

Particularity required for identification and protection.

§ 166. The degree of particularity necessary in setting out the offence can be best determined by examining the objects for which such particularity is required. These objects are ranked by an eminent criminal pleader as follows:[5] —

(*a.*) In order to identify the charge, lest the grand jury should find a bill for one offence and the defendant be put upon his trial for another.[6]

(*b.*) That the defendant's conviction or acquittal may enure

[1] Whart. Crim. Law, 8th ed. § 88.

[2] R. *v.* Gibbons, 12 Cox C. C. 237; R. *v.* Hicklin, L. R. 3 Q. B. 360; R. *v.* Prince, L. R. 1 C. C. R. 154; State *v.* Goodenow, 65 Me. 30; State *v.* Bacon, 7 Vt. 219; Com. *v.* Elwell, 2 Met. 110; Com. *v.* Thompson, 11 Allen, 23; Com. *v.* Smith, 103 Mass. 444; Phillips *v.* State, 17 Ga. 459.

The Ohio statute which declares that it shall be sufficient in any indictment, where it is necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, is not in conflict with § 10 of the Bill of Rights, which requires the accused, on demand, to be furnished with "the nature and cause of the accusation against him." Turpin *v.* State, 19 Ohio St. 540; 1869. As to similar provision in Pennsylvania statute see McClure *v.* Com. 86 Penn. St. 353. Whart. Crim. Law, 8th ed. § 742.

[3] R. *v.* Wright, 1 Vent. 170; Com. Dig. Indict. G. 5. As to evidence of surplusage of this kind see Whart. Crim. Ev. §§ 138 *et seq.*

[4] R. *v.* ——, 1 Chit. Rep. 698; R. *v.* Eccles, 1 Leach, 274; R. *v.* Gill, 2 Barn. & Ald. 204; Com. *v.* Judd, 2 Mass. 329; Com. *v.* Collins, 3 S. & R. 220; Com. *v.* Mifflin, 5 Watts & S. 461.

[5] 1 Starkie's C. P. 73, from which several of these points are taken.

[6] Staunf. 181.

to his subsequent protection, should he be again questioned on the same grounds.

(*c.*) To warrant the court in granting or refusing any particular right or indulgence, which the defendant claims as incident to the nature of the case.[1]

(*d.*) To enable the defendant to prepare for his defence[2] in particular cases, and to plead in all;[3] or, if he prefer it, to submit to the court by demurrer whether the facts alleged (supposing them to be true) so support the conclusion in law, as to render it necessary for him to make any answer to the charge.[4]

(*e.*) To enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment.

(*f.*) To instruct the court as to the technical limits of the penalty to be inflicted.[5]

(*g.*) To guide a court of error in its action in revising the record.[6]

VIII. WRITTEN INSTRUMENTS.

1. WHERE THE INSTRUMENT, AS IN FORGERY AND LIBEL, MUST BE SET OUT IN FULL, § 167.
   - (*a.*) In what case literal exactness is necessary, § 167.
   - (*b.*) "Tenor," "purport," and "substance," § 168.
   - (*c.*) What variance is fatal, § 173.
   - (*d.*) Quotation marks, § 175.
   - (*e.*) Lost, destroyed, obscene, or suppressed writings, § 176.
   - (*f.*) When any part may be omitted, § 180.
   - (*g.*) Where the instrument is in a foreign language, or is on its face insensible, § 181.
2. WHERE THE INSTRUMENT, AS IN LARCENY, ETC., MAY BE DESCRIBED MERELY BY GENERAL DESIGNATION, § 182.
3. WHAT GENERAL LEGAL DESIGNATION WILL SUFFICE, § 184.
   "Purporting to be," § 184.

[1] 1 Stark. C. P. 73.

[2] R. *v.* Hollond, 5 T. R. 623; Fost. 194; Com. *v.* McAtee, 8 Dana, 29. See, to the same effect, People *v.* Taylor, 3 Denio, 91. "That certainty and precision in an indictment is required, which will enable the defendant to judge whether the facts and circumstances stated constitute an indictable offence, that he may know the nature of the offence against which he is to prepare his defence; that he may plead a conviction or acquittal, in bar of another indictment; and that there may be no doubt as to the nature of the judgment to be given in case of conviction." Biggs *v.* People, 8 Barb. 547 — Edmonds, P. J.

[3] 3 Inst. 41.

[4] Cowper, 672.

[5] Cowper, 672; 5 T. R. 623; 1 Starkie C. P. 73.

[6] This reason was considered the most important in R. *v.* Bradlaugh, 38 L. T. (N. S.) 118; L. R. 3 Q. B. D. 607; 14 Cox C. C. 68; commented on infra, § 177.

"Receipt," "acquittance," §§ 185, 186.
"Bill of exchange," § 187.
"Promissory note," § 188.
"Bank note," § 189.
"Money," § 190.
"Goods and chattels," § 191.
"Warrant for the payment of money," § 192.
"Order," § 193.
"Request," § 194.
"Deed," § 196.
"Obligation," § 198.
"Undertaking," § 199.
"Guarantee," § 200.
"Property," § 201.
"Piece of paper," § 202.

1. *Where the Instrument, as in Forgery and Libel, must be set out in full.*[1]

When words of document are material they should be set forth.

§ 167. Where the words of a document are essential ingredients of the offence, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, libel, &c., the document should be set out in words and figures.[2] Thus, the omission of a word in an indictment for forgery is fatal.[3] In such cases, however,

[1] In Massachusetts, by Gen. Stat. 1864, c. 250, § 1, variance in writings or print is immaterial, if the identity of the instrument is manifest.

[2] R. *v.* Mason, 2 East, 238; 2 East P. C. 976; R. *v.* Powell, 1 Leach, 77; R. *v.* Hart, 1 Leach, 145; Com. *v.* Stow, 1 Mass. 54; Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Wright, 1 Cush. 46; Com. *v.* Tarbox, Ibid. 66; State *v.* Farrand, 3 Halst. 333; State *v.* Gustin, 2 South. R. 749; Com. *v.* Gillespie, 7 S. & R. 469; Com. *v.* Sweney, 10 S. & R. 173; State *v.* Stephens, Wright's Ohio R. 73; State *v.* Twitty, 2 Hawks, 248; Rooker *v.* State, 65 Ind. 86. As to variance see Whart. Crim. Ev. § 114. As to forgery, see Whart. Crim. Law, 8th ed. § 727. As to libel, Ibid. §§ 1156 *et seq.*

In indictment for libel, the alleged libellous matter must be set out accurately, any variance being fatal; Cartwright *v.* Wright, 1 D. & R. 230; Wright *v.* Clements, 3 B. & Ald. 503; Com. *v.* Tarbox, 1 Cush. 66; Com. *v.* Sweney, 10 S. & R. 173; State *v.* Brownlow, 7 Humph. 63; Walsh *v.* State, 2 McCord, 248; though matters not in the libellous passage, or of record, need not be exactly alleged. Thus, an indictment charging that the defendant published a libel on the twenty-first of the month, may be supported by proof of a publication on the nineteenth of the same month. But it is otherwise if the indictment has alleged that the libel was published in a paper dated the twenty-first of the month. Com. *v.* Varney, 10 Cush. 402.

Where parts are selected, they must be set forth thus: "In a certain part of which said," &c., "there were and are contained certain false, wicked, malicious, scandalous, seditious, and libellous matters, of and concerning," &c., "according to the tenor and effect following, that is to say:" "And in a certain other part," &c., &c. See 1 Camp. 350, per Lord Ellenborough;

[3] U. S. *v.* Hinman, 1 Baldwin, 292; U. S. *v.* Britton, 2 Mason, 464; State *v.* Street, Tayl. 158; and see State *v.* Bradley, 1 Hay. 403; State *v.* Coffey, N. C. Term R. 272.

it is not necessary to insert the vignettes, devices, letters, or figures in the margin, as they make no part of the meaning;[1] and so of stamps.[2] But it has been held fatal to omit the name of the State in the upper margin of a copy of a bank note, when such name is not repeated on the body.[3]

Archbold's C. P. 494; 1 Wms. Notes to Saund. 139. Infra, § 180.

The date at the end of the libel need not be set forth. Com. *v.* Harmon, 2 Gray, 289.

If the indictment does not on its face profess to set forth an accurate copy of the alleged libel in words and figures, it will be held insufficient on demurrer, or in arrest of judgment. State *v.* Twitty, 2 Hawks, 248; State *v.* Goodman, 6 Rich. 387; and cases cited to § 169. It is not sufficient to profess to set it forth according to its substance or effect. Com. *v.* Tarbox, 1 Cush. 66; Com. *v.* Wright, 1 Cush. 46; State *v.* Brownlow, 7 Humph. 63. And where the indictment alleged, that the defendant published, &c., an unlawful and malicious libel, *according to the purport and effect, and in substance* as follows, it was ruled that the words between *libel* and *as follows* could not be rejected as surplusage. Com. *v.* Wright, 1 Cush. 46. Infra, § 170.

Where it does not appear from the paper itself who its author was, nor the persons of and concerning whom it was written, nor the purpose for which it was written, these facts should be explicitly averred, for the consideration of the jury, in all cases in which they are material. State *v.* Henderson, 1 Rich. 179.

Where the persons alleged to have been libelled are alluded to in ambiguous and covert terms, it is not sufficient to aver generally that the paper was composed and published "of and concerning" the persons alleged to have been libelled, with innuendoes accompanying the covert terms, whenever they occur in the paper as set out in the indictment, that they meant those persons, or were allusions to their names. There should be a full and explicit averment that the defendant, under and by the use of the covert terms, wrote of and concerning the persons alleged to be libelled. R. *v.* Marsden, 4 M. & S. 164; State *v.* Henderson, 1 Rich. 179; State *v.* Brownlow, 7 Humph. 63. Infra, § 181 *a*.

The court will regard the use of fictitious names and disguises, in a libel, in the sense that they are commonly understood by the public. State *v.* Chace, Walker, 384.

Under a declaration which alleges the publication of a certain "libel concerning the plaintiff," but contains no innuendoes, colloquiums, or special averments of facts to connect the publication with the plaintiff, if no evidence be offered to connect him therewith, except the publication itself, the question whether the publication refers to the plaintiff is for the court, and not for the jury. Barrows *v.* Bell, 7 Gray, 301. Innuendoes are hereafter discussed. Infra, § 181 *a*.

[1] State *v.* Carr, 5 N. H. 367; Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Stephens, Ibid. 203; Com. *v.* Taylor, 5 Cush. 605; People *v.* Franklin, 3 Johnson's C. 299; Com. *v.* Searle, 2 Binn. 332; Buckland *v.* Com. 8 Leigh, 732; Griffin *v.* State, 14 Ohio St. R. 55; Whart. Crim. Law, 8th ed. § 731. Infra, § 180.

[2] Whart. Crim. Law, 8th ed. § 677.

[3] Com. *v.* Wilson, 2 Gray, 70.

§ 168. When it is necessary to set forth exactly a document,[1] it may be preceded by the words, "to the tenor following," or "in these words," or "as follows," or "in the words and figures following," for though the term "tenor," which imports an accurate copy,[2] has been considered to be the most technical way of introducing the document, yet it has been ruled that "as follows" is equivalent to the words "according to the tenor following," or "in the words and figures following," and that if under such an allegation the prosecutor fails in proving the instrument verbatim, as laid, the variance will be fatal;[3] and where the indictment, by these or similar averments, fails to claim to set out a copy of the instrument in words and figures, it will be invalid.[4]

In such case the indictment should claim to set forth the words.

§ 169. Purport, it is said, means the effect of an instrument as it appears on the face of it in ordinary construction, and is insufficient when literal exactness is required; tenor means an exact copy of it.[5] But if the instrument does not "purport" to be what the indictment avers — *i. e.* if its meaning is not accurately stated — the variance is fatal.[6]

"Purport" means effect; "tenor" means contents.

§ 170. The words "in manner and form following, that is to say," do not profess to give more than the substance, and are usual in an indictment for perjury;[7] but the word "aforesaid" binds the party to an exact recital.[8] "According to the purport and effect, and in substance," are bad, in cases where exactness of setting forth is required.[9] And so is "substance and effect."[10]

"Manner and form," "purport and effect," "substance," do not imply verbal accuracy.

[1] 1 Ch. C. L. 234; 2 Leach, 661; 6 East, 418-426; Whart. Crim. Law, 8th ed. § 737.

[2] 2 Leach, 660, 661; 3 Salk. 225; Holt, 347-350, 425; 11 Mod. 96, 97; Douglass, 193, 194; Whart. Crim. Law, 8th ed. § 737.

[3] 1 Leach, 78; 2 Leach, 660, 961; 2 East P. C. 976; 2 Bla. Rep. 787; Clay *v.* People, 86 Ill. 147. Whart. Crim. Law, 8th ed. § 737.

[4] 2 Leach, 597, 660, 661; State *v.* Bonney, 34 Me. 383; Com. *v.* Wright, 1 Cush. 46; Dana *v.* State, 2 Oh. St. 91; Whart. Crim. Law, 8th ed. §§ 737 *et seq.*, 1656.

[5] 2 Leach, 661; State *v.* Bonney, 34 Me. 383; State *v.* Witham, 47 Me. 165; Com. *v.* Wright, 1 Cush. 46.

[6] Dougl. 300; State *v.* Molier, 1 Devereux, 263; State *v.* Carter, Conf. N. C. R. 210; State *v.* Wimberly, 3 McCord, 190; Whart. Crim. Ev. § 114.

[7] 1 Leach, 192; Dougl. 193, 194.

[8] Ibid.; Doug. 97.

[9] Com. *v.* Wright, 1 Cush. 46; State *v.* Brownlow, 7 Humph. 63; Dana *v.* State, 2 Oh. St. 91.

[10] Com. *v.* Sweney, 10 S. & R. 173.

Attaching original papers is not adequate.

§ 171. The attaching of one of the original printed papers to the indictment, in place of inserting a copy, is not sufficient indication that the paper is set out in the very words.[1]

When exact copy is required mere variance of a letter is immaterial.

§ 173. A mere variance of a letter will not be fatal, even when it is averred that the tenor is set out, provided the meaning be not altered by changing the word misspelt into another of a different meaning;[2] thus, in an indictment for forging a bill of exchange, the tenor was "value received," and the bill as produced in evidence was "value reiceved;" the question being reserved, it was held that the variance was not material, because it did not change one word into another, so as to alter the meaning.[3] On the same principle, where, in an indictment for perjury, it was assigned for perjury that the defendant swore he "understood and believed," instead of "understood," the mistake was held to be immaterial.[4] So "promise" for "promised" was held not a fatal variance.[5] The great rigor of the old English law in this respect was one of the consequences of the barbarous severity of the punishment imposed. A more humane system of punishment was followed by a more rational system of pleading.[6]

[1] Com. *v.* Tarbox, 1 Cush. 66; Whart. Crim. Law, 8th ed. §§ 736 *et seq.*

In forgery, as is elsewhere seen, the indictment may run, that the prisoner forged a paper writing according to the tenor following, &c. 2 Leach, 660. Supra, § 167; Whart. Crim. Law, 8th ed. §§ 728 *a*, 737 *et seq.* An exact copy (2 Leach, 624; 2 East P. C. 928, 977) of the instrument, in words and figures (1 Leach, 78, 145; 2 East P. C. 976), must then be set forth, to enable the court to see whether the false making of it is in law considered as forgery; 2 Leach, 624, 657, 661; 2 East P. C. 975; and the same rule applies to indictments for threatening letters. 2 East P. C. 976; 1 Marsh. 522; 6 East, 418.

[2] Infra, § 273; Whart. Crim. Ev. § 114; R. *v.* Drake, Salk. 660; U. S. *v.* Hinman, 1 Bald. 292; U. S. *v.* Burroughs, 3 McL. 405; State *v.* Bean, 19 Vt. 530; State *v.* Weaver, 13 Ired. 491; State *v.* Coffee, 2 Murphey, 320.

[3] 1 Leach, 145.

[4] 1 Leach, 133; Dougl. 193, 194. See Whart. Crim. Law, 8th ed. §§ 1297–8.

[5] Com. *v.* Parmenter, 5 Pick. 279.

[6] See Heard's Cr. Pl. 215, citing 1 Taylor's Ev. § 234 *a*, 6th ed. Infra, §§ 273–4–5; Whart. Crim. Ev. § 114; Whart. Crim. Law, 8th ed. § 728 *a*.

Where an indictment alleged that a forged certificate was signed by Bowling Starke, but the instrument was signed B. Starke, and the signer's true name was Bolling Starke, the

Unnecessary document need not be set forth.

§ 174. Where the setting out of the document in an indictment can give no information in the court, it is unnecessary to set it out.[1]

Quotation marks are not sufficient.

§ 175. Quotation marks by themselves are not sufficient to indicate tenor, unless there be something to show that the document within the quotation marks was that on which the indictment rests.[2]

Document lost or in defendant's hands need not be set forth.

§ 176. Where the document on which the indictment rests is in the defendant's possession, or is lost or destroyed, it is sufficient to aver such special facts as an excuse for the non-setting out of the document, and then to proceed, either by stating its substance, or by describing it as a document which "the said inquest cannot set forth by reason," &c., of its loss, destruction, or detention, as the case may be,[3] giving, however, the purport of the instrument as near as may be.[4]

Thus, where the indictment excused the want of a particular description, by averring that the bond was with the defendant, it was held that this was sufficient.[5] Although it was said, in another case, the note is described as made on the —— day of May, and the proof is that the forged note was dated on a par-

variance was held fatal. Com. *v.* Kearns, 1 Va. Cas. 109; State *v.* Waters, Const. R. 669; Murphy *v.* State, 6 Tex. Ap. 554. *Contra*, State *v.* Bibb, 68 Mo. 286.

Where the name of John McNicoll, signed to a forged instrument, was in the setting out of the forged instrument in the indictment written John McNicole; this was held no variance. R. *v.* Wilson, 2 C. & K. 527; 1 Den. C. C. 284; 2 Cox C. C. 426. But see fully Whart. Crim. Ev. §§ 114 *et seq.*

The subject of variance between the indictment and the evidence in this respect is more fully considered in another work. Whart. Crim. Ev. § 114; Whart. Crim. Law, 8th ed. § 728 *a*.

[1] R. *v.* Coulson, 1 Eng. L. & E. 550; S. C., 1 T. & M. C. C. 332; 4 Cox C. C. 227.

[2] Com. *v.* Wright, 1 Cush. 46.

[3] Whart. Crim. Ev. §§ 118, 199. See Com. *v.* Sawtelle, 11 Cush. 142; People *v.* Bogart, 36 Cal. 245. Infra, § 218.

[4] Whart. Crim. Law, 8th ed. §§ 728 *et seq.*; R. *v.* Watson, 2 T. R. 200; R. *v.* Haworth, 4 C. & P. 254; R. *v.* Hunter, 4 C. & P. 128; U. S. *v.* Britton, 2 Mason, 468; State *v.* Bonney, 34 Me. 223; State *v.* Parker, 1 Chipman, Vt. 294; People *v.* Badgeley, 16 Wend. 531; Wallace *v.* People, 27 Ill. 45; Hart *v.* State, 55 Ind. 599; Pendleton *v.* Com. 4 Leigh, 694; State *v.* Davis, 69 N. C. 313; Du Bois *v.* State, 50 Ala. 139. See fully Whart. Crim. Ev. §§ 118, 199.

[5] People *v.* Kingsley, 2 Cow. 522. See Croxdale *v.* State, 1 Head, 139.

ticular day, a conviction will be sustained, notwithstanding the variance, when a satisfactory reason for the omission of a more particular description is given in the indictment.[1]

§ 177. It has also been ruled that if the grand jury declare of an indecent libel, "that the same would be offensive to the court here, and improper to be placed on the records thereof," the non-setting forth of the libel will be thereby sufficiently excused.[2] Thus in an indictment for publishing an obscene book or picture, it is not necessary that the libel should be set out at large,[3] but in such case it is necessary specifically to aver the reason of the omission.[4]

And so of obscene libel.

[1] People v. Badgeley, 16 Wend. 53. See State v. Squire, 1 Tyler, 147.

[2] Com. v. Holmes, 17 Mass. 336; and see Whart. Crim. Law, 8th ed. § 1609, for other cases, and cases given infra.

[3] State v. Brown, 1 Williams (Vt.), 619; Com. v. Holmes, 17 Mass. 336; Com. v. Dejardin, 126 Mass. 46; Com. v. Sharpless, 2 S. & R. 91; People v. Girardin, 1 Mann. (Mich.) 90. For form see Whart. Prec. 952, 968.

[4] Com. v. Tarbox, 1 Cush. 66.

The position of the text is accepted in England as to indecent prints. Dugdale v. R., Dears. C. C. 64. In R. v. Bradlaugh, 38 L. T. (N. S.) 118; L. R. 3 Q. B. D. 607; 14 Cox C. C. 68, it was ruled that an indictment which did not give the words of an alleged obscene libel or excuse their omission was bad. In this case it was noticed by Bramwell, J., that the American authorities excuse the non-setting forth of the libel on the grounds of its obscenity, which allegation was omitted in R. v. Bradlaugh. It will not do to say that this excuse is surplusage. An indictment which excuses the non-setting forth of a document on the ground of its loss, or of its destruction by the defendant, is good, though without such an excuse the indictment would be defective. The excuse, therefore, is essential. But, when such an excuse is made, the American cases present an almost unbroken line of authority to the effect that the obscene document need not be copied. Com. v. Holmes, 17 Mass. 336; State v. Brown, 1 Williams (Vt.), 619; McNair v. People, 89 Ill. 441, and People v. Girardin, 1 Mann. (Mich.) 90, are direct to this effect. Com. v. Tarbox, 1 Cush. 66, reaffirms the principle of Com. v. Holmes, but holds that to paste the alleged obscene matter to the indictment is a defective mode of pleading. As affirming Com. v. Holmes may also be cited Com. v. Dejardin, 126 Mass. 46. On the other hand, in State v. Hanson, 23 Tex. 232, an indictment for publishing an obscene document, without giving the words, was held bad. In this case, however, there was no excuse offered, as in Com. v. Holmes, for not setting out the libel. Com. v. Sharpless, 2 S. & R., was the case of an indecent picture, and the Supreme Court held that it was not necessary that the picture should be copied on the indictment. The reason, however, is the same as that given in Com. v. Holmes — that the court must preserve the "chastity" of its records, and not permit them to be used to

Prosecutor's negligence does not alter the case.

§ 178. Even where the prosecutor's negligence caused the loss, the loss will be an excuse for non-description, unless the misconduct was so gross as to imply fraud.[1]

Production of a document alleged to be "destroyed" is a fatal variance.

§ 179. When there is an allegation that a document is *destroyed*, as an excuse for its non-description, there is a fatal variance between the indictment and the proof if the destroyed instrument is produced on trial.[2]

Extraneous parts of document need not be set forth.

§ 180. Wherever the whole document is essential to the description of the offence, the whole must be set out in the indictment. It is otherwise, however, as to indorsements and other extraneous matter having nothing to do with the part of the document alleged to be forged.[3] And where, upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus: "8th March, 1773. Received the contents above by me, Stephen Withers," without setting out the account at the foot of which it was written; this was ruled sufficient.[4] In all other cases, where part only of a written instrument is included in the offence, that part alone is necessary to be set out. Thus, in cases where portions of publications are libellous and others not, it is only necessary, as is elsewhere noticed, to state those parts con-

perpetuate obscenities. It may be added to this that if an obscene publication were to be considered as exclusively a libel, it might be difficult to resist the conclusion, that as a libel, when indicted as such, it should be spread on the record, supposing that no legitimate excuse be given for the non-setting out. But there is much force in the position that an obscene publication is not so much a libel as an offence against public decency; and if it be the latter, the particularity required in setting forth libels is not necessary. If a mob, for instance, should gather about a religious assembly, disturbing its worship by profane and indecent language, it would not be necessary, it may well be argued, that those profane and indecent words should be set out. Nor is this the only illustration to which we may appeal. An indictment against a common scold need not set forth the words the "scold" was accustomed to use. See argument in Southern Law Rev. for 1878, p. 258.

[1] State *v.* Taunt, 16 Minn. 109.

[2] Smith *v.* State, 33 Ind. 159.

[3] Whart. Crim. Law, 8th ed. § 753. And see Com. *v.* Ward, 2 Mass. 397; Com. *v.* Adams, 7 Met. 50; Perkins *v.* Com. 7 Grat. 651; Buckland *v.* Com. 8 Leigh, 732; State *v.* Gardiner, 1 Ired. 27; Hess *v.* State, 5 Ohio, 5.

[4] R. *v.* Testick, 1 East, 181, n.; Whart. Crim. Law, 8th ed. §§ 729 *et seq.*

taining the libels; and if the libellous passages be in different parts of the publication, distinct from each other, they may be introduced thus: "In a certain part of which said libel there were and are contained the false, scandalous, malicious, and defamatory words and matter following, that is to say," &c. "And in a certain other part of which said libel there were and are contained," &c.[1] Where the indictment is for forging a note or bill, the indorsement, though forged, need not be set out.[2] And, as we have seen, it is not necessary to set forth vignettes or other embellishments, though if this be attempted a variance may be fatal.[3]

An altered document, as is elsewhere seen, may be averred to be wholly forged.[4] But if an alteration be averred, the alteration must be specified,[5] and an addition which is collateral to the document must, if forged, be specially pleaded.[6]

Foreign or insensible document must be explained by averments.

§ 181. A document in a foreign language must be translated and explained by averments.[7] The proper course is to set out, as "of the tenor following," the original, and then to aver the translation in English to be "as follows."[8] And so where initials appear without an averment of what they mean;[9] and where there is no averment of who the officer was whose name is copied in a forged instrument, there being no averment of what the instrument purports to be.[10]

In another volume it will be seen more fully that when "purport" or "tenor" is set out, a variance is fatal;[11] that when the legal effect only of a document is averred, it is sufficient if

[1] See Tabart *v.* Tipper, 1 Camp. 350; Whart. Crim. Law, 8th ed. § 1656, and cases cited to § 167.

[2] Com. *v.* Ward, 2 Mass. 397; Com. *v.* Adams, 7 Met. 50; Com. *v.* Perkins, 7 Grat. 654; Simmons *v.* State, 7 Ham. 116; Whart. Crim. Law, 8th ed. §§ 731–3, and cases cited to § 176.

[3] Whart. Crim. Ev. § 114; Whart. Crim. Law, 8th ed. § 731. Supra, § 167.

[4] Whart. Crim. Law, 8th ed. § 735.

[5] Ibid.

[6] Com. *v.* Woods, 10 Gray, 480.

[7] R. *v.* Goldstein, R. & R. 473; 7 Moore, 1; 10 Price, 88. Whart. Crim. Law, 8th ed. § 729.

[8] Ibid.; R. *v.* Szudurskie, 1 Moody, 429; R. *v.* Warshaner, 1 Mood. C. C. 466; Wormouth *v.* Cramer, 3 Wend. 394. As to California see special statute. People *v.* Ah Woo, 28 Cal. 205. If the translation be incorrect the variance is fatal. R. *v.* Goldstein, *ut supra;* and see 20 Wis. 239.

[9] R. *v.* Barton, 1 Moody C. C. 141; R. *v.* Inder, 2 C. & K. 635.

[10] R. *v.* Wilcox, R. & R. C. C. 50.

[11] Whart. Crim. Ev. § 114.

the proof substantially conforms;[1] that when the variance is doubtful, the question is for the jury;[2] and that a lost or unobtainable document may be proved by parol.[3]

§ 181 *a*. An innuendo is an interpretative parenthesis, thrown into the quoted matter to explain an obscure term. It can explain only where something already appears upon the record to ground the explanation; it cannot, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. It can interpret but cannot add.[4] It may serve as an explanation, but not as a substitute.[5] Extrinsic facts, if requisite to the sense, must be averred in the introductory part of the indictment.[6] Thus in an action for the words "He is a thief," the defendant's meaning in the use of the word "he" cannot be explained by an innuendo "meaning the said plaintiff," or the like, unless something appear previously upon the record to ground that explanation; but if the words had previously been charged to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for when it is alleged that the defendant said of the plaintiff "He is a thief," this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "he."[7] Hence "when the language is equivocal and uncertain, or is defamatory only be-

Innuendo can interpret but not enlarge.

[1] Whart. Crim. Ev. § 116.

[2] Ibid. § 117.

[3] Ibid. § 118.

[4] See 2 Salk. 512; Cowp. 684; Le Fanu *v.* Macolmson, 1 H. of L. Cas. 637; Solomon *v.* Lawson, 8 Q. B. 825; Goodrich *v.* Hooper, 97 Mass. 1; Mix *v.* Woodward, 12 Conn. 262; Van Vechten *v.* Hopkins, 5 Johns. 211; State *v.* Neese, N. C. T. R. 270; Bradley *v.* State, Walker, 156; State *v.* Henderson, 1 Rich. 179. It was held in Pennsylvania, in 1870, that where no new essential fact is requisite to the frame of an indictment for libel, which requires to be found by the grand jury as the ground of a colloquium, and where the only object of an innuendo is to give point to the meaning of the language, it is not proper to quash the indictment on the ground that the innuendo may be supposed to carry the meaning of the language beyond the customary meaning of the word. If some of the innuendoes in an indictment for libel extend the meaning of parts too far, but there be others sufficient to give point to it, the jury may convict under the latter alone. Com. *v.* Keenan, 67 Penn. St. 203. See, further, note to § 167.

[5] State *v.* Atkins, 42 Vt. 252; though see Com. *v.* Keenan, 67 Penn. St. 203; Com. *v.* Meeser, 1 Brewst. 492.

[6] 1 Saund. 121, 6th ed. Infra, § 496; Com. *v.* Snelling, 15 Pick. 321.

[7] Archbold's C. P. 494; State *v.* White, 6 Ired. 418.

cause of some latent meaning, or of its allusion to extrinsic facts and circumstances, then an inducement or innuendo or both are indispensable to express and render certain precisely what the libel is of which the defendant is accused."[1] But extrinsic facts need not be averred unless necessary to make out the sense.[2]

2. *Where the Instrument, as in Larceny, &c., may be described merely by general Designation.*[3]

§ 182. By state as well as by federal legislation, statutes have been enacted making the larceny of bank notes, bonds, and other writings for the payment of money, highly penal. Questions constantly arise whether certain articles alleged to be stolen are included within these

Statutory designations must be followed.

[1] Durfee, C. J., State *v.* Corbett, S. C. R. I. 1879, citing State *v.* Henderson, 1 Rich. 179.

[2] State *v.* Shelton, 51 Vt. 102.

Where the plaintiff averred, by way of innuendo, that the defendant, in attributing the authorship of a certain article to a "celebrated surgeon of whiskey memory," or to a "noted steam doctor," meant by these appellations the plaintiff, it was held, notwithstanding the innuendo, that the declaration was bad, for want of an averment that the plaintiff was generally known by these appellations, or that the defendant was in the habit of applying them to him, or something to that effect. Miller *v.* Maxwell, 16 Wend. 9. See also 2 Hill, 472, and 12 Johns. 474.

When an alleged libel affects the prosecutor only in his business standing, such business must be averred. Com. *v.* Stacey, 8 Phila. 617.

In another case, in an action on the case against a man for saying of another "He has burnt my barn," the plaintiff cannot, by way of innuendo, say, "meaning my barn full of corn;" Barham *v.* Nethersal, 4 Co. 20 *a;* because this is not an explanation derived from anything which preceded it on the record, but is the statement of an extrinsic fact not previously stated. But if in the introductory part of the declaration it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete. Archbold's C. P. 494; 4 R. Ab. 83, pl. 7; 85, pl. 7; 2 Ro. Rep. 244; Cro. Jac. 126; 1 Sid. 52; 2 Str. 934; 1 Saund. 242, n. 3: Golstein *v.* Foss, 9 D. & Ry. 197; 6 B. & C. 154; Clement *v.* Fisher, 1 M. & Ry. 281; Alexander *v.* Angle, 1 C. & J. 143; 7 Bing. 119; R. *v.* Tutchin, 5 St. Tr. 532.

The question of the truth of the innuendoes is for the jury; and they must be supported by evidence unless they go to matters of notoriety, or of which the court takes judicial notice. See cases cited supra; State *v.* Atkins, 42 Vt. 252; Com. *v.* Keenan, 67 Penn. St. 203; State *v.* Perrin, 2 Brev. 474.

[3] As to lumping descriptions of notes in larceny see infra, § 207.

statutes. The adjudications are too numerous to be here detailed; and we can only, within the limits assigned to us, fall back upon the general principle, that documents stolen, to bring them within the statute, must be described by the statutory terms.[1]

Though general designation is sufficient, yet if indictment purports to give words, variance is fatal.

§ 183. When a general designation of a document is all that is required, then it is ordinarily sufficient to give the statutory designation, and it is enough if this is sufficiently accurate to identify the document.[2] But if the pleader undertakes to give the words of the document, then a variance as to such words is at common law fatal.[3] On the other hand it is said that if the words are accurately given, an erroneous designation may be treated as surplusage.[4]

"Purporting to be" is not a necessary qualification of the designation.[5]

[1] As to variance in such cases see Whart. Crim. Ev. § 116.

[2] Bonnell *v.* State, 64 Ind. 498.

[3] See cases cited supra; and see R. *v.* Craven, R. & R. 14; U. S. *v.* Keen, 1 McLean, 429; U. S. *v.* Lancaster, 2 McLean, 431.

[4] Infra, § 184.

In an indictment for falsely pretending a paper to be a valid promissory note, it is sufficient to designate it, setting it forth not being necessary. R. *v.* Coulson, T. & M. 332; 1 Den. C. C. 592; 4 Cox C. C. 332; Com. *v.* Coe, 115 Mass. 481.

[5] R. *v.* Birch, 1 Leach, 79; 2 W. Bl. 790; State *v.* Gardiner, 1 Ired. 27; Whart. Crim. Law, 8th ed. § 738. Infra, § 184.

The following rulings under statutes may be of value: —

United States Courts. — Money, and bank notes, and coin, are "personal goods," within the meaning of the sixteenth section of the Crimes Act of 1790, c. 36, respecting stealing and purloining on the high seas. U. S. *v.* Moulton, 5 Mason, 537.

An order on the cashier of the Bank of the United States is evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States. U. S. *v.* Hinman, 1 Baldw. 292. It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster, nor to describe the bank notes, particularly, enclosed in the letter. But if either the letter or the notes be described in the indictment, they must be proved as laid. U. S. *v.* Lancaster, 2 McLean, 431. It is enough to show that the letter came into the hands of the postmaster, in the words of the statute, without showing where it was mailed, and on what route it was conveyed. Ibid.

Massachusetts. — An indictment under the Act of March 15, 1785, for larceny, alleging that the defendant stole "a bank note of the value of ——, of the goods and chattels of ——," is sufficient, without a more particular description of the note. Com. *v.* Richards, 1 Mass. 337. "Di-

3. *What General Legal Designation will suffice.*

§ 184. "*Purporting to be.*" — The pleader may aver the instrument to be of the class prohibited, or he may aver that it "purports to be," &c.; *e. g.* he may say that the defendant forged "a certain will," or "a certain false or paper writing *purporting to be* the last will,"

If designation be erroneous, variance is fatal.

vers bank bills, amounting in the whole to ——, &c., and of the value of, &c., of the goods and chattels," &c., has been held sufficient; Larned *v.* Com. 12 Met. 240; Com. *v.* Sawtelle, 11 Cush. 142. See other cases infra, §§ 189, 206; and so of "certain moneys, to wit, divers promissory notes, current as money in said Commonwealth." Com. *v.* Ashton, 125 Mass. 384. See, for other cases, infra, § 189 *a*.

"Sundry bank bills and sundry promissory notes issued by the United States, commonly called legal tender notes, all said bills and notes together amounting to ninety dollars, and of the value of ninety dollars," is not an adequate description of United States treasury notes. Com. *v.* Cahill, 12 Allen, 540. See Hamblett *v.* State, 18 N. H. 384.

"For the payment of money," need not be averred of a promissory note. Com. *v.* Brettun, 100 Mass. 206.

Connecticut. — Where an information for theft described the property alleged to be stolen as "thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank, in this State," it was held that this description was sufficiently certain. Salisbury *v.* State, 6 Conn. 101.

New York. — A contract not under seal is incorrectly described as a bond, and the error is fatal. People *v.* Wiley, 3 Hill, 194.

Where the indictment stated that the defendant stole "four promissory notes, commonly called bank notes, given for the sum of fifty dollars each, by the Mechanics' Bank in the city of New York, which were due and unpaid, of the value of two hundred dollars, the goods and chattels of P. C., then and there found," &c., it was held a sufficient description, without saying they were the property of P. C. The word chattels denotes property and ownership. People *v.* Holbrook, 13 Johns. 90.

Under the New York statute, which makes the stealing of "personal property" larceny, an indictment for grand larceny, in stealing bank notes, alleged that the defendant feloniously stole, took, and carried away ten promissory notes, called bank notes, issued by the Chicopee Bank for the payment of divers sums of money, amounting in the whole to the sum of fifty dollars, and of the value of fifty dollars; ten promissory notes, called bank notes, issued by the Agawam Bank, &c., of the goods, chattels, and property of B. M. It was held, on motion of an arrest of judgment, that the indictment was sufficient. It was held, also, that it was of no consequence whether the banks were organized within the bounds and under the laws of New York, or were banks of other States or countries, so far as the allegations in the indictment were concerned; the name of the banks being mentioned by way of descrip-

&c.,[1] though, as has just been seen, "purporting to be" may be omitted.[2] At common law, however, great care is necessary in

tion of the property stolen. People *v.* Jackson, 8 Barb. 637.

In an indictment for stealing bank notes, it is sufficient to describe them, in the same manner as other things which have an intrinsic value, by any description applicable to them as chattels. Ibid.

Pennsylvania. — Under the Act of 15th April, 1790, an indictment for stealing bank notes must lay them as promissory notes for the payment of money (Com. *v.* Boyer, 1 Binn. 201); and, therefore, an indictment for stealing a "ten dollar note of the President, Directors, and Company of the Bank of the United States," is bad. But "one promissory note," &c., is now sufficiently descriptive. Com. *v.* Henry, 2 Brewster, 566; Com. *v.* Byerly, Ibid. 568.

Under the Act of 1810, an indictment for stealing bank notes must aver in general that they were issued by a bank incorporated by law, or name the bank, and aver that it was incorporated, or show in some sufficient manner that the notes were lawful. Therefore, an indictment for stealing bank notes, generally, describing them as "promissory notes for the payment of money," is bad. Spangler *v.* Com. 3 Binn. 533.

An indictment charging that the defendant feloniously did steal and carry away "sundry promissory notes for the payment of money, of the value of eighty dollars, of the goods and chattels of the said A. M.," is too vague and uncertain; the notes should be more particularly described, and it should be set forth that the money was unpaid on them; Stewart *v.* Com. 4 S. & R. 194; though in a subsequent case it was said that where there was enough in the description of the note to show it was unpaid, an averment to that effect is unnecessary. Com. *v.* M'Laughlin, 4 Rawle, 464. Though see Rev. Act of 1860, hereafter cited.

An indictment for stealing three promissory notes for the payment of money, commonly called bank notes, "on the Bank of the United States," was, in another case, held to be good. M'Laughlin *v.* Com. 4 Rawle, 464. It is not necessary to state that the bank was duly incorporated. Ibid. An indictment for stealing "a bank note of the Bank of Baltimore," without describing it as a promissory note for the payment of money, was bad under the Act of 1790. Com. *v.* M'Dowell, 1 Browne, 360.

By the Revised Act of 1860, Pamph. 435, it is sufficient if the instrument be averred by the name by which it is generally known.

New Jersey. — "Bank notes," pleaded as such, are not goods and chattels under the statute. State *v.* Calvin, 2 Zab. 207.

Maryland. — In an indictment founded upon the Act of 1809, c. 138, for stealing a bank note, it is sufficient to describe the note as a bank note for the payment of, &c., and of the value of, &c. Nothing more is required than to charge the offence in the language of the act. State *v.* Cassel, *alias* Baker, 2 Har. & G. 407.

North Carolina. — In an indictment for stealing a bank note, a description of the note in the follow-

[1] 2 East P. C. 980; R. *v.* Birch, 1 Leach C. C. 79; State *v.* Gardiner, 1 Ired. 27; Whart. Crim. Law, 8th ed. §§ 728 *et seq.*

[2] Supra, § 183.

this respect, since if the document turns out in proof not to be what the indictment declares it purports to be, the variance is

ing words, "one twenty dollar bank note on the State Bank of North Carolina, of the value of twenty dollars," is good. State *v.* Rout, 3 Hawks, 618.

An indictment charged the defendant with feloniously stealing, &c., "a certain bank note, issued by the Bank of Newbern." The note offered in evidence upon the trial purported to be issued by "the President and Directors of the Bank of Newbern," whereupon the defendant was acquitted, because the evidence did not support the charge. He was then indicted for feloniously stealing, &c., a certain note "issued by the President and Directors of the Bank of Newbern." To this indictment he pleaded "former acquittal," and in support of the plea produced the record of the first indictment and the proceedings thereon. It was held that the record produced did not support the plea, and the plea was overruled. State *v.* Williamson, 3 Murph. 216.

"One promissory note issued by the treasury department of the United States for one dollar" is a sufficient description. State *v.* Fulford, 1 Phill. (N. C.) L. 563; and see Sallie *v.* State, 39 Ala. 691.

Georgia. — Where the indictment alleged that the notes stolen were "notes of the Georgia Railroad and Banking Company," and the owner proved that he received them from such banking company, it was held, in the absence of all proof to the contrary, that this was sufficient proof of their genuineness to support the allegation. State *v.* Allen, Charlton, 518.

Some evidence of genuineness, however, must be given. Ibid.

Alabama. — In an indictment charging the larceny of promissory notes, omission to charge the value of the notes is a material defect. Wilson *v.* State, 1 Port. 118.

Mississippi. — The statute of this State makes obligations, bonds, bills obligatory, or bills of exchange, promissory notes for the payment of money, or notes for the payment of any specific property, lottery tickets, bills of credit, subjects of robbery and larceny. Damewood *v.* State, 1 How. Miss. 262; Greeson *v.* State, 5 How. Miss. 33. It is not sufficient that the indictment describes a bank note as a promissory note for the payment of money purporting to be a bank note. Damewood *v.* State, 1 How. Miss. 262.

National notes are not correctly described as "$150 in United States currency." Merrill *v.* State, 45 Miss. 651. Infra, § 189 *a*.

Missouri. — It is not necessary to allege that the bank is chartered. M'Donald *v.* State, 8 Mo. 283.

Tennessee. — The place of payment in a bank note, charged to have been stolen, need not be stated as descriptive of the note in the indictment; but if it is stated, it then becomes material as descriptive of the offence charged, and the note produced in evidence must correspond with the description given in the indictment, or it will be a fatal variance. Hite *v.* State, 9 Yerger, 357.

Ohio. — An indictment for stealing bank bills is not sustained by proof that the prisoner stole the orders of the Ohio Railroad Company. Grummond *v.* State, Wilcox, 510. Indictments for having in possession counterfeit blank bank notes must specifically describe them. M'Millan *v.* State, 5 Ohio, 269.

fatal.[1] But, as has been already observed, when the tenor is correctly given, the general legal designation of the document may be rejected as surplusage.[2]

"Receipt" includes all signed admissions of payment.

§ 185. "*Receipt.*" — "Settled, Sam. Hughes," at the foot of a bill of parcels, was held to support an allegation of a receipt, without any explanatory averment.[3] Anything that admits payment, and is signed, is enough to bring the instrument within the term "receipt."[4] But if the fact of payment does not either appear on the instrument or is not averred,[5] or the name of the receiptor is wanting, or is obscure and is not helped out by averments,[6] the term "receipt" is not sustained. And such explanatory matter must not only be averred but proved.[7]

"Acquittance" includes discharges from duty.

§ 186. *Acquittance* is a term used in some statutes as cumulative with receipt, and all receipts may be regarded as acquittances;[8] but all acquittances are not receipts, as an acquittance may consist in an instrument simply discharging another from a particular duty.[9]

A certificate by a society that a member has paid up all his dues, and is honorably discharged, is, under the English statute,

[1] R. *v.* Jones, Douglass, 300; 1 Leach C. C. 204; R. *v.* Reading, 2 Leach C. C. 590; 2 East P. C. 952; R. *v.* Gilchrist, 2 Leach C. C. 657; R. *v.* Edsall, 2 East P. C. 984; 1 Bennett & Heard's Lead. Cas. 318; People *v.* Holbrook, 13 Johns. 90; Grummond *v.* State, Wilcox, 510; State *v.* Williamson, 3 Murphey, 216; Dowing *v.* State, 4 Mo. 572. And see fully Whart. Crim. Ev. § 116; Whart. Crim. Law, 8th ed. §§ 728 *et seq.*

[2] R. *v.* Williams, T. & M. 382; 2 Den. C. C. 61; 4 Cox C. C. 356; Com. *v.* Castles, 9 Gray, 123; Com. *v.* Coe, 115 Mass. 481; though see Mr. Greaves's criticism, 2 Rus. on Cr. 4th ed. 811, note; Heard's Cr. Pl. 213.

[3] R. *v.* Martin, 1 Moody C. C. 483; 7 C. & P. 549; R. *v.* Boardman, 2 Moody & R. 147; R. *v.* Rogers, 9 C. & P. 41.

[4] Testick's case, 2 East P. C. 925; R. *v.* Houseman, 8 C. & P. 180; R. *v.* Moody, Leigh & Cave, 173; but see, under peculiar Massachusetts statute, Com. *v.* Lawless, 101 Mass. 32.

[5] R. *v.* Goldstein, R. & R. C. C. 473; R. *v.* Harvey, R. & R. 227; R. *v.* West, 2 C. & K. 496; 1 Den. C. C. 258; R. *v.* Pries, 6 Cox C. C. 165; Clark *v.* State, 8 Ohio St. (N. S.) 630; State *v.* Humphreys, 10 Humph. 442; Whart. Crim. Law, 8th ed. § 740.

[6] R. *v.* Hunter, 2 Leach C. C. 624; 2 East P. C. 977; R. *v.* Boardman, 2 Mood. & R. 147; Whart. Crim. Law, 8th ed. § 740.

[7] See infra, §§ 192–3; and see Whart. Crim. Law, 8th ed. §§ 728 *et seq.*, 740.

[8] See R. *v.* Atkinson, 2 Moody, 215.

[9] Com. *v.* Ladd, 15 Mass. 526.

neither an acquittance nor a receipt;[1] nor is a scrip certificate in a railway company.[2]

"Bill of exchange" to be used in its technical sense

§ 187. "*Bill of Exchange.*" — If the drawer's, payee's, or drawee's name be wanting or be insensible; if there be any conditions of payment; if the amount be uncertain, or if it be not expressed in money, the instrument will not sustain the technical description.[3] And so if there be an obscurity or error in the "acceptance,"[4] or the indorsement;[5] and so where the instrument was made payable to —— *or* order.[6] That a bill drawn by a person in his own favor, and by him accepted and indorsed, is a "bill of exchange," is asserted in Massachusetts,[7] though in England the inclination of authority is the other way.[8] It is not necessary, in New York, to aver that there was money due on the bill.[9]

"Promissory note" used in a larger sense.

§ 188. "*Promissory Note.*" — Great liberality has been shown in the interpretation of this term when used in statutes making the forgery or larceny of "promissory notes" penal. Thus it has been held to include bank notes,[10] where the statute does not specifically cover "bank notes," though it seems to be otherwise when it does.[11] So, also, it is not necessary, in prosecutions for larceny, that the note be

[1] R. *v.* French, Law Rep. 1 C. C. R. 217.

[2] Clark *v.* Newsam, 1 Exch. 131; R. *v.* West, 1 Den. C. C. 258; 2 Cox C. C. 437.

[3] R. *v.* Curry, 2 Moody, 218; R. *v.* Birkett, R. & R. 251; R. *v.* Smith, 2 Mood. 295; R. *v.* Wicks, R. & R. 149; R. *v.* Hart, 6 C. & P. 106; R. *v.* Butterwick, 2 Mood. & R. 196; R. *v.* Randall, R. & R. 195; R. *v.* Bartlett, 2 Moody & R. 362; R. *v.* Mopsey, 11 Cox C. C. 143; People *v.* Howell, 4 Johns. 296. Whether drawee's name can be dispensed with, if place of payment be given, see R. *v.* Smith, supra; R. *v.* Snelling, Dears. 219; 22 Eng. L. & E. 597. See Whart. Crim. Law, 8th ed. §§ 739 *et seq.*

[4] R. *v.* Cooke, 8 C. & P. 582; R. *v.* Rogers, 8 C. & P. 629.

[5] R. *v.* Arscott, 6 C. & P. 408. If payable to drawer's own order, neither indorsement or acceptance is needed. R. *v.* Wicks, R. & R. 149; R. *v.* Smith, 2 Moody, 295.

[6] R. *v.* Randall, R. & R. 195.

[7] Com. *v.* Butterick, 100 Mass. 12.

[8] R. *v.* Smith, supra.

[9] Phelps *v.* People, 13 N. Y. Supreme Ct. 401; S. C., 72 N. Y. 334, 372.

[10] Com. *v.* Paulus, 11 Gray, 305; Com. *v.* Ashton, 125 Mass. 384; People *v.* Jackson, 8 Barb. 637; Com. *v.* Boyer, 1 Binn. 201; Hobbs *v.* State, 9 Mo. 855; though see Culp *v.* State, 1 Porter, 33.

[11] Spangler *v.* Com. 3 Binn. 533; Damewood *v.* State, 1 How. Miss. 262.

locally negotiable,[1] or be anything more than a mere due bill.[2] It was at one time ruled in Pennsylvania, that if a note be not averred or implied to be still due and unpaid, it will not be within the statute,[3] though it is enough if on the face of the paper it appears still outstanding.[4] And though an instrument signed by M. and payable to his order is not a promissory note until indorsed, an allegation that D., in forging the indorsement, forged the indorsement of a promissory note, may be sustained.[5]

"Bank note" includes notes issued by banks.

§ 189. "*Bank Note.*" — In England, in an indictment under the 2 Geo. 2, c. 25, the instrument stolen must be expressly averred to be a bank note, or a bill of exchange, or some other of the securities specified; and, therefore, it is insufficient to charge the defendant with stealing a certain note, commonly called a bank note, for none such is described in the act.[6] And in the case of a bank note, it is sufficient to describe it generally as a bank note of the Governor and Company of the Bank of England, for the payment of one pound, &c., the property of the prosecutor; the said sum of one pound thereby secured, then being due and unsatisfied to the proprietor.[7] In Massachusetts, a bank note is sufficiently described as a "bank bill" in an indictment on Rev. Sts. c. 126, § 17, for stealing it.[8] And an indictment charging the larceny of "sundry bank bills of some banks respectively, to the jurors unknown, of the value of," &c., is good.[9]

An unnecessarily minute description of a bank note may be fatal; as where an indictment for stealing a bank note alleged

[1] Story on Bills, § 60; Sibley *v.* Phelps, 6 Cush. 172; People *v.* Bradley, 4 Park. C. R. 245. For what is not negotiable in one country may be negotiable in another. Whart. Confl. of L. § 447.

[2] People *v.* Finch, 5 Johns. 237.

[3] Com. *v.* M'Laughlin, 4 Rawle, 464; Stewart *v.* Com. 4 S. & R. 194. But see Rev. Stat. supra, § 184, note.

[4] Ibid.; Com. *v.* Richards, 1 Mass. 337; Phelps *v.* People, 72 N. Y. 334; State *v.* Rout, 3 Hawks, 618. See Com. *v.* Brettun, 100 Mass. 206.

[5] Com. *v.* Dallinger, 118 Mass. 439.

[6] Craven's case, 2 East P. C. 601.

[7] Starkie's C. P. 217. See Com. *v.* Richards, 1 Mass. 337; Larned *v.* Com. 12 Met. 240; Com. *v.* Sawtelle, 11 Cush. 142; People *v.* Holbrook, 13 Johns. 10; State *v.* Williamson, 3 Murphey, 216, and other cases cited Whart. Crim. Ev. § 116 *a*.

[8] Eastman *v.* Com. 4 Gray, 416; Com. *v.* Stebbins, 8 Gray, 493. "Bank note" and "bank bill" are synonymous. State *v.* Hays, 21 Ind. 176.

[9] Com. *v.* Grimes, 10 Gray, 470. See State *v.* Hoppe, 39 Iowa, 468.

it to be "signed for the Governor and Company of the Bank of England, by J. Booth," and no evidence of Booth's signature was given, the judges held the prisoner entitled to an acquittal.[1]

"Bank bill or note" refers exclusively to bank paper, and does not include an ordinary promissory note.[2] It includes, however, notes redeemed by the bank, and in its agents' hands.[3]

Whether it is necessary to aver the bank to have been incorporated has been already considered.[4] Under the Maine statute it is not necessary to aver either genuineness or the name of the bank.[5]

§ 189 *a*. "Two five dollar United States treasury notes, issued by the treasury department of the United States government, for the payment of five dollars each and of the value of five dollars," has been held an adequate description.[6] "One promissory note issued by the treasury department of the United States," has been also held sufficient;[7] and so of "four promissory notes of the United States for the payment of money;"[8] and so of "fifty dollars in national currency of the United States, the exact denomination of which is to the grand jury unknown;"[9] and so of —— "dollars in paper currency of the United States of America."[10] In Massachusetts, it is held that "three bonds of the United States, each of the value of ten thousand dollars," is a good description;[11] and so of "divers promissory notes current as money in said Commonwealth, of the amount and value of eighty-seven dollars, a more particular description of which is to the jurors unknown,"[12] nor is it a variance that the notes were "three tens, eleven fives, and one two," and might have been so known by the grand jury.[13] "Divers promissory notes, of the amount and of

Treasury note and United States currency.

[1] R. *v.* Craven, Russ. & Ry. 14; Whart. Crim. Ev. § 116.

[2] State *v.* Stimson, 4 Zab. 9.

[3] Com. *v.* Rand, 7 Met. 475.

[4] Supra, § 110.

[5] State *v.* Stevens, 62 Me. 284.

[6] State *v.* Thomason, 71 N. C. 146.

[7] State *v.* Fulford, 1 Phill. N. C. L. 563; and see Sallie *v.* State, 39 Ala. 691.

[8] Hummel *v.* State, 17 Ohio St. 628.

[9] Dull *v.* Com. 25 Grat. 965; Du Bois *v.* State, 50 Ala. 139; Grant *v.* State, 55 Ala. 201; but see Merrill *v.* State, 45 Miss. 651; Martinez *v.* State, 41 Tex. 164; Ridgeway *v.* State, 41 Tex. 231. See supra, § 176.

[10] State *v.* Carro, 26 La. An. 377; State *v.* Shonhausen, 26 La. An. 421.

[11] Com. *v.* White, 123 Mass. 430.

[12] Com. *v.* Green, 122 Mass. 333.

[13] Ibid. See Com. *v.* Hussey, 111 Mass. 432.

the value in all of five thousand dollars, a more particular description of which is to the jurors unknown," is sufficient, and is sustained by proof of bank notes.[1] "Divers promissory notes payable to the bearer on demand, current as money in the said Commonwealth, of the amount and of the value of eighty dollars, a more particular description of which is to the jurors unknown," is also good, unless it should appear that the grand jury had at the time of the finding a full description of the notes.[2] But "sundry bank bills," "commonly called legal tenders," has been held insufficient.[3] "Certain money and bank bills," to wit, "six dollars and eighty-five cents in bank bills, usually called United States legal tender notes, as follows: one bill of the denomination of five dollars, one bill of the value of one dollar, and eighty-five cents in currency, usually known and called postal currency," was held in New York in 1870 not to be an averment sufficiently accurate to sustain a conviction for stealing national bank notes and United States fractional currency.[4] It was conceded that to charge the notes simply as "current bank bills of the value of ——" &c., would have been enough. But it was insisted that when surplus descriptive matter, varying the character of the thing stolen, is introduced, this must be proved.[5]

"Money" is convertible with currency.

§ 190. "*Money.*" — Under the general term "money," bank notes, promissory notes, or treasury warrants cannot be included, unless they be made a legal tender.[6] In England, however, it has been held that bank notes, when

[1] Com. *v.* Butts, 124 Mass. 449.

[2] Com. *v.* Gallagher, 126 Mass. 54; S. P., Com. *v.* Ashton, 125 Mass. 354.

An indictment on the Gen. Sts. c. 160, § 24, charging the robbery of several "promissory notes then and there of the currency current in said Commonwealth," is sustained by proof that the notes stolen were either bank bills or treasury notes. The words "of the currency current in this Commonwealth" are equivalent to "current as money in this Commonwealth." Com. *v.* Griffiths, 126 Mass. 252.

[3] Com. *v.* Cahill, 12 Allen, 540. See Hamblett *v.* State, 18 N. H. 384.

"Divers United States treasury notes, and national bank notes and fractional currency notes, amounting in the whole to $158.00, and of the value of $158.00," is sufficient. State *v.* Hurst, 11 W. Va. 54.

[4] People *v.* Jones, 5 Lansing, 340.

[5] People *v.* Loop, 3 Parker C. R. 559; People *v.* Quinlan, 6 Parker C. R. 9. See Hickey *v.* State, 23 Ind. 21, 334, 340; State *v.* Evans, 15 Rich. (S. C.) 31; State *v.* Cason, 20 La. An. 48; Com. *v.* Butterick, 100 Mass. 1; McEntee *v.* State, 24 Wis. 43.

[6] R. *v.* Major, 2 East P. C. 118;

a legal tender, are properly described in an indictment for larceny as "money," although at the time they were stolen they were not in circulation, but were in the hands of the bankers themselves.[1] Whatever is currency is money.

§ 191. "*Goods and Chattels.*" — Under "goods and chattels," it has been ruled that bank notes cannot be included,[2] nor bonds and mortgages,[3] nor coin.[4] But be this as it may, it seems that in such case the words "goods and chattels" may be discharged as surplusage, and a conviction sustained without them.[5] And the tendency is to embrace in the term all *movables*, *e. g.* poultry and other live stock;[6] and grain in a stable.[7] Indeed, it would seem as if whatever is subject to common law larceny should be embraced in the term unless restricted by statute.[8]

"Goods and chattels" include personalty, exclusive of *choses in action.*

§ 192. "*Warrant, Order, or Request for Money or Goods.*" — "Warrant" is now held to include any instrument calling for the payment of money or delivery

"Warrant" is an instrument calling for

R. *v.* Hill, R. & R. 190; State *v.* Foster, 3 McC. 442; Williams *v.* State, 12 Sm. & M. 58; State *v.* Jim, 3 Murph. 3; McAuley *v.* State, 7 Yerg. 526; Com. *v.* Swinney, 1 Va. Cas. 146; Johnson *v.* State, 11 Ohio St. 324; Colson *v.* State, 7 Black. 590; Hale *v.* State, 8 Tex. 171.

[1] R. *v.* West, 40 Eng. Law & Eq. 564; 7 Cox C. C. 183; Dears. & B. 109; R. *v.* Godfrey, Dears. & B. 426.

[2] Com. *v.* Eastman, 2 Gray, 76; State *v.* Calvin, 2 Zabr. 207; Com. *v.* Swinney, 1 Va. Cas. 146; State *v.* Jim, 3 Murphey, 3; *contra*, People *v.* Kent, 1 Dougl. (Mich.) 42. As to English practice see R. *v.* Mead, 4 C. & P. 535; R. *v.* Dean, 2 Leach, 693; R. *v.* Crone, Jebb, 47; Anon. 1 Crawf. & Dix C. C. 152. In R. *v.* Mead, halves of bank notes sent by mail were held "goods and chattels." R. *v.* Dean only holds notes to be "money." And a railway ticket has been said to be a *chattel*. R. *v.* Boulton, 1 Den. C. C. 508; 2 C. & K. 917. But see R. *v.* Kilham, L. R. 1 C. C. 264; Steph. Dig. C. L. art. 288, doubting. And whenever, in statutes, the terms "goods and chattels" are used as *nomen generalissimum*, and are not connected with the terms "money" or "property," they should have this general construction.

[3] R. *v.* Powell, 14 Eng. Law & Eq. 575; 2 Den. C. C. 403.

[4] R. *v.* Radley, 3 Cox C. C. 460; 2 C. & K. 977; 1 Den. C. C. 450; R. *v.* Davison, 1 Leach, 241; though see U. S. *v.* Moulton, 5 Mason, 537; Hall *v.* State, 3 Oh. St. 575.

[5] Ibid.; R. *v.* Morris, 1 Leach C. C. 109; Com. *v.* Eastman, 2 Gray, 76; S. C., 4 Gray, 416; Com. *v.* Bennett, 118 Mass. 452. Supra, §§ 158, 183.

[6] 2 East P. C. 748; R. *v.* Whitney, 1 Moody, 3.

[7] State *v.* Brooks, 4 Conn. 446.

[8] State *v.* Bonwell, 2 Harring. 529.

payment or delivery.

of goods, on which, if genuine, a *primâ facie* case of recovery could be made.[1]

"Order" implies mandatory power.

§ 193. "*Order*" implies, beyond this, a mandatory power in the drawer.[2]

[1] R. *v.* Vivian, 1 C. & K. 719; 1 Den. C. C. 35; R. *v.* Dawson, 2 Den. C. C. 75; 5 Cox C. C. 220; 1 Eng. Law & Eq. 589. A "dividend" warrant falls under this head. R. *v.* Autey, Dears. & B. 294; 7 Cox C. C. 329; and so does a letter of credit. R. *v.* Raake, 2 Moody, 66; and so, distinctively, of any letters *authorizing* but not *commanding* a particular act; and this constitutes the chief *differentia* between warrant and order. Perhaps the only cases, therefore, to which "order" does not apply, but "warrant" does, are those in which there is a discretionary power reserved to the drawee. An authority to a correspondent to advance funds if he thinks best, is a "warrant," but not an "order." See R. *v.* Williams, infra. But warrants include also (as has been seen) instruments where the drawer assumes mandatory power; *e. g.* besides the cases just mentioned, post-office drafts (R. *v.* Gilchrist, supra), and bills of exchange. R. *v.* Willoughby, 2 East P. C. 581.

[2] R. *v.* Williams, 2 C. & K. 51; McGuire *v.* State, 37 Ala. 161. *Primâ facie* case is enough; and though the drawer has neither money nor goods in the drawee's hands, and there is no privity between them, yet, as the instrument could be none the less on its face the basis of a suit, it does not, from such latent defects, lose the qualities of a forgeable order. See R. *v.* Carte, 1 C. & K. 741; People *v.* Way, 10 Cal. 336; R. *v.* Lockett, 1 Leach, 110. But a *primâ facie* drawer and drawee are necessary; and the drawer must occupy, on the face of the instrument, the attitude of "ordering," and the drawee the relation of being "ordered." See cases just cited, and R. *v.* Curry, 2 Moody, 218; C. & M. 652; R. *v.* Cullen, 5 C. & P. 116; R. *v.* Richards, R. & R. 193; People *v.* Farrington, 14 Johns. 348. Yet that there may be cases where a drawee's name can be dispensed with is on reason clear. An order on the keeper of a prison, for instance, or on the sheriff of a county, is no less an order because the drawee's name is not given; and so we can conceive of an order by a factory treasurer on the factory store-keeper, to which the same remark would apply. As sustaining this may be cited, R. *v.* Gilchrist, 2 Moody, 233; R. *v.* Snelling, Dears. 219; 22 Eng. L. & Eq. 597; Com. *v.* Butterick, 100 Mass. 12; Noakes *v.* People, 25 N. Y. 380. *Defectiveness*, or elliptical obscurity, does not destroy the forgeable character of the instrument as an "order," if it can be proved to be an order by parol. But if so, the wanting links must be supplied by special averment in the indictment. See supra, § 181; Whart. Crim. Law, 8th ed. §§ 682 *et seq.* Yet when this is done, our courts have not been so fastidious, as appears to have been sometimes the case in England, as to require each "order" to come up to a preconceived legal standard. This, perhaps (besides our emancipation from the numbing effect on old English judges of the consciousness of the death penalty in forgery), may be attributed to the fact that in this country everybody does business in every sort of way, while in England the class is comparatively limited, and restricted to settled forms. As sus-

§ 194. "*Request*" is wider still, and includes a mere invitation, and is technically proper in cases where the party supposed to draw is without authority to draw;[1] nor is it necessary that a drawer should be specified.[2] Checks, drafts, and bills of exchange fall under either head.[3] The writing need not be of a business character, nor negotiable.[4]

"Request" includes mere invitation.

taining the American liberalization of the rule, see Com. *v.* Fisher, 17 Mass. 46; Com. *v.* Butterick, 100 Mass. 12; State *v.* Cooper, 5 Day, 250; People *v.* Shaw, 5 Johns. R. 236; People *v.* Farrington, 14 Johns. R. 348; Hoskins *v.* State, 11 Ga. 92; McGuire *v.* State, 37 Ala. 361. See Jones *v.* State, 50 Ala. 161. The following was held to be an "order for the payment of money," although the party addressed was not indebted to the supposed drawer, or bound to comply: "Mr. Campbell, please give John Kepper $10, Frank Neff." Com. *v.* Kepper, 114 Mass. 278. Even in England a note from a merchant, asking that the bearer should be permitted to test wine in the London docks, is an "order" for the delivery of goods. R. *v.* Illidge, 2 C. & K. 871; T. & M. 127; 3 Cox C. C. 552. No American expansion of the rule has exceeded this.

[1] R. *v.* James, 8 C. & P. 292; R. *v.* Thomas, 2 Moody, 16; R. *v.* Newton, 2 Moody, 59; R. *v.* Walters, C. & M. 588; R. *v.* White, 9 C. & P. 282; R. *v.* Evans, 5 C. & P. 553; R. *v.* Kay, L. Rep. 1 C. C. 257.

[2] R. *v.* Pulbrook, 9 C. & P. 37.

[3] R. *v.* Willoughby, 2 East P. C. 944; R. *v.* Shepherd, Ibid.; State *v.* Nevins, 23 Vt. 519; People *v.* Howell, 4 Johns. 296. So is a post-dated check; R. *v.* Taylor, 1 C. & K. 213; but not a warrant for wages. R. *v.* Mitchell, 2 F. & F. 44.

[4] 2 Russ. on Crimes, 514.

A forged instrument of writing was in the following terms: —

"Mr. Davis: Wen. 19th.

"pleas let the boy have $6 00 dolers for me. B. W. EARL."

It was held that such instrument is *primâ facie* an "order for the payment of money" within the meaning of the statute. Evans *v.* State, 8 Ohio State Rep. (N. S.) 196.

Many subtleties formerly existed in the English law as to the distinctions between these several designations. The following cases are generally referred to under this head: R. *v.* McIntosh, 2 East P. C. 942; R. *v.* Anderson, 2 Moody & R. 469; R. *v.* Dawson, supra; R. *v.* Williams, 2 C. & K. 51; R. *v.* Hart, 6 C. & P. 106; R. *v.* Roberts, C. & M. 682. The pleader has, however, been relieved from most of these by a more recent case (1850), where it was held that if the instrument be set out *in haec verba*, a misdescription will be immaterial, at least if it fall within *one* of several terms used to designate it. R. *v.* Williams, 2 Den. C. C. 61; 4 Cox C. C. 356; cited supra, §§ 184, 192–3. And the intimation was even thrown out that where the indictment sets forth the forged instrument, the court will see whether it is within the statute (when the indictment is under a statute), and if so, will sustain a conviction, although it was not specifically averred to be an instrument which the statute covered. Thus, where the indictment charged the defendant to have forged a certain warrant, order, and request, in the words and figures following, to wit: "Mr. Bevan, S. — Pleas to send by bearer a quantity of

§ 195. When the pleader is doubtful as to the class in which the instrument falls, it seems that instead of averring the instrument, as in the case last cited, to be "a certain warrant, order, and request," the better course is to aver the uttering of one warrant, one order, and one request. But it is doubtful whether even this is not duplicity, where the words do not each describe the object;[1] and hence, where there is a question whether the document is an "order," or "request," or "warrant," it is safe to give to each designation a separate count.[2]

Terms may be used cumulatively.

§ 196. If the writing, on its face, comes short of being either an order, warrant, request, or other statutory term, averment may be made, and evidence received, bringing it up to the required standard, as where the name of the party addressed is omitted,[3] or where the body of the writing is on its face insensible.[4] And where the fraudulent or illegal character of the document does not appear on its face, this must be helped out by averments.[5]

Defects may be explained by averments.

Innuendoes have been already discussed.[6]

§ 197. "*Deeds.*" — To sustain the averment of a deed, there must be a writing under seal, purporting to pass some legal right from one party to another, either mediately

A "deed" must be in writing un-

basket nails," &c., the Court of Criminal Appeal, Lord Campbell presiding, sustained the conviction, apparently on the ground that if there was a technical misnomer of the instrument, this was cured by its being fully set forth, and thus speaking for itself. R. *v.* Williams, 2 Den. C. C. 61; 4 Cox C. C. 356; 2 Eng. Law & Eq. 633. See other cases cited supra, §§ 184, 192. But simply "W. Trim, 2*s.*," is insensible and incurable. R. *v.* Ellis, 4 Cox C. C. 258.

[1] R. *v.* Gilchrist, 2 M. C. C. 233; C. & M. 224; R. *v.* Crowther, 5 C. & P. 316, per Bosanquet, J. See Com. *v.* Livermore, 4 Gray, 18; *sed quaere*, whether the unnecessary cumulation could not be discharged as surplusage. Compare State *v.* Corrigan, 24 Conn. 286; Whart. Crim. Ev. § 138.

[2] See supra, §§ 162-3; infra, § 251.

[3] R. *v.* Carney, 1 Mood. 351; R. *v.* Pullbrook, 9 C. & P. 37; R. *v.* Rogers, 9 C. & P. 41. See supra, § 185.

[4] R. *v.* Hunter, 2 Leach C. C. 624; R. *v.* Walters, C. & M. 588; R. *v.* Atkinson, C. & M. 325; R. *v.* Cullen, 1 Moody, 300; R. *v.* Pullbrook, 9 C. & P. 37; Com. *v.* Spilman, 124 Mass. 327; Carberry *v.* State, 11 Oh. St. 410; State *v.* Crawford, 13 La. An. 300; Whart. Crim. Law, 8th ed. §§ 728 *et seq.*

[5] Ibid.; Com. *v.* Hinds, 101 Mass. 209; Com. *v.* Costello, 120 Mass. 359.

[6] Supra, § 181 *a*.

or immediately; and hence a power of attorney to sell stock is a deed under the statutes.[1] Nor is it necessary that a deed should rigorously pursue the statutory form.[2] *Primâ facie* validity is enough.

Under seal passing a right.

§ 198. "*Obligation.*" — Under statutes based, as those of Louisiana, on the Roman law, an obligation is a unilateral engagement by which one party engages himself to another to do a particular thing. The English common law authorities sometimes speak as if the term is limited to bonds with penalties. But when the term is used in a statute as *nomen generalissimum*, it must be construed in its most liberal sense.[3]

"Obligation" is a unilateral engagement.

§ 199. As to "*undertaking*," the same remark is to be made. Where, however, either term is used to represent a subordinate species or class, then the instrument must be proved to belong to this species or class.[4]

And so is "undertaking."

§ 200. A "*guarantee*" is an undertaking;[5] and so is a bare "I. O. U." without any expressed consideration.[6]

A "guarantee" and an I. O. U. are undertakings.

§ 201. "*Property*," it needs scarcely be said, includes whatever may be appropriated to individual use. Money necessarily falls within this definition.[7]

"Property" is whatever may be appropriated.

§ 202. "*Piece of Paper.*" — It has been sometimes the practice to aver, in larceny, the stealing of "one piece of paper, of the value of one dollar," &c., as the case may be; and it has been thought that in this way the difficulty as to setting out doubtful instruments could be

"Piece of paper" is subject of larceny.

[1] R. *v.* Fauntleroy, 1 C. & P. 421; 1 Moody, 52.

[2] R. *v.* Lyon, R. & R. C. C. 255.

In R. *v.* Morton, 12 Cox C. C. 456; L. R. 2 C. C. R. 22, it was held that the forging of letters of orders issued by a bishop, certifying that on a day and at a place mentioned therein A. B. was admitted into the holy order of deacons, according to the manner prescribed by the Church of England, and rightly and canonically ordained deacon, in testimony whereof the bishop had caused his episcopal seal to be affixed thereunto, is not the feloniously forging of a deed within the 24 & 25 Vict. c. 98, s. 20.

[3] See Fogg *v.* State, 9 Yerg. 392.

[4] R. *v.* West, 1 Den. C. C. 258; 2 C. & K. 496; S. P., Clark *v.* Newsam, 1 Exch. 131.

[5] R. *v.* Joyce, 10 Cox C. C. 100; L. & C. 576; R. *v.* Reed, 2 Moody, 62.

[6] R. *v.* Chambers, L. R. 1 C. C. 341.

[7] People *v.* Williams, 24 Mich. 156.

avoided. How far this is the case will be considered hereafter.[1] A "piece of paper," it may be generally said, if of any value, is the subject of larceny.[2]

"Challenges" to fight need not be set forth.

§ 202 *a*. A written letter, if merely the inducement or introduction to an oral communication, conveying a challenge, need not be set forth. Thus, where T., in a letter to N., used expressions implying a challenge, and by a postscript referred N., the challenged party, to one H. (the bearer of the letter), if any further arrangements were necessary, it was held that the letter was only evidence of the challenge, and need not be specially pleaded; and that N. might give testimony of the conversation between H., the bearer of the letter, and himself.[3] Even when a statute makes sending a challenge indictable, it has been held not necessary to set out a copy of the challenge;[4] and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, no way altering the meaning, this is cured by verdict.[5]

IX. WORDS SPOKEN.

Words spoken must be set forth exactly, though substantial proof is enough.

§ 203. Where words are the gist of the offence, they must be set forth in the indictment with the same particularity as a libel; as, for instance, in an indictment for scandalous or contemptuous words spoken to a magistrate in the execution of his office;[6] or for blasphemous or seditious words,[7] or for perjury.[8] It is not enough, in such case, to lay the substance of the words alleged to have been spoken. The words themselves must be laid, but only the substance need be proved.[9] But the meaning must be evidently

[1] Infra, § 213; Whart. Crim. Law, 8th ed. § 880. See R. *v.* Bingley, 5 C. & P. 602.

[2] R. *v.* Perry, 1 Den. C. C. 69; S. C., 1 C. & K. 727; R. *v.* Clark, R. & R. 181.

[3] State *v.* Taylor, 3 Brev. 243.

[4] Brown *v.* Com. 2 Va. Cas. 516; State *v.* Farrier, 1 Hawks, 487.

[5] See Heffren *v.* Com. 4 Metc. (Ky.) 5; Ivey *v.* State, 12 Ala. 276.

[6] R. *v.* Bagg, 1 Rolle Rep. 79; R. *v.* How, 2 Str. 699. Infra, § 965.

[7] R. *v.* Popplewell, 2 Str. 686; R. *v.* Sparling, Ibid. 498.

[8] See Whart. Crim. Law, 8th ed. § 1297; Whart. Crim. Ev. § 120 *a*.

[9] Updegraph *v.* Com. 11 Serg. & Rawle, 394; Com. *v.* Kneeland, 20 Pick. 206; Bell *v.* State, 1 Swan (Tenn.), 42; Whart. Crim. Law, 8th ed. §§ 1603–7, 1615.

In indictments for threatening with

and clearly the same, without the help of any implication or anything extrinsic.[1] Should any substantial difference exist between the words proved and those laid, even if laid as spoken in the third person and proved to have been spoken in the second,[2] the defendant must be acquitted. But if some of the words be proved as laid, and the words so proved amount to an indictable offence, it will be sufficient.[3] And when the words do not constitute the gist of the offence, as where the charge is attempt to extort by threats, then it is enough to set forth the substance.[4]

In treason enough to set forth substance.

§ 204. When words are laid as an overt act of treason, it is sufficient to set forth the substance of them,[5] for they are not the gist of the offence, but proofs or evidences of it merely.

X. PERSONAL CHATTELS.

1. Indefinite, Insensible, or Lumping Descriptions, § 206.
2. Value, § 213.
3. Money or Coin, 218.

§ 205. In this connection it is proposed to treat the pleading of personal chattels only so far as necessary for the purpose of a demurrer, or a motion in arrest of judgment. The question of variance between the description and the evidence will be considered in a separate volume.[6]

1. *Indefinite, Insensible, or Lumping Description.*

Personal chattels, when subjects of an offence, must be specifically described.

§ 206. When, as in larceny, or receiving stolen goods, personal chattels are the subject of an offence, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated;[7] thus, for instance: "one coat of the value of twenty shillings;

intent to extort money the words need not be set out exactly. The substance is enough. Com. *v.* Goodwin, 122 Mass. 19.

[1] People *v.* Warner, 5 Wend. 271; State *v.* Bradley, 1 Hay. 403, 463; State *v.* Coffey, N. C. Term R. 272; State *v.* Ammons, 3 Murph. 123.

[2] R. *v.* Berry, 4 T. R. 217; Com. *v.* Moulton, 108 Mass. 308. See Whart. Crim. Law, 8th ed. §§ 1603–7, 1615.

[3] Com. *v.* Kneeland, 20 Pick. 206.

[4] Com. *v.* Moulton, *ut supra*. See Com. *v.* Goodwin, 122 Mass. 19.

[5] Fost. 194; R. *v.* Layer, 8 Mod. 93; 6 St. Tr. 328.

[6] Whart. Crim. Ev. § 121 *et seq.*

[7] See 2 Hale, 182, 183; People *v.* Coon, 45 Cal. 672; Whart. Crim. Ev. §§ 121–6.

two pairs of boots, each pair of the value of thirty shillings; two pairs of shoes, each pair of the value of twelve shillings; two sheets, each of the value of thirteen shillings; of the goods and chattels of one J. S.," or "one sheep of the price of twenty shillings," &c., and the like. If the description were "twenty wethers and ewes," the indictment would be bad for uncertainty; it should state how many of each.[1] But an indictment charging the defendant with feloniously taking three head of cattle has been held sufficiently certain under a statute, without showing the particular species of cattle taken.[2]

When several articles are stated, it is not necessary to separate them by the connecting word "and."[3]

When notes are stolen in a bunch, denominations may be proximately given.

§ 207. When several notes are stolen in a bunch, it is rarely that the prosecutor can designate their respective amounts and values. As a matter of necessity, therefore, an indictment charging the larceny of "sundry bank bills, of some banks respectively to the jurors unknown, of the value of $38," &c., is sufficient.[4] And there is even authority to the effect that it is enough to say "divers bank bills, amounting in the whole to, &c., and of the value of, &c., of the goods and chattels," &c.[5]

An indictment charging the defendant with the larceny of "six handkerchiefs" is good, though the handkerchiefs were in one piece, the pattern designating each handkerchief.[6]

The distinctions as to variance of instruments of death are elsewhere discussed.[7]

Certainty must be such as to individuate offence.

§ 208. The common acceptation of property is to govern its description, and there must be such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded, and will judicially show to the court

[1] 2 Hale, 183; Archbold's C. P. 45. Otherwise in Texas. State *v.* Murphy, 39 Tex. 46.

[2] People *v.* Littlefield, 5 Cal. 355.

[3] State *v.* Bartlett, 55 Me. 200.

[4] Com. *v.* Grimes, 10 Gray, 470; Com. *v.* Sawtelle, 11 Cush. 142.

[5] Larned *v.* Com. 12 Met. 240; Com. *v.* O'Connell, 12 Allen, 451; State *v.* Taunt, 16 Minn. 109; *contra*, Hamblett *v.* State, 18 N. H. 384; Low *v.* People, 2 Park. C. R. 37. See Com. *v.* Cahill, 12 Allen, 540. Other cases are given supra, § 189 *a*.

[6] 6 Term R. 267; 1 Ld. Raym. 149. Whart. Crim. Ev. § 121.

[7] Whart. Crim. Ev. §§ 91–4; Whart. Crim. Law, 8th ed. §§ 519–20.

that it could have been the subject matter of the offence charged.[1]

§ 209. When animals are stolen alive, it is not necessary to state them to be alive, because the law will presume them to be so unless the contrary be stated; but if when stolen the animals were dead, that fact must be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal.[2] But if an animal have the same appellation whether it be alive

"Dead" animals must be averred to be such. "Living" must be intelligently described.

[1] Whart. Crim. Ev. § 121; Com. *v.* James, 1 Pick. 376; People *v.* Jackson, 8 Barb. S. C. 657; Reed's case, 2 Rodger's Rec. 168; Com. *v.* Wentz, 1 Ashm. 269.

It is sufficiently certain to describe the article stolen as "one hide, of the value," &c. (State *v.* Dowell, 3 Gill & J. 310), or "one watch," &c. Widner *v.* State, 25 Ind. 234.

An indictment charging A. with stealing a printed book, of the value, &c., is correct, and the title of the book need not be stated. State *v.* Dowell, 3 Gill & J. 310; State *v.* Logan, 1 Mo. 377.

A count charging manslaughter on the high seas, by casting F. A. from a vessel, whose name was unknown, is sufficiently certain; and so of a count charging the offence to have been committed from a long-boat of the ship W. B., belonging, &c. United States *v.* Holmes, 1 Wall. Jun. 1. See Com. *v.* Strangford, 112 Mass. 289. As to variance in pleading instrument of death see Whart. Crim. Law, 8th ed. §§ 519-20. As to variance of goods see Whart. Crim. Ev. § 121.

A "*Lot of Lumber*," "*Parcel of Oats*," "*Mixtures*." — In Louisiana judgment was arrested on an indictment which charged the defendant with stealing a "lot of lumber," a certain lot of furniture," and "certain tools." State *v.* Edson, 10 La. An. R. 229. On the other hand, in North Carolina, a "parcel of oats" was adjudged a sufficient description of the stolen property. State *v.* Brown, 1 Dev. 137. The reason of this distinction is, that in the first case a closer description was possible; in the second, not so. And a general description in larceny is enough. This doctrine is founded partly on the fact that the prosecutor is not considered in possession of the article stolen, and is not, therefore, enabled to give a minute description; and principally, because, notwithstanding the general description, it is made certain to the court, from the face of the indictment, that a crime has been committed, if the facts be true. State *v.* Scribner, 2 Gill & J. 246.

Substances mechanically mixed should not be described in an indictment as a "certain mixture consisting of," &c., but by the names applicable to them before such mixture, though it is otherwise with regard to substances chemically mixed. R. *v.* Bond, 1 Den. C. C. 517.

It has been held in Massachusetts that where brandy was feloniously drawn from a cask, and then bottled, it could not be described in the indictment as "bottles of brandy." Com. *v.* Gavin, 121 Mass. 54.

[2] R. *v.* Edwards, R. & R. 497; R. *v.* Halloway, 1 C. & P. 128; Com. *v.* Beaman, 8 Gray, 497. See R. *v.* Wil-

or dead, and it makes no difference as to the charge whether it were alive or dead, it may be called, when dead, by the appellation applicable to it when alive.[1]

Whether a description is sufficient depends in statutory cases largely on the statute.[2] It has been held that "one sheep" is a sufficiently exact description;[3] and so is "a chestnut sorrel horse,"[4] and "one beef steer,"[5] and "one black pig, white listed, and one white pig, with a blue rump, both without ear marks, of the value of $2.00."[6] But "a yearling" is not a sufficient description.[7]

When a dead animal, or part of an animal, has a distinctive name, it may be described as such. Hence an indictment charging the stealing "one ham," of the value of ten shillings, of the goods and chattels of T. H., was held good, although it did not state the animal of which the ham had formed a part.[8] But an indictment for stealing "meat" is bad for generality.[9]

Variance as to animals is discussed in another volume.[10] In a future section it will be seen that the question of specification depends largely on the terms of the statute.[11]

When only certain articles of a class are subjects of indictment, then individuals must be described.

§ 210. Specification is necessary when certain members of a class are subjects of indictment, and certain others not. Thus an indictment for stealing "three eggs" has been ruled to be bad, because only the eggs of animals *domitae naturae* are the subject of larceny.[12] But an indictment for bestiality, which described the animal as "a certain bitch," was held sufficiently certain, although the female of foxes and some other animals, as well as of dogs, are so called.[13] In larceny this would be bad, as the

liams, 1 Mood. C. C. 107. See Whart. Crim. Law, 8th ed. § 871.

[1] R. *v.* Puckering, 1 Mood. C. C. 242; *contra*, Com. *v.* Beaman, 8 Gray, 497. Infra, § 237; Whart. Crim. Ev. § 124; Whart. Crim. Law, 8th ed. § 874.

[2] Infra, §§ 237.

[3] State *v.* Pollard, 53 Me. 124; Whart. Crim. Ev. § 824.

[4] Taylor *v.* State, 44 Ga. 263.

[5] Short *v.* State, 36 Tex. 644.

[6] Brown *v.* State, 44 Ga. 300.

[7] Stollenwerk *v.* State, 55 Ala. 142.

[8] R. *v.* Gallears, 2 C. & K. 981; 1 Den. C. C. 501.

[9] State *v.* Morey, 2 Wis. 494; State *v.* Patrick, 79 N. C. 656.

[10] Whart. Crim. Ev. § 124.

[11] Infra, § 237.

[12] R. *v.* Cox, 1 C. & K. 487; *sed quaere*, 1 Den. C. C. 502. See Whart. Crim. Law, 8th ed. § 870.

[13] R. *v.* Allen, Ibid. 495.

term would not indicate whether or no the animal was larcenous.[1] In bestiality this distinction is immaterial.

Minerals must be averred to be severed from realty.

§ 211. An indictment charging the stealing of certain "gold-bearing quartz-rocks," is bad. It should appear that the rock was severed from the realty.[2]

Variance in number or value immaterial.

§ 212. The prosecutor is bound by the description of the species of goods stated; thus, for instance, an indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of a pair of boots. But a variance in the number of the articles or in their value is immaterial, provided the value proved be sufficient to constitute the offence at law.[3] So if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more of a sufficient value, it will be sufficient, although he fail in his proof of the rest.[4] But it was held otherwise where five certificates of stock of a particular number were alleged to be stolen, and it appeared that only one certificate of that number had been issued.[5]

2. *Value.*

Value must be assigned when larceny is charged.

§ 213. It is necessary that some specific value should be assigned to whatever articles are charged as the subjects of larceny.[6] An indictment cannot be sustained for stealing a thing of no intrinsic or artificial value.[7]

Larceny of "piece of paper"

§ 214. A count for stealing "one piece of paper, of the value of one cent," may be good, when a count for stealing a bank note fails[8] in consequence of the instrument

[1] Whart. Crim. Law, 8th ed. §§ 869–71.

[2] State *v.* Burt, 64 N. C. 619; People *v.* Williams, 35 Cal. 671; Whart. Crim. Law, 8th ed. § 865.

[3] R. *v.* Forsyth, R. & R. 274; Hope *v.* Com. 9 Met. 134; Com. *v.* Cahill, 12 Allen, 540; State *v.* Fenn, 41 Conn. 590.

[4] Com. *v.* Eastman, 2 Gray, 76; Com. *v.* Williams, 2 Cush. 583; People *v.* Wiley, 3 Hill N. Y. 194. Infra, §§ 252, 470; Whart. Crim. Ev. § 145.

[5] People *v.* Coon, 45 Cal. 672.

[6] Roscoe's Crim. Ev. 512; State *v.* Goodrich, 46 N. H. 186; State *v.* Fenn, 41 Conn. 590; People *v.* Payne, 6 Johns. 103; State *v.* Stimson, 4 Zab. 9; State *v.* Smart, 4 Rich. 356; State *v.* Tillery, 1 Nott & McCord, 9; State *v.* Thomas; 2 McCord, 527; State *v.* Wilson, 1 Porter, 118; State *v.* Allen, Charlton, 518; Merwin *v.* People, 26 Mich. 298; Morgan *v.* State, 13 Fla. 671; Sheppard *v.* State, 42 Ala. 531. Supra, § 206; Whart. Crim. Ev. § 126; Whart. Crim. Law, 8th ed. § 951.

[7] State *v.* Bryant, 2 Car. Law Rep. 617.

[8] R. *v.* Perry, 1 Den. C. C. 69; S.

may be prosecuted.

described being void, but not, it is said, where it is valid.[1]

Value essential to restitution, and also to mark grades.

§ 215. It has been said that the object of inserting value is either to distinguish grand from petit larceny, or to enable the court to be guided as to imposing fines or restitution; and that when neither of these conditions exist (*e. g.* where a statute punishes horse stealing, irrespective of value), then value need not be averred.[2] But this is doubtful law; though the amount of value is only material in those cases in which an offence is graduated in conformity to the value of the thing taken.[3] And where the value of a thing which is the subject of the offence is necessary to fix the grade of the offence, it is a proper mode of stating it to aver that the thing is of or more than the value prescribed by the statute.[4]

Legal currency need not be valued.

§ 216. An averment of the value of bank notes, not legal tender, is always necessary, but not so of government coins, which are values themselves.[5]

When there is lumping valuation, conviction cannot be had for stealing fraction.

§ 217. A collective or lumping valuation, so far as demurrer or arrest of judgment is concerned, is always permissible.[6] And it is said that where several articles, all of one kind, are described, their value may be alleged in the aggregate or collectively, and the defendant may be convicted of stealing a part of less value than the whole, if there be anything on the record to attach to the articles on which the conviction was had a value sufficient to sustain the conviction.[7]

C., 1 Car. & K. 727; R. *v.* Clark, R. & R. 181; 2 Leach, 1039.

[1] Whart. Crim. Law, 8th ed. § 880.

[2] Ritchey *v.* State, 7 Blackf. 168. See Sheppard *v.* State, 42 Ala. 531; Whart. Crim. Law, 8th ed. §§ 951, 952.

[3] People *v.* Stetson, 4 Barb. 151; People *v.* Higbee, 66 Barb. 131; State *v.* Gillespie, 80 N. C. 396; Lunn *v.* State, 44 Tex. 85.

[4] Phelps *v.* People, 72 N. Y. 334.

[5] State *v.* Stimson, 4 Zabr. (N. J.) 9; Grant *v.* State, 55 Ala. 201. Infra, § 218.

A description in an indictment in these words, "ten five-dollar bank bills of the value of five dollars each," is sufficiently definite. Eyland *v.* State, 4 Sneed, 357. Supra, § 189 *a*.

[6] State *v.* Hood, 51 Me. 363; Com. *v.* Grimes, 10 Gray, 470; People *v.* Robles, 34 Cal. 591.

[7] Com. *v.* O'Connell, 12 Allen, 451; but see Hamblett *v.* State, 18 N. H. 384. In Com. *v.* O'Connell the indictment was for "a quantity of bank notes current within this Commonwealth, amounting together to one hundred and fifty dollars, and of the

But when articles of different kinds, *e. g.* "sundry bank bills, and sundry United States treasury notes," are thus lumped with a common value, the indictment cannot be sustained by proof of stealing only a part of the articles enumerated.[1] Nor can a conviction for stealing a part of the articles charged be sustained unless to such part sufficient value is assigned or implied.[2]

3. *Money and Coin.*

§ 218. Money is described as so many pieces of the current gold or silver coin of the realm, called ——. The species of coin must be specified.[3] The subject of variance is elsewhere discussed.[4]

Money must be specifically described.

"Twenty-five dollars in money" is not a sufficiently exact designation.[5]

"Bank notes" have been already noticed.[6]

"United States gold coin" is equivalent to "gold coin of the United States;" such coin being current by law, both court and jury know, without allegations, that a gold coin of the denomination and value of ten dollars is an eagle.[7]

value of one hundred and fifty dollars." It was said by the court that "it is not perceived that the description of bank bills as 'a quantity,' instead of 'divers and sundry,' constitute an error. And the statement of the aggregate of the property stolen, where all the articles are of one kind, has been sanctioned by the court." Com. *v.* Sawtelle, 11 Cush. 142. Upon such an indictment, when the articles are all of one class, the defendant may be convicted of stealing a less sum than that charged in the indictment. Com. *v.* O'Connell, 12 Allen, 451. See, further, supra, § 189 *a*.

[1] Whart. Crim. Ev. § 126; Com. *v.* Cahill, 12 Allen, 540; and see Hope *v.* Commonwealth, 9 Met. 134; Com. *v.* Lavery, 101 Mass. 207, cited Whart. Crim. Ev. § 126.

[2] Hamblett *v.* State, 18 N. H. 384; Lord *v.* State, 20 N. H. 404; State *v.* Goodrich, 46 N. H. 186; Com. *v.* Smith, 1 Mass. 245; Low *v.* People, 2 Parker C. R. 37; Collins *v.* People, 39 Ill. 233; Shepard *v.* State, 42 Ala. 531.

[3] R. *v.* Fry, R. & R. 482. See R. *v.* Warshoner, 1 Mood. C. C. 466; People *v.* Ball, 14 Cal. 100; *contra*, U. S. *v.* Rigsby, 2 Cranch C. C. R. 364. As to description in forgery see Whart. Crim. Law, 8th ed. § 751.

[4] Whart. Crim. Ev. § 122.

[5] Smith *v.* State, 33 Ind. 159; Merwin *v.* People, 26 Mich. 298; Lavarre *v.* State, 1 Tex. App. 685; and so substantially is State *v.* Longbottoms, 11 Humph. 39. In McKane *v.* State, 11 Ind. 195, "sixty dollars of the current gold coin of the United States" was held enough. See also State *v.* Green, 27 La. An. 598.

[6] Supra, § 189.

[7] Daily *v.* State, 10 Ind. 536. See Whart. Crim. Ev. § 122.

A count charging the conversion of $19,000 of money, and $19,000 of bank notes, is bad for uncertainty.[1] Generality of description, however, may be excused by an averment that the precise character and value of the coin or notes are unknown to the grand jury.[2]

When money is given to change, and change is kept, indictment cannot aver stealing change.

§ 219. It should be kept cautiously in mind, that if the indictment charges stealing a particular note or piece of coin, and the evidence is that such note or coin was given to the prosecutor to change, who refused to return the change, the defendant, even under the statutes making such conversion larceny, cannot be convicted of stealing the change; for there is a fatal variance between the description in the indictment and the proof.[3] But an indictment charging the larceny of the note or coin actually given to the defendant may be good.[4]

XI. OFFENCES CREATED BY STATUTE.

1. GENERALLY SUFFICIENT AND NECESSARY TO USE WORDS OF STATUTE, § 220.
2. COMMON LAW OFFENCES MADE INDICTABLE BY STATUTE, § 230.
   (a.) Statutory directions must be pursued, § 230.
   (b.) Specification must be given, § 231.
   (c.) When common law and statutory indictments are cumulative, § 232.
3. TECHNICAL AVERMENTS IN STATUTES, § 235.
4. DESCRIPTION OF ANIMALS IN STATUTE, § 237.
5. PROVISOS AND EXCEPTIONS, § 238.

[1] State *v.* Stimson, 4 Zabr. 9.

[2] Supra, §§ 189 *et seq.*

An indictment for larceny from the person of "sundry gold coins, current as money in this Commonwealth, of the aggregate value of twenty-nine dollars, but a more particular description of which the jurors cannot give, as they have no means of knowledge," and containing similar allegations as to bank bills and silver coin, is sufficiently specific to warrant a judgment upon a general verdict of guilty. Com. *v.* Sawtelle, 11 Cush. 142; Com. *v.* Butts, 124 Mass. 449; People *v.* Bogart, 36 Cal. 245.

And so *a fortiori* as to an averment of "four hundred and fifty dollars in specie coin of the United States, the denomination and description of which is to the grand jury unknown." Chisholm *v.* State, 45 Ala. 66. As to allegation "unknown" see supra, § 189 *a;* Whart. Crim. Ev. §§ 97, 122.

But where practical, the pieces charged to be stolen should be specifically designated. Leftwich *v.* Com. 20 Grat. 716; People *v.* Ball, 14 Cal. 101; Murphy *v.* State, 6 Ala. 845.

"Of the moneys of the said M. N." sufficiently describes ownership. R. *v.* Godfrey, D. & B. 426; Whart. Crim. Law, 8th ed. § 979.

[3] R. *v.* Jones, 1 Cox C. C. 105; R. *v.* Wast, D. & B. 109; 7 Cox C. C. 183; R. *v.* Bird, 12 Cox C. C. 257; and other cases cited supra; Whart. Crim. Ev. § 123.

[4] Com. *v.* Barry, 124 Mass. 325.

§ 220. Where a statute prescribes or implies the form of the indictment, it is usually sufficient to describe the offence in the words of the statute,[1] and for this purpose it is essential that these words should be used.[2] In such case the defendant must be specially brought within all the material words of the statute; and nothing can be taken by intendment.[3] Whether this can be done by a mere transcript of the words of the statute depends in part upon the structure of the statute, in part upon the rules of pleading adopted by statute or otherwise, in the particular jurisdiction. On the general principles of common law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individuates the offence that the offender has proper notice, from the mere adoption of

Usually sufficient and necessary to use words of statute.

[1] U. S. v. Batchelder, 2 Gall. 5; U. S. v. Jacoby, 12 Blatch. 491; U. S. v. Dickey, 1 Morris, 412; State v. Beckman, 57 N. H. 174; State v. Little, 1 Vt. 331; State v. Cocke, 38 Vt. 437; Com. v. Malloy, 119 Mass. 347; Whiting v. State, 14 Conn. 487; State v. Lockwood, 38 Conn. 400; State v. Hickman, 3 Halst. 299; Res. v. Tryer, 3 Yeates, 451; Com. v. Chapman, 5 Whart. 427; Com. v. Hampton, 3 Grat. 590; Helfrick v. Com. 29 Grat. 844; State v. Riffe, 10 W. Va. 794; Camp v. State, 3 Kelly, 419; Allen v. People, 82 Ill. 610; Cole v. People, 84 Ill. 216; State v. Seamons, 1 Greene (Iowa), 418; Buckley v. State, 2 Greene, 162; State v. Smith, 46 Iowa, 662; State v. Comfort, 22 Minn. 271; Com. v. Tanner, 5 Bush, 316; Davis v. State, 13 Bush, 318; State v. Ladd, 2 Swan, 226; Hall v. State, 3 Cold. 125; State v. Chumley, 67 Mo. 41; State v. Williams, 2 Strobh. 474; State v. Blease, 1 McMul. 472.

[2] 1 Hale, 517, 526, 535; Fost. 423, 424; R. v. Ryan, 7 C. & P. 854; 2 Moody, 15; U. S. v. Lancaster, 2 McLean, 431; U. S. v. Andrews, 2 Paine, 451; U. S. v. Pond, 2 Curtis C. C. 265; State v. Gurney, 37 Me. 149; State v. Rust, 35 N. H. 438; Com. v. Fenno, 125 Mass. 387; Phelps v. People, 72 N. Y. 334; People v. Allen, 5 Denio, 76; State v. Gibbons, 1 South. 51; Com. v. Hampton, 3 Grat. 590; Howel v. Com. 5 Grat. 664; State v. Ormond, 1 Dev. & Bat. 119; State v. Stanton, 1 Ired. 424; State v. Calvin, Charlt. 151; Cook v. State, 11 Ga. 53; Sharp v. State, 17 Ga. 290; State v. Click, 2 Ala. 26; Lodono v. State, 25 Ala. 64; Mason v. State, 42 Ala. 543; State v. Pratt, 10 La. An. 191; State v. Comfort, 5 Mo. 357; State v. Shiflet, 20 Mo. 415; State v. Vaughan, 26 Mo. 29; Com. v. Turner, 8 Bush, 1; People v. Martin, 32 Cal. 91; People v. Burke, 34 Cal. 661.

[3] U. S. v. Lancaster, 2 McLean, 431; State v. Foster, 3 McCord, 442; State v. O'Banson, 1 Bail. 144; State v. La Creux, 1 M'Mull. 488; State v. Noel, 5 Black. 548; Chambers v. People, 4 Scam. 351; State v. Duncan, 9 Port. 260; State v. Mitchell, 6 Mo. 147; State v. Helm, 6 Mo. 263; Ike v. State, 23 Miss. 525; though see Com. v. Fogerty, 8 Gray, 489, and Frazer v. People, 54 Barb. 306.

the statutory terms, what the offence he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statutory charge, to put the defendant on trial without specification of the offence, than it would be under a common law charge. And besides this general principle, there are the following settled exceptions to the rule before us.

Conclusion of law not enough.

§ 221. (1.) Statutes frequently make indictable common law offences, describing them in short by their technical name, *e. g.* "burglary," "arson." No one would venture to say that in such cases indictments would be good charging the defendants with committing "burglary" or arson.[1]

(2.) A statute may be one of a system of statutes, from which, as a whole, a description of the offence must be picked out. Thus, a statute makes it indictable to obtain negotiable paper by false pretences. But what are "false pretences?" To learn this we have to go to another statute, and this statute, it may be, refers to another statute, giving the definition of terms. No one of these statutes gives an adequate description of the offence, nor can such description be taken from them in a body. It is inferred from them, not extracted from them.

(3.) A statute on creating a new offence describes it by a

[1] Supra, § 154; R. *v.* Powner, 12 Cox C. C. 235. See U. S. *v.* Pond, 2 Curt. C. C. 265; U. S. *v.* Crosby, 1 Hughes, 448; State *v.* Simmons, 73 N. C. 269; Bates *v.* State, 31 Ind. 72; State *v.* Meschac, 30 Tex. 518; People *v.* Martin, 52 Cal. 201.

In U. S. *v.* Simmons, 96 U. S. 360, it was held that where a defendant is not charged with using a still, boiler, or other vessel himself, but with causing and procuring some person to use them, the name of such person must be given in the indictment. It was further ruled, that an indictment for distilling vinegar illegally must set out that the apparatus was used for that purpose, and in the premises described, and the vinegar manufactured *at the time* the apparatus described was being used; and further, that the averment that defendant caused and procured the apparatus to be used for distilling implies with sufficient certainty that it was so used; it is not essential that its actual use shall be set out. It was held, also, that it is not necessary, in an indictment for defrauding the revenue, to set out the particular means of the fraud.

An indictment under the Mass. statute, which charges the defendant with adulterating "a certain substance intended for food, to wit, one pound of confectionery," is not sufficiently descriptive of the substance alleged to have been adulterated. Com. *v.* Chase, 125 Mass. 202.

popular name. It is made indictable, for instance, to obtain goods by "falsely personating" another. But no one would maintain that it is enough to charge the defendant with "falsely personating another." So far from this being the case, the indictment would not be good unless it stated the kind of personation, and the person on whom the personation took effect. An act of Congress, to take another illustration, makes it indictable to "make a revolt," but under this act it has been held necessary to specify what the revolt is.[1] "Fraud" in elections, in a Pennsylvania statute, is made indictable; but the indictment must set out what the fraud is.[2] It is not enough to say that the defendant "attempted" an offence, though this is all the statute says; the particulars of the attempt must be given.[3] "Not a qualified voter," in a statute, must be expanded in the indictment by showing in what the disqualification consists.[4]

(4.) The terms of a statute may be more broad than its intent, in which case the indictment must so differentiate the offence (though this may bring it below the statutory description) as may effectuate the intention of the legislature.[5]

(5.) An offence, when against an individual, must be specified as committed on such an individual, when known, though no such condition is expressed in the statute; though it is otherwise with nuisances, and offences against the public.[6]

§ 222. An indictment, when professing to *recite* a statute, is bad if the statute is not set forth correctly.[7] It is otherwise when the statute is counted on (or appealed to by

Variance if indictment proposes

[1] U. S. *v.* Almeida, Whart. Prec. 1061.

[2] Com. *v.* Miller, 2 Pars. 197.

[3] R. *v.* Marsh, 1 Den. C. C. 505; R. *v.* Powner, 12 Cox C. C. 235; Com. *v.* Clark, 6 Grat. 675; Whart. Crim. Law, 8th ed. § 192, where other cases are given.

[4] Pearce *v.* State, 1 Sneed, 63. See U. S. *v.* Crosby, 1 Hughes, 448; People *v.* Wilber, 1 Park. C. R. 19; State *v.* Langford, 3 Hawks, 381; Anthony *v.* State, 29 Ala. 27; Danner *v.* State, 54 Ala. 127; State *v.* Pugh, 15 Mo. 509; State *v.* Jackson, 7 Ind. 270; State *v.* Shaw, 35 Iowa, 575; though see State *v.* Dole, 3 Blackf. 298; State *v.* Brougher, 3 Blackf. 307.

[5] U. S. *v.* Pond, 2 Curtis C. C. 268; Com. *v.* Slack, 19 Pick. 304; Com. *v.* Collins, 2 Cush. 556.

[6] Com. *v.* Ashley, 2 Gray, 357; Whart. Crim. Law, 8th ed. §§ 1410 *et seq.*

[7] Infra, § 224; Com. *v.* Burke, 15 Gray, 408; though see, for a more liberal view, R. *v.* Westley, Bell C. C. 193.

to but fails to set forth statutory words.

the conclusion against the form of the statute, &c.), in which case, as is hereafter noticed, terms convertible with those in the statute may be used.[1]

Special limitations to be given.

§ 223. Where a general word is used, and afterwards more special terms, defining an offence, an indictment charging the offence must use the most special terms; and if the general word is used, though it would embrace the special term, it is inadequate.[2]

Private statute must be given in full.

§ 224. An indictment on a private statute must set out the statute at full.[3] As has been seen, it is otherwise with a public statute.[4]

Offence must be averred to be within statute.

§ 225. The indictment must show what offence has been committed and what penalty incurred by positive averment. It is not sufficient that they appear by inference.[5]

Section or designation of statute need not be stated.

§ 226. It is not necessary to indicate the particular section, or even the particular statute, upon which the case rests. It is only necessary to set out in the indictment such facts as bring the case within the provisions of some statute which was in force when the act was done, and also when the indictment was found.[6]

Where statute requires two defendants one is not sufficient.

§ 227. Where a statute creates an offence, which, from its nature, requires the participation of more than one person to constitute it, a single individual cannot be charged with its commission unless in connection with persons unknown.[7] Thus, an indictment against one individual unconnected with others, based upon that section of th Vermont statute relative to offences against public policy

[1] See infra, § 236; Whart. Crim. Ev. §§ 91 *et seq.*; Com. *v.* Unknown, 6 Gray, 489; State *v.* Petty, Harp. 59; Butler *v.* State, 3 McCord, 383; Hall *v.* State, 3 Kelly, 18.

[2] State *v.* Plunkett, 2 Stew. 11; State *v.* Raiford, 7 Port. 101; Archbold C. P. 93.

[3] State *v.* Cobb, 1 Dev. & Bat. 115; Goshen *v.* Sears, 7 Conn. 92; 1 Sid. 356; 2 Hale, 172; 2 Hawk. c. 25, s. 103; Bac. Ab. Indict. p. 2.

[4] R. *v.* Sutton, 4 M. & S. § 542; U. S. *v.* Rhodes, 1 Abb. U. S. 28; Com. *v.* Colton, 11 Gray, 1; Com. *v.* Hoye, 11 Gray, 462.

[5] Com. *v.* Walters, 6 Dana, 291; State *v.* Briley, 8 Port. 472; Hampton's case, 3 Grat. 590.

[6] Com. *v.* Griffin, 21 Pick. 523, 525; Com. *v.* Wood, 11 Gray, 85; Com. *v.* Thompson, 108 Mass. 461.

[7] See infra, § 305.

which inflicts a penalty upon each individual of any company of players or other persons who shall exhibit any tragedies, &c., is insufficient.[1]

Disjunctive statutory statements to be averred conjunctively.

§ 228. Though the language of the statute be disjunctive, *e. g.* burned *or* caused to be burned, and the indictment charge the offence in the conjunctive, *e. g.* burned *and* caused to be burned, the allegation, as has been noticed, is sufficient.[2] The same rule applies where the intent is averred disjunctively. In either case the superfluous term may be rejected as surplusage.[3] And it is held that when the words of the statute are synonymous, it may not be error to charge them alternatively.[4]

At common law defects in statutory indictments are not cured by verdict.

§ 229. Defects in the description of a statutory offence will not at common law be aided by verdict,[5] nor will the conclusion *contra formam statuti* cure.[6] But if the indictment describe the offence in the words of the statute, in England, after verdict, by the operation of the 7 Geo. 4, c. 64,[7] it will be sufficient in all offences created or subjected to any greater degree of punishment by any statute.[8] But as a rule, at common law the features of the statute must be enumerated by the indictment with rigid particularity.

Statutes creating an offence are to be closely followed.

§ 230. Where an act not before subject to punishment is declared penal, and a mode is pointed out in which it is to be prosecuted, that mode must be strictly pursued.[9]

[1] State *v.* Fox, 15 Vt. 22.

[2] Supra, § 162; infra, § 251. Thus a conviction has been sustained upon a count charging the defendant, under the Act of Congress of 3d March, 1823, § 1, with transmitting to, and presenting at, and causing and procuring to be transmitted to, and presented at, the office of the commissioner of pensions a forged writing, for the fraudulent purpose of obtaining a soldier's bounty land, though the only act of the defendant was putting the forged letter, with the guilty purpose, into the post-office at Philadelphia, directed to the Commissioner of Pensions at Washington, in the District of Columbia. U. S. *v.* Armstrong, 5 Phil. Rep. 273 (Grier, J., 1863).

[3] Supra, §§ 161–3.

[4] State *v.* Ellis, 4 Mo. 474; State *v.* Flint, 62 Mo. 393; Lancaster *v.* State, 43 Tex. 519. Supra, § 161.

[5] See Lee *v.* Clarke, 2 East, 333.

[6] 2 Hale, 170; and see R. *v.* Jukes, 8 T. R. 536; Com. Dig. Inform. D. 3.

[7] See supra, § 90.

[8] R. *v.* Warshoner, 1 Mood. C. C. 466.

[9] Atty. Gen. *v.* Radloff, 10 Exch. 84; Com. *v.* Howes, 15 Pick. 231; McElhinney *v.* Com. 22 Penn. St. 365; Com. *v.* Turnpike, 2 Va. Cas. 361;

When common law offence is made penal by title, details of offence must be given.

§ 231. As we have already noticed, where a statute refers to a common law offence by its technical name, and proceeds to impose a penalty on its commission, it is insufficient to charge the defendant with the commission of the offence in the statutory terms alone.[1] The cases are familiar where, notwithstanding the existence of statutes assigning punishments to "murder," "arson," "burglary," &c., by name, with no further definition, it has been held necessary for the pleader to define the offences by stating the common law ingredients necessary to its consummation.[2]

When statute is cumulative, common law may be pursued.

§ 232. Generally where a statute gives a new remedy, either summary or otherwise, for an existing right, the remedy at common law still continues open.[3]

Journey *v.* State, 1 Mo. 304; State *v.* Helgen, 1 Speers, 310; State *v.* Maze, 6 Humph. 17.

Where an offence is created by statute, or the statute declares a common law offence committed under peculiar circumstances, not necessarily included in the original offence, punishable in a different manner from what it would be without such circumstances; or where the nature of the common law offence is changed by statute from a lower to a higher grade, as where a misdemeanor is changed into a felony; the indictment must be drawn in reference to the provisions of the statute, and conclude *contra formam statuti;* but where the statute is only declaratory of what was previously an offence at common law, without adding to or altering the punishment, the indictment need not so conclude. People *v.* Enoch, 13 Wend. 159; State *v.* Loftin, 2 Dev. & Bat. 31; State *v.* Corwin, 4 Mo. 609. See infra, § 280.

[1] Supra, § 221; Bates *v.* State, 31 Ind. 72; State *v.* Absence, 4 Port. 397; State *v.* Stedman, 7 Port. 495; State *v.* Meshac, 30 Tex. 518. See Erle's case, 2 Lew. 133; Davis *v.* State, 39 Md. 355.

[2] See supra, §§ 154, 221; Com. *v.* Stout, 7 B. Monr. 247. When a statute makes official extortion indictable, the indictment must give the facts of the extortion. State *v.* Perham, 4 Oregon, 188.

[3] R. *v.* Jackson, Cowp. 297; R. *v.* Wigg, 2 Ld. Raym. 1163; U. S. *v.* Halberstadt, Gilpin, 262; Jennings *v.* Com. 17 Pick. 80; Com. *v.* Rumford Works, 16 Gray, 231; Pitman *v.* Com. 2 Robinson, 800; State *v.* Thompson, 2 Strobh. 12; State *v.* Rutledge, 8 Humph. 32; Simpson *v.* State, 10 Yerg. 525; State *v.* Moffett, 1 Greene (Iowa), 247; People *v.* Craycroft, 2 Cal. 243; Whart. Crim. Law, 8th ed. §§ 26–7. As to when offence is to be regarded as statutory see infra, § 281.

In Pennsylvania, as it has been noticed, it is required by act of assembly, that every act must be followed strictly, and where a statutory penalty is imposed, the common law remedy is forever abrogated. Act 21st March, 1806, § 13; 4 Smith's Laws, 332; Resp. *v.* Tryer, 3 Yeates, 451; Updegraph *v.* Com. 6 S. & R. 5; 3 Ibid. 273; 1 Rawle, 290; 5 Wharton, 357; Evans *v.* Com. 13 S. & R. 426. See Whart. Crim. Law, 8th ed. §§ 26–7. It has accordingly

§ 233. On the other hand, as has been noticed,[1] where the statute both creates the offence and prescribes the penalty, the statute must be exclusively followed, and no common law penalty can be imposed. But where the statute creates the offence but assigns no penalty, then the punishment must be by common law.[2]

When statute assigns no penalty punishment is at common law.

§ 234. Wherever a general statute, purporting to be exhaustive, is passed on a particular topic, it absorbs and vacates on that topic the common law.[3]

Exhaustive statute absorbs common law.

§ 235. Whenever a statute attaches to an offence certain technical predicates, these predicates must be used in the indictment.[4] Thus in an indictment on the statute which makes it high treason to clip, round, or file any of the coin of the realm, "for wicked lucre or gain sake," it was necessary to charge the offence to have been committed for the sake of wicked lucre or gain,[5] otherwise it would be bad. In another case, an indictment on that part of the Black Act (now repealed) which made it felony, "*wilfully and maliciously*" to shoot at any person in a dwelling-house or other place, was ruled bad, because it charged the offence to have been done "*unlawfully and maliciously*," omitting the word "wilfully;"[6] some of the judges thought that "maliciously" included "wilfully;" but the greater number held, that as wilfully *and* maliciously were both mentioned in the statute, as descriptive of the offence, both must be stated in the indictment. But, in Penn-

Statutory technical averments to be introduced.

been held that where a magistrate is guilty of extortion, the common law remedy, by indictment, is abrogated by the act of assembly giving the injured party, in such case, a *qui tam* action for the penalty. Evans *v.* Com. 13 S. & R. 246. But it must be conceded that the courts have shown great unwillingness to extinguish the common law remedy in many cases where a statutory penalty is created. Thus nuisances to navigable rivers are still indictable at common law, though the Act of 23d March, 1803, points out a peculiar procedure by which the obstruction is to be abated; Com. *v.* Church, 1 Barr, 107; and a common law indictment is preserved against an interference with the health of the city of Philadelphia, though the legislature has particularly committed that interest to the care of a board of health, with plenary powers to abate or indict. Com. *v.* Vansickle, 1 Brightly, 69. See Whart. Crim. Law, 8th ed. §§ 25–6.

[1] Supra, § 230.

[2] R. *v.* Robinson, 2 Burr. 799.

[3] Com. *v.* Dennis, 105 Mass. 162; Whart. Crim. Law, 8th ed. §§ 30 *et seq.*

[4] As to particular averments see infra, § 257.

[5] 1 Hale, 220.

[6] R. *v.* Davis, 1 Leach, 493.

sylvania, an indictment for arson, charging that the defendant did "feloniously, unlawfully, and maliciously set fire," &c., was held to be sufficient without the word "wilfully," though "wilfully" was included in the description of the offence given in the act constituting it.[1] In New Hampshire, the contrary view has been taken.[2]

But equivalent terms may be given.

§ 236. It must be remembered, in qualification of what has been heretofore stated, that as to the *substance*, as distinguished from the technical incidents of an offence, it is the wrongful act that the statute forbids, and that the words used by the statute in describing the act may not be the only words sufficient for this purpose. A statute may include in such description cumulative terms of aggravation, for which substitutes may be found without departing from the sense of the statutory definition; or, as in the case of the Pennsylvania and cognate statutes dividing murder into two degrees, the terms used to indicate the *differentia* of the offence may be regarded as so far equivalents of the common law description that the common law description may be held to be proper, and the introduction of the statutory terms unnecessary. Or, another word may be held to be so entirely convertible with one in the statute that it may be substituted without variance. In such case a deviation from the statutory terms may be sustained. We have already seen that these words, when they state a conclusion of law, are not sufficient, but that the unlawful act must be further described. We have further to add that these words, when they describe the substance, are not necessarily exclusive. Hence, where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it,

[1] Chapman *v.* Com. 5 Wharton, 427. See State *v.* Pennington, 3 Head (Tenn.), 119.

[2] State *v.* Gove, 34 N. H. 510.

An indictment upon stat. 7 & 8 G. 4, c. 39, s. 2, for feloniously, voluntarily, and maliciously setting fire to a barn, was holden bad, because the words of the statute are "unlawfully and maliciously." R. *v.* Turner, 1 Mood. C. C. 239.

Where an indictment charged in one count that the defendant did break *to get* out, and in another that he did break *and get* out, this was ruled insufficient, because the words of the statute are "break out." R. *v.* Compton, 7 C. & P. 139.

and includes it, the indictment may be sufficient.[1] Thus, if the word "*knowingly*" be in the statute and the word "*advisedly*" be substituted for it in the indictment,[2] or the word "*wilfully*" be in the statute and "*maliciously*" in the indictment, the words "*advisedly*" and "*maliciously*," not being in the statutes respectively, the indictment would be sufficient. In further illustration of this view it may be mentioned that "excite, move, and procure" are held convertible with "command, hire, and counsel" as used in the statute,[3] and "without lawful authority and excuse" with "without lawful excuse."[4]

§ 237. We have elsewhere seen that where a statute uses a single general term, this term is to be regarded as comprehending the several species belonging to the *genus;* but that if it specifies each species, then the indictment must designate specifically.[5] Where an indictment on the repealed statutes 15 G. 2, c. 34, and 14 G. 2, c. 6, which made it felony, without benefit of clergy, to steal any cow, ox, heifer, &c., charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was determined to be a fatal variance; for the statute having mentioned both cow and heifer, it was presumed that the words were not considered by the legislature as synonymous.[6] It is otherwise when "cow" is used as a *nomen generalissimum*.[7] A "ewe"[8] or "lamb"[9] may be included under the general term "sheep," when such general term stands

Where a statute describes a class of animals by a general term, it is enough to use this term for the whole class: otherwise not.

[1] U. S. *v.* Nunnemacher, 7 Biss. 129; Dewee's case, Chase's Dec. 531; Tully *v.* People, 67 N. Y. 15; State *v.* Shaw, 35 Iowa, 575; McCutcheon *v.* State, 69 Ill. 601; State *v.* Welch, 37 Wis. 196; State *v.* Lawrence, 81 N. C. 521; State *v.* Thorne, 81 N. C. 558; Roberts *v.* State, 55 Miss. 414; State *v.* Watson, 65 Mo. 115.

[2] R. *v.* Fuller, 1 B. & P. 180.

[3] R. *v.* Grevil, 1 And. 194.

[4] R. *v.* Harvey, L. R. 1 C. C. 284.

It is not essential, on an indictment on the Slave-trade Act of 20th of April, 1818, c. 86, §§ 2 and 3, to aver that the defendant knowingly committed the offence. U. S. *v.* Smith, 2 Mason, 143.

[5] Whart. Crim. Ev. § 124.

[6] R. *v.* Cooke, 2 East P. C. 616; Leach, 123. See also R. *v.* Douglas, 1 Camp. 212; Turley *v.* State, 3 Humph. 323; State *v.* Plunket, 2 Stew. 11. See supra, § 209; Whart. Crim. Ev. § 124.

[7] People *v.* Soto, 49 Cal. 69. See Taylor *v.* State, 6 Humphreys, 285.

[8] R. *v.* Barran, Jebb, 245; R. *v.* Barnam, 1 Crawf. & Dix C. C. 147.

[9] R. *v.* Spicer, 1 C. & K. 699; R. *v.* McCully, 2 Moody, 34; State *v.* Tootle, 2 Harring. 541. See, however, R. *v.* Beany, R. & R. 416.

alone in the statute, without "ewes" or "lambs" being specified; but not otherwise.[1] On the same reasoning, under the term "cattle" may be included "pigs,"[2] "asses,"[3] "horses,"[4] and "geldings,"[5] but not a domesticated buffalo.[6]

Generally we may state the rule to be that when a statute uses a *nomen generalissimum as such* (*e. g. cattle*), then a particular species can be proved; but that when the statute enumerates certain species, leaving out others, then the latter cannot be proved under the *nomen generalissimum*, unless it appears to have been the intention of the legislature to use it as such.[7]

Provisos and exceptions not part of definition need not be stated.

§ 238. "Provisos" and "exceptions," to whose consideration we next proceed, though usually coupled in this connection, are logically distinct; a "proviso" being a qualification attached to a category, an "exception," the taking of particular cases out of that category. For our present purposes, however, they may be considered together; and the first principle that meets us is that when they are not so expressed in the statute as to be incorporated in the definition of the offence, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the statutory provisos.[8] Nor is it even necessary to

[1] R. *v.* Puddifoot, 1 Moody, 247; R. *v.* Loom, Ibid. 160.

[2] R. *v.* Chapple, R. & R. 77.

[3] R. *v.* Whitney, 1 Moody, 3.

[4] R. *v.* Magle, 3 East P. C. 1076; State *v.* Hambleton, 22 Mo. (1 Jones) 452. So in Texas, a "gelding" under the term "horse." Jordt *v.* State, 31 Tex. 571.

[5] R. *v.* Mott, 2 East P. C. 1075.

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

[7] R. *v.* Welland, R. & R. 494; R. *v.* Chard, R. & R. 488. See State *v.* Abbott, 20 Vt. 537; Taylor *v.* State, 6 Humph. 285; State *v.* Plunket, 2 Stew. 11; State *v.* Godet, 7 Ired. 210; Shubrick *v.* State, 2 S. C. 21; though see State *v.* McLain, 2 Brev. 443.

[8] 1 Sid. 303; 2 Hale, 171; 1 Lev. 26; Poph. 93, 94; 2 Burr. 1037; 2 Stra. 1101; 1 East Rep. 646, in notes; 5 T. R. 83; 1 Bla. Rep. 230; 2 Hawk. c. 25, s. 112; Bac. Ab. Indict. H. 2; Burn, J., Indict. ix.; 1 Chitty on Pleading, 357; Murray *v.* R. 7 Q. B. 700; U. S. *v.* Cook, 17 Wall. 168; State *v.* Gurney, 37 Me. 149; State *v.* Boyington, 56 Me. 512; State *v.* Abbott, 11 Foster, 434; State *v.* Wade, 34 N. H. 495; State *v.* Cassady, 52 N. H. 500; State *v.* Abbot, 29 Vt. 60; Com. *v.* R. R. 10 Allen, 189; State *v.* Miller, 24 Conn. 522; State *v.* Powers, 25 Conn. 48; Walter *v.* Com. 6 Weekly Notes, 389; Fleming *v.* People, 27 N. Y. 329; Becker *v.* State, 8 Oh. St. 391; Stanglein *v.* State, 17 Oh. St. 453; Billingheimer *v.* State, 32 Oh. St. 535; Swartzbaugh *v.* People, 85 Ill. 457; Beasley *v.* People, 89 Ill. 571; Colson *v.* State,

allege that he is not within the benefit of the provisos, though the purview should expressly notice them; as by saying that none shall do the act prohibited, except in the cases thereinafter excepted.[1] Nor, even when the enacting clause refers to the subsequent excepting clauses, does this necessarily draw such subsequent clauses up into the enacting clause.[2] For when such exceptions embrace matters of defence, they are properly to be introduced by the defendant.[3] Extenuation which comes in by

7 Blackf. 590; Russell *v.* State, 50 Ind. 174; Metzker *v.* State, 14 Ill. 101; Romp *v.* State, 3 Greene (Iowa), 276; State *v.* Williams, 20 Iowa, 98; Worley *v.* State, 11 Humph. 172; State *v.* Loftin, 2 Dev. & B. 31; State *v.* O'Gorman, 68 Mo. 179; State *v.* Jaques, 68 Mo. 260. See on this head elaborate and able notes in 1 Benn. & Heard's Leading Cases, 250; 2 Ibid. 7, 11. See also, as to proof of negative averments, Whart. Crim. Ev. § 321.

[1] State *v.* Adams, 6 N. H. 533; State *v.* Sommers, 3 Vt. 156; State *v.* Abbey, 29 Vt. 60; State *v.* Powers, 25 Conn. 48; Matthews *v.* State, 2 Yerg. 233; People *v.* Nugent, 4 Cal. 341. See Whart. Crim. Law, 8th ed. § 1713.

[2] Ibid.; 2 Hawk. P. C. C. 25; Com. *v.* Hill, 5 Grat. 682.

[3] 1 Bla. Rep. 230; 2 Hawk. c. 25, s. 113; 2 Ld. Raym. 1378; 2 Leach, 548; People *v.* Nugent, 4 Cal. 341.

The subject is closely allied to that of Burden of Proof, discussed in Whart. Crim. Ev. § 319.

In Com. *v.* Hart, 11 Cush. 130, we have the following from Metcalf, J.: —

"The rule of pleading a statute which contains an exception is usually expressed thus: 'If there be an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause or subsequent statute, that is matter of defence, and is to be shown by the other party.' The same rule is applied in pleading a private instrument of contract. If such instrument contain in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party, relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it together with the exception." Gould Pl. c. 4, §§ 20, 21; Vavasour *v.* Ormrod, 9 Dowling & Ryland, 597, and 6 Barnewall & Cresswell, 430; 2 Saunders Pl. & Ev. 2d ed. 1025, 1026. The reason of this rule is obvious, and is simply this: Unless the exception in the enacting clause of a statute, or in the general clause in a contract, is negatived in pleading the clause, no offence or no cause of action appears in the indictment or declaration, when compared with the statute or contract. Plowden, 410. But when the exception or proviso is in a subsequent substantive clause, the case provided for in the enacting or general clause may be fully stated without negativing the subsequent exception or proviso. A *primâ*

way of subsequent proviso or exception need not be pleaded by the prosecution.[1]

Otherwise when proviso is in same clause.

§ 239. But where a proviso adds a qualification to the enactment, so as to bring a case within it, which, but for the proviso, would be without the statute, the indictment must show the case to be within the proviso.[2] And where a statute forbids the doing of a particular act, without the existence of either one of two conditions, the indictment must negative the existence of both these conditions before it can be supported.[3]

§ 240. Where exceptions are stated in the enacting clause (under which term is to be understood all parts of the statute

facie case is stated, and it is for the party, for whom matter of excuse is furnished by the statute or the contract, to bring it forward in his defence. . . . .

"The word 'except' is not necessary in order to constitute an exception within the rule. The words 'unless,' 'other than,' 'not being,' 'not having,' &c., have the same legal effect, and require the same form of pleading. Gill *v.* Scrivens, 7 Term R. 27; Spieres *v.* Parker, 1 Term R. 141; R. *v.* Palmer, 1 Leach C. C. 4th ed. 102; Wells *v.* Iggulden, 5 D. & R. 19; Com. *v.* Maxwell, 2 Pick. 139; State *v.* Butler, 17 Vt. 145; 1 East P. C. 166, 167.

"There is a middle class of cases, namely, where the exception is not, in express terms, introduced into the enacting clause, but only by reference to some subsequent or prior clause, or to some other statute. As when the words 'except as hereinafter mentioned,' or other words referring to matter out of the enacting clause, are used. The rule in these cases is, that all circumstances of exemption and modification, whether applying to the offence or to the person, which are incorporated by reference with the enacting clause, must be distinctly negatived. *Verba relata inesse videntur.* R. *v.* Pratten, 6 Term R. 559; Vavasour *v.* Ormrod, 9 D. & R. 597; 6 B. & Cr. 430."

But in a subsequent case the last distinction was reconsidered in the same court, it being held that an exception not in the enacting clause need not be negatived, unless necessary to the definition of the offence. Com. *v.* Jennings, 121 Mass. 47.

[1] R. *v.* Bryan, 2 Stra. 111.

[2] U. S. *v.* Cook, 17 Wall. 168; State *v.* Godfrey, 24 Me. 232; State *v.* Gurney, 37 Me. 149; State *v.* Boyington, 56 Me. 512; State *v.* Barker, 18 Vt. 195; State *v.* Palmer, 18 Vt. 570; State *v.* Abbott, 11 Foster, 434; Com. *v.* Jennings, 121 Mass. 47; Com. *v.* Davis, 121 Mass. 352; Conner *v.* Com. 13 Bush, 714; State *v.* Heaton, 81 N. C. 542; People *v.* Roderigas, 44 Cal. 9; and cases in prior notes.

As to statutory exceptions in bigamy, see Whart. Crim. Law, 8th ed. § 1713.

[3] State *v.* Loftin, 2 Dev. & Bat. 31. Thus when either of two licenses is specified, both must be negatived. Neales *v.* State, 10 Mo. 498.

which define the offence), unless they be mere matters of extenuation or defence, it will be necessary to negative them, in order that the description of the crime may in all respects correspond with the statute.[1] Thus, where a statute imposes a penalty on the selling of spirituous liquors without a license, it is necessary to aver the want of a license in the indictment.[2] So, in an indictment under the Mississippi Act of 1830, prohibiting any person, other than Indians, from making settlements within their territory, it is necessary to aver that the defendant is not an Indian.[3] Again, on an indictment under the Massachusetts statute of 1791, c. 58, making it penal to entertain persons not being strangers on the Lord's day, it must appear that the parties entertained were not strangers.[4] So in Vermont, an indictment under the statute which prohibits the exercise on the Sabbath of any "secular business," &c., except "works of necessity and charity," must allege that the acts charged were not acts of "necessity and charity."[5] Even where certain persons were authorized by the legislature to erect a dam, in a certain manner, across a river which was a public highway, it was held that an indictment for causing a nuisance, by erecting the dam, must contain an averment that the dam was beyond the limits prescribed in the charter, and that it was not erected in pursuance of the act of the legislature.[6]

Exceptions in enacting clause to be negatived.

§ 241. Such are the technical tests which are usually applied to determine whether an exception or proviso is or is not to be negatived in an indictment. In many cases we are told that when the exception or proviso is in the "enacting clause," it must be negatived in the indictment, but it is otherwise when it is in "subsequent" clauses. This distinction has sometimes been called

Question in such case is whether statute creates a general or a limited offence.

[1] 2 Hale, 170; 1 Burr. 148; Fost. 430; 1 East Rep. 646, in notes; 1 T. R. 144; 1 Ley, 26; Com. Dig. Action, Statute; 1 Chitty on Plead. 357; State *v.* Munger, 15 Vt. 290; State *v.* Godfrey, 24 Me. 232; though see State *v.* Price, 12 Gill & J. 260; Elkins *v.* State, 13 Ga. 435; Metzker *v.* People, 14 Ill. 101.

[2] Com. *v.* Thurlow, 24 Pick. 374; State *v.* Webster, 5 Halsted, 293; *contra*, Surratt *v.* State, 45 Miss. 601; Riley *v.* State. 43 Miss. 397. See fully infra, note to § 241, and compare Whart. Crim. Law, 8th ed. § 1713.

[3] State *v.* Craft, 1 Walker, 409. See Matthews *v.* State, 2 Yerger, 233.

[4] Com. *v.* Maxwell, 2 Pick. 139.

[5] State *v.* Barker, 18 Vt. 195.

[6] State *v.* Godfrey, 24 Me. 232.

rude, and sometimes artificial, yet in point of fact it serves to symbolize a germinal point of discrimination. I prohibit, for instance, all sale of alcohol by a sweeping section; and in a subsequent section I except from this sales for medicinal purposes. Here the very structure of the statute shows my intent, which is to make the sale of alcohol a crime by statute, as is the exploding gunpowder in the streets a crime at common law; and hence a license in the first case need not be negatived in the indictment any more than a license in the second.[1] On the other hand, I enact that none but licensed persons shall sell alcohol. Here I do not create a general crime, but I say that if certain persons do certain things they shall be liable to indictment; and to maintain an indictment it must be averred that the defendants were of the class named. Hence the test before us is not formal, but essential; it is practically this, — is it the scope of the statute to create a *general* offence, or an offence limited to a particular class of persons or conditions? In other words, is it intended to impose the stamp of criminality on an entire class of actions, or upon only such actions of that class as are committed by particular persons or in a particular way? In the latter case, the defendant must be declared to be within this class; in the former case this is not necessary. We may take as a further illustration a statute defining murder, in which statute are specified the cases in which necessity or self-defence are to be regarded as excusatory. It would make no matter, in such case, whether these excusatory cases be or be not given in the same clause with that prohibiting the general offence; in either case they need not be negatived in the indictment The same might be said of the defence, that the person killed was an alien enemy, and that the killing was in open war. On the other hand, if the statute should say that an offence is indictable only when perpetrated on a particular class of persons, no matter how many clauses may intervene between the designation of the offence and the limitation of the object, the limitation of the object must be given in the indictment.[2] Of course the question thus involved, whether a crime is general or limited as to persons, may be determined otherwise than by the

[1] See Surratt *v.* State, 45 Miss. 601.

[2] Com. *v.* Maxwell. 2 Pick. 139.

structure of a statute. If it be clear that an act is only to become a crime when executed by persons of a particular class, or under particular conditions, then this class or those conditions must be set out in the indictment, no matter in what part of the statute they may be expressed. With this view practically coincides that expressed in some of the cases cited above, that mere excusatory defence is not to be negatived in the indictment. For an excusatory defence implies a *crimen generalissimum*; and to a *crimen generalissimum* no exceptions, on the foregoing principles, need be negatived in the indictment.[1]

[1] See 1 Benn. & Heard's Lead. Cas. *ut supra;* State *v.* Abbey, 29 Vt. 60; Com. *v.* Hart, 11 Cush. 130; Com. *v.* Jennings, 121 Mass. 47; State *v.* O'Donnell, 10 R. I. 472; Hill *v.* State, 53 Ga. 472; Neales *v.* State, 10 Mo. 498; Surratt *v.* State, 45 Miss. 601; Whart. Crim. Law, 8th ed. § 1713.

It has been said in England a statute casting on the defendant the burden of proving a license does not, by itself, relieve the prosecution from averring the want of license (R. *v.* Harvey, L. R. 1 C. C. 284), though otherwise in Massachusetts. Com. *v.* Edwards, 12 Cush. 187.

In prosecutions for selling liquor without license, the indictment, as a general rule, should negative the license. State *v.* Munger, 15 Vt. 290; Com. *v.* Thurlow, 24 Pick. 374; State *v.* Webster, 5 Halst. 293; Com. *v.* Hampton, 3 Grat. 590; State *v.* Horan, 25 Tex. (Sup.) 271; Com. *v.* Smith, 6 Bush, 303. See Burke *v.* State, 52 Ind. 461. Indictment need not aver defendant not to be a "druggist," &c. Surratt *v.* State, 45 Miss. 601; Riley *v.* State, 43 Miss. 397. See also State *v.* Fuller, 33 N. H. 259; State *v.* Blaisdell, 33 Ibid. 388; State *v.* Buford, 10 Mo. 703. As the cases show, the whole question depends on the principle underlying the statute. Where one section of the statute imposes a penalty on selling "in violation of the provisions of this act," it has been held unnecessary to negative exceptions in subsequent sections. Com. *v.* Tuttle, 12 Cush. 502; Com. *v.* Hill, 5 Grat. 682.

In Texas, a statute providing that license need not be negatived has been pronounced unconstitutional. Hewitt *v.* State, 125 Tex. 722; State *v.* Horan, 25 Tex. (Sup.) 271; *contra*, State *v.* Comstock, 27 Vt. 553. And in Maine a statute has been held unconstitutional which prescribes that the vendee need not be named. State *v.* Learned, 47 Me. 426.

"Without" implies a sufficient negation. Com. *v.* Thompson, 2 Allen, 507. "Without lawful excuse" is equivalent to without authority. R. *v.* Harvey, L. R. 1 C. C. 284. If the negation of the license to sell is as to quantity coextensive with the quantity charged to be sold, it is sufficient. The general negation, "not having a license to sell liquors as aforesaid," relates to the time of sale, and not to the time of finding of the bill, and will suffice. State *v.* Munger, 15 Vt. 290. "Without being duly authorized and appointed thereto according to law," is a sufficient negation. Com. *v.* Keefe, 7 Gray, 332; Com. *v.* Conant, 6 Gray; 482; State *v.* Fanning, 38 Mo. 359; Com. *v.* Hoyer, 125 Mass.

XII. DUPLICITY.

1. GENERALLY, JOINDER IN ONE COUNT OF TWO DISTINCT OFFENCES IS BAD, § 243.
2. EXCEPTIONS TO THE RULE, § 244.
(a.) Minor offences included in major. Burglary, &c., 244.
(b.) Assaults with intent, &c., § 247.
(c.) Misdemeanors constituent in felonies, and herein of how far the term "feloniously" may be rejected, § 249
(d.) Where alternate phases in an offence are united in statute, § 251.
(e.) Double articles in larceny, § 252.
(f.) Double overt acts or intents, § 253.
(g.) Double batteries, libels, or sales, § 254.
3. HOW DUPLICITY MAY BE OBJECTED TO, § 255.

Generally, joinder in one count of two dis-

§ 243. A count in an indictment which charges two distinct offences is bad, and the defendant, on a motion to quash, or demurrer, can defeat it.[1] Thus, when to horse stealing and ordinary larceny different penalties

209; Roberson *v.* Lambertville, 38 N. J. L. 69. See State *v.* Hornbreak, 15 Mo. 478; State *v.* Andrews, 28 Mo. 17. As to mode of negativing see Eagan *v.* State, 53 Ind. 162.

In indictments for bigamy, the exceptions in the statute, when not part of the description of the offence, need not be negatived. Murray *v.* R. 7 Q. B. 700; State *v.* Abbey, 29 Vt. 60; Com. *v.* Jennings, 121 Mass. 50; Stanglein *v.* State, 17 Oh. Stat. 453; State *v.* Williams, 20 Iowa, 98; State *v.* Johnson, 12 Minn. 476; State *v.* Loftin, 2 Dev. & Bat. 31. It is otherwise where the exception describes the offence in the enacting clause. Fleming *v.* People, 27 N. Y. 329. Nor is it necessary to allege that the defendant knew at the time of his second marriage that his former wife was then living, or that she was not beyond seas, or to deny her continuous absence for seven years prior to the second marriage. Barber *v.* State, S. C. Md. 1879, citing Bode *v.* State, 7 Gill, 316.

Where an indictment, under the Massachusetts statute, alleged that the defendant, on a certain day, was lawfully married to A.; and that afterwards, on a certain day, he "did unlawfully marry and take to his wife one B., he, the defendant, then and there being married and the lawful husband of the said A., she, the said A., being his lawful wife, and living, and he, the said defendant, never having been legally divorced from the said A.;" and it was proved that the defendant was lawfully married to A.; that afterwards she was duly divorced from him for misconduct on his part; and that he then married B.; it was ruled, that there was a variance between the allegations and the proof. Com. *v.* Richardson, 126 Mass. 34.

[1] Starkie's C. P. 272; Archbold C. P. 49; U. S. *v.* Nunnemacher, 7 Biss. 129; U. S. *v.* Sharp, 1 Peters C. C. R. 131; State *v.* Smith, 31 Me. 386; State *v.* Morton, 27 Vt. 310; Com. *v.* Symonds, 2 Mass. 163; People *v.* Wright, 9 Wend. 193; Com. *v.* Gable, 7 S. & R. 423; State *v.* Lot, 1 Richards. 260; Long *v.* State, 12 Ga. 293. See Hoskins *v.* State, 11 Geo. 92; Rasnick *v.* Com. 2 Va. Cas. 356.

are affixed, to join the two in one count is a good cause for arresting judgment.[1] Under the Mississippi statute against retailing spirituous liquors, making it unlawful to sell in less quantities than one gallon, and also declaring it unlawful for the person selling to suffer the same to be drunk in and about his house, a count in an indictment charging that the defendant sold in less quantities than one gallon, and suffered the same to be drunk in his house, was held bad for duplicity.[2] To constitute duplicity, however, the second or superfluous offence must be sufficiently averred, as otherwise its description can be rejected as surplusage.[3]

Distinct offences is bad.

§ 244. The most prominent exception to the rule before us is to be found in indictments for burglary, in which it is correct to charge the defendant with having broken into the house with intent to commit a felony, and also with having committed the felony intended;[4] and in indictments in England for embezzlement by persons intrusted with public or private property, which may charge any number of embezzlements, not exceeding three, committed within six months.[5] On the same principle, a count stating that the defendant broke and entered into a shop with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity.[6] So when an indictment alleged that the defendant broke and entered into the dwelling-house of one person with intent to steal his goods, and having so entered, stole the goods of another person, &c., it was held there was no misjoinder.[7] Hence, a person may be indicted in one count for breaking and entering a building with intent to steal, and also with stealing, and may be convicted of the larceny simply.[8]

Exception in cases where larceny is included in burglary or embezzlement.

[1] State *v.* Nelson, 8 N. H. 163.

[2] Miller *v.* State, 5 How. Miss. 250.

[3] Whart. Crim. Ev. § 138; State *v.* Palmer, 35 Me. 9; Com. *v.* Tuck, 20 Pick. 356; Breese *v.* State, 12 Oh. St. 146; Green *v.* State, 23 Miss. 509. Supra § 158.

[4] Infra, §§ 465–7; Whart. Crim. Law, 8th ed. § 819.

[5] Archbold's C. P. 49. Infra, §§ 465–6; Whart Crim. Ev. § 129. As to verdict see infra, § 736.

[6] Com. *v.* Tuck, 20 Pick. 356; State *v.* Ayer, 3 Foster (N. H.), 301. Infra, § 819.

[7] State *v.* Brady, 15 Vt. 353.

[8] See State *v.* Colter, 6 R. I. 195; State *v.* Crocker, 3 Harring. 554; Breese *v.* State, 12 Oh. St. 146; Speers *v.* Com. 17 Grat. 570; Vaughan *v.* Com. 17 Grat. 576; Davis *v.* State, 3 Cold. (Tenn.) 77; State *v.* Brandon, 7 Kans. 106; State *v.* Grisham, 1 Hayw. 12. See Whart. Crim. Law, 8th ed. § 819,

§ 245. Another exception has been recognized in indictments for adultery, in which under some statutes the jury may find the defendants guilty of fornication but not guilty of adultery.[1] And so, on an indictment for seduction,[2] the defendant, it is said, may be found guilty of fornication.[3] It is not duplicity, also, to join "battery" with "rape."[4]

And so where fornication is included in major offence.

§ 246. Generally speaking, where an accusation (as in the case of the inclusion of manslaughter in murder) includes an offence of an inferior degree, the jury may discharge the defendant of the high crime, and convict him of the less atrocious; and in such case it is sufficient if they find a verdict of guilty of the inferior offence, and take no notice of the higher.[5] And on indictments

When major crime includes minor, conviction may be for either.

and other cases; and see infra, §§ 465–7. So in Ohio, as to "robbery" and "assault." Howard *v.* State, 25 Oh. St. 399.

[1] Com. *v.* Roberts, 1 Yeates, 6; State *v.* Cowell, 4 Ired. 231; but see Maull *v.* State, 37 Ala. 160. See Whart. Crim. Law, 8th ed. § 1737.

[2] Dinkey *v.* Com. 17 Penn. St. 126. See Whart. Crim. Law, 8th ed. § 1737.

[3] Dinkey *v.* Com. 17 Penn. St. 126. "The general rule," says Black, C. J., in the last case, "is, that where an indictment charges an offence which includes within it another and less offence, the party may be convicted of the latter if he is guilty, and acquitted of the former if the evidence make it proper. For instance, on an indictment for murder, there being no sufficient proof of malice, the jury may find a verdict for manslaughter. A person charged with burglary and stealing may be convicted of larceny, if the proof fail of the breaking and entering. In Shouse *v.* The Commonwealth, 5 Barr, 83, it was held that the defendants, indicted for a riotous assault and battery, might be convicted of assault and battery only. This court then declared it to be enough to prove so much of the indictment as shows that the defendant has committed a substantive offence therein charged. It would be easy to multiply cases to this effect if it were necessary. It is proper, however, to add, that in an indictment for felony there cannot be a conviction for a minor offence included within it, if such minor offence be a misdemeanor; and this is the foundation of the rule that an acquittal of a felony is no bar to another indictment for the same act, charging it as a misdemeanor, and *vice versa*." See Com. *v.* Murphey, 2 Allen, 163, cited infra.

[4] Com. *v.* Thompson, 116 Mass. 346.

[5] See infra, §§ 465–7, 743; Whart. Crim. Law, 8th ed. §§ 542–641 *a*; R. *v.* Dawson, 3 Stark. R. 62; R. *v.* Dungey, 4 F. & F. 99; R. *v.* Oliver, 8 Cox C. C. 384; Bell C. C. 287; R. *v.* Yeadon, 9 Cox C. C. 91; State *v.* Waters, 39 Me. (4 Heath) 54; Com. *v.* Griffin, 21 Pick. 523; Swinney *v.* State, 8 S. & M. 576; Cameron *v.* State, 8 Eng. (13 Ark.) 712; State *v.* Taylor, 3 Oregon, 10; though see, as to verdict, State *v.* Flannagan, 6

for riot there can be a conviction of any averred indictable ingredient.[1]

§ 247. Further illustrations are to be found in indictments for assault and battery, or assault with intent to kill or ravish, or assault with intent to do other illegal acts, where the defendant may be convicted of assault alone.[2]

"Assault" is included under "assault with intent."

§ 248. Where an offence is, by law, made more highly punishable if committed upon a person of a particular class than if committed upon a person of another class, an indictment for the offence may be maintained, though it does not specify to which of the classes the injured person belongs; and upon a conviction on such an indictment, the milder punishment only will be awarded.[3] And although the evidence prove the major offence, if the indictment charge only the minor, the defendant can only be convicted of minor.[4]

On indictment for minor there can only be conviction of minor.

§ 249. In several States, as will be hereafter seen, it has been held that at common law one charged with a felony could not be convicted of part of the charge, unless the part amounted to a felony.[5] But in Massachusetts, by Rev. Stat. c. 137, § 11, on such an indictment, if the jury acquit of part of the charge, the defendant may be sentenced for any offence substantially charged by the residue of

Misdemeanor may be enclosed in felony.

Md. 167; Johnson *v.* State, 14 Ga. 55. Infra, § 736.

[1] Whart. Crim. Law, 8th ed. § 1550.

[2] R. *v.* Mitchell, 12 Eng. Law & Eq. 588; State *v.* Waters, 39 Me. 54; State *v.* Dearborn, 54 Me. 442; State *v.* Hardy, 47 N. H. 538; State *v.* Coy, 2 Aiken, 181; State *v.* Burt, 25 Vt. (2 Deane), 373; State *v.* Reed, 40 Vt. 603; State *v.* Johnson, 1 Vroom, 185; Francisco *v.* State, 4 Zabr. 30; Stewart *v.* State, 5 Ohio R. 242; Carpenter *v.* State, 23 Ala. 84; State *v.* Stedman, 7 Port. 495; M'Bride *v.* State, 2 Eng. (Ark.) 374; Reynolds *v.* State, 11 Tex. 20; State, *v.* Kennedy, 7 Blackf. 233; Foley *v.* State, 9 Ind. 363; State *v.* Lessing, 16 Minn. 75; State *v.* Robey 8 Nev. 312; State *v.* Gaffney, Rice, 431; Clark *v.* State, 12 Ga. 131; Lewis *v.* State, 33 Ga. 131. For other cases see Whart. Crim. Law, 8th ed. §§ 641 *a*, 1550.

Where one is indicted for an assault with intent to commit murder in the first degree, by the Tennessee Act of 1832, c. 22, this includes an indictment for an assault and battery; and upon failure of proof to warrant a conviction of felony, the defendant may be convicted of the misdemeanor. State *v.* Bowling, 10 Humph. 52.

[3] State *v.* Fielding, 32 Me. 585.

[4] See infra, §§ 465–6.

[5] See Com. *v.* Newell, 7 Mass. 245; Com. *v.* Roby, 12 Pick. 496; overruling Com. *v.* Cooper, 15 Mass. 187; *contra*, Rogers *v.* People, 34 Mich 345. See infra, § 261.

such indictment.[1] Thus, on an indictment for rape, one may be convicted of assault and battery,[2] or, on the same charge, of incest ;[3] or, on an indictment for manslaughter, of assault and battery.[4] And in New York it has been determined that on an indictment for procuring an abortion of a quick child, which by the Revised Statutes is a felony, the prisoner may be convicted, though it turn out the child was not quick, and the offence, therefore, a mere misdemeanor.[5] And we may now generally hold that it is not duplicity to enclose a misdemeanor in a felony.[6]

But minor offence must be accurately stated.

§ 250. In every case, however, the minor offence must be accurately stated. Thus, on an indictment for rape, there can be no conviction for fornication unless there be an averment that the prosecutrix was not the defendant's wife.[7]

[1] Com. *v.* Drum, 19 Pick. 479.

[2] Ibid. So in Illinois. Prindeville *v.* People, 42 Ill. 217.

[3] Com. *v.* Goodhue, 2 Met. Mass. 193.

[4] Com. *v.* Drum, 19 Pick. 479. See also Com. *v.* Hope, 22 Pick. 1, 7; Com. *v.* Griffin, 21 Pick. 523.

[5] People *v.* Jackson, 3 Hill's N. Y. R. 92. See infra, § 261.

[6] Infra, § 261.

In Pennsylvania: —

Party indicted for Felony or Misdemeanor may be found guilty of Attempt to commit the same. — "If on the trial of any person charged with any felony or misdemeanor it shall appear to the jury, upon the evidence, that the defendant did not complete the offence charged, but was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return, as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment; and no person so tried as herein lastly mentioned shall be liable to be afterward prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." Rev. Act, 1860, p. 442.

In Virginia the practice is the same. Code, 1866, chap. ccviii. § 27. And so in Georgia. Hill *v.* State, 53 Ga 125.

What is the general common law rule on this point in the United States will be considered under another head. Infra, § 261. In Massachusetts, "feloniously" is made by statute unnecessary in all cases. Stat. 1852, c. 40, § 3.

[7] Com. *v.* Murphy, 2 Allen, 163.

In a leading English case, it was ruled that, in order to convict a prisoner of a felony, not a felony primarily charged in the indictment, it is necessary that the minor felony should be substantially included in the indictment. Thus, an indictment for burglary includes an indictment for house-breaking, and generally also for larceny, and the prisoner on this may be found guilty of one or other of these felonies. But in an indictment

§ 251. Where a statute, as has already been observed,[1] makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offence, it has in many cases been ruled they may be coupled in one count.[2] Thus, setting up a gaming-table, it has been said, may be an entire offence; keeping a gaming-table, and inducing others to bet upon it, may constitute a distinct offence; for either unconnected with the other an indictment will lie.[3] Yet when both are perpetrated by the same person at the same time, they may be coupled in one count.[4] An indictment also for keeping and maintaining, at a place and time named, "a certain building, to wit: a dwelling-house, used as a house of ill-fame, resorted to for prostitution, lewdness, and for illegal gaming, and used for the illegal sale and keeping of intoxicating liquors, the said building, so used as aforesaid, being then and there a common nuisance," may be sustained.[5] And an indictment which charges a prisoner with the offences of falsely making, forging, and counterfeiting, of causing and procuring to be falsely made, forged, and counterfeited, and of willingly aiding and assisting in the said false making, forging, and counterfeiting, is good, though all of these charges are contained in a single count; and as the words of the statute have been pursued, there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct.[6] It is

Not duplicity to couple successive statutory phases.

for burglary, and for breaking and entering a house and stealing, the prisoner cannot be found guilty of breaking and entering a house with intent to steal. R. *v.* Reid, 2 Den. C. C. 89; 1 Eng. Law & Eq. 599. See Speers *v.* Com. 17 Grat. 570.

[1] Supra, § 162.

[2] Supra, § 247; infra, § 742; Whart. Crim. Ev. §§ 134, 138; R. *v.* Bowen, 1 Den. C. C. 21; R. *v.* Oliver, 8 Cox C. C. 384; Bell C. C. 287; R. *v.* Yeadon, 9 Cox C. C. 91; State *v.* Nelson, 29 Me. 329; Com. *v.* Hall, 4 Allen, 305; State *v.* Matthews, 42 Vt. 542; Barnes *v.* State, 20 Conn. 232; State *v.* Connor, 30 Ohio St. 405; Hoskins *v.* State, 11 Ga. 92; Murphy *v.* State, 47 Mo. 274; State *v.* Myers, 10 Iowa, 448; State *v.* Harris, 11 Iowa, 414; State *v.* Bergman, 6 Oregon, 341; State *v.* Carr, 6 Oregon, 133; Thompson *v.* State, 30 Tex. 356. See also Com. *v.* Nichols, 10 Allen, 199.

[3] See State *v.* Fletcher, 18 Mo. 425.

[4] Hinkle *v.* Com. 4 Dana, 518.

[5] Com. *v.* Ballou, 124 Mass. 26.

[6] Supra, § 162; Whart. Crim. Law, 8th ed. § 727; R. *v.* North, 6 D. & R.

admissible, also, to charge that the defendant "administered, and caused to be administered," poison, &c.[1] "Obstruct or resist" process may be joined, so as to read "obstruct and resist" in the indictment.[2] And in an indictment on the Massachusetts Rev. Stats. c. 58, § 2, by which the setting up or promoting of any of the exhibitions therein mentioned, without license therefor, is prohibited, it is not duplicity to allege that the defendant "did set up and promote" such an exhibition.[3] In such cases the offences are divisible, and a verdict may be had for either.[4]

Several articles can be joined in larceny.

§ 252. In all cases of larceny, and like offences, several articles may be joined in a count, the proof of either of which will sustain the indictment,[5] though where a variety of articles are stolen at the same time and place, and from the same individual, it has been held that the stealing of such articles at the same time and place is only one offence, and must be so charged.[6] It has even been ruled that the same count may join the larceny of several distinct articles, belonging to different owners, where the time and the place of the taking of each are the same.[7] This, however, has been

143; U. S. *v.* Armstrong, 5 Phil. R. 273; State *v.* Hastings, 53 N. H. 452; State *v.* Morton, 27 Vt. 310; Com. *v.* Grey, 2 Gray, 501; State *v.* Price, 6 Halst. 203; Angel *v.* Com. 2 Va. Cas. 231; Rasnick *v.* Com. Ibid. 356; Mackey *v.* State, 3 Ohio St. 363; Jones *v.* State, 1 McMull. 236; Hoskins *v.* State, 11 Ga. 92; Wingard *v.* State, 13 Ga. 396; State *v.* McCollum, 44 Mo. 343; People *v.* Tomlinson, 35 Cal. 503.

[1] Ben *v.* State, 22 Ala. 9.

[2] Slicker *v.* State, 8 Eng. (13 Ark.) 397. See also State *v.* Locklear, 1 Busbee, 205. Supra, § 228.

[3] Com. *v.* Twitchell, 4 Cush. 74.

[4] See infra, § 742; Whart. Crim. Law, 8th ed. § 727; Whart. Crim. Ev. § 154.

A neglect by supervisors of roads both to open and repair roads may be charged in one count of an indictment against them. Edge *v.* Com. 7 Barr, 275.

[5] Supra, § 212; infra, § 470; Whart. Crim. Ev. § 132; State *v.* Cameron, 40 Vt. 555; Com. *v.* Williams, 2 Cush. 583; Com. *v.* Eastman, 2 Gray, 76; Com. *v.* O'Connell, 12 Allen, 451; State *v.* Hennessey, 23 Ohio St. 339; State *v.* Williams, 10 Humph. 101; Lorton *v.* State, 7 Mo. 55; State *v.* Johnson, 3 Hill S. C. 1.

In Maine it has been ruled that a count charging a larceny of bank bills, each of a denomination and value stated, and of a pocket-book and knife, "of the goods, chattels, and money of J. S. K.," &c., contains a sufficient description of the property, and is not bad for duplicity. Stevens *v.* State, 62 Me. 284.

[6] Ibid.; and see, particularly, infra § 470.

[7] Infra, § 470.

properly denied;[1] and when averred to be at distinct times, the count is double.[2]

§ 253. Laying several overt acts in a count for high treason is not duplicity,[3] because the charge consists of the compassing, &c., and the overt acts are merely evidences of it; and the same as to conspiracy. A count in an indictment, charging one endeavor or conspiracy to procure the commission of two offences, is not bad for duplicity, because the endeavor is the offence charged.[4] The same rule exists where assaults and other offences with several intents are charged.[5]

And so of double overt acts or intents.

§ 254. A man may be indicted for the battery of two or more persons in the same count,[6] or for libel upon two or more persons, where the publication is one single act;[7] or for selling liquor to two or more persons,[8] or in several forms,[9] without rendering the count bad for duplicity. And it is said that burning several houses by one fire can be joined.[10]

And so of double batteries, libels, or sales.

Various means used in committing the offence may be stated without duplicity.[11]

[1] State *v.* Thurston, 2 McMull. 382; Com. *v.* Andrews, 2 Mass. 409. Infra, § 470; Casey *v.* People, 72 N. Y. 393; and see Whart. Crim. Law, 8th ed. §§ 931, 948.

[2] State *v.* Newton, 42 Vt. 537.

[3] Kelyng, 8.

[4] R. *v.* Fuller, 1 B. & P. 181; R. *v.* Bykerdike, 1 M. & Rob. 179.

[5] R. *v.* Dawson, 1 Eng. Law & Eq. 62; R. *v.* Cox, R. & R. 362; R. *v.* Davis, 1 C. & P. 306; R. *v.* Smith, 4 C. & P. 569; R. *v.* Gillow, 1 Moody C. C. 85; R. *v.* Hill, 2 Moody C. C. 30; R. *v.* Balt, 6 C. & P. 329; State *v.* Moore, 12 N. H. 42; Com. *v.* McPike, 3 Cush. 181; People *v.* Curling, 1 Johns. R. 320; State *v.* Dineen, 10 Minn. 407; Whart. Crim. Law, 8th ed. § 119; Whart. Crim. Ev. § 135.

[6] R. *v.* Benfield, 2 Burr. 983; R. *v.* Giddings, C. & M. 634; Com. *v.* O'Brien, 107 Mass. 208; Kenney *v.* State, 5 R. I. 385; Fowler *v.* State, 3 Heisk. 154. See 2 Str. 890; 2 Ld. Raym. 1572; State *v.* McClintock, 8 Iowa, 203, *contra;* and so of a double shooting or stabbing. Com. *v.* McLaughlin, 12 Cush. 615; Shaw *v.* State, 18 Ala. 547. See Ben *v.* State, 22 Ala. 9; R. *v.* Scott, 4 B. & S. 368. Infra, §§ 468, 492.

[7] Infra, § 468; R. *v.* Jenour, 7 Mod. 400; 2 Burr. 983. See State *v.* Womack, 7 Cold. (Tenn.) 508.

[8] State *v.* Anderson, 3 Rich. 172; State *v.* Bielby, 21 Wis. 204. See, for a cognate case, Walter *v.* Com. 6 Weekly Notes, 389; Whart. Crim. Law, 8th ed. § 1515.

[9] Osgood *v.* People, 39 N. Y. 449.

[10] Woodford *v.* People, 62 N. Y. 117. Infra, § 469.

[11] Com. *v.* Brown, 14 Gray, 419; State *v.* McDonald, 37 Mo. 13; People *v.* Casey, 72 N. Y. 393. See Whart. Crim. Ev. §§ 134, 138.

Whether the killing of two persons by one act is one offence is hereafter discussed.[1]

Duplicity is usually cured by verdict.

§ 255. Duplicity, in criminal cases, may be objected to by special demurrer, perhaps by general demurrer; or the court, in general, upon application, may quash the indictment; but the better view is that it cannot be made the subject of a motion in arrest of judgment, or of a writ of error;[2] and it is in any view cured by a verdict of guilty as to one of the offences, and not guilty as to the other,[3] and by a *nolle prosequi* as to one member of the count.[4] But when two inconsistent offences, requiring different punishments, are introduced in one count, judgment may be arrested.[5]

XIII. REPUGNANCY.

Where material averments are repugnant, indictment is bad.

§ 256. When one material averment in an indictment is contradictory to another the whole is bad.[6] Thus, to adopt one of the old illustrations, if an indictment charge the defendant with having forged a certain writing, whereby one person was bound to another, the whole will be vicious, for it is impossible any one can be bound by a forgery.[7]

An indictment for selling spirituous liquors without a license charged that the defendant, at his storehouse and dwelling-house in Pennsboro, in said county, did sell, &c.; and it was held, on motion to quash, that it was not intended to charge two distinct sales at different places, but rather to describe the store and dwelling-house as constituting one building, and one and the same place; and, therefore, there were not two distinct offences charged in the same count. Conley *v.* State, 5 W. Va. 522. Compare Whart. Crim. Law, 8th ed. § 1515.

[1] Infra, § 468.

[2] Nash *v.* R. 9 Cox C. C. 424; 4 B. & S. 935; Com. *v.* Tuck, 20 Pick. 356; State *v.* Johnson, 3 Hill S. C. 1; Simons *v.* State, 25 Ind. 331; State *v.* Brown, 8 Humph. 89; People *v.* Shotwell, 27 Cal. 394. Infra, § 777; but see *contra*, when there is a confusion of averments, R. *v.* Cook, 1 R. & R. 176; State *v.* Fowler, 28 N. H. 184; Com. *v.* Powell, 8 Bush, 7; State *v.* Howe, 1 Rich. 260, and cases cited supra, § 243. As to curing by verdict see infra, § 759.

[3] R. *v.* Guthrie, L. R. 1 C. C. 241; State *v.* Miller, 24 Conn. 522; State *v.* Merrill, 44 N. H. 624.

[4] State *v.* Merrill, 44 N. H. 624. Infra, § 383.

[5] Cases cited supra, and State *v.* Nelson, 8 N. H. 163; Com. *v.* Holmes, 119 Mass. 198.

[6] 2 Hawk. c. 25, s. 62; R. *v.* Harris, 1 Den. C. C. 461; T. & M. 177; Com. *v.* Lawless, 101 Mass. 32.

[7] 3 Mod. 104; 2 Show. 460. See Mills *v.* Com. 13 Penn. St. 634.

Repugnancy has been held to exist where an indictment charged an offence to have been committed in November, 1801, and in the twenty-fifth

A relative pronoun, also, referring with equal uncertainty to two antecedents will make the proceedings bad, in arrest of judgment. But, as is elsewhere seen, every fact or circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage.[1]

That disjunctive statements are inadmissible has been elsewhere seen.[2]

XIV. TECHNICAL AVERMENTS.

1. "TRAITOROUSLY," § 257.
2. "FELONIOUSLY DID KILL," "MALICE AFORETHOUGHT," "STRIKE," § 260.
3. "FELONIOUSLY," — WHEN NECESSARY, AND WHEN IT MAY BE DISCHARGED AS SURPLUSAGE, § 261.
4. "RAVISH," "CARNALLY KNEW," "FORCIBLY," "FALSELY," § 263.
5. "FALSELY," § 264.
6. "BURGLARIOUSLY," § 265.
7. "TAKE AND CARRY AWAY," § 266.
8. "VIOLENTLY AND AGAINST THE WILL," § 267.
9. "UNLAWFULLY," § 269.
10. "FORCIBLY AND WITH A STRONG HAND," § 270.

§ 257. In indictments for treason, the offence must be laid to have been committed traitorously; but if the treason itself be laid to have been so committed, whether it consist in levying war against the supreme authority or otherwise, it is not necessary to allege every overt act to have been traitorously committed.[3]

In treason, "traitorously" must be used.

§ 258. In an indictment for murder, it must be alleged that

year of American Independence (State *v.* Hendricks, Con. R. 369), and where the crime was laid to have been committed A. D. 1830. Serpentine *v.* State, 1 How. Miss. R. 260.

[1] Supra, §§ 158, 253–4; Whart. Crim. Ev. §§ 138 *et seq.*; R. *v.* Craddock, 2 Den. C. C. 31; T. & M. 361; 1 Chitty on Pleading, 334, 335; State *v.* Cassety, 1 Richards. 91.

Where there was a general verdict of guilty on an indictment for procuring a miscarriage, in which one count averred quickness and the other merely pregnancy, and one count averred the abortion of the mother and the other of the child, the Supreme Court refused to reverse on the ground of repugnancy. Mills *v.* Com. 13 Penn. St. 634.

An indictment charging an assault with three weapons — a pair of tongs, a hammer, and an axe-handle — is not void for repugnancy. State *v.* McDonald, 67 Mo. 13.

[2] Supra, §§ 161, 228.

Where one count charges the offence to have been committed in one county and another count charges it in another, the general rule is, that the counts are repugnant, and the indictment will be quashed on motion, or the prosecutor be compelled to elect which he will proceed on. State *v.* Johnson, 5 Jones (N. C.), 221.

[3] Cranbourn's case, 4 St. Tr. 701; Salk. 633; East P. C. 116.

the offence was committed of the defendant's malice aforethought, words which cannot be supplied by the aid of any other; and if any of these terms be omitted, or if the defendant be merely charged with killing and slaying the deceased, the offence will amount to no more than manslaughter.[1]

"Malice aforethought" essential to murder.

§ 259. Where the death arises from any wounding, beating, or bruising, it has been said that the word struck is essential, and that the wound or bruise must be alleged to have been mortal.[2]

"Struck" usually essential to wound.

§ 260. The word feloniously was at common law essential to all indictments for felony, whether at common law or statutory,[3] although the reason for the term being purely arbitrary,[4] it is no longer necessary unless prescribed by statute, or unless describing a common law felony.[5] But in all common law felonies it is essential. Thus, in an indictment for murder, it is at common law requisite to state as a conclusion from the facts previously averred that the said defendant, him, the said C. D., in manner and form aforesaid, feloniously did kill and murder.[6]

"Feloniously" essential to felony.

[1] 1 Hale, 450, 466; East P. C. 345; Whart. Crim. Law, 8th ed. §§ 517 *et seq.* A killing by misadventure, or chance medley, is described to have been done "casually and by misfortune, and against the will of the defendant." See State *v.* Rabon, 4 Rich. 260.

[2] See Whart. Crim. Law, 8th ed. §§ 518 *et seq.*; 2 Hale, 184; 2 Inst. 319; 2 Hawk. c. 23, s. 82; Cro. J. 635; 5 Co. 122; Lad's case, Leach, 112.

[3] R. *v.* Gray, L. & C. 365; Mears *v.* Com. 2 Grant, 385; State *v.* Murdock, 9 Mo. 730; State *v.* Gilbert, 24 Mo. 380; Bowler *v.* State, 41 Miss. 570; Edwards *v.* State, 25 Ark. 444. It has, however, been held that when a statute creating a felony does not use the term "feloniously," the latter term may be omitted in the indictment. People *v.* Olivera, 7 Cal. 403; Jane *v.* Com. 3 Metc. (Ky.) 18. The word "feloniously" may be sometimes dispensed with by statute, either expressly or by implication. Peek *v.* State, 2 Humph. 78; Butler *v.* State, 22 Ala. 43.

[4] The term was originally introduced in order to exclude the offender from his clergy; R. *v.* Clerk, Salk. 377; and is not essential to an indictment for manslaughter. See, as to gradual disappearance of distinction, Whart. Crim. Law, 8th ed. § 22.

[5] See Steph. Cr. Law, §§ 56, 57 *et seq.*; State *v.* Felch, Sup. Ct. N. H. 1876.

[6] Whart. Crim. Law, 8th ed. §§ 518 *et seq.*; 1 Hale, 450, 466; 4 Bl. 307; Yel. 205; Cain *v.* State, 18 Tex. 387.

It has been held that "feloniously" is not essential to an assault and

§ 261. If an act be charged to have been done with a felonious intent to commit a crime, and it appears upon the face of the indictment that the crime, though perpetrated, would not have amounted to a felony, the word felonious, being repugnant to the legal import of the offence charged, may be rejected as surplusage.[1]

Word "feloniously" can be rejected as surplusage.

Where, however, the indictment on its face is for a complete felony, it has been doubted whether a conviction can be had for the constituent misdemeanor. In England, the rule at common law was that such a conviction could not be had, the reason being, that if a misdemeanor be tried under an indictment for a felony, the defendant loses his right to a special jury and a copy of the bill of indictment.[2] In this country, though the reason fails, the principle that under an indictment for a felony there can, at common law, be no conviction for a misdemeanor, has been followed in Massachusetts,[3] in Indiana,[4] in Tennessee,[5] in North Carolina,[6] and in Maryland.[7] In New

battery with intent to kill; Stout *v.* Com. 11 S. & R. 177; State *v.* Scott, 24 Vt. 27; though elsewhere the omission was held fatal. Mears *v.* Com. 2 Grant, 385; Scudder *v.* State, 62 Ind. 13; Curtis *v.* People, 1 Breese, 199; and see Whart. Crim. Law, 8th ed. § 644.

In all cases of mayhem, the words feloniously and did maim are requisite; 1 Inst. 118; 2 Hawk. c. 23, ss. 15, 16, &c.; 2 Hawk. c. 25, s. 55; Com. *v.* Reed, 3 Am. L. Journ. 140; Canada *v.* Com. 22 Grat. 899; State *v.* Brown, 60 Mo. 141; Whart. Crim. Law, 8th ed. § 586; though it is said in Massachusetts that the offence is not a felony (Com. *v.* Newell, 7 Mass. 244), and in Georgia, to be only so in case of castration. Adams *v.* Barrett, 5 Geo. 404.

[1] Whart. Crim. Ev. § 148; 2 East P. C. 1028; Cald. 397; Hackett *v.* Com. 15 Penn. St. 95; Com. *v.* Gable, 7 S. & R. 423; People *v.* Jackson, 3 Hill (N. Y.), 92; People *v.* White, 22 Wend. 175; Lohman *v.* People, 1 Comst. 379; Hess *v.* State, 5 Ohio, 1. But see Starkie's C. P. 169, n. r.; Black *v.* State, 2 Md. 376. See supra, § 249.

[2] R. *v.* Woodhall, 12 Cox C. C. 240; R. *v.* Cross, 1 Ld. Raym. 711; 3 Salk. 193; 2 Hawk. c. 47, s. 6; 1 Chitty C. L. 251, 639; R. *v.* Walker, 6 C. & P. 657; R. *v.* Gisson, 2 C. & K. 781; R. *v.* Reid, 2 Den. C. C. 88; 2 Eng. Law & Eq. 473. See supra, §§ 246–7. Now, however, the statute of 1 Vict. c. 85, s. 11 (Lord Denman's Act), enables conviction to be had for a constituent misdemeanor.

[3] Com. *v.* Newell, 7 Mass. 245. This has been corrected by statute. Com. *v.* Drum, 19 Pick. 479; Com. *v.* Scannel, 11 Cush. 547. See supra, § 249.

[4] State *v.* Kennedy, 7 Blackf. 233; Wright *v.* State, 5 Ind. 527.

[5] State *v.* Valentine, 6 Yerg. 533.

[6] State *v.* Durham, 72 N. C. 447. See State *v.* Upchurch, 9 Ired. 455.

[7] Black *v.* State, 2 Md. 376; aff. in Barber *v.* State, 1879; though see

York,[1] Pennsylvania,[2] Vermont,[3] New Jersey,[4] Ohio,[5] South Carolina,[6] Michigan,[7] and Arkansas,[8] it has been held that the English reason ceasing, the rule itself ceases. In most States this latter position is now established by statute, if not by common law.[9]

In such case conviction may be had of attempt.

§ 262. *Attempts*, by the statutes of England and most of the United States, are made substantive offences, even where they do not exist as such at common law. And by the same statutes, the jury in most instances — even in indictments for felony — may convict of the attempt.[10]

"Ravish" and "forcibly" are

§ 263. In indictments of rape, the words feloniously ravished are essential, and the word *rapuit* is not supplied by the words *carnaliter cognovit*;[11] and it seems that the

Burk *v.* State, 2 Har. & J. 426; State *v.* Sutton, 4 Gill, 494. Supra, § 247.

[1] People *v.* White, 22 Wend. 175; People *v.* Jackson, 3 Hill (N. Y.), 92; Lohman *v.* People, 1 Comst. 379. See supra, § 249.

[2] Hunter *v.* Com. 79 Penn. St. 503. See Com. *v.* Gable, 7 S. & R. 433; and Whart. Crim. Law, 8th ed. § 542.

[3] State *v.* Coy, 2 Aiken, 181; State *v.* Wheeler, 3 Vt. 344; State *v.* Scott, 24 Vt. 129.

[4] State *v.* Johnson, 1 Vroom, 185.

[5] State *v.* Hess, 5 Ohio, 1; Stewart *v.* State, 5 Ohio, 242.

[6] State *v.* Gaffney, Rice, 431; State *v.* Wimberly, 3 McCord, 190.

[7] Rogers *v.* People, 34 Mich. 345.

[8] Cameron *v.* State, 8 Eng. (13 Ark.) 712.

[9] Supra, § 158; Whart. Crim. Ev. § 148; Com. *v.* Squires, 1 Met. 258; Com. *v.* Scannel, 11 Cush. (Mass.) 547. So in Minnesota. State *v.* Crummey, 17 Minn. 72. In North Carolina. State *v.* Purdie, 67 N. C. 26, 326. See State *v.* Upchurch, 9 Ired. 455. In Iowa. State *v.* McNally, 32 Iowa, 580. And in Texas. Jorasco *v.* State, 6 Tex. Ap. 238.

[10] Whart. Crim. Law, 8th ed. § 173; and see infra, §§ 742 *et seq.*, as to verdict.

An indictment for arson charged that the defendants "feloniously, wilfully, and unlawfully," set fire to, burned, and consumed a certain building used as a brewery for the manufacture of beer. It was held that the indictment was defective in not alleging that the burning was malicious. Kellenbeck *v.* State, 10 Md. 431. Supra, § 235.

Where a statute makes criminal the doing of the act "wilfully and maliciously," it is not sufficient for the indictment to charge that it was done "feloniously and unlawfully," or feloniously, unlawfully, and wilfully; these latter terms not being synonymous, equivalent, of the same legal import, or substantially the same as "wilfully and maliciously." State *v.* Gove, 34 N. H. 510; though see supra, § 235; Whart. Crim. Law, 8th ed. § 586.

[11] Gougleman *v.* People, 3 Parker C. R. (N. Y.) 15; 1 Hale, 628; 2 Hale, 184; 1 Inst. 190; 2 Inst. 180.

latter words are also essential in indictments,[1] though the contrary has been ruled in the case of an appeal.[2] The usual course in an indictment for rape is to aver that it was committed forcibly, and against the will of the female, and therefore it would not be safe to omit the averment,[3] though in Pennsylvania the omission was held not to be fatal, in a case where ravish and carnally know were introduced.[4] In an indictment for an unnatural crime, the descriptive words of the statute taking[5] away clergy, must be used; and it is not sufficient to say *contra naturae ordinem rem habuit venereamet carnaliter cognovit*.[6]

essential to rape.

§ 264. In an indictment for perjury, it is necessary to charge that the defendant wilfully and corruptly swore falsely.[7]

"Falsely" essential to perjury.

§ 265. In burglary the essential words are "feloniously and burglariously broke and entered the dwelling-house, in the night-time;" and the felony intended to be committed, or actually perpetrated, must also be stated in technical terms.[8] But "burglariously" is not necessary in statutory house-breaking.[9]

"Burglariously" to burglary.

§ 266. In larceny, the words feloniously took and carried away the goods,[10] or took and led away the cattle, are essential.

"Take and carry away" essential to larceny.

§ 267. In an indictment for robbery from the person, the words feloniously, violently,[11] and against the

"Violently and against the

[1] 1 Hale, 632; 3 Inst. 60; Co. Lit. 137; 2 Inst. 180.

[2] 11 H. 4, 13; 2 Hawk. c. 23, s. 79; Staun. 81.

[3] State *v.* Jim, 1 Dev. 142; Whart. Crim. Law, 8th ed. § 573.

[4] Harman *v.* Com. 12 Serg. & R. 69; and see Com. *v.* Fogerty, 8 Gray, 489; and see, for fuller discussion, Whart. Crim. Law, 8th ed. § 573.

[5] 5 Eliz. c. 17, 3, 4; W. & M. c. 9, s. 2; Fost. 424; Co. Ent. 351; 3 Inst. 59; 1 Hawk. c. 4, s. 2.

[6] East P. C. 480; 3 Inst. 59.

[7] See fully Whart. Crim. Law, 8th ed. § 1286.

[8] 1 Hale, 549; Portwood *v.* State, 29 Tex. 47. See Lyon *v.* People, 68 Ill. 271; and see Whart. Crim. Law, 8th ed. § 814.

[9] Tully *v.* Com. 4 Met. 357.

[10] 1 Hale, 504; 2 Hale, 184; R. *v.* Middleton, L. R. 2 C. C. 41; Com. *v.* Adams, 7 Gray, 43; Whart. Crim. Law, 8th ed. § 914. In Green *v.* Com. 111 Mass. 417, it was held that "steal" might be a substitute; though this ruling may be questioned.

[11] 1 Hale, 534; Fost. 128; 3 Inst. 68. But see Smith's case, East's P. C. 783, in which it was holden that *violenter* is not an essential term of

"will" essential to robbery.

will, are essential; and it is usual, though it is said to be unnecessary, to allege a putting in fear.[1]

"Piratical" to piracy.

§ 268. Piracy must be alleged to have been done feloniously and piratically.[2]

"Unlawfully," and other aggravative terms, not essential.

§ 269. The phrase "unlawful" is in no case essential, unless it be a part of the description of the offence as defined by some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful; if the facts stated be legal, the word unlawful cannot render it indictable.[3] The same observation is applicable to the terms "wrongfully," "unjustly," "wickedly," "wilfully," "corruptly," to "the evil example," "falsely," "maliciously," and such like.[4] Thus, though it is usual to allege that the party falsely forged and counterfeited, it is enough to allege that he forged, because the word implies a false making. In indictment for libels, it is sufficient either to use the word falsely or maliciously,[5] or an equivalent epithet. But when either of these terms is part of the essential definition of the offence, it cannot be dropped.[6]

"Forcibly" and with a strong hand essential to forcible entry.

§ 270. In forcible entry, at common law, the defendants must be charged with having used such a degree of force as amounts to a breach of the peace.[7] The words, "with strong hand," are indispensable. But it is sufficient in such an indictment to aver, that the defendants unlawfully and with a strong hand entered the prosecutor's mills, &c., and expelled him from the possession thereof.[8]

"*Vi et armis*" not essential.

§ 271. The practice still exists of introducing, in indictments for forcible injuries, the technical words, *vi et armis;* but by the stat. 37 H. 8, c. 8, it is enacted that "inquisitions or indictments lacking the words *vi et armis*,

art. See Whart. Crim. Law, 8th ed. § 857.

[1] Whart. Crim. Law, 8th ed. § 857.

[2] 1 Hawk. c. 37, ss. 6, 10.

[3] U. S. *v.* Driscoll, 1 Low. 305; State *v.* Williams, 3 Foster (N. H.), 321; State *v.* Vt. R. R. 27 Vt. 103; State *v.* Bray, 1 Mo. 126; Capps *v.* State, 4 Iowa, 502; Stazey *v.* State, 58 Ind. 514; Williams *v.* State, 3 Heisk. 376.

[4] See Whart. Crim. Law, 8th ed. §§ 517, 839.

[5] Sty. 392; 2 Wms. Saund. 242; Starkie C. P. 86.

[6] Com. *v.* Turner, 8 Bush, 1.

[7] R. *v.* Wilson et al. 8 T. R. 357; 6 Mod. 178; Whart. Crim. Law, 8th ed. § 1107.

[8] Ibid.

viz., *baculis*, *cultellis*, *arcubus*, *et sagittis*, or any such like words, shall be taken, deemed, and adjudged, to all intents and purposes, to be good and effectual in law, as the same inquisitions and indictments having the same words were theretofore taken, deemed, and adjudged to be." These words are therefore superfluous, even where the crime is of a forcible nature, and were unnecessary at common law, where the injury was not forcible.[1] And in case of murder, the force at common law is implied from the very nature of the offence.[2] The stat. 37 H. 8, c. 8, is in force in Pennsylvania,[3] in New Hampshire,[4] in Vermont,[5] in Massachusetts,[6] in North Carolina,[7] in Tennessee,[8] in Indiana,[9] and in Louisiana,[10] and in these States, as well as generally in this country, the term may be properly omitted.[11]

§ 272. "Knowingly" is one of the expletives which, when fraud is charged, it may be useful to insert. For although it may be discharged as surplusage if unnecessary, it may be sometimes employed to help out an otherwise defective allegation of guilty knowledge.[12]

"Knowingly" always prudent.

XV. CLERICAL ERRORS.

§ 273. *Verbal or grammatical inaccuracies*, which do not affect the sense, are not fatal.[13] Mere misspelling will not be fatal, as in writing "*fifty-too*" for "*fifty-two*,"[14] and "assalt" for "assault."[15] The omission of a letter in the prisoner's name, in the title of a bill found by a

Verbal inaccuracies not affecting sense not fatal.

[1] 2 Lev. 221; Cro. Jac. 473; 3 P. Wms. 497; Skinner, 426; 2 Hawk. c. 25, s. 90.

[2] 2 Hale, 187; 1 Hawk, c. 25, s. 3; 1 Hale, 534; 3 Inst. 68; Pulton, 131 *b*.

[3] Roberts's Dig. 34; Com. *v.* Martin, 2 Barr, 244, in which case the omission of the "*vi et armis*" was held immaterial.

[4] State *v.* Kean, 10 N. H. 347.

[5] State *v.* Munger, 15 Vt. 290; 2 Tyler, 166.

[6] Com. *v.* Scannel, 11 Cush. 547.

[7] State *v.* Duncan, 6 Ired. 236.

[8] Tipton *v.* State, 2 Yerg. 542; Taylor *v.* State, 6 Humph. 285.

[9] State *v.* Elliot, 7 Blackf. 280.

[10] Territory *v.* M'Farlane, 1 Martin, 224. See State *v.* Thornton, 2 Rice's Dig. 109.

[11] See also State *v.* Temple, 3 Fairf. 214.

[12] 1 Starkie C. P. 390.

[13] R. *v.* Stokes, 1 Den. C. C. 307; Com. *v.* Burke, 15 Gray, 408; Shay *v.* People, 22 N. Y. 317; Phelps *v.* People, 72 N. Y. 334, 372; Com. *v.* Moyer, 7 Barr, 439; Com. *v.* Ailstock,

[14] State *v.* Hedge, 6 Ind. 333.

[15] State *v.* Crane, 4 Wis. 400.

grand jury, is not a good ground for a motion in arrest of judgment, as the prisoner had pleaded to it, and had been convicted upon it, especially where the name is properly stated in the body of the bill of indictment itself;[1] and so where "mark," in an indictment for putting a false mark on sheep, was written "make."[2] But in an indictment for murder, where the letter *a* was omitted in the word breast, in describing the place of the wound, judgment, in an old case, was arrested.[3] In a subsequent case, however, in the same court, it was held that false spelling, which does not alter the meaning of the words misspelt, is no ground for arresting judgment.[4] And this is sound law.[5]

3 Grat. 650; Lazier *v.* Com. 10 Grat. 708; State *v.* Gilmore, 9 W. Va. 641; State *v.* Hedge, 6 Ind. 330; State *v.* Raymond, 20 Iowa, 582; State *v.* Haney, 2 Dev. & Bat. 400; Grant *v.* State, 55 N. C. 201; State *v.* Davis, 80 N. C. 384; State *v.* Shepherd, 8 Ired. 195; State *v.* Smith, 63 N. C. 234; Williams *v.* State, 3 Heisk. 376; State *v.* Coleman, 8 S. C. 237; Fortenberry *v.* State, 55 Miss. 403; Ward *v.* State, 50 Ala. 120; State *v.* Edwards, 19 Mo. 674; Snow *v.* State, 6 Tex. Ap. 274; and see particularly, as a specimen of how much carelessness can be passed by when the sense is preserved, Hackett *v.* Com. 15 Penn. St. 95. See supra, §§ 167 *et seq.*; infra, § 760; Whart. Crim. Ev. §§ 114 *et seq.* As to curing by verdict see infra, § 759.

Thus, in an indictment for selling spirituous liquors by the small measure, without license, the omission of the auxiliary verb "did," which should have been joined with the words "sell and dispose of," has been held immaterial. State *v.* Whitney, 15 Vt. 298; State *v.* Edwards, 19 Mo. 674. In an indictment, however, which charged that the defendant "feloniously utter and publish, dispose and pass," &c., &c., omitting the word "did" before utter, &c., the court arrested the judgment on the ground of uncertainty, no charge being made that the prisoner did the act. State *v.* Halder, 2 McCord, 377. See State *v.* Hutchinson, 26 Tex. 111; State *v.* Daugherty, 30 Tex. 360; State *v.* Earp. 41 Tex. 487; Koontz *v.* State, 41 Tex. 570.

[1] State *v.* Dustoe, 1 Bay, 377. Infra, §§ 760 *et seq.*

[2] State *v.* Davis, 1 Ired. 125.

[3] State *v.* Carter, Conf. Rep. 210; S. C., 2 Hay. 140, Taylor, J., dissent.

[4] State *v.* Molier, 1 Dev. 263. See State *v.* Caspary, 11 Richs. 356; State *v.* Wimberly, 3 McCord, 190; State *v.* Karn, 16 La. An. 183.

[5] See State *v.* Karn, 16 La. An. 183.

In a bill of indictment with three counts, if in the third count it is omitted to be stated that the grand jury, "on their oath," present (the first two counts being regular in that respect), the objection is obviated by the fact, that the record states that the grand jury was sworn in open court. Huffman *v.* Com. 6 Randolph, 685.

The substitution of "an" for "the," in an indictment for perjury, was held immaterial; People *v.* Warner, 5 Wend. 271; and the substitution of "on" for "of," in the expression, "notes on the Bank U. S.," will be disregarded. M'Laughlin *v.* Com. 4 Rawle, 464.

§ 274. Words written at length are not only more certain, but less liable to alteration, than figures; and, therefore, when the year and day of the month are inserted in any part of an indictment, they are more properly inserted in words written at length than in Arabic characters, but a contrary practice will not vitiate an indictment.[1] The terms *anno domini*, in an information or bill of indictment, are equivalent to the year of our Lord. Either is good, and so is the want of either.[2] But some signs ("A. D.," or "in the year") must appear to show what the figures mean.[3] Hence it is not fatal that the date, instead of being written in full, is abbreviated, as A. D. 1830, if the figures are plainly legible.[4] And where a bill was found on the 2d of January, 1839, and the indorsement of the plea of not guilty was dated as of the 2d of January, 1838, this was held to be a mere clerical error, and amendable.[5] But when a written instrument in figures is copied, the figures are to be given.[6]

Numbers may be given by abbreviations.

§ 275. Where an indictment commenced, "the grand jurors within and the body of the county," &c., it was held, that the omission of the word "for" was not fatal.[7] And so of the omission of the word "present," in the commencement.[8]

Omission of formal words may not be fatal.

[1] Supra, §§ 124, 125; State v. Reed, 35 Me. 489; Lazier v. Com. 10 Grattan, 708; Kelly v. State, 3 Sm. & Marsh. 518; State v. Raiford, 7 Porter, 101; State v. Seamons, 1 Greene (Iowa), 418; Winfield v. State, 3 Greene (Iowa), 339; though see Berrian v. State, 2 Zabr. 9; State v. Voshal, 4 Ind. 589.

[2] State v. Gilbert, 13 Vt. 647; Hall v. State, 3 Kelly, 18; but see Whitesides v. People, Breese's R. 4; and see fully supra, §§ 124, 125.

[3] Com. v. Doran, 14 Gray, 37; Com. v. McLoon, 5 Gray, 91; Engleman v. State, 2 Ind. 91; though *contra*, Rawson v. State, 19 Conn. 292.

[4] State v. Hodgeden, 3 Vt. 481; Bouvier's Law Dictionary, "Figures." And see supra, §§ 124, 125. See Engleman v. State, 2 Ind. 91.

[5] Com. v. Chauncey, 2 Ash. 90.

"First of March," instead of "first day of March," is not fatal. Simmons v. Com. 1 Rawle, 142.

[6] See supra, § 167.

[7] State v. Brady, 14 Vt. 353.

[8] State v. Freeman, 21 Mo. (6 Bennett) 481.

It is not fatal to omit the word "so," in the passage, "and so the jurors, &c., do present;" State v. Moses, 2 Dev. 452; nor the word "did," before "assault," in an indictment for an assault. State v. Edwards, 19 Mo. 674. Supra, § 273.

It is not a fatal objection to an indictment that the name of a grand juror in the caption does not correspond with his name in the panel, nor that the indictment is stated as found upon the *oaths*, instead of the *oath*, of

§ 276. Mere signs, however, cannot be substituted for words. Thus in Vermont under the statute requiring indictments to be in English, it was held bad on demurrer for an indictment to use the mathematical signs, (° ′) in place of "degrees" and "minutes."[1] And where the substitution is purely arbitrary this holds good at common law.[2]

Signs cannot be substituted for words.

§ 277. *Erasures and interlineations* do not, on a motion in arrest of judgment, vitiate an indictment otherwise legible,[3] and interlineations may be read so as to make sense without regard to the *caret*,[4] though the *caret* will ordinarily be regarded as decisive of the point of introduction.[5] Even a *pencil* interlineation has been sustained.[6] But defects of this kind, though not fatal in motions in arrest, may sustain a motion to quash.[7]

Erasures and interlineations are not fatal.

§ 278. That an indictment has been defaced, or even torn into separate parts, does not affect its validity, if the record be preserved in a legible state,[8] and the question of legibility is for the court.[9] But a lost indictment cannot, at common law, be prosecuted on parol proof of its contents, or by a copy.[10]

Tearing or defacing not necessarily fatal. Lost indictment.

the inquest. State *v.* Dayton, 3 Zabr. 49. Supra, § 92.

[1] State *v.* Jericho, 40 Vt. 121; though see State *v.* Gilbert, 13 Vt. 647.

[2] A clerk of the court placed on the margin, by several counts, the numbers one, two, and so on, and, by mistake or otherwise, began to number at the second count, and the same error was continued through the whole number of counts; and the jury returned a verdict of guilty on the seventh or eighth count, "as marked." It was held, that it was error for the court to render sentence on the seventh and eighth counts of the indictment as found. Woodford *v.* State, 1 Ohio State R. 427.

[3] Com. *v.* Fagan, 15 Gray, 194; French *v.* State, 12 Ind. 670. The question of erasure or interlineation is for the court. Ibid.; Com. *v.* Davis, 11 Gray, 4; Com. *v.* Riggs, 14 Gray, 376.

[4] State *v.* Daniels, 44 N. H. 383. But see R. *v.* Davis, 7 C. & P. 319.

[5] R. *v.* Davis, 7 C. & P. 319.

[6] May *v.* State, 14 Ohio, 461. Infra, § 278 *a*.

[7] Com. *v.* Desmarteau, 16 Gray, 16.

[8] Com. *v.* Roland, 97 Mass. 598.

[9] Com. *v.* Davis, 11 Gray, 4; Com. *v.* Riggs, 14 Gray, 376.

[10] In Bradford *v.* State, 54 Ala. 230, it was held that where an indictment was lost *after plea*, it could be supplied by a copy. In Gannaway *v.* State, 22 Ala. 777, this was denied in a case where the indictment was lost before arraignment. In Mount *v.* State, 14 Oh. 295, it was held that a loss *after conviction* could be so supplied. In Bradshaw *v.* Com. 16 Grat. 507, where an indictment was lost *after plea*, it was held that it could not

§ 278 *a*. It is seen in another work [1] that a pencil writing may be a valid document, even under the statute of frauds. Objectionable as this mode of writing may be, and strong as may be the reason for quashing an indictment written in pencil in such a way as to be uncertain, it cannot be said that after the jury has passed on the indictment, the fact that it is in whole or in part in pencil is ground for a motion in arrest. "Pencil" writing, in fact, it may be difficult to distinguish from "ink" writing. Some pencils write with what is virtually condensed ink. Some ink may be as pale and evanescent as the lead commonly used in pencils.[2]

Pencil writing may be sufficient.

XVI. CONCLUSION OF INDICTMENTS.

§ 279. The constitutions of most of the States contain a provision that all indictments shall conclude against their peace and dignity respectively, and when so the conclusion must be thus given in the indictment.[3] Thus in Pennsylvania, it is provided that all prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude, "against the peace and dignity of the same," [4] and the proper conclusion of an indictment in Pennsylvania, said the Supreme Court, is "against the peace and dignity of the Commonwealth of Pennsylvania." [5] In New Hampshire, the Constitution requires all indictments to terminate "against the peace and dignity of the State;" and it has been held, that it is sufficiently complied with by an indictment concluding "against the peace and dignity of our said State." [6] In South Carolina, an indictment stating an offence against the State, and concluding with the words, "against the peace and dignity of the same," is good within the terms of the Constitution of 1790.[7] Where an indictment commenced "South

Conclusion must conform to Constitution.

be supplied. And so generally. Com. *v.* Keger, 1 Duvall, 240. See State *v.* Harrison, 10 Yerg. 542. As to statutory provisions see State *v.* Elliott, 14 Tex. 423.

[1] Whart. on Ev. § 666.

[2] See R. *v.* Warshaner, 1 Mood. C. C. 466; 7 C. & P. 429; May *v.* State, *supra*.

[3] See, for forms, Whart. Prec. 3, 4, 5, &c.; and see Lemons *v.* State, 4 W. Va. 755; Rice *v.* State, 3 Heisk. 215; Holden *v.* State, 1 Tex. Ap. 225. But informations are not bound by the limitation. Nichols *v.* State, 35 Wis. 308.

[4] Constit. art. v. § 11.

[5] Com. *v.* Rogers, 5 S. & R. 463.

[6] State *v.* Kean, 10 N. H. 347.

[7] State *v.* Washington, 1 Bay, 120.

Carolina," and not the "State of South Carolina," and concluded "against the peace and dignity of the said State," and not against the peace and dignity of the same, the court held the termination good.[1] In the same State an indictment was held good, though it concluded "against the peace and dignity of this State," instead of concluding "against the peace and dignity of the same State."[2] But the conclusion must be against the peace and dignity of the State.[3] Whenever required by constitution or statute, the omission of the conclusion "against the peace," &c., will be held fatal.[4] By the Constitution of Arkansas, indictments must conclude "against the peace and dignity of the State of Arkansas,"[5] but the interpolation of the words, "people of the," will not vitiate. "The form adopted by the Constitution," it was said, "is merely declaratory, and in affirmance of an old principle, not the creation of a new one."[6] In Mississippi, an indictment commencing with the words, "The State of Mississippi," and concluding, "against the peace and dignity of the same," is sufficient.[7] In Illinois, an indictment concluding "against the peace and dignity of the people of the State of Illinois," is good.[8] An indictment in Kentucky, which states in the commencement correctly the name of the Commonwealth, by the authority of which it proceeds, may conclude against the peace and dignity of the Commonwealth, without stating the name, nor is it necessary even to aver "the authority," of the Commonwealth.[9] The Constitution of Iowa requires proceedings to be conducted in the name of the "State of Iowa;" and under it, it is held that an indictment in the name of the "State of Iowa" is good.[10]

[1] State *v.* Anthony, 1 McCord, 285.

[2] State *v.* Yancey, 1 Con. R. 237.

[3] State *v.* Strickland, 10 S. C. 19.

[4] Com. *v.* Carney, 4 Grat. 546; Thompson *v.* Com. 20 Grat. 724; Lemons *v.* State, 4 W. Va. 755; State *v.* Allen, 8 W. Va. 680; State *v.* McCoy, 29 La. An. 593; State *v.* Lopez, 19 Mo. 254; State *v.* Reaky, 1 Mo. Ap. 3; State *v.* Durst, 7 Tex. 74.

[5] Buzzard *v.* State, 20 Ark. 106.

[6] Anderson *v.* State, 5 Pike, 445. And if there be several counts in an indictment, each one must so conclude, or the court will quash the count in which the proper conclusion is omitted. State *v.* Cadle, 19 Ark. 613.

[7] State *v.* Johnson, 1 Walk. 392.

[8] Zarresseller *v.* People, 17 Ill. 101.

[9] Com. *v.* Young, 7 B. Mon. 1; Allen *v.* Com. 2 Bibb, 210.

[10] Harriman *v.* State, 2 Greene (Iowa), 270.

§ 280. Where a statute creates an offence, or declares a common law offence, when committed under particular circumstances, not necessarily in the original offence, punishable in a different manner from what it would have been without such circumstances; or, where the statute changes the nature of the common law offence to one of a higher degree, as where what was originally a misdemeanor is made a felony, the indictment should conform to the statute creating or changing the nature of the offence, and should conclude against the form of the statute.[1] Under a statute revising and absorbing the common law, the conclusion must be statutory.[2]

Where statute creates or modifies an offence, conclusion should be statutory.

§ 281. It is otherwise where the statute is only declaratory of what was a previous offence at common law, without adding to or altering the punishment.[3] And where a statute only inflicts a punishment on that which was *an offence* before, judgment may be given for the punishment prescribed therein, though the indictment does not conclude *contra formam statuti*, &c.[4] This is clearly the case when the statute only mitigates the common law punishment.[5]

Otherwise when statute does not modify offence.

[1] 1 Hale, 172, 189, 192; Dougl. 441; 1 Salk. 370; 13 East, 258; 5 Mod. 307; 2 Ld. Raym. 1104; 1 Saund. 135 *a*, n. 3, 4; 2 Hawk. c. 23, s. 99; c. 25, s. 116; Bac. Ab. Indictment, H. 4; Burn, J., Indict. ix.; Cro. C. C. 39; 1 Chitty on Pleading, 358; 2 Hale, 189; Browne's case, 3 Greenl. 177; State *v.* Soule, 20 Me. 19; Com. *v.* Springfield, 7 Mass. 9; Com. *v.* Stockbridge, 11 Mass. 279; Com. *v.* Northampton, 2 Mass. 116; Com. *v.* Cooley, 10 Pick. 37; Com. *v.* Searle, 6 Binn. 332; Chapman *v.* Com. 5 Whart. 427; State *v.* Gray, 14 Rich. S. C. 174; Beasley *v.* State, 18 Ala. 535. As to relations of statutes to common law see supra, § 232.

[2] Com. *v.* Cooley, *ut supra;* Com. *v.* Dennis, 105 Mass. 162.

[3] 1 Deac. Crim. Law, 661; People *v.* Enoch, 13 Wendell, 175, per Walworth, Chanc.; Warner *v.* Com. 1 Barr, 154; State *v.* Evans, 7 Gill & J. 290; State *v.* Jim, 3 Murph. 3. See Whart. Crim. Law, 8th ed. §§ 25–6.

[4] State *v.* Burt, 25 Vt. 373; Com. *v.* Searle, 2 Binn. 332; Russel *v.* Com. 7 S. & R. 489; White *v.* Com. 6 Binn. 179; Chiles *v.* Com. 2 Va. Cas. 260; State *v.* Ratts, 63 N. C. 503; State *v.* Stedman, 7 Port. 495; 2 Hale, 190; 1 Saund. 135 *a*, n. 3, 6; 2 Roll. Abr. 82. See People *v.* Cook, 2 Parker C. R. 12; State *v.* Jim, 3 Murph. 3. Infra, § 287.

[5] State *v.* Laurence, 81 N. C. 521; State *v.* Thorne, 81 N. C. 555.

In Massachusetts, a conclusion "against the peace and the statute," is good; Com. *v.* Caldwell, 14 Mass. 330; though in the same State it was held insufficient to charge the offence as committed against the law in such case made and provided. Com. *v.* Stockbridge, 11 Mass. 279.

In Kentucky, by the Code, an indictment is sufficient if it show intel-

Such conclusion does not cure defects.

§ 282. An indictment in which the statute is defectively set forth is not cured by a statutory conclusion.[1]

Conclusion need not be in plural.

§ 283. Where the offence is governed or limited by two statutes, there have been various distinctions taken respecting the conclusion against the form of the statutes in the plural or the statute in the singular. The rule given by the older writers is, that where an offence is prohibited by several independent statutes, it was necessary to conclude in the plural; but now the better opinion seems to be, that a conclusion in the singular will suffice.[2] The common practice now is to conclude in the singular in all cases, though in Maryland,[3] and in Indiana,[4] it has been held that when an offence is

ligibly the offence intended to be charged, and need not conclude "against the form of the statute." Com. *v.* Kennedy, 15 B. Mon. (Ky.) 531.

In Arkansas, the omission of the words, "contrary to the form of the statute in such case made and provided," does not vitiate the indictment under the Code (Dig. c. 52, § 98), though the offence be created by statute. State *v.* Cadle, 19 Ark. Rep. 613.

In the United States courts, a conclusion "contrary to the true intent and meaning of the act of Congress, in such case made and provided," has been held sufficient. U. S. *v.* La Costa, 2 Mason, 129; U. S. *v.* Smith, 2 Mason, 143. But see U. S. *v.* Crittenden, 1 Hempst. 61. But an indictment charging A. with having committed an offence, made such by a statute, "in contempt of the laws of the United States of America," is bad. U. S. *v.* Andrews, 2 Paine C. C. 451.

The proper office of the conclusion, *contra formam statuti*, is to show the court the action is founded on the statute, and is not an action at common law. Crain *v.* State, 2 Yerg. 390. One count concluding "*contra formam*," &c., does not cure another without the proper conclusion. State *v.* Soule, 20 Me. 19. But such a conclusion of the final count has been held in Alabama to validate prior counts defective in this respect. McGuire *v.* State, 1 Ala. Sel. Ca. 69; 37 Ala. 161.

[1] 2 Hawk. c. 25, s. 110. Supra, § 229.

[2] 1 Hale, 173; Sid. 348; Owen, 135; 2 Leach, 827; 1 Dyer, 347 *a*; 4 Co. 48; 2 Hawk. c. 25, s. 117; R. *v.* Pim, R. & R. 425; though see R. *v.* Adams, C. & M. 299; U. S. *v.* Trout, 4 Biss. 105; Butman's case, 8 Greenl. 113; Kane *v.* People, 9 Wend. 203; Townley *v.* State, 3 Harr. N. J. 311; State *v.* Jones, 4 Halst. 357; State *v.* Dayton, 3 Zabr. 49; Bennett *v.* State, 3 Ind. 167; State *v.* Robbins, 1 Strobh. 355; State *v.* Bell, 3 Ired. 506.

[3] State *v.* Cassel, 2 Harr. & Gill, 407. See also State *v.* Pool, 2 Dev. 202.

[4] Francisco *v.* State, 1 Carter, 179; King *v.* State, 2 Ibid. 523. See Crawford *v.* State, 2 Ibid. 132. But where an indictment for murder concluded *contra formam statuti*, and by the statute of 1843 the punishment of that crime was death; but by the Act of 1846 the punishment is either death or imprisonment in the state prison at hard labor during life, at the discre-

prohibited by one act of assembly, and the punishment prescribed and affixed by another, the conclusion should be against the acts of assembly.

Though there is but one statute prohibiting an offence, it is not fatal for the indictment to conclude contrary to the "statutes."[1]

§ 284. In a common law indictment, the words *contra formam statuti* may be rejected as surplusage.[2] And where an offence, both by statute and common law, is badly laid under the statute, the judgment may be given at common law.[3]

Statutory conclusion may be rejected as surplusage.

XVII. JOINDER OF OFFENCES.

§ 285. A defendant, as has been already seen, cannot generally be charged with two distinct offences in a single count. It is otherwise, however, when we approach the question of the introduction of a series of distinct counts. Offences, it is held, though differing from each other, and varying in the punishments authorized to be inflicted for their perpetration, may be included in the same indictment, and the accused tried upon the several charges at the same time, provided that the offences be of the same general character, and provided the mode of trial is the same.[4] In

Counts for offences of the same character and the same mode of trial may be joined.

tion of the jury, it was held that the conclusion of the indictment in the singular, to wit, *contra formam statuti*, was correct. Bennett *v.* State, 3 Ind. 167.

[1] Townley *v.* State, 3 Harr. N. J. 311; Carter *v.* State, 2 Carter (Ind.), 617; but see *contra*, State *v.* Cassel, 2 Harr. & G. 407; State *v.* Abernathy, 1 Busbee, 428.

[2] State *v.* Burt, 25 Vt. 373; State *v.* Gove, 34 N. H. 510; State *v.* Buckman, 8 N. H. 203; Com. *v.* Hoxey, 16 Mass. 385; Knowles *v.* State, 3 Day, 103; Southworth *v.* State, 5 Conn. 325; Com. *v.* Gregory, 2 Dana, 417; Resp. *v.* Newell, 3 Yeates, 407; Penn. *v.* Bell, Addison, 171; Haslip *v.* State, 4 Hayw. 273; 2 Hale, 190; Alleyn, 43; 1 Salk. 212, 213; 5 T. R. 162; 2 Leach, 584; 2 Salk. 460; 1 Ld. Raym. 1163; 1 Saund. 135, n. 3; 2 Hawk. c. 25, s. 115; Bac. Ab. Indict. H. 2; Burn, J., ix.

[3] Com. *v.* Lanigan, 2 Boston Law Rep. 49; State *v.* Phelps, 11 Vt. 117.

[4] R. *v.* Fussell, 3 Cox C. C. 291; U. S. *v.* O'Callahan, 6 McLean, 596; Charlton *v.* Com. 5 Met. 532; Josslyn *v.* Com. 6 Met. 236; Com. *v.* Costello, 120 Mass. 358; Com. *v.* Brown, 121 Mass. 69 (in Massachusetts, the law is not changed by the stat. of 1861; Com. *v.* Costello, supra;) People *v.* Rynders, 12 Wend. 425; Edge *v.* Com. 7 Barr, 275; Mills *v.* Com. 13 Penn. St. 631; Hoskins *v.* State, 11 Ga. 92; Engleman *v.* State, 2 Carter (Ind.), 91; Johnson *v.* State, 29 Ala. 62; State *v.* Kibby, 7 Mo. 317; Baker *v.* State, 4 Pike, 56; Orr *v.* State, 18 Ark. 540. See, however, *contra*,

misdemeanors, the joinder of several offences will not vitiate the prosecution in any stage.[1] Hence, it is the constant practice to permit counts for several libels or assaults in the same indictment.[2] And in a leading case,[3] under several counts for a conspiracy alleging several conspiracies of the same kind, on the same day, the prosecutor was allowed to give in evidence several conspiracies on different days.[4] In what cases election will be compelled will be considered in a future section.[5]

Assaults on two persons can be joined.

§ 286. It was once said that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence.[6] But in a subsequent case,[7] the court held the latter case not to be law, and said: "Cannot the king call a man to account for a breach of the peace, because he broke two heads instead of one? It is a prosecution in the king's name for the offence charged, and not in the nature of an action, where a person injured is to recover separate damages."[8]

So in conspiracy.

§ 287. So may be joined counts for a misdemeanor with counts for a conspiracy to commit a misdemeanor.[9]

Common law and statute.

§ 288. An indictment may also contain a count at common law and another under a statute.[10]

when punishments differ in character. Norvell *v.* State, 50 Ala. 174.

The U. S. Revised Stats. § 1024, provides that charges which may be joined in one indictment shall be joined, or may be consolidated.

[1] Young *v.* R. 3 T. R. 105; R. *v.* Jones, 2 Camp. 132; R. *v.* Benfield, 2 Burr. 984; R. *v.* Kingston, 2 East, 468; U. S. *v.* Peterson, 1 W. & M. 05; U. S. *v.* Porter, 2 Cranch C. C. 60; People *v.* Costello, 1 Denio, 83; Harman *v.* Com. 12 S. & R. 69; Com. *v.* Gillespie, 7 S. & R. 476; Weinzorpflin *v.* State, 7 Blackf. 186; State *v.* Gummer, 22 Wis. 441; Quinn *v.* State, 49 Ala. 353; State *v.* Randle, 41 Tex. 292. Infra, § 293. See Whart. Crim. Law, 8th ed. § 978.

[2] Ibid.

[3] R. *v.* Levy, 2 Stark. N. P. 458. See Res. *v.* Hevice, 2 Yeates, 114; Whart. Crim. Law, 8th ed. § 1387.

[4] See also R. *v.* Broughton, 1 Trem. P. C. 111, where the indictment charged no less than twenty distinct acts of extortion. The indictment against Mayor Hall, tried in New York, October, 1872, contained four counts for each of fifty-five different acts, containing two hundred and twenty counts in all.

[5] Infra, § 293.

[6] R. *v.* Clendon, 2 Ld. Raym. 1572; 2 Str. 870.

[7] R. *v.* Benfield, 2 Burr. 984. See supra, § 254, for other cases.

[8] Supra, § 254.

[9] Whart. Crim. Law, 8th ed. § 1387; R. *v.* Murphy, 8 C. & P. 297; Com. *v.* Gillespie, 7 S. & R. 476, 477; 6 P. L. J. 283.

[10] Com. *v.* Sylvester, *ut supra*; State

§ 289. Nor does it vary the case that one offence is a felony and the other a misdemeanor. Thus in an English case reserved, it was held by Lord Campbell, C. J., Cresswell, J., Coleridge, J., Platt, B., and Williams, J., that it is no ground for arresting a judgment upon conviction of felony that the indictment contained a count for a misdemeanor.[1] And indictments will be sustained which join larceny with conspiracy to defraud, both based on the same transaction;[2] and a felony with a misdemeanor, forming distinct stages in the same offence.[3] It has been held, however, that murder cannot be joined with conspiracy to murder.[4]

And so of felony and misdemeanor.

§ 290. Where two or more distinct felonies are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect on which charge he will proceed,[5] but the indictment will not be quashed where several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offence, or for cognate offences; though when the offences developed in the evidence are distinct, the prosecution, as will presently be seen, will be compelled before verdict to elect that on which it relies.[6] And it is a common practice to join counts for distinct felonies, when constructed on different

Cognate felonies may be joined.

v. Williams, 2 McCord, 301; Brightly R. 331; State *v.* Thompson, 2 Strobh. 12. Infra, § 291.

[1] R. *v.* Ferguson, 29 Eng. Law & Eq. 536; 6 Cox C. C. 454. Infra, § 759.

[2] Henwood *v.* Com. 52 Penn. St. 424.

[3] Stevick *v.* Com. 78 Penn. St. 460; Hunter *v.* Com. 79 Penn. St. 503; People *v.* Satterlee, 5 Hun, 167. Infra, § 293.

[4] U. S. *v.* Scott, 4 Biss. 29; *sed quaere.* In Georgia, it is said that the joinder of robbery and assault is demurrable. Davis *v.* State, 57 Ga. 66. Infra, § 292.

[5] Lazier *v.* Com. 10 Grat. 708; Womack *v.* State, 7 Cold. (Tenn.) 508. Infra, §§ 293, 307, 736, 771, *et seq.* That such joinder is not bad on demurrer see State *v.* Smalley, 50 Vt. 736.

[6] R. *v.* Trueman, 8 C. & P. 727; State *v.* Nelson, 29 Me. 329; Com. *v.* Hills, 10 Cush. 530; Com. *v.* Sullivan, 104 Mass. 552; State *v.* Tuller, 34 Conn. 281; State *v.* Hazard, 2 R. I. 474; Kane *v.* People, 8 Wend. 203; Donnelly *v.* State, 2 Dutch. (N. J.) 463, 601; Wright *v.* State, 4 Humph. 194; Cash *v.* State, 10 Humph. 111; Weinzorpflin *v.* State, 7 Black. 186; Mershorn *v.* State, 51 Ind. 14; State *v.* Strickland, 10 S. C. 191; State *v.* Jacob, 10 La. R. 141; Ketchingham *v.* State, 6 Wis. 426; People *v.* Thompson, 28 Cal. 214; People *v.* Valencia, 43 Cal. 552; Fisher *v.* State, 33 Tex. 792. Infra, §§ 308 *et seq.* See Charlton *v.* Com. 5 Met. 532;

sections of the same statute. Thus, for instance, in indictments under the Massachusetts statute for arson or burglary, where the common law offence is divided into distinct grades, counts may be joined embracing each section.[1]

Successive grades may be joined.

§ 291. Felonies and misdemeanors, forming part of the same transaction, may in like manner be joined.[2] Thus, where an assault is an ingredient of a felony, as in the case of rape, and assault with intent to commit rape; or larceny and conspiracy to steal;[3] or where the misdemeanor is of the nature of a corollary to the felony, as in larceny and the receiving of stolen goods,[4] a joinder is good. So, by Judge Woodbury, it was ruled, that if there be two counts in one indictment for offences committed at the same time and place, and of the same class, but different in degree, as one for a revolt, and another for an attempt to excite it, the judgment will not be arrested, though a verdict of guilty be returned on both.[5]

Com. v. Cain, 102 Mass. 487, cited infra, § 910.

[1] Com. v. Hope, 22 Pick. 1; Com. v. Sullivan, 104 Mass. 552.

[2] Hunter v. Com. 79 Penn. St. 503; Stevick v. Com. 78 Penn. St. 466; Hutchison v. Com. 82 Penn. St. 472. See State v. Johnson, 5 Jones (N. C.), 221.

[3] Whart. Crim. Law, 8th ed. § 1387; Henwood v. Com. 52 Penn. St. 424; State v. Hood, 51 Me. 363; Cawley v. State, 37 Ala. 152. Supra, §§ 285, 286; infra, §§ 736 *et seq.*

[4] R. v. Huntley, 8 Cox C. C. 260; R. v. Ferguson, 6 Cox C. C. 454; R. v. Craddock, 2 Den. C. C. 31; R. v. Flower, 3 C. & P. 413; U. S. v. Prior, 5 Cranch C. C. 37; State v. Stimpson, 45 Me. 608; Com. v. Adams, 7 Gray, 43; Com. v. O'Connell, 12 Allen, 451; State v. Hazard, 2 R. I. 474; Harman v. Com. 12 Serg. & R. 69; Buck v. State, 2 Harr. & J. 426; State v. Sutton, 4 Gill, 495; Dowdy v. Com. 9 Grat. 727; State v. Speight, 69 N. C. 72; State v. Baker, 70 N. C. 530; State v. Lawrence, 81 N. C. 522; State v. Gaffney, Rice, 431; State v. Boyes, 1 McM. 191; State v. Montague, 2 McCord, 257; Stephen v. State, 11 Ga. 225; State v. Coleman, 5 Port. 32; State v. Daubert, 42 Mo. 243; Keefer v. State, 4 Ind. 246; Maynard v. State, 14 Ind. 427; State v. Posey, 7 Richard. 484. As to election see infra, § 293.

When the offences are cognate, "it matters not that the offences alleged in the several counts are of different grades, and call for different punishments." Earl, J., Hawker v. People, 75 N. Y. 496.

[5] U. S. v. Peterson, 1 W. & M. 305.

In New York, when by statute an offence comprises different degrees, an indictment may contain counts for the different degrees of the same offence, or for any of such degrees. Rev. Stat. part iv. c. 11, tit. 3, art. 2, § 51. And so under U. S. Rev. Stat. U. S. v. Jacoby, 12 Blatch. 491. The joinder of embezzlement with larceny has

§ 292. It was formerly held, that if the legal judgment on each count would be materially different, as in felony and misdemeanor, then the joinder of several counts would be bad on demurrer, in arrest of judgment, or on error,[1] though this objection could be cured at the trial by taking a verdict on the counts only that can be joined.[2] At present, after a general verdict of guilty, it is considered no objection to an indictment, on motion in arrest, that offences of different grades and requiring different punishments are charged in the different counts.[3] If any one of the counts is sufficient, the court, it has been argued, will render judgment upon such count; and if all the counts are sufficient, judgment will be rendered on the count charging the highest offence.[4] There is

Joinder of different offences no ground for error.

equal sanction. Whart. Crim. Law, 8th ed. § 1047.

Where an indictment charges in one count a breaking and entering of a building, with intent to steal, and in another count, a stealing in the same building on the same day, and the defendant is found guilty generally, the sentence, whether that which is proper for burglary only, or for burglary and larceny also, cannot be reversed on error, because the record does not show whether one offence only, or two were proved on the trial; and as this must be known by the judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved. Crowley *v.* Com. 11 Met. 575; Kite *v.* Com. 11 Met. 581; Com. *v.* Birdsall, 69 Penn. St. 482. See People *v.* Garnett, 29 Cal. 622. *Contra*, Wilson *v.* State, 20 Ohio, 26. A count in an indictment, which charges the breaking and entering in the night-time of a shop adjoining to a dwelling-house, with intent to commit a larceny, may be joined with a count which charges the stealing of goods in the same shop, and the defendant, if found guilty generally, may be sentenced for both offences. But if the breaking and entering, and the actual stealing, are charged in one count, only one offence is charged, and the defendant, on conviction, can be sentenced to one penalty only. Josslyn *v.* Com. 6 Met. 236; Davis *v.* State, 57 Ga. 66. See State *v.* Nelson, 14 Rich. (S. C.) L. 169.

[1] Young *v.* R. 3 T. R. 103; Hancock *v.* Haywood, Ibid. 435; but see 1 East P. C. 408; 1 Chitty's C. L. 254, 255; State *v.* Merrill, 44 N. H. 624; State *v.* Freels, 3 Humph. 228; Hildebrand *v.* State, 5 Mo. 548. Compare Buck *v.* State, 1 Ohio St. R. 61. Infra, §§ 737, 771, 910.

[2] R. *v.* Jones, 8 C. & P. 776.

[3] R. *v.* Ferguson, 6 Cox C. C. 454; U. S. *v.* Stetson, 3 W. & M. 164; State *v.* Hood, 51 Me. 363; Carlton *v.* Com. 5 Met. 532; Kane *v.* People, 8 Wend. 203; Com. *v.* Birdsall, 69 Penn. St. 482; Stone *v.* State, 1 Spencer, 404; Moody *v.* State, 1 W. Va. 337; State *v.* Speight, 69 N. C. 72; State *v.* Reel, 80 N. C. 442; Covey *v.* State, 4 Port. 186. Infra, §§ 737–40, 771, 910.

[4] Infra, §§ 771, 910; State *v.* Hood, 51 Me. 363; State *v.* Hooker, 17 Vt. 658; State *v.* Merwin, 34 Conn. 113; State *v.* Tuller, 34 Conn. 113; Cook

also high authority, to be hereafter noticed, to the effect that when there is a verdict of guilty on each of a series of counts, there may be a specific sentence imposed on each,[1] though it is otherwise in respect to counts which are defective.[2]

So far as concerns the jury, on the trial of an indictment charging distinct offences in separate counts, the better course is to pass upon each count separately, applying to it the evidence bearing on the question of the defendant's guilt of the offence therein charged.[3] At the same time, where two counts are for successive stages of the same crime, the practice is to take a general verdict, which carries the greater offence; or where good and bad counts are joined, a verdict on the good counts.[4]

Election will not be compelled where offences are connected.

§ 293. As a general rule, when two offences charged form parts of one transaction, and are of the same nature, the prosecutor will not be called upon to elect upon which charge he will proceed.[5] Between larceny and stolen goods, therefore, an election will not be compelled

v. State, 4 Zab. 843; Com. *v.* McKisson, 8 S. & R. 420; Hutchison *v.* Com. 82 Penn. St. 472; Manly *v.* State, 7 Md. 149; State *v.* Nelson, 14 Rich. (S. C.) 169; Dean *v.* State, 43 Ga. 218; Cowley *v.* State, 37 Ala. 152; State *v.* McCue, 39 Mo. 112; Cribbs *v.* State, 9 Fla. 409; People *v.* Shotwell, 27 Cal. 394. So in England. R. *v.* Ferguson, 6 Cox C. C. 454. See, for general verdict in larceny and receiving, State *v.* Baker, 70 N. C. 530. As to how far bad count vitiates verdict see § 771.

[1] Infra, §§ 908–10.

[2] Infra, § 771; Adams *v.* State, 52 Ga. 565.

[3] Com. *v.* Carey, 103 Mass. 214; but see State *v.* Tuller, 34 Conn. 281. See infra, §§ 737–740, 908, 910.

[4] Infra, §§ 737, 740, 742, 908–10; and cases cited supra.

Where a count for a misdemeanor in Pennsylvania is joined to a count for felony, the jury cannot, in acquitting the prisoner, impose costs upon him; and though such a verdict be rendered and judgment ordered, the county is liable for the costs. Wayne *v.* Com. 26 Penn. St. 154.

[5] R. *v.* Jones, 2 Camp. 132; R. *v.* Austin, 7 C. & P. 796; R. *v.* Hartell, Ibid. 475; R. *v.* Wheeler, Ibid. 170; R. *v.* Pulham, 9 C. & P. 281; State *v.* Flye, 26 Me. 312; People *v.* Costello, 1 Denio, 83; People *v.* Satterlee, 5 Hun, 167; Armstrong *v.* People, 70 N. Y. 38; Com. *v.* Manson, 2 Ashm. 31; State *v.* Bell, 27 Md. 675; Dowdy *v.* Com. 9 Grat. 727; State *v.* Nelson, 14 Richs. L. 169; Mayo *v.* State, 30 Ala. 32; State *v.* Hogan, R. M. Charlton, 474; State *v.* Jackson, 17 Mo. 554; Sarah *v.* State, 28 Miss. 267; Miller *v.* State, 51 Ind. 405; Wall *v.* State, 51 Ind. 453; State *v.* Jacob, 10 La. An. R. 141.

Between different items of a continuous taking election will not be compelled. R. *v.* Ward, 10 Cox C. C. 42.

when the evidence is such that it is doubtful of which offence the defendant was guilty.[1] And the prosecutor will not be compelled to elect where a count, charging a person with being accessary before the fact, is joined with one charging him with being accessary after;[2] nor where the defendant is indicted as a principal in the first degree in one count, and as principal in the second degree in another count.[3] On the same principle, where there are counts in an indictment for forging a bill, acceptance, and indorsement, the prosecutor is not driven to elect on which he will proceed.[4] Of course no election will be compelled when the counts vary only in form.[5] But where two defendants were indicted for a conspiracy and for a libel, and at the close of the case for the prosecution, there was evidence against both as to the conspiracy, but no evidence against one of them as to the libel, the judge observed that it was more fair that the prosecutor should elect which charge he should go upon, and it was done accordingly.[6]

§ 294. Abandoning the artificial and now in most jurisdictions obsolete distinction between felonies and misdemeanors, we may hold, therefore, summing up what has been already said, the following conclusions: —

Object of election is to reduce to a single issue.

(1.) Cognate offences may be joined in separate counts in the same indictment.

(2.) If this is done in such a way as to oppress the defendant, the remedy is a motion to quash.

(3.) It is permissible, in most States, to join several distinct offences, to each of which fine or imprisonment is attachable; and upon a conviction on each count, to impose a sentence on each.[7]

(4.) Yet as to offences of high grade in all States, and in some States as to all offences, the court will not permit more

[1] State *v.* Hogan, Charlton, 474; Engleman *v.* State, 2 Carter (Ind.), 91; Keefer *v.* State, 4 Ind. 246; Dowdy *v.* Com. 9 Grat. 727; State *v.* Daubert, 42 Mo. 242; State *v.* Bell, 27 Md. 675; and cases cited supra, § 291.

[2] R. *v.* Blackson, 8 C. & P. 43; Tompkins *v.* State, 17 Ga. 356.

[3] R. *v.* Gray, 7 C. & P. 164; State *v.* Testerman, 68 Mo. 408.

[4] R. *v.* Young, Peake's Add. Cas. 228.

[5] Stewart *v.* State, 58 Ga. 577.

[6] R. *v.* Murphy, 8 C. & P. 297.

[7] See infra, § 910.

than a single issue to go to the jury, and hence will require an election on the close of the prosecution's case, except in those cases in which offences are so blended that it is eminently for the jury to determine which count it is that the evidence fits.[1]

The object of the rule, it may be added, is to *first*, enable the defendant to prepare properly for his defence; and *secondly*, to protect him, by an individualization of the issue, in case a second prosecution is brought against him. On the other hand, we must remember that there are a series of minor offences in which a joinder is a benefit to the defendant, even though he should be convicted on each count, as he is thus saved from an accumulation of costs that might have a crushing effect. There are numerous lines of cases in which, where separate indictments are introduced to cover a series of simultaneous or closely consecutive offences (*e. g.* as in the cases of the famous tea suits before Judge Washington, in which a separate libel was brought for each of a thousand chests of tea alleged to have been smuggled), the court will require, in order to save the defendant from unnecessary vexation, if not ruin, that the cases be consolidated.[2]

Election at discretion of court.

§ 295. Whether a court will compel a prosecuting officer to elect which count to proceed on rests in the discretion of the court, and cannot ordinarily be assigned for error.[3] But when two distinct felonies are put in evi-

[1] Supra, §§ 288, 290; Whart. Crim. Law, 8th ed. §§ 540, 1047; R. *v.* Vandercomb, 2 Leach, 816; R. *v.* Smith, R. & R. 295; R. *v.* Hart, 7 C. & P. 652; R. *v.* Trueman, 8 C. & P. 727; R. *v.* Hinley, 2 M. & R. 524; U. S. *v.* Dickenson, 2 McLean, 325; State *v.* Nelson, 29 Me. 329; State *v.* Smith, 22 Vt. 74; State *v.* Croteau, 23 Vt. 14; State *v.* Hazard, 2 R. I. 474; Kane *v.* People, 8 Wend. 203; People *v.* Austin, 1 Parker C. R. 154; Lanergan *v.* People, 39 N. Y. 39; State *v.* Early, 3 Harring. 561; Bainbridge *v.* State, 30 Oh. St. 264; State *v.* Haney, 2 Dev. & Bat. 390; State *v.* Sims, 3 Strobh. 137; Tompkins *v.* State, 17 Ga. 356; Elam *v.* State, 26 Ala. 48; Cochrane *v.* State, 30 Ala. 542; People *v.* Jenness, 5 Mich. 305; Long *v.* State, 56 Ind. 182; Kidder *v.* State, 58 Ind. 68; Snyder *v.* State, 59 Ind. 105; State *v.* Testerman, 68 Mo. 408; State *v.* Jourdan, 32 Ark. 203.

[2] That indictments may be consolidated in the federal courts under statute has been already seen.

[3] Infra, § 778; State *v.* Hood, 51 Me. 363; Com. *v.* Sullivan, 104 Mass. 552; State *v.* Tuller, 34 Conn. 280; People *v.* Baker, 3 Hill (N. Y.), 159; Nelson *v.* People, 23 N. Y. 293; State *v.* Bell, 27 Md. 675; Bailey *v.* State, 4 Oh. (N. S.) 440; Snyder *v.* State, 59 Ind. 105; Beasley *v.* People, 89 Ill. 571; Johnson *v.* State, 29 Ala. 62; George *v.* State, 39 Miss. 570; State *v.* Leonard, 22 Mo. 449; State *v.* Green, 66 Mo. 632.

dence, under separate counts, against protest, this rule, in its rigor, cannot be applied.[1]

Election may be any time before verdict.

§ 296. It has been said in Iowa that when the repugnancy is of record, the time for an application to elect is before plea; and the court has refused to permit a plea to be withdrawn in order to let in a motion to require an election.[2] But as the repugnancy may not appear until the evidence is developed, it is not in such case just to compel an election until the prosecutor knows what to elect. Hence the motion has been held in time if made before verdict.[3] To elect a count is virtually to withdraw the others from the consideration of the jury.[4] *After* verdict, the course is not to elect a particular count, but to enter a *nolle prosequi* as to those on which judgment is not asked.[5] But at any time *before* verdict it is within the power of the prosecution to make the election, though this should ordinarily be done before summing up.[6]

Counts should be varied to suit case.

§ 297. Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits. Thus he may vary the ownership of articles stolen, in larceny;[7] of houses burned, in arson;[8] or the fatal instrument and other incidents, in homicide.[9]

[1] Womack *v.* State, 7 Cold. 508.

[2] State *v.* Abrahams, 6 Iowa, 117.

[3] Womack *v.* State, 7 Cold. 508; State *v.* Sims, 3 Strobh. 137; Elam *v.* State, 26 Ala. 48; Johnson *v.* State, 29 Ala. 62; Wash *v.* State, 14 Sm. & M. 120.

[4] Mills *v.* State, 52 Ind. 187.

[5] Infra, §§ 707, 740, 742, 908–10; State *v.* Reel, 80 N. C. 442.

[6] Woodford *v.* People, 62 N. Y. 117; and see infra, § 874.

[7] State *v.* Nelson, 29 Me. 329; Com. *v.* Dobbin, 2 Parsons, 380. As to verdict see infra, § 740.

[8] R. *v.* Trueman, 8 C. & P. 727; Newman *v.* State, 14 Wis. 393.

[9] See Whart. Crim. Law, 8th ed. § 540; Hunter *v.* State, 40 N. J. L. 495.

The reason for this is thus excellently stated by Chief Justice Shaw: —

"To a person unskilled and unpractised in legal proceedings, it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document; but it is often necessary, and the reason for it, when explained, will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed

A verdict of guilty on four counts, charging the murder to have been committed with a knife, a dagger, a dirk, and a

to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment. Take the instance of a murder at sea: a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide, by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third, alleging a death by the joint results of both causes combined." Bemis's Webster case, 471; S. C., 5 Cush. 533. See also State *v.* Johnson, 10 La. An. R. 456; U. S. *v.* Pirates, 5 Wheat. 184.

How generally the same practice exists in England may appear from the very pertinent inquiry of Alderson, B., in a recent case: "Why may there not be as many counts for receiving as there are for stealing — one for each? It is really only one offence, laying the property in different persons. It is one stealing, and one receiving; and because there was some doubt as to the person to whom the property really belonged, the property is laid five different ways. If a late learned judge had drawn the indictment, you would very likely had it laid in fifty more." R. *v.* Beeton, 2 Car. & Kir. 961, Alderson, B. To same effect see Beasley *v.* People, 89 Ill. 571; People *v.* Thompson, 28 Cal. 214. See, as to verdict to be taken in such cases, infra, § 740.

"Where the felonies are of the same general nature, and supported by evidence of a similar kind, and the punishment to be awarded is the same in its nature, the more common practice is to try the whole indictment by the same jury. If there is any danger that such trial will operate to the prejudice of the defendant, the court is authorized to direct the prosecutor to elect on which count he will proceed." Lord, J., Pettes *v.* Com. 126 Mass. 245.

From the report of the English Commissioners of 1879 we take the following: —

"The Draft Code next deals with the subject of indictments, the object being to reduce them to what is really necessary for the purposes of justice. The law as it at present stands is in the form of objectionable unwritten rules, qualified by several wide exceptions which modify some of their defects. These general rules require the greatest minuteness in many matters, which need not be referred to here. Two rules, however, may be specially mentioned: (1.) Indictments must not be double and cannot be in the alternative; each count must charge one offence and no more: (2.) All material averments must be proved as laid. Although these rules have been considerably relaxed in practice, the effect of them is that indictments run to a most inordinate length, and become at once so long and so intricate that it is hardly possible to understand them, and that practically no one reads them but the counsel who draw and the clerks who copy them.

"The method employed is to take a section of an act of parliament and draw a series of counts, each charging one of the offences which the section creates; and as a single section often creates many offences hardly differing from each other except by very slight shades of meaning, counts

dirk-knife, is not repugnant, inconsistent, or void, since the same kind of death is charged in all the counts.[1]

Two counts precisely alike defective.

§ 298. As both in civil and criminal pleading two counts charging the same thing would be bad on special demurrer for duplicity, — though the fault in civil pleading is cured by pleading over, — it has been usual, by inserting the word "other" in a second count, to obviate this difficulty, through the fiction that the cause of action thus stated is new and distinct. The rule is clear, that when two counts setting out the same offences occur judgment will be arrested. "Neither, as we think," says Lord Denman, in a case in 1846, "can one offence, whether felonious or not, be properly charged twice over, when with one indictment or two; and as special demurrers are not necessary in criminal cases, we think that if the two counts in an indictment necessarily appear to be for the same charge, the objection might be taken in arrest of judgment. But still the court would, if possible, hold them not to be for the

are inordinately multiplied in this manner. For instance, in R. *v.* Sillem (2 H. & C. 431), an information (which might have been an indictment) charged certain persons i substance with having equipped for the Confederate States, then at war with the United States, a ship called the Alexandra. The information was framed upon 59 Geo. 3, c. 69, and contained ninety-five counts. The first count charged an equipping with intent that the ship should be employed by certain foreign states, styling themselves the Confederate States, with intent to cruise against the Republic of the United States. The second count, instead of the Republic of the United States, mentioned the citizens of the Republic of the United States. The third count omitted all mention of the Confederate States, and called the United States the Republic of, &c. The fourth count was like the third, with the exception of returning to the expression 'citizens,' &c. After giving various names to the United States and Confederate States in the first eight counts, eight other counts were added substituting 'furnish' for 'equip.' Eight more substituted 'fit out' for 'furnish.' In short, the indictment contained a number of counts obtained by combining every operative verb of the section on which it was founded with all the other operative words."

Lord Campbell in R. *v.* Rowlands, 2 Den. C. C. 38, and Lord Denman, in R. *v.* O'Connell, 11 Cl. & F. 374, censure the undue multiplication of counts; though under common law pleading, this, in complicated cases, cannot be avoided. To split the charge in distinct indictments would unduly accumulate costs, and would expose the prosecution to an application to consolidate.

[1] Donnelly *v.* State, 2 Dutch. (N. J.) 463; affirmed in error, 2 Dutch. (N. J.) 601. Supra, §§ 290 *et seq.*; infra, §§ 736 *et seq.* To same effect see Merrick *v.* State, 63 Ind. 637.

same offence; and certainly the omission of the word 'other' would not of itself make the same; though the insertion of the word 'other' would make them different."[1] In New Hampshire, however, it is said that where the same offence is described with formal variations in different counts, it is not necessary to allege the offence described in each of the several counts to be other and different from that described in the others.[2]

Even according to the strictest practice, the omission in an indictment, containing two counts, of an averment that they are for different offences, is cured by a verdict of not guilty on one of the counts, or the entry of a *nolle prosequi* on that count.[3]

The relative "said," used in one of the subsequent counts of an indictment referring to matter in a previous count, is always to be taken to refer to the count immediately preceding where the sense of the whole indictment does not forbid such a reference.[4]

One bad count cannot be aided by another.

§ 299. Where the first count of an indictment is bad, a subsequent count may be sustained, even though it refers to the first count for some allegations, and without repeating them.[5] Generally, however, one bad count cannot help another bad count, which is defective in a distinct way.[6]

Even in good counts, it is unsafe to attempt to supply a material averment by mere reference to a preceding count. Time and place may be thus implied, but not, it seems, descriptive averments which enter into the vitals of the offence.[7]

§ 300. There may be cases, it seems, in which counts may be

[1] Campbell *v.* R. 11 Ad. & El. N. S. 800.

[2] State *v.* Rust, 35 N. H. 438.

Where an indictment in the first count charged the defendant with the forging of a certain instrument, and in the second count charged another person with the uttering of the instrument, and then proceeded to charge the defendant with being an accessary before the fact to such uttering, it was ruled in Massachusetts that but two counts were charged. Pettes *v.* Com. 126 Mass. 242.

[3] Com. *v.* Holmes, 103 Mass. 440 (Ames, J. 1869).

[4] Sampson *v.* Com. 5 W. & S. 385.

[5] Com. *v.* Miller, 2 Parsons, 480. See State *v.* Lea, 1 Cold. (Tenn.) 175.

[6] State *v.* Longley, 10 Ind. 482.

[7] See R. *v.* Dent, 1 C. & K. 249; 2 Cox C. C. 354; R. *v.* Martin, 9 C. & P. 213; State *v.* Nelson, 29 Me. 329; Sampson *v.* Com. 5 W. & S. 385; State *v.* Lyon, 17 Wis. 237; Keech *v.* State, 15 Fla. 591; but see supra, §§ 292 *et seq.*, as to practice in counts for receiving stolen goods.

transposed after verdict, so as to invest the second with the incidents of the first, or *vice versa*. Thus, in an English case, A. and B. were indicted for the murder of C., by shooting him with a gun. In the first count A. was charged as principal in first degree, B. as present, aiding and abetting him; in the second count B. as principal in first degree, A. as aiding and abetting. The jury convicted both, but said they were not satisfied as to which fired the gun. It was held, that the jury were not bound to find the prisoners guilty of one or other of the counts only (Maule, J., dissentiente); and that notwithstanding the word "afterward" in the second count, both the counts related substantially to the same person killed, and to one killing, and might have been transposed without any alteration of time or meaning.[1]

Counts may be transposed after verdict.

The effect of a bad count after verdict will be considered hereafter.[2]

XVIII. JOINDER OF DEFENDANTS.

1. *Who may be joined.*

§ 301. When more than one join in the commission of an offence, all, or any number of them, may be jointly indicted for it, or each of them may be indicted separately.[3] Thus if several[4] commit a robbery, burglary, or murder, they may be indicted for it jointly[5] or separately; and the same where two or more commit a battery, or are guilty of extortion;[6] or are concerned in a common violation of the Lord's day;[7] or are engaged in the same boat in unlawfully fishing.[8] And even parties to the crime of adultery may be indicted jointly;[9] though where two are jointly indicted for

Joint offenders can be jointly indicted.

[1] R. *v.* Downing, 1 Den. C. C. 52.

[2] Infra, §§ 736, 771.

[3] U. S. *v.* O'Callahan, 6 McLean, 596; State *v.* Gay, 10 Mo. 440. As to joint punishment see infra, § 940. As to new trial from misjoinder see infra, §§ 873 *et seq.* As to when co-defendants can be witnesses for each other see Whart. Crim. Ev. § 445.

[4] Supra, § 293; R. *v.* Giddings, C. & M. 634; Com. *v.* O'Brien, 107 Mass. 208; Com. *v.* McLaughlin, 12 Cush. 615; Fowler *v.* State, 3 Heisk, 154, where the indictment was against two for assault and battery upon three.

[5] 2 Hale, 173.

[6] R. *v.* Atkinson, 1 Salk. 382; R. *v.* Trafford, 1 B. & Ad. 874; Kane *v.* People, 8 Wend. 203.

[7] Com. *v.* Sampson, 97 Mass. 407.

[8] Com. *v.* Weatherhead, 110 Mass. 175.

[9] Com. *v.* Elwell, 2 Met. 190; State

fornication or adultery, and are tried together, and one party is found guilty and the other not guilty, no judgment can be rendered against the former.[1] Where property has been obtained under false pretences, and the false pretences were conveyed by words spoken by one defendant in the presence of others, all of whom acted in concert together, all parties may be indicted jointly.[2] And where two persons are jointly indicted and one only is tried, a separate count charging the latter alone with the crime is unnecessary.[3]

But not when offences are several.

§ 302. But where the offences are necessarily several there can be no joinder.[4] It is true that where a libellous song was sung by two men, it was held that they might be indicted jointly;[5] and the same view has been taken where two or more persons join in any other kind of publication of a libel; yet if the utterance of each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately. Two or more cannot be jointly indicted for perjury,[6] or for seditious, obscene, or blasphemous words, or the like, because such offences are in their nature distinct.[7] And if A. and B. are jointly indicted and tried for gaming, and the evidence shows that A. and others played at one time when B. was not present, and B. and others played at another time when A. was not present, no conviction can be had against them.[8] If, also, the offence charged does not wholly arise from the joint act of all the defendants, but from some personal and particular act or omission of each defendant (*e. g.* as with larceny and receiving, or receiving at distinct times),[9] the indictment must charge them severally and not

v. Mainor, 6 Ired. 340. But see Whart. Crim. Law, 8th ed. § 1339.

[1] State *v.* Mainor, 6 Ired. 340.

[2] R. *v.* Young, 3 T. R. 98. Infra, § 1209.

[3] State *v.* Bradley, 9 Richards. (S. C.) 168. See Weatherford *v.* Com. 10 Bush, 196.

[4] Infra, § 315; Elliott *v.* State, 26 Ala. 78; though see Young *v.* R. 3 T. R. 106; R. *v.* Kingston, 1 East, 468.

[5] R. *v.* Benfield, 2 Burr. 985. See Whart. Crim. Law, 8th ed. § 1603.

[6] R. *v.* Phillips, 2 Str. 921.

[7] State *v.* Roulstone, 3 Sneed (Tenn.), 107.

[8] Elliott *v.* State, 26 Ala. 78; Lindsay *v.* State, 48 Ala. 169; Galbreath *v.* State, 36 Tex. 200; State *v.* Homan, 41 Tex. 155. See *contra*, Com. *v.* McChord, 2 Dana, 242.

[9] R. *v.* Dovey, 2 Den. C. C. 92; 4 Cox C. C. 478; U. S. *v.* Kazinski, 2 Sprague, 7; Horne *v.* State, 37 Ga. 80; Stephens *v.* State, 14 Oh. 386. Infra, § 315.

jointly.[1] And it has been held that when A. strikes B. on one day, and C. strikes B. on another, A. and C. cannot be included jointly in one count.[2]

§ 303. Persons holding different offices with separate duties cannot be jointly indicted for a misdemeanor in office. Thus an indictment charging such an offence against the inspectors, clerks, and judge of an election, was held bad on demurrer.[3]

So as to officers with separate duties.

§ 304. Principals in the first and second degree, and accessaries before and after the fact, may all be joined in the same indictment, and they may be convicted of different degrees;[4] or the principals may be indicted first, and the accessaries after the conviction of the principals.[5] And their relation may be transposed in alternate counts.[6]

Principals and accessaries can be joined.

§ 305. In conspiracy, where one cannot be indicted for an offence committed by himself alone, the acquittal of all charged in the same indictment with him as co-defendants must of course extend to him.[7] In an indictment for conspiracy, less than two cannot possibly

In conspiracy at least two must be joined.

[1] R. *v.* Messingham, 1 M. C. C. 257; Com. *v.* Miller, 2 Parsons, 480; People *v.* Hawkins, 34 Cal. 181. See R. *v.* Parr, 2 M. & Rob. 346; Vaughn *v.* State, 4 Mo. 530.

[2] R. *v.* Devett, 8 C. & P. 639. Infra, § 315.

Several Receivers. — Although as a rule several receivers cannot be jointly charged in the same count with separate and distinct acts of receiving (R. *v.* Pulham, 9 C. & P. 281), yet it is too late, after verdict, to object that they should have been indicted separately. R. *v.* Hayes, 2 M. & Rob. 156.

Concert justifies Joinder. — Although the acts are several, yet there can be no exception to a joinder if concert be inferred. And this is good though the only evidence for the prosecution is of separate acts, at separate times and places, done by several persons charged as accessaries, upon which a conviction is had. R. *v.* Barber, 1 Car. & Kir. 442.

[3] Com. *v.* Miller, 2 Parsons, 481. Otherwise when officers concur in extortion. R. *v.* Tisdale, 20 Up. Can. Q. B. 272.

[4] R. *v.* Moland, 2 Mood. C. C. 270; R. *v.* Greenwood, 2 Den. C. C. 453; Com. *v.* Drew, 3 Cush. 384; Com. *v.* Felton, 101 Mass. 14; Klein *v.* People, 31 N. Y. 229; Mask *v.* State, 32 Mass. 405; 2 Hale, 173. Infra, § 753. That such is the case with principals and accessaries see Whart. Crim. Law, 8th ed. §§ 230, 231.

[5] People *v.* Valencia, 45 Cal. 304. See Whart. Crim. Law, 8th ed. §§ 205 *et seq.*

[6] Supra, § 300.

[7] R. *v.* Kinnersley, 1 Stra. 193; R. *v.* Sudbury, 12 Mod. 262; 2 Salk. 593; 1 Lord Raym. 484; People *v.* Howell, 4 John. 296; Turpin *v.* State, 4 Blackf. 72; State *v.* Mainor, 6 Ired.

be joined;[1] a wife and husband together not being sufficient. It has been doubted whether a charge of conspiracy could be sustained against two defendants one of whom is found by the jury to be insane;[2] but it is clear that one defendant may be tried alone, when his co-conspirators are alleged to be unknown,[3] or when such co-conspirators are dead, or absent, or previously convicted.[4]

From the peculiar character of the pleading in conspiracy, a new trial as to one defendant is a new trial as to all.[5]

In riot, three must be joined.

§ 306. In an indictment for riot, when the offence is not charged to have been committed with persons unknown, unless three of the parties named are proved to have been concerned, they must all be acquitted.[6] Where there is an allegation of defendants unknown, or there are co-defendants, dead or absent, or previously convicted, the case is otherwise.[7] The effect of charging the offence to have been committed by persons "unknown" has been further considered under another head.[8]

Husband and wife may be joined.

§ 306 *a*. As has been seen in another volume, there is no technical objection to an indictment joining a married woman with her husband.[9] And this rule has been applied to indictments for assault;[10] for keeping disorderly

340; State *v.* Allison, 3 Yerger, 428. See Whart. Crim. Law, 8th ed. §§ 1388 *et seq.*, as to conspiracy; and § 1545, as to riot. As to verdict see infra, § 755.

[1] R. *v.* Gompertz, 9 Q. B. 824; U. S. *v.* Cole, 5 McLean, 513; Com *v.* Manson, 2 Ashm. R. 31; State *v.* Sam, 2 Dev. 569; State *v.* Covington, 4 Ala. 603; Whart. Crim. Law, 8th ed. §§ 82, 1392. Infra, § 755.

[2] Brackenridge's Miscellanies, 223.

[3] U. S. *v.* Miller, 3 Hughes, 553; Whart. Crim. Law, 8th ed. § 1388.

[4] R. *v.* Kenrick, 5 Q. B. 49; R. *v.* Cooke, 5 B. & C. 538; 7 D. & R. 673; State *v.* Buchanan, 5 Har. & J. 500. Supra, § 104; infra, § 1388.

[5] R. *v.* Gompertz, 9 Q. B. 824. Infra, §§ 850, 875.

[6] Penn. *v.* Hurston, Addis. R. 334; Whart. Crim. Law, 8th ed. § 1545.

[7] R. *v.* Scott, 3 Burr. 1262; Klein *v.* People, 31 N. Y. 229; State *v.* Egan, 10 La. R. 698. As to verdict see infra, § 755.

[8] Supra, §§ 104, 111; Whart. Crim. Law, 8th ed. §§ 1391, 1847.

[9] Whart. Crim. Law, 8th ed. § 75; R. *v.* Sergeant, 1 Ry. & M. 352; R. *v.* Hammond, 1 Leach, 499; R. *v.* Matthews, 1 Den. C. C. 596; State *v.* Nelson, 29 Me. 329; Com. *v.* Trimmer, 1 Mass. 476; Com. *v.* Lewis, 1 Met. (Mass.) 151; Com. *v.* Tryon, 99 Mass. 442; State *v.* Collins, 1 McC. 355; Rather *v.* State, 1 Port. 132; State *v.* Bentz, 11 Mo. 27.

[10] R. *v.* Cruse, 8 C. & P. 541; State *v.* Parkerson, 1 Strobh. 169.

and gaming-houses;[1] for forcible entry and detainer;[2] for murder,[3] for stealing and receiving.[4] The presumptions of law in such cases are elsewhere considered.[5]

§ 307. Misjoinder of defendants, when apparent on the record, may be made the subject of a demurrer, a motion in arrest of judgment, or a writ of error; or the court will in some cases quash the indictment.[6] When the misjoinder appears in evidence, an acquittal may be ordered. If, however, two be improperly found guilty separately on a joint indictment, the objection may, in general, be cured by producing a pardon, or entering a *nolle prosequi* as to the one of them who stands second on the verdict. During the trial the difficulty may be relieved by a *nolle prosequi*, or an acquittal of a defendant improperly joined. If there be error in this respect a new trial may be granted.[7]

Misjoinder may be excepted to at any time.

§ 308. Where two persons are indicted for a conspiracy, and one of them dies before the trial, and it proceeds against both, it is no mistrial, and entry of a suggestion of the death on the record is unnecessary.[8]

Death need not be suggested on record.

2. *Severance.*

§ 309. Where several persons are jointly indicted, they may be tried separately, at the election of the prosecution or of the defendants. The prosecution may sever as a matter of right;[9] but the question of severance is usually raised by the defendants themselves, as to whom the matter

Defendants may elect to sever.

[1] R. *v.* Williams, 10 Mod. 63; R. *v.* Dixon, 10 Mod. 335; Com. *v.* Murphy, 2 Gray, 516; Com. *v.* Cheney, 114 Mass. 281; State *v.* Bentz, 21 Mo. 27.

[2] State *v.* Harvey, 3 N. H. 65.

[3] R. *v.* Cruse, 8 C. & P. 541.

[4] R. *v.* M'Athey, 9 Cox C. C. 251.

[5] Whart. Crim. Law, 8th ed. § 78.

[6] Young *v.* R. 3 T. R. 103–106; 1 Stra. 623; Com. Dig. Ind. H. As to new trial see infra, § 874. That in such cases error does not lie see State *v.* Underwood, 77 N. C. 502; State *v.* Lindsay, 78 N. C. 499.

[7] Infra, §§ 873–4.

When the indictment charges only A. and B. as conspirators, a *nolle prosequi* as to A. has been held to operate as an acquittal of B. State *v.* Jackson, 7 S. C. 283.

[8] R. *v.* Kenrick, 5 Ad. & El. N. S. (5 Q. B.) 49.

[9] State *v.* Bradley, 9 Richards. 168; State *v.* McGrew, 13 Richards. 313; Hawkins *v.* State, 9 Ala. 137; State *v.* Thompson, 13 La. An. 515.

is left to the discretion of the court.[1] Where they elect to be tried separately, and where the application is granted by the court, the prosecuting officer may elect who he will try first,[2] which is usually at his discretion.[3] But after the jury have been sworn, and part of the evidence heard, it is usually too late for either defendant to demand a separate trial.[4]

Severance should be granted when defences clash.

§ 310. Where the defences of joint defendants are antagonistic, it is proper to grant a severance.[5] And this is eminently the case where one joint defendant has made a confession implicating both, and which the prosecution intends to offer on trial.[6]

In conspiracy and

§ 311. In conspiracy and riot, though it was once thought otherwise,[7] it is now held the defendants may claim separate trials.[8] And when the case is tried jointly, the

[1] Infra, § 755; State *v.* Conley, 39 Me. 78; State *v.* O'Brien, 7 R. I. 336; Whitehead *v.* State, 10 Oh. St. 449; Curran's case, 7 Grat. 619; Com. *v.* Lewis, 25 Grat. 938; Robinson *v.* State, 1 Lea, 673; Hawkins *v.* State, 9 Ala. 137; U. S. *v.* Collyer et al. Wharton on Homicide, Appendix. See Com. *v.* Manson, 2 Ashm. 31; State *v.* Wise, 7 Richards. 412; State *v.* McGrew, 13 Richards. 316; Wade *v.* State, 40 Ala. 74; Parmer *v.* State, 41 Ala. 416; Lawrence *v.* State, 10 Ind. 453. When the wife of one defendant is a witness for the others see Com. *v.* Manson, supra; Com. *v.* Easland, 1 Mass. 15; Whart. Crim. Ev. § 445. But at common law, a severance will not be granted to enable one defendant to be a witness for the other; as even on separate trials this result could not be reached. U. S. *v.* Gibert, 2 Sumner, 19. When, however, there is no evidence against a particular defendant, or the evidence is but slight, the court may direct an acquittal of such defendant, so as to rehabilitate him as a witness. Com. *v.* Eastman, 1 Cush. 189; State *v.* Roberts, 15 Mo. 28. Infra, §§ 755, 873. See Whart. Crim. Ev. § 445.

In Tennessee, this is a statutory right. State *v.* Knight, 3 Baxter, 418; Robinson *v.* State, 1 Lea, 673.

[2] Com. *v.* Berry, 5 Gray, 93 (riot); People *v.* McIntyre, 1 Park. C. C. 371; People *v.* Stockham, Ibid. 424; Jones *v.* State, 1 Kelly, 610.

[3] Patterson *v.* People, 46 Barb. 625. See, as to misdemeanors, People *v.* White, 55 Barb. 606. As holding that in such cases error does not lie see State *v.* Lindsay, 78 N. C. 499. As to new trial see infra, § 874. As to calling one as a witness for the other see Whart. Crim. Ev. § 445.

[4] McJunkins *v.* State, 10 Ind. 140.

[5] U. S. *v.* Kelly, 4 Wash. C. C. 528; U. S. *v.* Marchant, 12 Wheat. 480; State *v.* Soper, 16 Me. 293; Com. *v.* Robinson, 1 Gray, 555; Maton *v.* People, 15 Ill. 536; Hawkins *v.* State, 9 Ala. 137; Thompson *v.* State, 25 Ala. 41; Mask *v.* State, 32 Miss. 405; Roach *v.* State, 5 Cold. (Tenn.) 39.

[6] Com. *v.* James, 99 Mass. 438.

[7] Com. *v.* Manson, supra, § 305.

[8] Infra, § 698.

court must direct the jury that they are not to permit one defendant to be prejudiced by the other's defence.[1] riot no severance.

3. *Verdict and Judgment.*

§ 312. Joint defendants may be convicted of different grades.[2] Thus, where two or more defendants are jointly charged in the same indictment with murder, it is competent to the jury to find one guilty of murder, and another of manslaughter, and on such a verdict being rendered it Joint defendants may be convicted of different grades.

[1] Com. *v.* Robinson, 1 Gray, 555.

See, as to Virginia practice, Code 1866, chap. ccviii. § 15. In Ohio, by statute, joint defendants can claim separate trials by right. Crim. Proc. § 153.

[2] Infra, § 755; Whart. Crim. Ev. § 136; Klein *v.* People, 31 N. Y. 229; White *v.* People, 32 N. Y. 465; Shouse *v.* Com. 5 Barr, 83; State *v.* Arden, 1 Bay, 487; Brown *v.* State, 28 Geo. 209; R. *v.* Butterworth, R. & R. 520. "It remains to consider how far averments charging defendants with a joint offence are divisible. These averments of joint offences are divisible (as to the degree of criminality in the several persons charged) where the offence is of such a nature as that the defendants may act a different part in the transaction; and if the evidence affects them differently, the judge may select such parts as are applicable to each, and leave their cases separately to the jury. And it was, accordingly, held by the judges in the case of Butterworth, Braithwaite, and Moss, who were indicted for a burglary, in breaking into the dwelling-house of W. K. in the night-time, *and stealing therein to the value of* 40*s.*, that upon such an indictment the offence of one might be aggravated by burglary in him alone; because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking; and, accordingly, there was judgment against Moss for the burglary and capital larceny, and against the other two for the capital larceny. Russell & Ryan C. C. 520. But it is important to observe, says Gabbett (2 Crim. Law, 416), first, that this was a *single* or continuing transaction, in which *all* the defendants joined or coöperated; and, secondly, that the judgment, as against all the prisoners, was for a capital felony and *the same;* and it is distinguishable in these respects from the case of Mary and John Messingham, where the defendants were charged jointly with receiving stolen goods; and it was decided, on a case reserved, that as on the joint charge it was necessary to prove a joint receipt, and as it appeared from the evidence that Mary Messingham was absent when John Messingham received the goods, her receipt afterwards was to be considered as a *separate* transaction, and the conviction therefore wrong. 1 Mood. C. C. 257. In such case, judgment may be given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted. R. *v.* Dovey, 2 Den. C. C. 86; 4 Cox C. C. 428; 2 Eng. L. & Eq. Rep. 532." 2 Benn. & Heard Lead. Cases, 138

will not be disturbed by the court as irregular.[1] So, also, in assault and battery, one may be found guilty of assault and another of battery.[2] *A fortiori* a verdict is good in ordinary cases where the jury convict one, and acquit or disagree as to the other.[3]

Defendants may be convicted severally.

§ 313. Where one of several defendants is tried alone, he may be convicted alone;[4] nor is it ground of exception that the others who were jointly indicted were not tried.[5]

Sentence is to be several.

§ 314. In an indictment against two or more, the charge is several as well as joint, and the conviction is several;[6] so that if one is found guilty, judgment may be rendered against him, although one or more may be acquitted. To this rule there are exceptions, as in case of conspiracy or riot, to which the agency of two or more is essential; but violations of the license law, not being within the reason of these exceptions, come under the general rule.[7]

Where several persons are jointly indicted and convicted, they should be sentenced severally,[8] and the imposition of a joint fine is erroneous.[9]

[1] U. S. *v.* Harding, 1 Wall. Jun. 127; Mask *v.* State, 32 Miss. 406; but see Hall *v.* State, 8 Ind. 439. Infra, § 755.

[2] White *v.* People, 32 N. Y. 465.

[3] See R. *v.* Cooke, supra, § 305; R. *v.* Taggart, 1 C. & P. 201; Com. *v.* Wood, 12 Mass. 313; Com. *v.* Cook, 6 S. & R. 577.

On an indictment against three, a joint verdict finding each defendant guilty by name is in substance a distinct verdict against each defendant. Fife *v.* Commonwealth, 29 Penn. St. R. 429.

[4] This is prescribed in Rev. Stat. U. S. § 1036.

[5] Supra, § 305, and cases cited; State *v.* Clayton, 11 Richards. 581; Com. *v.* McChord, 2 Dana, 243.

[6] Infra, § 755; State *v.* Brown, 49 Vt. 437; State *v.* Smith, 2 Ired. 402. See, as to joint receivings, Whart. Crim. Law, 8th ed. § 989. When two are charged with an assault, it is not a variance that the proof goes only to one. R. *v.* Carson, R. & R. 303; Com. *v.* Griffin, 21 Pick. 523; Jennings *v.* Com. 105 Mass. 586; Com. *v.* O'Brien, 107 Mass. 208. As to verdict, infra, § 755. As to sentence, infra, § 940.

[7] Com. *v.* Griffin, 3 Cush. 523. As to adultery see State *v.* Lyerly, 7 Jones (N. C.), 159.

One defendant on an indictment is not liable for the costs of others jointly indicted with him. State *v.* McO'Blenis, 21 Mo. 272; Moody *v.* People, 20 Ill. 315. But in Virginia only one clerk's or attorney's costs are to be collected on a joint verdict. Com. *v.* Sprinkle, 4 Leigh, 650. See Calico *v.* State, 4 Pike, 430; Searight *v.* Com. 13 S. & R. 301.

[8] Waltzer *v.* State, 3 Wis. 785; Straughan *v.* State, 16 Ark. 37; Curd *v.* Com. 14 B. Mon. 386. Infra, § 940.

[9] Curd *v.* Com. 14 B. Mon. 386; State *v.* Gay, 10 Mo. 440; State *v.*

§ 315. To convict of a joint charge, the act proved must be joint. One offence proved against one defendant, and a subsequent offence against another, cannot justify a conviction, unless the offences are overt acts of treason or conspiracy, which are charged as such.[1] Thus two defendants cannot be convicted upon proof that each one committed an act constituting an offence similar to the act charged in the indictment.[2] And so a man and a woman cannot be jointly convicted of a single act of adultery upon the admission by one of an act of adultery committed at one time, and an admission by the other of an act of adultery committed at another time.[3]

Offence must be joint to justify joint verdict.

XIX. STATUTES OF LIMITATION.

§ 316. While, as will be hereafter seen, courts look with disfavor on prosecutions that have been unduly delayed,[4] there is, at common law, no absolute limitation which prevents the prosecution of offences after a specified time has arrived. Statutes to this effect have been passed in England and in the United States, which we now proceed to consider. We should at first observe that a mistake is sometimes made in applying to statutes of limitation in criminal suits the construction that has been given to statutes of limitation in civil suits. The two classes of statutes, however, are essentially different. In civil suits the statute is interposed by the legislature as an impartial arbiter between two contending parties. In the construction of the statute, therefore, there is no intendment to be made in favor of either party. Neither grants the right to the other; there is therefore no grantor against whom the ordinary presumptions of construction are to be made. But it is other-

Construction to be liberal to defendant.

Berry, 21 Mo. 504; State *v.* Hollenscheik, 61 Mo. 302. Infra, § 940.

[1] Supra, § 302; infra, § 940; R. *v.* Dovey, 2 Den. C. C. 86; R. *v.* Hempstead, R. & R. 344; R. *v.* Pulham, 9 C. & P. 281. But see R. *v.* Barber, supra, § 302.

[2] Stevens *v.* State, 14 Ohio, 386.

[3] Com. *v.* Cobb, 14 Gray, 57.

In gaming, joint indictments have been sustained against parties taking separate parts in the same game. Com. *v.* McChord, 2 Dana, 242. But see *contra*, Elliott *v.* State, 26 Ala. 78; Lindsay *v.* State, 48 Ala. 169; State *v.* Homan, 41 Tex. 155; Johnson *v.* State, 8 Eng. 685.

In England, it is said that when there is a joint conviction for separate acts, the conviction may be sustained as to the party proved to have committed the first felony in order of time. R. *v.* Gray, 2 Den. C. C. 87.

[4] See infra, § 326.

wise when a statute of limitation is granted by the State. Here the State is the grantor, surrendering by act of grace its right to prosecute, and declaring the offence to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offence; that the offender shall be at liberty to return to his country, and resume his immunities as a citizen; and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt.[1] Independently of these views, it must be remembered that delay in instituting prosecutions is not only productive of expense to the State, but of peril to public justice in the attenuation and distortion, even by mere natural lapse of memory, of testimony. It is the policy of the law that prosecutions should

[1] This is powerfully exhibited in a famous metaphor by Lord Plunkett, of which it is said by Lord Brougham (Works, &c. Edinb. ed. of 1872, iv. 341), that "it cannot be too much admired for the perfect appropriateness of the figure, its striking and complete resemblance, as well as its raising before us an image previously familiar to the mind in all particulars, except its connection with the subject for which it is so unexpectedly but naturally introduced." "Time," so runs this celebrated passage, "with his scythe in his hand, is ever mowing down the evidences of title; wherefore the wisdom of the law plants in his other hand the hour-glass, by which he metes out the periods of that possession that shall supply the place of the muniments his scythe has destroyed." *In other words, the defence of the statute of limitations is one not merely of technical process, to be grudgingly applied, but of right and wise reason, and, therefore, to be generously dispensed.* The same thought is to be found in another great orator: λαβὲ δέ μοι καὶ τὸν τῆς προθεσμίας νόμον . . . . δοκεῖ γάρ μοι καὶ ὁ Σόλων οὐδενὸς ἄλλου ἕνεκα θεῖναι αὐτὸν, ἢ τοῦ μὴ συκοφαντεῖσθαι ὑμᾶς. τοῖς μὲν γὰρ ἀδικουμένοις ἱκανὰ τὰ πέντε ἔτη ἡγήσατο εἶναι εἰσπράξασθαι. κατὰ δὲ τῶν ψευδομένων τὸν χρόνον ἐνόμισε σαφέστατον ἔλεγχον ἔσεσθαι. καὶ ἅμα ἐπειδὴ ἀδύνατον ἔγνω ὂν τούς τε συμβαλόντας καὶ τοὺς μάρτυρας ἀεὶ ζῆν, τὸν νόμον ἀντὶ τούτων ἔθηκεν, ὅπως μάρτυς εἴη τοῦ δικαίου τοῖς ἐρήμοις. Demosthenes, pro Phorm. ed. Reiske, p. 952.

To the same effect may be noticed Woolsey's Polit. Phil. § 123; and see U. S. v. Norton, 91 U. S. (1 Otto) 566.

be prompt, and that statutes enforcing such promptitude should be vigorously maintained. They are not merely acts of grace, but checks imposed by the State upon itself, to exact vigilant activity from its subalterns, and to secure for criminal trials the best evidence that can be obtained.[1]

[1] The early English common law, based as it was on a rough *lex talionis*, knew nothing of such limitations, and even for some time after their introduction they were viewed as mere acts of process, to be construed in doubtful cases against the defendant, and not as acts of grace. It is remarkable that in this, as well as in other points connected with the definition and punishment of crime, we find much greater humanity in the Roman law. Perhaps the reason may be found in the fact that the English system, so far as crimes are concerned, was based on the old Germanic codes, which, while they recognized certain rude immunities in the lords, as against the emperor, vested no rights whatever in the vassal, as against the lord; while, on the other hand, the Roman law viewed all freemen of the empire, noble or simple, as endowed with equal unalienable rights, which no one could interfere with but the emperor, and he, after Justinian, only by a fixed code. This idea was adopted by the countries accepting the Roman common law. See Kostlin, System i. § 128; Hoorebeke l. c. pp. 54–59. "Que le crime soit demeuré caché, même à l'aide de manoeuvres employées par le coupable ou qu'il ait été découvert; que le coupable se soit absenté du territoire ou qu'il y soit resté; qu'il ait obéi aux appels de la justice ou qu'il s'y soit soustrait, n'importe; le défaut de poursuites, pendant le temps fixé par la loi, n'en éteindra pas moins l'action publique." By the old Roman law, the general limitation was twenty years. L. 3. D. de requir. vel absent. (48. 17.) . . . . quamcunque enim quaestionem apud fiscum, si non alia sit praescriptio, viginti annorum silentio praescribi, Divi principes voluerunt. L. 12. C. ad. L. Corn. de fals. (9. 22.) Querela falsi temporalibus praescriptionibus non excluditur, nisi viginti annorum exceptione, sicut cetera quoque fere crimina. In embezzlements and peculations, however, in order to afford a protection against frivolous accusations, the limitation was reduced to *five* years. L. 7. D. ad L. Jul. pecul. (48. 13.) and so as to other crimes specified as follows: L. 2. 9. § 6. D. ad. L. Iul. de adult. (48. 5.) See fully Geib, Lehrbuch, &c., § 81.

The revolution in the English common law in this respect is strikingly illustrated by the equitable extension of the statute to cases where the prosecution is suspicious, and marked by unwarrantable delay. See infra, § 326.

Another important point here to be noticed is that by the Roman common law these statutes, being acts of grace or oblivion, and not of process, extinguished all future prosecution. When once the statute fell, the offence was blotted out, and could not be again called into existence at the caprice of the prince. An extraordinary contrast to this is to be found in the Act of Congress of March 3, 1869, by which the time for finding indictments in the "late rebel States" is extended for the period of two years from and after said States are restored to representation in Congress. So far as this statute undertakes to authorize

Statute need not be specially pleaded.

§ 317. Although at one time it was thought otherwise, the rule is now generally accepted that the plea may be taken advantage of on the general issue.[1]

Indictment should aver offence within statute, or, if excluded by statute, should, by strict practice, aver facts of exception.

§ 318. Ordinarily, as we have seen,[2] the offence must be laid in the indictment within the time fixed by the statute of limitations. On the other hand, where the statute does not impose an absolute and universal bar, but only a bar in certain lines of cases, the prosecution may lay the offence outside the statute, and may prove, without averring it in the indictment, that the defendant was within the exceptions of the statute.[3] Where this view obtains, the fact that the offence is on the face of the

prosecutions for offences which prior statutes of limitation have cancelled, it is not merely an *ex post facto* law, and hence void, but is void in undertaking to make punishable an offence which has previously been extinguished by an act of grace. This statute has never been judicially invoked, and has now practically expired. But it is important here to recall the principle applicatory to any future legislative attempts to institute prosecutions for offences which prior statutes have cancelled.

A *qui tam* action on the act prohibiting the slave-trade is within the limitation of the federal statute. Adams *v.* Woods, 2 Cr. 336. So is an action for a penalty under the Consular Act of 1803. Parsons *v.* Hunter, 2 Sumn. 419. The two years' limitation of suits for penalties is repealed by implication by Act of 28th February, 1839, which extends the time to five years. Stimpson *v.* Pond, 2 Curt. C. C. 502. See for other cases, U. S. *v.* Fehrenback, 2 Woods, 175; People *v.* Haun, 44 Cal. 96.

[1] R. *v.* Phillips, R. & R. 369; U. S. *v.* Cook, 17 Wall. 168; U. S. *v.* Smith, 4 Day, 121; U. S. *v.* Watkins, 3 Cranch C. C. 441; U. S. *v.* White, 5 Cranch C. C. 73; U. S. *v.* Brown, 2 Low. 267; State *v.* Robinson, 9 Fost. 274; Com. *v.* Ruffner, 28 Penn. St. 259; overruling Com. *v.* Hutchinson, 2 Pars. 453; McLane *v.* State, 4 Ga. 335; State *v.* Bowling, 10 Humph. 52; Hackney *v.* State, 8 Ind. 494; State *v.* Hussey, 7 Iowa, 409. *Contra*, People *v.* Roe, 5 Park. C. R. 231; State *v.* Carpenter, 74 N. C. 230. See, as to duplicity in such pleas, U. S. *v.* Shorey, 9 Int. Rev. Rec. 201.

[2] Supra, § 137.

[3] U. S. *v.* Cook, 17 Wall. 168; U. S. *v.* Ballard, 3 McL. 469; and see note thereto in Am. Law Reg. Nov. 1873; U. S. *v.* White, 5 Cranch C. C. 73; State *v.* Hobbs, 39 Me. 212; People *v.* Van Santvoord, 9 Cow. 655; Com. *v.* Hutchinson, 2 Pars. 453; State *v.* Bowling, 10 Humph. 52; State *v.* Rust, 8 Blackf. 195.

In U. S. *v.* Cook, supra, an indictment charged the accused with the commission, more than two years previously, of certain acts amounting to an offence as defined by an act of Congress; another act limited prosecutions for this and other offences to two years, unless the accused had been a fugitive from justice. On demurrer the indictment was held good, though it did not allege that the accused was within the exception.

indictment *primâ facie* barred cannot be taken advantage of by demurrer, or motion to quash, nor, *a fortiori*, by arrest of judgment.[1] But where a statute exists limiting all prosecutions within fixed periods, the more exact course is to state the time correctly in the indictment, and then aver the exception, and this mode of pleading is now generally required.[2] Perhaps the conflict may be reduced by appealing to the tests heretofore asserted,[3] and holding that when the exception is part of the limitation it must be pleaded, but when it is contained in a subsequent clause, and is clearly matter of rebuttal, then such particularity is not needed.[4]

In any view a special averment that the offence was committed within the statute is unnecessary.[5]

§ 319. Statutory words of description must be taken in their technical exclusive sense, when it appears they are used as specifications. Thus "penalty" has been held to include only civil suits,[6] and "deceit" has been ruled not to include "conspiracy."[7] On the other hand, on reasoning already given, when an offence is described, not as the technical term for a species, distinguished from other specific terms, but as *nomen generalissimum*, then it is to have a wide and popular construction.

Statute, unless general, operates only on offences it specifies.

§ 320. As a rule, statutes of limitation apply to offences perpetrated before the passage of the statute as well as to subsequent offences.[8]

Statute is retrospective.

[1] See supra, § 137. U. S. *v.* Cook, *ut supra;* People *v.* Van Santvoord, U. S. *v.* White, *ut supra;* State *v.* Howard, 15 Richards. 274; State *v.* Hussey, 7 Iowa, 409; and see R. *v.* Treharne, 1 Moody, 298; Com. *v.* Hutchinson, 2 Pars. 453; Clark *v.* State, 12 Ga. 350; State *v.* Bowling, 10 Humph. 52. See *contra*, as to arrest of judgment, White *v.* State, Texas, reported in Cent. L. J., Dec. 13, 1878, 6 Tex. Ap. 476.

[2] State *v.* Hobbs, 39 Me. 212; State *v.* Robinson, 9 Foster, 274; McLane *v.* State, 4 Ga. 335; State *v.* Meyers, 68 Mo. 266; State *v.* Bryan, 19 La. An. 435; State *v.* Bilbo, Ibid. 76; State *v.* Pierce, Ibid. 90; State *v.* English, 2 Mo. 182. See Hatwood *v.* State, 18 Ind. 492; State *v.* Rust, 8 Blackf. 195; People *v.* Miller, 12 Cal. 291.

When plea of limitation is good on the face of the indictment, the burden of proof is on the State to overthrow a plea of the statute. State *v.* Snow, 30 La. An. 401. See State *v.* Williams, 30 La. An. 842.

[3] Supra, § 238.

[4] Garrison *v.* State, 87 Ill. 96.

[5] Supra, §§ 162, 238; though see State *v.* Noland, 29 Ind. 212.

[6] State *v.* Thomas, 8 Rich. 295; State *v.* Free, 2 Hill (S. C.), 628.

[7] State *v.* Christianburg, Busbee, 46.

[8] Johnson *v.* U. S. 3 McLean, 89; Adams *v.* Woods, 2 Cr. 342; U. S. *v.*

§ 321. The statute begins to run on the day of the commission of the offence.[1] "This," says Berner, "is to be dated from the period when the crime is consummated.[2] *Instantaneous* crimes, such as killing and arson, are consummated when they reach the point of completion. When a distinct result is necessary to completion, *i. e.* death to homicide, it becomes part of the crime, no matter how long it may be delayed, and the offence is fixed in the moment of the killing. *Continuous* crimes (such as the carrying of concealed weapons, use of false weights, &c.) endure after the period of consummation. With instantaneous crimes, therefore, the statute begins with the consummation (*Vollendung*); with continuous crimes, it begins with the ceasing of the criminal act or neglect." In bigamy, the statute runs from the bigamous marriage, unless the offence is made by statute continuous.[3]

Statute begins to run from commission of crime.

§ 322. The procedure which must be instituted in order to save the statute is, in the federal statutes, "indictment or information,"[4] and in the statutes of most of the

Indictment or information

Ballard, 3 McLean, 469; U. S. *v.* White, 5 Cr. C. C. 73; Com. *v.* Hutchinson, 2 Pars. 453; and to common law offences in the District of Columbia; U. S. *v.* Slacum, 1 Cr. C. C. 485; U. S. *v.* Porter, 2 Ibid. 60; U. S. *v.* Watkins, 3 Ibid. 442; though see Martin *v.* State, 24 Tex. 61.

In New York, the Act of 1873, extending the time for finding an indictment from three to five years, has been held not to cover offences committed before its passage. People *v.* Martin, 1 Parker C. R. 187; referring to People *v.* Carnal, 6 N. Y. 463; Sanford *v.* Bennett, 24 Ibid. 20; Shepperd *v.* People, 25 Ibid. 406; Hastings *v.* People, 28 Ibid. 400; Stone *v.* Fowler, 47 Ibid. 566; Palmer *v.* Conway, 4 Den. 375, 376; Watkins *v.* Haight, 18 Johns. 138; Dash *v.* Van Cluck, 7 Ibid. 477; Johnson *v.* Burrell, 2 Hill, 238; Calkins *v.* Calkins, 3 Barb. 305; McMannis *v.* Butler, 49 Ibid. 176, 181; 7 Cow. 252; 10 Wend. 114, 117; 3 Barb. 621; 8 Wend. 861; Hathaway *v.* Johnson, 55 N. Y. 93; Amsbry *v.* Hinds et al. 48 Ibid. 57; Mongeon *v.* People, 55 Ibid. 613; Ely *v.* Holton, 15 N. Y. 595; Moore *v.* Mausert, 49 Ibid. 332. And see N. Y. & Oswego M. R. R. Co. *v.* Van Horn, 57 N. Y. 473; People ex rel. Ryan *v.* Green, 58 Ibid. 295, 303, 304; cited in letter to Alb. L. J. of Sept. 23, 1875.

[1] State *v.* Asbury, 26 Tex. 82.

[2] Lehrbuch d. Strafrechts, 1871, p. 301.

[3] Gise *v.* Com. 81 Penn. St. 428; Scoggins *v.* State, 32 Ark. 205. As to the operation of the statute on continuous offences see U. S. *v.* Irvine, 98 U. S. 450.

[4] The finding of an informal presentment is not sufficient to take the case out of the statute. U. S. *v.* Slacum, 1 Cr. C. C. 485. Nor will a former indictment on which a *nolle prosequi* was entered. U. S. *v.* Ballard, 3 McLean, 469. But see infra, § 325.

States, "indictment." "Information," in the federal statutes,[1] means not "complaint" by a prosecutor, but the technical *ex officio* information filed by the government. Under such statutes, though the indictment must be found to prevent the bar of the statute, the defendant need not be sentenced within the limitation.[2]

saves statute.

§ 323. In England, on the other hand, and in jurisdictions where "indictment" or "information" is not required, the usual warrant issued by a magistrate on a preliminary complaint is enough to save the statute.[3] And this is clearly the case with a *presentment* by a grand jury, though the *indictment* was not found until after the statute expired;[4] and so it is held to be with a commitment or binding over by a magistrate.[5]

In some jurisdictions statute saved by warrant or presentment.

[1] U. S. *v.* Vondersmith, Whart. Crim. Law, 7th ed. § 436, note *g;* U. S. *v.* Slacum, 1 Cr. C. C. 485.

[2] Com. *v.* The Sheriff, 3 Brewster, 394 (Brewster, J. 1869).

[3] R. *v.* Parker, 9 Cox C. C. 475; Leigh & C. 459; State *v.* Howard, 15 Richards. 274; Foster *v.* State, 38 Ala. 425; Ross *v.* State, 55 Ala. 177; *contra*, R. *v.* Hull, 2 F. & F. 16.

[4] Brock *v.* State, 22 Ga. 98; and see R. *v.* Brooks, 1 Den. C. C. 217; 2 C. & K. 402; 2 Cox C. C. 436.

[5] R. *v.* Austin, 1 C. & K. 621. One or two analogous cases under the English statute may not be here out of place. In R. *v.* Willace, 1 East P. C. 186, it was holden upon the repealed statutes relating to coin, that the information and proceeding before the magistrate, upon the defendant's being taken, was to be deemed the "commencement of the prosecution" within the meaning of those acts. See also R. *v.* Brooks, 1 Den. C. C. 217; 2 C. & K. 402. But proof by *parol* that the prisoner was apprehended for treason respecting the coin, within three months after the offence was committed, was holden not to be sufficient, where the indictment was after the three months, and the warrant to apprehend or to commit was not produced. R. *v.* Phillips, R. & R. 369. In R. *v.* Killminster, 7 C. & P. 228, an indictment for night poaching was preferred against the defendant within twelve months after the commission of the offence, and was ignored; four years afterward another bill was found against him for the same offence, and upon an objection that the proceeding was out of time, Coleridge, J., doubted whether the first indictment was not a proceeding sufficient to entitle prosecutor to proceed. He reserved the point, but the defendant was acquitted upon the merits. See also Tilladam *v.* Inhabitants of Bristol, 4 N. & M. 144.

In a remarkable case in Georgia, it was held that on an indictment for a major offence, to which the statute does not apply, but which includes a minor offence, covered and shielded by the statute, where the jury convicted of the minor offence, the statute may be applied to the major offence. Clark *v.* State, 12 Ga. 350.

§ 324. Whether the exceptions to the statute must be specially averred in indictment, has been just noticed.

When flight suspends statute, it is not renewed by temporary return.

It is not necessary to constitute the exception of a person "fleeing from justice," that the defendant should have been intermittingly absent from the jurisdiction. If he flies from a prosecution, mere occasional returns will not start the statute afresh.[1] The same rule applies to "concealment."[2]

But to soldiers enlisting in the army and then removing this exception does not apply;[3] and the same reason would be good as to all removals under direction of the State.[4]

§ 325. The failure of a defective indictment, and the presentation of a new and correct indictment after the statute has begun to run, does not revive the statute. The statute, as to the particular offence, was put aside by the commencement of legal proceedings against the defendant, and remains silent until these legal proceedings terminate. And this termination cannot be until a final judgment is reached on the merits.[5]

Failure of defective indictment does not revive statute.

Of course much depends on the form of the statute, for it is possible to conceive of a statute so couched as to make a judgment on mere technical grounds a termination of the prosecution, so that a new indictment would be regarded as a new prosecution.

§ 326. In cases of secret offences, where the prosecutor is the

[1] U. S. *v.* White, 5 Cr. C. C. 116.

A fleeing from justice does not necessarily import a fleeing from prosecution begun. U. S. *v.* Smith, 4 Day, 123. A person may flee from justice though no process was issued against him. U. S. *v.* White, 5 Cr. C. C. 39. The defendant is not entitled to the benefit of the limitation, if within the two years he left any place, or concealed himself, to avoid detection or punishment for any offence; Ibid. 73; although he should within the two years have returned openly to the place where the offence was committed, so that, with ordinary diligence and due means, he might have been arrested. Ibid. 116.

[2] Robinson *v.* State, 57 Ind. 113.

[3] Graham *v.* Com. 51 Penn. St. 255.

[4] See U. S. *v.* Brown, 2 Lowell, 267.

[5] Com. *v.* Sheriff, 3 Brewst. 394; State *v.* Johnston, 5 Jones (N. C.), 221; State *v.* Hailey, 6 Jones (N. C.), 42; Foster *v.* State, 38 Ala. 425.

A prosecution, therefore, continues when an indictment is dismissed, and the matter immediately submitted to a grand jury, and a new indictment found, without releasing the defendant. Tully *v.* Com. 13 Bush, 142. See U. S. *v.* Ballard, supra, § 322.

sole or principal witness, and where, after a short lapse of time, the defendant, unless previously notified, must in the nature of things have great difficulty, from the evanescent character of memory, in collecting evidence *aliunde* as to *alibi*, the policy of the law is to compel a speedy prosecution. Eminently is this the case with sexual prosecutions, especially those which are capable of being used for the extortion of money. Hence courts, as will hereafter be seen, look with disfavor on prosecutions for rape in which the prosecutrix does not make immediate complaint. And there are cases when the delay is marked and unexcused, when an acquittal will be directed. This course was taken by a learned English judge (Alderson) in a case of bestiality, where nearly two years (not quite the statutory limitation) was allowed by the prosecutor to pass before institution of proceedings.[1]

Courts look with disfavor at long delay in prosecution.

§ 327. The enumeration of specific exceptions is exhaustive, and the statute cannot be suspended in favor of the prosecution by any allegations of fraud on the part of the defendant. Thus, where it appears that an alleged misdemeanor was committed more than two years before the warrant was issued, and that the defendant was all the time a resident of the State, the prosecution cannot save the bar of the statute by showing that the defendant put the prosecutor on a wrong scent, and concealed the crime until a few weeks before the arrest.[2]

Statute not suspended by fraud.

§ 328. In several of the States restrictions exist requiring trials in criminal cases to take place within a specified period after the institution of the prosecution.[3] Thus in Pennsylvania: "If any person shall be committed for treason or felony, and shall not be indicted and tried some time in the next term of oyer and terminer, general jail delivery, or other court, where the offence is properly cognizable, after such commitment, it shall and may be lawful

Under statute indictments unduly delayed may be discharged.

[1] R. *v.* Robins, 1 Cox C. C. 114.

[2] Com. *v.* The Sheriff, 3 Brewster, 394.

The statute runs in favor of an offender, although it was not known to the officers of the United States that he was the person who committed the offence. U. S. *v.* White, 5 Cr. C. C 39.

[3] As to Georgia see Roebuck *v.* State, 57 Ga. 154. The effect of such discharge as a bar is considered infra, § 449.

for the judges or justices thereof, and they are hereby required upon the last day of the term, sessions, or court, to set at liberty the said prisoner upon bail, unless it shall appear to them upon oath or affirmation that the witnesses for the Commonwealth, mentioning their names, could not then be procured; and if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment, unless the delay happen on the application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment. Provided always, that nothing in this act shall extend to discharge out of prison any person guilty of, or charged with treason, felony, or other high misdemeanor, in any other State, and who, by the confederation, ought to be delivered up to the executive power of such State, nor any person guilty of, or charged with a breach or violation of the laws of nations." [1] The power of discharging a prisoner under this act, it has been held, where he has not been tried at the second term, is strictly confined to the court in which he was indicted; and the Supreme Court will not interfere if the commitment is unexceptionable on the face of it.[2] A prisoner who stands indicted for aiding and abetting another to commit murder, and who was not tried at the second term, is not entitled to be discharged under the third section of the act if the principal has absconded, and proceedings to outlawry against him were commenced without delay, but sufficient time had not elapsed to complete them.[3] A prisoner is not entitled to demand a trial at the second term if he has a contagious or infectious disease, which may be communicated in the court to the prejudice of those present.[4]

[1] Act of 18th Feb. 1785, § 3; 2 Smith's Laws, 275; Purdon's Dig. 9th ed. 260. See infra, §§ 583 *et seq.*, where this subject is discussed in connection with the right to a continuance.

[2] Ex parte Walton, 2 Whart. 501.

[3] Com. *v.* Sheriff, &c. of Alleghany, 16 Serg. & R. 304, Gibson, C. J., dissenting.

[4] Ex parte Phillips, 7 Watts, 363.

In Virginia it is required, "when any prisoner committed for treason or felony shall apply to the court the first day of the term, by petition or motion, and shall desire to be brought to his trial before the end of the term, and shall not be indicted in that term, unless it appear by affidavit that the witnesses against him cannot be produced in time, the court shall set him at liberty, upon his giving bail, in such penalty as they shall think reasonable, to appear before them at a day to be appointed of the succeeding term. Every person charged with such crime, who shall be indicted before or at the

§ 329. Statutes of limitation, unless the words of the law expressly direct the contrary, are acts of grace, binding only the sovereign enacting them, and have no extra-territorial force.[1] If, to apply this principle to the present question, a foreigner commits an offence in England or the United States, it could never be pretended that he could plead that in his own country the period for prosecution had expired. And so where jurisdiction is based on allegiance, as in case of political offences against the United States committed abroad, the defendant, when put on trial in the country of his allegiance, would not be permitted to set up the limitations of the *forum delicti commissi*. In either case the law as to limitation is that of the court of process. And in this view most foreign jurists coincide.[2] Fœlix, however, seems to think, that in case of a difference in this respect in the codes of States having concurrent jurisdiction, the milder legislation is to be preferred.[3]

Statutes have no extra-territorial effect.

second term after he shall have been committed, unless the attendance of the witnesses against him appear to have been prevented by himself, shall be discharged from imprisonment, if he be detained for that cause only; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime, unless such failure proceed from any continuance granted on the motion of the prisoner, or from the inability of the jury to agree on their verdict." R. C. of Va. c. 169, § 28. It has been decided that the word term, where it occurs in this act, means, not the prescribed time when the court should be held, but the actual session of the court. 2 Va. Cases, 363. When the accused has been tried and convicted, and a new trial awarded to him, although he should not be again tried till after the third term from his examination, he is not entitled to a discharge. 2 Va. Cas. 162; Davis's Va. Cr. Law, 422; and see Foster *v.* State, 38 Ala. 425.

[1] Whart. Confl. of L. §§ 534–544, 939.

[2] Berner, Wirkungskreis der Strafgesetze, p. 164; Köstlin, Syst. Deutsc. Straf. p. 24; Bar, § 143, p. 568.

[3] II. No. 602.

CHAPTER IV.

OF FINDING INDICTMENTS, AND HEREIN OF GRAND JURIES.

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- Theory that grand juries are limited to cases of notoriety, or in their own knowledge, or given to them by court or prosecuting officers, § 338.
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I. POWER TO INSTITUTE PROSECUTIONS.

Conflict of opinion as to power of grand juries to originate prosecutions.

§ 332. The value of grand juries is one of those questions which shifts with the political tendencies of the age. When liberty is threatened by excess of authority, then a grand jury, irresponsible as it is, and springing (supposing it to be fairly constituted) from the body of the people, is an important safeguard of liberty. If, on the other hand, public order, and the settled institutions of the land, are in danger from momentary popular excitement, then a grand jury, irresponsible and secret, partaking, without check, of the popular impulse, may, through its inquisitorial powers, become an engine of great mischief to liberty as well as to order. In the time of James II., when Lord Somers's famous tract was written, a barrier was needed against oppressive state prosecutions, and this barrier grand juries presented. In our own times a restraint may be required upon the malice of private prosecutors, and the violence of popular excitement; and it is to the adequacy of grand juries for that purpose that public attention has been turned.[1] It is possible to conceive of a third even more perilous contingency: that grand juries, selected in times of high party excitement, may be so organized as to become the unscrupulous political tools of the party which happens to be in power, and may be used by this party to annoy or oppress its political antagonists. Rejecting, however, this hypothesis as one which a free people living under a constitutional government would not permanently tolerate, we may view the question in its relation to the conditions above first stated. Assuming that of all prosecutions instituted either by government or individuals the grand jury has an absolute veto at the outset, the fundamental question still remains, have grand juries anything more than the

[1] See, for recent criticisms, London Law Times, Oct. 4, 1879.

power of veto, or, in other words, can they originate prosecutions, and if so, with what qualifications?

§ 333. On this point three views are advanced, which it will be out of the compass of this work to do more than state, with the authorities by which they are respectively supported, leaving the question for that local judicial arbitrament by which alone it can be settled.

These views are: —

Theory that such power belongs to grand jury.

§ 334. That grand juries may on their own motion institute all prosecutions whatsoever, is a view which was generally accepted at the institution of the federal government, and was in accordance with the English practice then obtaining.[1]

The right of a prosecutor to make complaint personally to a grand jury is practically recognized by Mr. Bradford, at the

[1] In the report of the English Commissioners of 1879, we have the following (pp. 32-3): —

"We doubt whether the existence of the power to send up a bill before a grand jury without a preliminary inquiry before a magistrate, the extent of this power, and the facilities which it gives for abuse, are generally known. It is not improbable that many lawyers, and most persons who are not lawyers, would be surprised to hear that theoretically there is nothing to prevent such a transaction as this: Any person might go before a grand jury without giving any notice of his intention to do so. He might there produce witnesses, who would be examined in secret, and of whose evidence no record would be kept, to swear, without a particle of foundation for the charge, that some named person had committed any atrocious crime. If the evidence appeared to raise a *primâ facie* case, the grand jury, who cannot adjourn their inquiries, who have not the accused person before them, who have no means of testing in any way the evidence produced, would probably find the bill. The prosecutor would be entitled to a certificate from the officer of the court that the indictment had been found. Upon this he would be entitled to get a warrant for the arrest of the person indicted, who, upon proof of his identity, must be committed to prison till the next assizes. The person so committed would not be entitled as of right to bail, if his alleged offence were felony. Even if he were bailed, he would have no means of discovering upon what evidence he was charged, and no other information as to his alleged offence than he could get from the warrant, as he would not be entitled by law to see the indictment or even to hear it read till he was called upon to plead. He would have no legal means of obtaining the least information as to the nature of the evidence to be given, or (except in cases of treason) even as to the names of the witnesses to be called against him; and he might thus be tried for his life without having the smallest chance of preparing for his defence, or the least information as to the character of the charge."

time attorney general of the United States, in a letter to the secretary of state, dated Philadelphia, February 20, 1794.[1] A question had arisen whether a tumultuous assemblage before the house of a foreign consul, coupled with a demand for the delivery of persons supposed to have been concealed therein, was the subject of prosecution in the courts of the United States. The district attorney thought it was not, and of the same opinion was Mr. Bradford. "But if the party injured is advised or believes that the federal courts are competent to sustain the prosecution," said the latter eminent authority, "I conceive that he ought not to be concluded by my opinion or that of the district attorney. If he desires it, he ought to have access to the grand jury with his witnesses; and if the grand jury will take it upon themselves to present the offence in that court, it will be the duty of the district attorney to reduce the presentment into form and the point in controversy will be thus put in a train for judicial investigation." Mr. Bradford's language is too pointed, when taken in consideration with his long practical experience with the duties of a prosecuting officer, and his remarkable precision as a lawyer, to admit of the supposition that he contemplated an approach to the grand jury through the return of a committing magistrate. The grand jury were to "present" the offence without the interposition of magistrate or attorney general, and they were to receive personally the prosecutor and his witnesses, for the purpose of determining whether a presentment should be made.

§ 335. Such, also, appears to have been the view of the late Judge Wilson of the Supreme Court of the United States.[2]

§ 336. In the works of the first Judge Hopkinson, the right of the grand jury to call such additional witnesses as they desire, not in themselves part of the witnesses for the prosecution, is defended in a tract written with much spirit, though in a style intended at the time more for popular than professional effect.[3] A similar latitude of inquiry is apparently advocated by Judge Addison. "The matters which, whether given in charge or of their own knowledge, are to be presented by the grand jury, are all offences within the county. To grand juries is committed

[1] 1 Opinions of Attorneys General, 22.

[2] 2 Wilson's Lectures on Law, 361.

[3] 1 Hopkinson's Works, 194.

the preservation of the peace of the county, the care of bringing to light for examination, trial, and punishment, all violence, outrage, indecency, and terror; everything that may occasion danger, disturbance, or dismay to the citizens. Grand juries are watchmen stationed by the laws to survey the conduct of their fellow-citizens, and inquire where and by whom public authority has been violated, or our Constitution and laws infringed." [1] As the learned judge, however, in the same charge, intimates an opinion that a grand jury is not to be permitted to summon witnesses before it, except under the supervision of the court, it would seem that the inquisitorial powers which he describes are to be only exercised on subjects which are given in charge to them by the court, or rest in the personal knowledge of the jurors.

§ 337. Perhaps, however, the broadest exposition is found in an opinion of the Supreme Court of Missouri, where it was held that a grand jury have a right to summon witnesses and start a prosecution for themselves; and that the court is bound to give them its aid for this purpose.[2]

The same view has been taken in the Circuit Court of the United States in the District of Columbia.[3]

A similar question was raised in 1851, in the Circuit Court of the United States for the Middle District of Tennessee. The grand jury, it would seem, without the agency of the district attorney, called witnesses before them whom they interrogated as to their knowledge concerning the then late Cuban expedition. The question was brought before the presiding judge (Catron, J., of the Supreme Court of the United States), who sustained the legality of the proceeding, and compelled the witnesses to answer.[4] Perhaps, however, the writer may venture

[1] Addison's Charges, 47.

[2] Ward *v.* State, 2 Mo. 120. See State *v.* Corson, 12 Mo. 404; State *v.* Terry, 30 Mo. 368.

[3] U. S. *v.* Tompkins, 2 Cranch C. C. R. 46; though see U. S. *v.* Lyles, 4 Cranch C. C. 469.

[4] "The grand jury," said Judge Catron, "is bound to present on the information of one of its members. He states to his fellow-jurors the facts that have come to his knowledge by seeing, or hearing them confessed by the guilty party. The juror makes his statement as a witness, under his oath taken as a grand juror. He does state, and is bound by his oath to state, the person who did the criminal act, and all the facts that are evidence tending to prove that a crime had been committed.

"The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally,

the remark that the learned judge, in citing a former edition of this book, goes too far in assuming that it is there unqualifiedly stated that the general practice is as he lays down.

and to found presentments on the evidence of such witnesses; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime. If a grand juror was a witness, he would be bound to give the information to his fellow-jurors voluntarily, as his oath requires him to do so. And so also the general oath taken in court by a witness, who comes before a grand jury, imposes upon him the obligation to answer such legal questions as are propounded by the jury, to the end of ascertaining crimes and offences (and their perpetrators) that the jurors suppose to have been committed. If general inquiries could not be made by the grand jury, neither the offence nor the offender could be reached in many instances where common law jurisdiction is exercised. In the federal courts such instances rarely occur; still they have happened in this circuit, in cases where gangs of counterfeiters were sought to be detected; but especially in cases where spirituous liquors had been introduced among the Indians residing west of the Missouri River. That drunkenness, riots, and occasionally murder, had been committed by Indians who were intoxicated was notorious; but who had introduced the intoxicating spirits into the Indian country was unknown. The fact of introduction was the crime punishable by act of Congress. In the Missouri District many such cases have arisen; there the grand jury is instructed, as of course, to ascertain who did the criminal act. The fact and the offender it is their duty to ascertain; and these they do ascertain constantly, by general inquiries of witnesses, whether they know that spirituous liquors have been introduced into the Indian country; and, secondly, who introduced them. It is part of the oath of the grand jury to inquire of matters given them in charge by the court, and to present as criminal such acts as the court charges them to be crimes or offences indictable by the laws of the United States. And in executing the charge it is lawful for the grand jury — and it is its duty — to search out the crime by questions to witnesses of a general character. The questions propounded by the jury in this instance, and presented to the court for our opinion, are in substance: 'Please to state what you may know of any person or persons in the city of Nashville, who have begun or have set on foot, or who have provided the means for a military expedition from hence against the island of Cuba. 2d. Or of any person who has subscribed any amount of money to fit out such an expedition. 3d. Or do you know of any person who has procured any one to enlist as a soldier in a military expedition to be carried on from hence against the island of Cuba? 4th. Or of any person asking subscriptions for, or enlisting as soldiers in, a military expedition to be carried on from hence against the island of Cuba?'

"As all these questions tend fairly and directly to establish some one of the offences made indictable by the Act of 1818, and are pertinent to the charge delivered to the grand jury, they may be properly propounded to the witness under examination, and he is bound to answer any or all of them, unless the answer would tend to estab-

§ 338. A second view is that the grand jury may act upon and present such offences as are of public notoriety, and within their own knowledge, such as nuisances, seditions, &c., or such as are given to them in charge by the court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate. This is the view which may be now considered as accepted in the United States courts, and in most of the particular States. In Pennsylvania the annoyances and disorders attending the unlimited access of private prosecutors to the grand jury room has led a court of great respectability to hold it to be an indictable offence for a private citizen to address the grand jury unless when duly summoned.[1] And this is now generally accepted.[2]

Theory that grand juries are limited to cases of notoriety, or in their own knowledge, and to cases given to them by court or prosecuting officers.

In accordance with this view, Judge King, in an able decision delivered in 1845, refused to permit the grand jury, on their own motion, to issue process to investigate into alleged misdemeanors in the officers of the board of health, a public institution established in Philadelphia for the preservation of public health and comfort.[3] This conclusion was, in 1870, emphatically

lish that the witness was himself guilty according to the act of Congress.

"This doctrine is believed to be in conformity to the former practice of the state Circuit Courts of Tennessee, and is assuredly so according to the practice in other States, as will be seen by the opinions of the Supreme Courts and circuit judges found in Whart. Crim. Law, 3d ed. c. 6."

[1] Com. v. Crans, 3 P. L. J. 442. See Ridgeway's case, 2 Ashmead, 247; State v. Wolcott, 21 Conn. 272. And see also comments in Hartranft's App. 85 Penn. St. 433.

[2] Infra, §§ 367, 966.

[3] "A warrant of arrest," he said, "founded on probable cause supported by oath or affirmation, is first issued against the accused by some magistrate having competent jurisdiction. On his arrest, he hears the 'nature and cause of the accusation against him,' listens to the testimony of the witnesses 'face to face,' has the right to cross-examine them, and may resort to the aid of counsel to assist him. It is not until the primary magistrate is satisfied by proof that there is probable cause that the accused has committed some crime known to the law, that he is further called to respond to the accusation. He is then either bailed or committed to answer before the appropriate judicial tribunal, to whom the initiatory proceedings are returned for further action. On this return, the law officer of the Commonwealth prepares a formal written accusation, called an indictment, which, with the witnesses named in the proceeding as sustaining the accusation, are sent before a grand jury, composed of not less than twelve, nor more than twenty-three citizens acting under oath, only to make true presentments, who again

sustained by the Supreme Court of the State, by whom it was held that a grand jury cannot indict without a previous prose-

examine the accuser and his witnesses, and not until at least twelve of this body pronounce the accusation to be well founded by returning the indictment a true bill, is the accused called upon to answer whether he is guilty or not guilty of the offence charged against him. No system can present more efficient guarantees against the oppressions of power or prejudice, or the machinations of falsehood and fraud. The moral and legal responsibilities of a public oath, the liability to respond in damages for a malicious prosecution, are cautionary admonitions to the prosecutor at the outset. If the primary magistrate acts corruptly and oppressively, in furtherance of the prosecution, and against the truth and justice of the case, he may be degraded from his judgment seat. By the opportunity given to the accused of hearing and examining the prosecutor and his witnesses, he ascertains the time, place, and circumstances of the crime charged against him, and thus is enabled, if he is an innocent man, to prepare his defence, — a thing of the hardest practicability if a preliminary hearing is not afforded to him. For how is an accused effectively to prepare his defence unless he is informed, not merely what is charged against him, but when, where, and how he is said to have violated the public law. It is not true that a bill of indictment found, without a preliminary hearing, furnishes him with this vital information. It practically neither describes the time, place, nor circumstances of the offence charged. Time is sufficiently described, if the day on which the crime is charged is any day before the finding of the bill, whether it is the true day of its commission or not. Place is sufficiently indicated, if stated to be within the proper county where the indictment is found; and circumstances are adequately detailed, when the offence is described according to certain technical *formulae*. Hence the inestimable value of preliminary public investigations, by which the accused can be truly informed, before he comes to trial, what is the offence he is called upon to respond to. It is by this system that criminal proceedings are ordinarily originated. Were it otherwise, and a system introduced in its place, by which the first intimation to an accused of the tendency of a proceeding against him, involving life or liberty, should be given when arraigned for trial under an indictment, the keen sense of equal justice, and the innate detestation of official oppression which characterize the American people, would make it of brief existence. It is the fitness and propriety of the ordinary mode of criminal procedure, its equal justice to accuser and accused, that renders it of almost universal application in our own criminal courts, and makes it unwise to depart from it, except under special circumstances or pressing emergencies."

Three exceptions were laid down to the general rule thus described as follows: —

"The first of these is where criminal courts, of their own motion, call the attention of grand juries to and direct the investigation of matters of general public import, which, from their nature and operation in the entire community, justify such intervention. The action of the courts on such occasions rather bears on things than persons, the object being the suppression of general and public evils, affecting, in their influence and operation, communities rather than

cution before a magistrate; except in offences of public notoriety, such as are within their own knowledge, or are given

individuals, and, therefore, more properly the subject of general and special complaint; such as great riots, that shake the social fabric, carrying terror and dismay among the citizens; general public nuisances, affecting the public health and comfort; multiplied and flagrant vices, tending to debauch and corrupt the public morals, and the like. In such cases the courts may properly, in aid of inquiries directed by them, summon, swear, and send before the grand jury such witnesses as they may deem necessary to a full investigation of the evils intimated, in order to enable the grand jury to present the offence and the offenders. But this course is never adopted in cases of ordinary crimes charged against individuals, because it would involve, to a certain extent, the expression of opinion by anticipation of facts subsequently to come before the courts for direct judgment, and because such cases present none of those urgent necessities which authorize a departure from the ordinary course of justice. In directing any of these investigations, the court act under their official responsibilities, and must answer for any step taken not justified by the proper exercise of a sound judicial discretion.

"Another instance of extraordinary proceeding is where the attorney general, *ex officio*, prefers an indictment before a grand jury without a previous binding over or commitment of the accused. That this can be lawfully done is undoubted. And there are occasions where such an exercise of official authority would be just and necessary; such as where the accused has fled the justice of the State, and an indictment found may be required previous to demanding him from a neighboring State, or where a less prompt mode of proceeding might lead to the escape of a public offender. In these, however, and in all other cases where this extraordinary authority is exercised by an attorney general, the citizen affected by it is not without his guarantees. Besides, the intelligence, integrity, and independence which always must be presumed to accompany high public trust, the accused, unjustly aggrieved by such a procedure, has the official responsibility of the officer to look to. If an attorney general should employ oppressively this high power, given to him only to be used when positive emergencies or the special nature of the case requires its exercise, he may be impeached and removed from office for such an abuse. The court, too, whose process and power is so misapplied, should certainly vindicate itself by protecting the citizen. In practice, however, the law officer of the Commonwealth always exercises this power cautiously, — generally under the directions of the court, — and never unless convinced that the general public good demands it.

"The third and last of the extraordinary modes of criminal procedure known to our Penal Code is that which is originated by the presentment of a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the Commonwealth. Like an indictment, however, it must be the act of the whole jury, not less than twelve concurring on it. It is, in fact, as much a criminal accusation as an indictment, except that it emanates from their own knowledge, and not from the public accuser, and ex-

them in charge by the court, or are sent to them by the district attorney.[1]

cept that it wants technical form. It is regarded as instructions for an indictment. That a grand jury may adopt such a course of procedure, without a previous preliminary hearing of the accused, is not to be questioned by this court. And it is equally true, that in making such a presentment, the grand jury are entirely irresponsible, either to the public or to individuals aggrieved, — the law giving them the most absolute and unqualified indemnity for such an official act. Had the grand jury, on the present occasion, made a legal presentment of the parties named in their communication, the court would, without hesitation, have ordered bills of indictment against them, and would have furnished the grand jury with all the testimony oral and written, which the authority we are clothed with would have enabled us to obtain. While the power of presentment is conceded, we think no reflecting man would desire to see it extended a particle beyond the limit fixed to it by precedent and authority. It is a proceeding which denies the accused the benefit of a preliminary hearing; which prevents him from demanding the indorsement of the name of the prosecutor on the indictment before he pleads, — a right he possesses in every other case; and which takes away all his remedies for malicious prosecution, no matter how unfounded the accusation on final hearing may prove to be, — a system which certainly has in it nothing to recommend its extension."

Within these limits, it was held, the action of a grand jury was confined,

[1] McCullough *v.* Com. 67 Penn. St. R. 30; S. P., Com. *v.* Simons, 6 Phil. R. 167.

In McCullough *v.* Com. it was said by the chief justice: "It has never been thought that the 9th section of the 9th article of the Constitution, commonly called the Bill of Rights, prohibits all modes of originating a criminal charge against offenders except that by a prosecution before a committing magistrate. Had it been so thought, the court, the attorney general, and the grand jury, would have been stripped of power universally conceded to them. In that event the court could give no offence in charge to the grand jury, the attorney general could send up no bill, and the grand jury could make no presentment of their own knowledge, but all prosecutions would have to pass through the hands of inferior magistrates."

In Rowand *v.* Com. 82 Penn. St. 405, it was ruled that the district attorney, with the powers of the deputy attorney general conferred upon him by the Act of May 3, 1850 (P. L. 654), may prefer an indictment before the grand jury without a preliminary hearing or previous commitment of the accused, and this even after a return of *ignoramus* to a previous indictment of the accused for the same offence; but this power is to be exercised under the supervision of the proper court of criminal jurisdiction, and its employment can only be justified by some pressing and adequate necessity. It was further said, that where the exercise of such power by the district attorney has been approved by the Court of Quarter Sessions, it will not be reviewed by the Supreme Court. See infra, § 373. To the same effect see Brown *v.* Com. 76 Penn. St. 319; and compare People *v.* Horton, 4 Parker C. R. 222.

So it is held in Tennessee that a presentment, found not on the knowledge of any of the grand jury, but upon information

and in the particular case before the court, where a communication had been received from the grand jury, stating that charges had been made by one of their number, to the effect that one or more members of a public trust had been guilty of converting to their own use public money, and asking that witnesses should be furnished them, to enable them to examine the charge, the court held that such an investigation was incompatible with the limits of the common law. "Grand juries," it was said, "are high public functionaries, standing between accuser and accused. They are the great security to the citizens against vindictive prosecution, either by government or political partisans, or by private enemies. In their independent action the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice. These elevated functions do not comport with the position of receiving individual accusations from any source, not preferred before them by the responsible public authorities, and not resting in their own cognizance sufficient to authorize a presentment. Nor should courts give, unadvisedly, aid or countenance to any such innovations. For if we are bound to send for persons and papers, to sustain one charge by a grand juror before the body against one citizen, we are bound to do so upon every charge which every other grand juror, present and future, following the precedent now sanctioned, may think proper hereafter to prefer. It is true, that in the existing state of our social organization, but partial and occasional evils might flow from grand jurors receiving, entertaining, and acting on criminal charges against citizens, not given them by the public authorities, nor within their own cognizance. But we cannot rationally claim exemption from the agitations and excitements which have at some period of its history convulsed every nation. Those communities which have ranked among the wisest and the best have become, on occasions, subject to temporary political and other frenzies, too vehement to be resisted by the ordinary safeguards provided by law for the security of the innocent. Under such irregular influences, the right of every member of a body like the grand jury, taken immediately from the excited mass, to charge what crime he pleases in the secret conclave of the grand jury room, might produce the worst results. It is important, also, in the consideration of this question, to be borne in mind, that the body so to be clothed with these extraordinary functions is, perhaps, the only one of our public agents that is totally irresponsible for official acts. When the official existence of a grand jury terminates, they mingle again with the general mass of the citizens, intangible for any of their official acts, either by private action, public prosecution, or legislative impeachment. That the action of such a body should be kept within the powers clearly pertaining to it is a proposition self-evident, — particularly where a doubtful authority is claimed, the exercise of which has a direct tendency to deprive a citizen of any of the guarantees of his personal rights secured by the Constitution. Our system of criminal administration is not subject to the reproach, that there exists in it an

delivered to the jury by others, should be abated on a plea of the defendant.[1]

irresponsible body with unlimited jurisdiction. On the contrary, the duties of a grand jury, in direct criminal accusations, are confined to the investigation of matters given them in charge by the court, of those preferred before them by the attorney general, and of those which are sufficiently within their own knowledge and observation to authorize an official presentment. And they cannot, on the application of any one, originate proceedings against citizens, which is a duty imposed by law on other public agents. This limitation of authority we regard as alike fortunate for the citizen and the grand jury. It protects the citizen from the persecution and annoyance which private malice or personal animosity, introduced into the grand jury room, might subject him to. And it conserves the dignity of the grand jury, and the veneration with which they ought always to be regarded by the people, by making them umpire between the accuser and the accused, instead of assuming the office of the former.

"We have less difficulty in coming to these conclusions, from the consciousness that they have no tendency to give immunity to the parties named in the communication of the grand jury, if they have violated any public law. The charge preferred by the grand juror alluded to in the communication is clear and distinct. It is one over which every committing magistrate of the city and county of Philadelphia has jurisdiction. Any one of this numerous body may issue his warrant of arrest against the accused, his subpœna for the persons and papers named, and may compel their appearance and production. And if sufficient probable cause is shown that the accused have been guilty of the crimes charged against them, he may bail or commit them to answer to this court. The differences to the accused between this procedure and that proposed are, that before a primary magistrate the defendants have a responsible accuser, to whom they may look if their personal and official characters have been wantonly and maliciously and falsely assailed. They have the opportunity of hearing the witnesses face to face. They may be assisted by counsel, in cross-examining those witnesses, and sifting from them the whole truth. And not the least, they by this means know what crime is precisely charged against them; and when, where, and how it is said to have been perpetrated: rights which we admit and feel the value of, and of which we would most reluctantly deprive them, even if we had the legal authority to do so.

"On the whole, we are of opinion that we act most in accordance with the rights of the citizen, most in conformity with a wise and equal administration of the public law, by declining to give our aid to facilitate the extraordinary proceedings proposed against the parties named in the communication of the grand jury; and by referring any one, who desires to prosecute them for the offences charged, to the ordinary tribunals of the Commonwealth, which possesses all the jurisdiction necessary for that purpose, and can exercise it more in unison with the rights of the accused

[1] State *v.* Love, 4 Humph. 255. See also State *v.* Caine, 1 Hawks, 352. Infra, § 358, note.

To the same effect is an authoritative charge of Judge Field, of the Supreme Court of the United States, delivered to a California grand jury, in August, 1872: "Your oath requires you to diligently inquire, and true presentment make, 'of such articles, matters, and things *as shall be given you in charge, or otherwise come to your knowledge touching the present service.*' The first designation of subjects of inquiry are those which shall *be given you in charge;* this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall '*otherwise come to your*

than could be accomplished by the mode proposed in the communication of the grand jury."

To the same effect are the remarks of the Commissioners appointed in 1870 to revise the Criminal Code of New York: —

"It had its origin," they say (p. 116), "in England, at a time when the conflicts between the power of the government on the one hand, and the rights of the subject on the other, were fierce and unremitting; and it was wrung from the hands of the crown, as the only means by which the subject, appealing to the judgment of his peers, under the immunity of secrecy, and of irresponsibility for their acts, could be rendered secure against oppression. Happily, in our country, no illustration of its value in this respect has been furnished. But it was nevertheless introduced among us in the same spirit in which it took its rise in the mother country, and, as the very language of the Constitution shows, was designed to be a means of protection to the citizen against the dangers of a false accusation, or the still greater peril of a sacrifice to public clamor. That language is, that 'no person shall be held to answer for a capital or otherwise infamous crime (except in cases which are enumerated), unless on presentment or indictment of a grand jury.' Acting within this sphere, the institution of a grand jury may be regarded, not merely as a safeguard to private right, but as an indispensable auxiliary to public justice; and within these limits, it is the duty alike of the legislature and of the people to sustain it in the performance of its duties. But when it transcends them, — when it can be used for the gratification of private malignity, — or when, wrapping itself in the secrecy and immunity with which the law invests it, its high prerogatives are prostituted for purposes frowned upon by every principle of law and human justice, — it may become an instrument dangerous alike to public and to private liberty."

See also report of English Commissioners, given in the 7th edition of this work, § 458.

In New York a binding over is not necessary if the case is under examination. See People *v.* Hyler, 2 Parker C. R. 566; People *v.* Horton, 4 Parker C. R. 222.

A grand jury, it seems, may of their own knowledge indict a person committing perjury before them. State *v.* Terry, 30 Mo. 368.

knowledge touching the present service;' this means those matters within the sphere of and relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court or submitted to your consideration by the district attorney. But how come to your knowledge? Not by rumors and reports, but by knowledge acquired from the evidence before you, or from your own observations. Whilst you are inquiring as to one offence, another and a different offence may be proved, or witnesses before you may, in testifying, commit the crime of perjury. Some of you, also, may have personal knowledge of the commission of a public offence against the laws of the United States, or of facts which tend to show that such an offence has been committed, or possibly attempts may be made to influence corruptly or improperly your action as grand jurors. If you are personally possessed of such knowledge, you should disclose it to your associates; and if any attempts to influence your action corruptly or improperly are made, you should inform them of it also, and they will act upon the information thus communicated as if presented to them in the first instance by the district attorney. But unless knowledge is acquired in one of these ways, it cannot be considered as the basis for any action on your part. We, therefore, instruct you that your investigations are to be limited: *First.* To such matters as may be called to your attention by the court; or, *Second.* May be submitted to your consideration by the district attorney; or, *Third.* May come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, *Fourth.* May come to your knowledge from the disclosures of your associates. You will not allow private prosecutors to intrude themselves into your presence and present accusations. Generally such parties are actuated by private enmity, and seek merely the gratification of their personal malice. If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney, who will seldom fail to act in a proper case. But if the district attorney should refuse to act, they can make their complaint to a committing magistrate, before whom the matter can be investigated, and if sufficient evidence be produced of the commission of a public

offence by the accused, he can be held to bail to answer to the action of the grand jury."[1]

Perhaps with this position may be harmonized a case in New York, where it was held that a grand jury may find a bill against parties who are under arrest on a coroner's warrant, after the coroner's jury has returned an inquest implicating them, and before the examination by the coroner has been completed.[2]

Theory that grand jury are restricted to cases returned by magistrates and prosecuting officer.

§ 339. The third view is that the grand jury are in all instances limited in their action to cases in which there has been such a primary hearing as enables the defendant, before he is put on trial, to be confronted with the witnesses against him, and meet his prosecutor face to face.[3] If it should happen, under any contingencies of legislation, that grand juries should be selected by the dominant political party, so as to be used by that party for political ends, then it is important that they should be restricted in the way which this limitation prescribes. An executive should have power, it is true, to institute, at his discretion, prosecutions, even though these prosecutions are aimed at political antagonists. But he should act, when exercising this power, responsibly, taking upon himself the burden, and challenging impeachment or popular condemnation should he do wrong. In this check he will move cautiously, and with due regards to constitutional and legal sanctions. It is otherwise, however, when he is authorized to act through a grand jury selected by himself or his dependents, and ready to execute, in every respect, his will. Such a body, irresponsible, servile to the political party whose creature it is, armed with inquisitorial powers of summoning before it whomsoever it will, examining them in secret, giving whatever interpretation it may choose to their evidence, finding whatever

[1] Pamph. Rep. p. 9. See 2 Sawyer, 663-67; S. P., Lewis *v.* Commis. 74 N. C. 194.

[2] People *v.* Hyler, 2 Park. C. R. (N. Y.) 566. The prosecuting attorney, according to the usual practice, may on his official responsibility send a bill to a grand jury without a prior arrest or binding over. U. S. *v.* Fuers, 12 Int. Rev. Rec. 43.

[3] As advocating this view may be noticed a pamphlet entitled The History and Law of the Writ of Habeas Corpus, with an Essay on the Law of Grand Juries, by E. Ingersoll, of the Philadelphia Bar, 1849. 2 Hale's Pleas of the Crown, by Stokes & Ingersoll, 164.

bills it chooses and ignoring all others, may become a dangerous engine of despotism, calculated to disgrace the government which acts through it, and provoke to revolution those on whom it acts. Under a system in which the grand jury is appointed by the executive, it is better that its functions should be limited in the terms here prescribed; and that in all cases in which the executive desires to initiate a prosecution, it should be by information, or preliminary arrest before a magistrate. At common law, the right in a grand jury to institute prosecutions on its own motion is based on the assumption that it represents the people at large, and ceases to exist when it is not so constituted.[1]

Power of grand juries limited to court summoning them.

§ 340. Under the federal Constitution, Congress has invested the courts of the United States with criminal jurisdiction, and since this jurisdiction is chiefly exercised through the instrumentality of grand juries, the power of Congress to determine their functions results by necessary implication. As a rule, the powers of grand juries are coextensive with, and are limited by, the criminal jurisdiction of the courts of which they are an appendage.[2] Hence, too, a presentment by a grand jury in the Circuit Court of the United States, of an offence of which that court has no jurisdiction, is *coram non judice*, and is no legal foundation for any prosecution which can only be instituted on the presentment or the indictment of a grand jury, to be carried on in another court.[3]

[1] Except where proceedings originate *ex officio* from the attorney general, or where a grand juror possesses in his own breast sufficient knowledge of the commission of a crime to enable his fellows to find a bill exclusively on his evidence, cases, both in England and this country, are rare where an indictment is found without a preceding hearing and binding over to answer; and even where the bill is based on the evidence of a member of the grand jury, it has been held in one of the States that public safety required his name to be indorsed on the bill as prosecutor. State *v.* Caine, Hawks, 352.

In Tennessee, the grand jury cannot originate prosecutions except when by statute they have inquisitorial power. State *v.* Robinson, 2 Lea, 114.

In Michigan, there must be a preliminary binding over. O'Hara *v.* People, 41 Mich. 623; cf. Shepherd *v.* State, 64 Ind. 43.

[2] See Shepherd *v.* State, 64 Ind. 43.

[3] See U. S. *v.* Hill, 1 Brock. 156; U. S. *v.* Reed, 2 Blatch. 435; U. S. *v.* Tallman, 10 Blatch. 21.

II. CONSTITUTION OF GRAND JURIES.

§ 341. Though twenty-four are usually summoned on grand juries, not more than twenty-three can be empanelled, as, otherwise, a complete jury of twelve might find a bill, when, at the same time, a complete jury of twelve might dissent.[1] If of twenty-four, the finding is void.[2] And it appears that, at common law, a grand jury composed of any number from twelve to twenty-three is a legal grand jury.[3] If less than twelve the defect at common law is fatal.[4]

Number must be between twelve and twenty-three.

§ 342. After the jury is assembled, the first thing, if no challenges are made, or exceptions taken, is to select a foreman, which, in the United States courts, in New York, in Pennsylvania, and in most of the remaining States, is done by the court; in New England, by the jury themselves.[5]

Foreman usually appointed by court.

§ 343. The oath administered to the foreman is substantially the same in most of the States: "You, as foreman of this inquest, for the body of the county of ——, do swear (or affirm) that you will diligently inquire, and true presentment make, of such articles, matters, and things as shall be given you in charge; the commonwealth's (or state's) counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; neither shall you leave any one unpresented for fear, favor, affection, hope of reward, or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding (so help you God)." The rest of the grand jury, three at a time, are then sworn (or affirmed) as follows: "The same oath

Jurors to be duly sworn.

[1] Cro. Eliz. 654; 2 Hale, 121; 2 Hawk. c. 25, s. 16; Com. v. Wood, 2 Cush. 149; Hudson v. State, 1 Blackf. 317; Rev. Stat. N. Y. p. iv. c. 4, § 26. See Ridling v. State, 56 Ga. 601. As to statutes limiting number see U. S. v. Reynolds, 1 Utah, 319; 98 U. S. 145.

[2] R. v. Marsh, 6 Ad. & El. 236; People v. Thurston, 5 Cal. 69.

[3] State v. Symonds, 36 Me. 128; State v. Davis, 2 Iredell, 153; Pybos v. State, 3 Humph. 49; Dowling v. State, 5 Sm. & M. 664; Norris v. State, 3 Greene (Iowa), 513. In Missouri twelve jurors suffice. State v. Green, 66 Mo. 631. In other States special limitations exist. See State v. Swift, 14 La. An. 827.

[4] Clyncard's case, Cro. Eliz. 654; State v. Symonds, 36 Me. 128; Com. v. Sayres, 8 Leigh, 722; State v. Davis, 2 Ired. 153; Barney v. State, 12 Sm. & M. 68; People v. Butler, 8 Cal. 435.

[5] Smith's Laws of Pa. vol. vii. p. 685; Rev. St. N. Y. part iv. c. 2, tit. 4, § 26; Davis's Prec. p. 9.

(or affirmation) which your foreman hath taken, on his part, you and every of you shall well and truly observe, on your part (so help you God)."[1] In Pennsylvania, after the words, "shall be given you in charge," in the foreman's oath occur the words, "or otherwise come to your knowledge, touching the present service." In Virginia the same expression is introduced; but the subsequent clause, enjoining secrecy, is omitted.[2] In Massachusetts the jury are sworn in a body, the foreman being afterwards elected, but the oath is the same as the above.[3]

III. DISQUALIFICATION OF GRAND JURORS, AND HOW IT MAY BE EXCEPTED TO.

Irregularities in empanelling, to be met by challenge to array.

§ 344. Irregularities in selecting and empanelling the grand jury, which do not relate to the competency of individual jurors, may usually be objected to by challenge to the array,[4] or by motion to quash. This must of course be before the general issue.[5]

[1] See Cr. Cir. Com. p. 11, 6th ed.

[2] Tate's Dig. tit. Juries. In the Crimes Act of 1866 the oath is given in full. Pamph. L. 926.

[3] Rev. Stat. Mass. c. 136, § 5.

Where, on the first day of the term of a circuit superior court, a grand jury was empanelled and sworn, and proceeded in discharge of its duties, but next day it was discovered that one of the grand jurors wanted legal qualification, upon which the court discharged him and ordered another to be sworn in his place, it was held that this was regular, and the grand jury was duly constituted. Com. *v.* Burton, 4 Leigh, 645. See Jetton *v.* State, 1 Meigs, 192.

[4] Jewett's case, 3 Wend. 314; U. S. *v.* Blodgett, 35 Ga. 336; James *v.* State, 45 Miss. 572; Chase *v.* State, 46 Miss. 683; Boles *v.* State, 24 Miss. 445; Logan *v.* State, 50 Miss. 269; Barney *v.* State, 12 S. & M. 68; State *v.* Duncan, 7 Yerg. 271; Vanhook *v.* State, 12 Tex. 252; Reed *v.* State, 1 Tex. Ap. 1; State *v.* Jacobs, 6 Tex. 99; People *v.* Earnest, 45 Cal. 29; U. S. *v.* Tallman, 10 Blatch. 21.

It has been held not to be a good cause of challenge to the array, that the officers whose duty it was to make the original selection were two or three weeks at the work; nor, that one of them was temporarily absent; nor, that they employed a clerk to write the names selected, and put them in the wheels. Com. *v.* Lippard, 6 S. & R. 395.

But strong personal bias on the part of the persons employed in drawing the jury may be a cause for challenge of the array. State *v.* McQuaige, 5 S. C. 429.

[5] Infra, § 350; Brown *v.* Com. 73 Penn. St. 34; State *v.* Easter, 30 Oh. St. 542; Barrows *v.* People, 73 Ill. 256; State *v.* Borroum, 25 Miss. 203; James *v.* State, 45 Miss. 572; State *v.* Whitton, 68 Mo. 91; State *v.* Greenwood, 23 Minn. 104; Dixon *v.* State, 29 Ark. 165; People *v.* Southwell, 46 Cal. 141.

In North Carolina plea is said to

Disqualified juror may be challenged.

§ 345. When a person who is disqualified is returned it is a good cause of challenge, which may be made by any person who is concerned in the business to come before the grand jury.[1] Although it is said an *amicus curiae* may be sometimes allowed to intervene,[2] yet generally the right is limited to those who are at the time under a prosecution for an offence about to be submitted to the consideration of the grand jury or against whom a prosecution is threatened.[3]

Preadjudication ground for challenge.

§ 346. It is therefore a good cause of exception to a grand juror, that he has formed and expressed an opinion as to the guilt of a party whose case will probably be presented to the consideration of the grand inquest.[4] As will presently be seen, the objection must ordinarily be found before indictment found.[5]

So of conscientious scruples.

§ 347. A conscientious inability to find a bill for a capital offence is a good ground for challenge.[6]

be the proper mode of exception. State *v.* Heywood, 73 N. C. 437. For N. Y. practice as to plea in abatement see Dolan *v.* People, 64 N. Y. 485; People *v.* Tweed, 50 How. Pr. 262, 273, 280, 286. A challenge to the array is in New York not permitted. Carpenter *v.* People, 64 N. Y. 483.

[1] 2 Hawk. c. 25, s. 16; Bac. Ab. Juries, A.; Burn, J., 29th ed. Jurors, A; Mershom *v.* State, 51 Ind. 14. As to time of challenge see People *v.* Geiger, 49 Cal. 643. As to plea see infra, § 419.

[2] Com. *v.* Smith, 9 Mass. 107.

[3] People *v.* Horton, 4 Park. C. R. 222; Hudson *v.* State, 1 Blackf. 318; Ross *v.* State, 1 Blackf. 390; Thayer *v.* People, 2 Dougl. (Mich.) 418; State *v.* Herndon, 5 Blackf. 75; U. S. *v.* Blodgett, 35 Ga. 336; State *v.* Corson, 12 Mo. 404; but see *contra*, Tucker's case, 8 Mass. 286; State *v.* Clarissa, 11 Ala. 57; State *v.* Hughes, 1 Ala. 655.

[4] People *v.* Jewett, 3 Wend. 314; U. S. *v.* White, 5 Cranch C. C. R. 457; Com. *v.* Clark, 2 Browne, 325; State *v.* Gillick, 7 Iowa, 287; State *v.* Quimby, 51 Me. 395; People *v.* Manahan, 32 Cal. 68; but see Musick *v.* People, 40 Ill. 268; State *v.* Clarissa, 11 Ala. 57.

[5] In Pennsylvania, before Tilghman, C. J., and Brackenridge, J., in 1814, the defendants, who were confined in jail on a charge of homicide, were allowed to challenge a grand juror for favor, after the grand jury were sworn. Com. *v.* Clarke, 2 Browne, 325.

[6] State *v.* Rockafellow, 1 Halst. 332; State *v.* Ricey, 5 Halst. 83; Gross *v.* State, 2 Carter (Ind.), 329; Jones *v.* State, 2 Blackf. 477; State *v.* Duncan, 7 Yerg. 271. Infra, § 664.

A challenge to the array, however, will not be allowed on the ground that in the selection of the grand jurors all persons belonging to a particular fraternity were excluded, if those who are returned are unexceptionable, and possess the statutory qualifications.

§ 348. In Massachusetts it was held, in an early case, that the court will not set aside a grand juror because he has originated a prosecution against a person for a crime, whose case was to come under the consideration of the grand jury.[1] In Vermont, a still more extreme doctrine has been maintained, it being held that the court has no power to order a grand juror to withdraw from the panel in any particular case, although it were one of a complaint against himself.[2] But these decisions cannot be reconciled with the general tenor of authority, nor with the analogies of the English common law. It is a serious discredit as well as peril to a man to have a bill found against him; and if this is likely to be done corruptly, or through interested parties, he has a right to apply to arrest the evil at the earliest moment. Besides, it is far less productive of injury to public justice for a jury to be purged, at the outset, of an incompetent member, than for the indictment, after the grand jury adjourns, to be set aside on account of such incompetency.[3]

Personal interest a disqualification.

§ 349. It is no ground for challenge to a grand juror that he belongs to an association whose object it is to detect crime.[4]

"Vigilance" membership no ground.

§ 350. Much difference of opinion has existed on the question whether, after bill found, the defendant can take advantage of the personal incompetency of any of the grand jury who found it. In Massachusetts it was said, generally, that objections to the personal qualifications of a grand juror, or to the legality of the returns, cannot affect any indictments found by them, after they have been received by the court and filed;[5] and, though the doctrine was doubted in a subsequent case, it cannot be said to have been

Objections to juror must be made before general issue pleaded.

People *v.* Jewett, 3 Wend. 314, *sed quaere*. See Com. *v.* Lippard, 6 S. & R. 395.

[1] Com. *v.* Tucker, 8 Mass. 286. See U. S. *v.* Williams, 1 Dillon, 485.

[2] Baldwin's case, 2 Tyler, 473.

[3] In New York, by the Revised Statutes, a person held to answer to any criminal charge may object to the competency of a grand juror, *before he is sworn*, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, subpœnaed or recognized as such; and if such objection is established, the juror is to be set aside. But no challenge to the array, or to any person summoned on it, shall be allowed in any other cases. 2 R. S. 724, §§ 27, 28.

[4] Musick *v.* People, 40 Ill. 268. See infra, § 660.

[5] Com. *v.* Smith, 9 Mass. 107.

overruled.[1] The New York practice at common law was, as has been stated, substantially the same.[2] In New Jersey, it is said that it is not a good plea in abatement, that a member or members of the grand jury were interested in the conviction of the defendant, and had prejudged his case.[3] In Pennsylvania, it has been held no cause for quashing an indictment for burglary that ten of the grand jurors were stockholders of the bank on which the burglary had been committed.[4] In Alabama, it was said, originally, that after an indictment has been found against the prisoner, and the same has been filed and accepted in court, he cannot except to the personal qualifications of the persons selected and sworn on the grand jury, or plead in bar or avoidance of the indictment, that one of the jurors who preferred it is an alien;[5] but the point appears, afterwards, to have been determined otherwise; and it was then held that a plea in abatement in such case was the proper mode of objection.[6] The mere fact that a prosecutor was a member of a grand jury is not, it has been held in the United States Circuit Court in Minnesota, ground for a plea in abatement.[7] In Virginia, at an early period, it was ruled that where a bill of indictment is found by a grand jury, one of whom is an alien, or otherwise disqualified by law, the bill or presentment may be avoided by plea.[8] So where, in a prosecution for a misdemeanor at the instance of a voluntary prosecutor, the defendant filed a plea in abatement that one of the grand jurors who found the indictment was not a freeholder, and the issue made upon that plea was found for the defendant, and the indictment quashed, it was held the court should give judgment for the costs against the prosecutor.[9] In Ohio an indictment found by a grand jury composed of less than fifteen

[1] Com. *v.* Parker, 2 Pick. 563.

[2] People *v.* Jewett, 3 Wend. 314.

[3] State *v.* Rickey, 5 Halst. (N. J.) R. 83.

[4] Rolland *v.* Com. 82 Penn. St. 306. Pleading in Pennsylvania, or even standing mute so that a plea of not guilty is entered, is by statute a waiver of all errors and defects involved in precept, venire, drawing, summoning, and returning of jurors. Dyott *v.* Com. 5 Whart. 67; Brown *v.* Com. 76 Penn. St. 319. See Com. *v.* Chauncey, 2 Ashm. 90.

[5] Boyington *v.* State, 2 Port. 100.

[6] State *v.* Middleton, 5 Port. 484; State *v.* Ligon, 7 Port. 167; State *v.* Clarissa, 11 Ala. 57; and see Musick *v.* People, 40 Ill. 268.

[7] U. S. *v.* Williams, 1 Dillon, 485.

[8] Com. *v.* Cherry, 2 Va. Cas. 20. See Reich *v.* State, 53 Ga. 73.

[9] Com. *v.* St. Clair, 1 Grat. 556.

persons, having the qualifications required by the statute, is not sufficient to put the accused on trial, and a plea to the indictment, that one of the grand jurors had not the requisite statutory qualifications, is a good plea in bar;[1] but in this State it is now settled that a plea to the incompetency of a grand juror is bad.[2] In several States, it has been determined that the disqualifications of one of the grand jurors finding an indictment may be taken advantage of by motion to quash or plea in abatement, but that this must be before the general issue is pleaded.[3]

Ordinarily after the general issue has been pleaded objections are too late; and when the objection goes to the manner of drawing, it should be taken by challenge to the array.[4] Such is undoubtedly the English rule, as well as that existing in most parts of the United States.[5] But on principle, in those cases in which the defendant is surprised, and had no opportunity to take exception until after the finding of the bill, he should be allowed to take advantage of any irregularity by plea.[6]

[1] Doyle *v.* State, 17 Ohio, 222.

[2] State *v.* Easter, 30 Oh. St. 542.

[3] State *v.* Burlinghame, 15 Me. 104; State *v.* Symonds, 36 Me. 128; State *v.* Carver, 49 Me. 588; State *v.* Wright, 53 Me. 328; State *v.* Rand, 33 N. H. 216; State *v.* Newfane, 12 Vt. 422; State *v.* Maloney, S. C. R. I. 1879; People *v.* Griffin, 2 Barb. 427; People *v.* Harriot, 3 Park. C. R. 112; State *v.* Norton, 3 Zab. 33; Com. *v.* Chauncey, 2 Ash. 90; Com. *v.* Williams, 5 Grat. 702; State *v.* Martin, 2 Ired. 101; State *v.* Duncan, 6 Ired. 98; State *v.* Griffin, 74 N. C. 316; State *v.* Duncan, 7 Yerg. 271; State *v.* Bryant, 10 Yerg. 527; Terrill *v.* State, 9 Ga. 58; Thompson *v.* State, 9 Ga. 210; Reich *v.* State, 53 Ga. 73; State *v.* Brooke, 9 Ala. 10; State *v.* Clarissa, 11 Ala. 57; Barney *v.* State, 12 S. & M. 68; Boles *v.* State, 24 Miss. 445; McQuillan *v.* State, 8 S. & M. 587; Rawls *v.* State, Ibid. 599; State *v.* Borroum, 25 Miss. 728; Vanhook *v.* State, 12 Tex. 252; Jackson *v.* State, 11 Tex. 261; Gladden *v.* State, 12 Fla. 562; Wilburn *v.* State, 21 Ark. 198. See Battle *v.* State, 54 Ala. 93; State *v.* Mahan, 12 Tex. 283. As to New York see Dolan *v.* People, 64 N. Y. 485, and cases cited supra, 344. Whart. Prec. § 1158.

[4] Ibid. Supra, § 344.

[5] 2 Hale, 155; 3 Inst. 34; Cro. Car. 134, 147; 2 Hawk. c. 25, ss. 18, 26, 29, 30; Bac. Ab. Juries, A.; 1 Ch. C. L. 309; State *v.* Carver, 49 Me. 588; People *v.* Griffin, 2 Barb. 427; Rolland *v.* Com. 82 Penn. St. 306; State *v.* Martin, 2 Ired. 101; State *v.* Ward, 2 Hawks, 443; State *v.* Lamon, 3 Hawks, 175; State *v.* Seaborn, 4 Dev. 305; People *v.* Hidden, 32 Cal. 445. See for form Whar. Prec. 1158. In Indiana such is, by statute, no longer the law. Ward *v.* State, 48 Ind. 289; overruling State *v.* Herndon, 5 Blackf. 75; Vattier *v.* State, 4 Blackf. 72. As to practice under such plea see Bird *v.* State, 53 Ga. 602.

[6] See, however, U. S. *v.* White, 5 Cranch C. C. 457; U. S. *v.* Talman, 10 Blatch. 21; State *v.* Quimby,

§ 351. It is necessary that the plea, in such case, should set forth sufficient to enable the court to give judgment on it on demurrer.[1] Thus where, upon a presentment by a grand jury for gaming, the defendant tendered a plea in abatement, that one of the grand jurors nominated himself to the sheriff to be put on the panel, who summoned him to serve, without alleging that this nomination of himself by the grand juror was corrupt, or that there was a false conspiracy between him and the sheriff for returning him on the panel; it was held that the plea was bad.[2]

Plea should be special.

§ 352. It is not necessary, at common law, that any part of a grand jury finding a bill against an alien should be aliens.[3] Such, it has been determined, is also the rule in Pennsylvania.[4] The doctrine, that all the grand jurors should be inhabitants of the county for which they are sworn to inquire, admits, it would seem, of no modification.[5]

Aliens not necessary in prosecutions against aliens.

§ 353. As we have already seen, objections to the grand jury, when such objections are not of record, must be taken before trial of the general issue; and in some States even record defects are cured by verdict.[6] It is otherwise, at common law, as to objections of record. Here, if there be no statutory impediment, a motion in arrest may be entertained.[7]

As to record objections there may be arrest of judgment.

Where the error is of record, its existence must be determined by inspection.[8]

51 Me. 595; People *v.* Jewett, 3 Wend. 314; State *v.* Gillick, 7 Iowa, 287.

[1] Ward *v.* State, 48 Ind. 289.

[2] Com. *v.* Thompson, 4 Leigh, 667.

A plea in abatement, that the grand jurors who found the indictment were selected by the board of commissioners on the 6th of May, 1841, and that they had no authority to make the selection on that day, is bad, for not showing that the said 6th of May was not included in the May session of the board in that year. State *v.* Newer, 7 Blackf. 307.

[3] Hawk. b. 2, c. 43, § 36.

[4] Res. *v.* Mesca, 1 Dall. 73.

[5] Roll. Abr. 82; 2 Inst. 32, 33, 34; Hawk. b. 2, c. 25.

[6] Supra, §§ 345, 350; infra, § 766.

[7] State *v.* Harden, 2 Richards. 533. See Floyd *v.* State, 30 Ala. 511; State *v.* Connell, 49 Mo. 282; State *v.* Vahl, 20 Tex. 779. Infra, § 766.

[8] Smith *v.* State, 28 Miss. 728.

IV. INDICTMENT MUST BE SANCTIONED BY THE PROSECUTING ATTORNEY.

Ordinarily bill must be signed by prosecuting officer.

§ 354. It is essential to the validity of an indictment that it should be submitted to the grand jury by the prosecuting officer of the State;[1] and it is even said that his signature is necessary before such submission,[2] though the point has been doubted;[3] and in several jurisdictions it has been expressly decided that an indictment need not be so signed.[4]

Name may be signed after finding.

§ 355. Even where the signature is necessary, the district attorney will be allowed to sign an indictment found without his signature being appended thereto, and a motion to quash for want of such signature will then be overruled.[5]

Prosecuting officer's sanction necessary.

§ 356. The proceedings in bringing an indictment before the court must be conducted by the prosecuting attorney in person, even where the trial before court and jury may be conducted by other counsel.[6] The indictment being signed and preferred by the attorney general, it

[1] McCullough *v.* Com. 67 Penn. St. 30; Com. *v.* Simons, 6 Phil. R. 167; Foote *v.* State, 3 Hayw. 98; Hite *v.* State, 9 Yerg. 198.

[2] Ibid.; Teas *v.* State, 7 Humph. 174. A signature of the first name by the initial letter is enough. Vanderkarr *v.* State, 51 Ind. 91. Supra, § 338; infra, §§ 554 *et seq.*

[3] State *v.* Vincent, 1 Car. Law R. 493.

[4] State *v.* Reed, 67 Me. 127; State *v.* Coleman, 8 S. C. 237; Thomas *v.* State, 6 Miss. 20; Keithler *v.* State, 10 S. & M. 192; Ward *v.* State, 22 Ala. 16; Harrall *v.* State, 26 Ala. 53; Anderson *v.* State, 5 Pike, 444; *contra*, Jackson *v.* State, 4 Kans. 150. See U. S. *v.* McAvoy, 4 Blatch. 418. In Indiana it would seem now necessary that the bill should come to court signed by the prosecuting attorney. Heacock *v.* State, 42 Ind. 393; though see McGregg *v.* State, 4 Blackf. 101. As to variance in title see State *v.* Tannahill, 4 Kans. 117.

In Tennessee, an indictment signed "Nathaniel Baxter, Attorney General," was held to be sufficiently signed, without adding the name of the district of which he was attorney general. State *v.* Brown, 8 Humph. 89; State *v.* Evans, 8 Humph. 110; and see People *v.* Ashnauer, 47 Cal. 98. But an indictment signed by a person styling himself solicitor general is invalid, there being no such officer known in that State. Teas *v.* State, 7 Humph. 174. See State *v.* Salge, 2 Nev. 321. It has been held to be not a valid objection to an indictment that it is signed by one as district attorney *pro tem.*, rather than by the district attorney. Reynolds *v.* State, 11 Tex. 120. See State *v.* Gonzales, 26 Tex. 197; State *v.* Nulf, 15 Kans. 404.

[5] Com. *v.* Lenox, 2 Brewst. 249.

[6] Infra, §§ 554 *et seq.*; Rush *v.* Cav-

will be presumed, in the absence of anything to the contrary, that an attorney general *pro tem.*, who conducted the trial, was properly appointed.[1]

V. SUMMONING OF WITNESSES, AND INDORSEMENT OF THEIR NAMES ON BILL.

Witnesses for prosecution to be bound to appear.

§ 357. In every case where there has been a previous examination and binding over, which, as has been seen, is the regular, and, with a few guarded exceptions, the sole way of putting an offender on his trial, the prosecutor, if there be any, and the witnesses, are ordinarily put under recognizance to appear and testify. The practice is, immediately at the opening of the court, to call their names; and, in case of non-appearance, to secure their attendance by process. At common law, a justice of the peace, at the hearing of a criminal case, has power to bind over the witnesses, as well as the defendant, to appear at the next court, and in default of bail to commit them.[2] The presence of witnesses not under recognizance to attend is obtained by the ordinary means of a subpœna.[3]

Names of witnesses usually placed on bill.

§ 358. The practice is, for the prosecuting attorney, or, in England, the clerk of the assizes, to mark on the back of each bill the witnesses belonging to it; though it has been held that the omission is not fatal.[4] Nor, even when required by statute, is the prosecution after-

anaugh, 2 Barr, 187; Byrd *v.* State, 1 How. Miss. 247; Jarnagin *v.* State, 10 Yerg. 529. See Bemis's Webster case, where this practice is reported to have been sustained.

The attorney general may properly assist the circuit attorney at a trial for murder, whether ordered by the governor to do so or not, and the prisoner cannot take just exception. State *v.* Hays, 23 Mo. (2 Jones) 287.

[1] Isham *v.* State, 1 Sneed, 112. (A capital case.) See infra, § 554.

In Pennsylvania, by the first section of the Act of May 3, 1850, providing for the election of district attorney, it is provided that the officer so elected shall sign all bills of indictment, and conduct in court all criminal or other prosecutions in the name of the Commonwealth, or when the State is a party, which arise in the county for which he is elected. Pamph. 1850, 654; Com. *v.* Lenox, 3 Brewst. 249.

[2] 2 Hale P. C. 52, 282; 3 M. & S. 1. For cases see Whart. Crim. Ev. § 352.

[3] See Whart. Crim. Ev. § 345.

[4] 4 M. & S. 9; U. S. *v.* Shepard, 12 Int. Rev. Rec. 10; People *v.* Naughton, 7 Abbott (N. Y.) Pr. N. S. 421; 38 How. Pr. 430; State *v.* Scott, 25 Ark. 107.

In Iowa, witnesses testifying to immaterial facts need not be indorsed. State *v.* Little, 42 Iowa, 51; and see State *v.* Flynn, 42 Iowa, 164.

In Massachusetts, such does not ap-

wards precluded, in cases of surprise, from calling non-indorsed witnesses.[1]

pear to be the course, it being usual for the grand jury to return generally the names of all the witnesses examined by them, without specifying the bills; but in a leading case, where the prisoner's counsel requested that a list of the witnesses before the grand jury should be given, the court granted the application without doubt, it being remarked by Wilde, J., that such a request had never been refused. Com. *v.* Knapp, 9 Pick. 498.

In Pennsylvania, the Act of 1705 provides that no person or persons shall be obliged to answer to any indictment or presentment, unless the prosecutor's name be indorsed thereupon; 1 Smith's Laws, 56; though it has been held by the Supreme Court that the act does not go so far as to require that a prosecutor should be indorsed in cases where no prosecutor exists. R. *v.* Lukens, 1 Dallas, 5.

Undoubtedly the spirit of the common law requires that the bill itself should afford the defendant the means of knowing who are the witnesses on whose evidence the accusation against him is based. Arch. C. P. by Jervis, 13; Barbour's Cr. Treatise, 272. If the grand jury act irregularly in introducing witnesses without the action of the attorney general, the proper course is to move to quash. The irregularity cannot be pleaded in bar. Jillard *v.* Com. 26 Penn. St. 169.

It is further provided in Pennsylvania by the Revised Act of 1860, that "No person shall be required to answer to any indictment for any offence whatsoever, unless the prosecutor's name, if any there be, is indorsed thereon, and if no person shall avow himself the prosecutor, the court may hear witnesses, and determine whether there is such a private prosecutor, and if they shall be of opinion that there is such a prosecutor, then direct his name to be indorsed on such indictment." § 27, Bright. Supp. 1376.

A similar provision exists in Virginia. Com. *v.* Dever, 10 Leigh, 685.

In Ohio, it is provided that no bill of indictment for any offence specified in the act entitled "An Act for the Punishment of Crimes," passed March 8, 1831, shall be found a true bill by any grand jury, unless the name of the prosecutor be indorsed thereon, except such bill be found upon testimony sworn and sent to the grand jury by order of the court, at the request of the prosecuting attorney, or the foreman of the grand jury; in which cases the fact that the bill was found upon testimony sworn and sent to the grand jury by order of the court shall be indorsed on the bill, instead of the name of the prosecutor. Act of April 11, 1857, § 6.

The same act provides, that in all cases where the prosecutor's name is indorsed on the bill, and the same is found a true bill by the grand jury, and upon trial the defendant is acquitted, the prosecutor shall be liable for costs; and the court, at the term at which such acquittal shall take place, or at any subsequent term, shall render judgment against such prosecutor for such costs, unless the court shall be of opinion that there were reasonable grounds for instituting the prosecution. Act of April 11, 1857, § 7.

[1] Hill *v.* People, 26 Mich. 496. As will be hereafter seen, the prosecution is not required to call all the witnesses so indorsed, though they should be produced in court. Infra, § 565.

As a rule, it may be said that whenever by statute such an indorsement is required, its omission can be taken advantage of by motion to quash, demurrer, or plea in abatement if not by motion in arrest.[1]

In Illinois, under the statute, it is enough if the names are entered after that of the prosecuting attorney. Scott *v.* People, 63 Ill. 508.

In Mississippi, though the want of the name of the prosecutor indorsed on the back of the bill is fatal (Peter *v.* State, 3 How. Miss. 433), it is not necessary that the grand jury should return, with the indictment, the names of the witnesses examined, or the evidence. King *v.* State, 5 How. Miss. 730.

In Missouri, the name of the prosecutor is required to be indorsed upon an indictment for any trespass not amounting to a felony (Rev. Code, 1835, § 451), and under this statute the prosecutor's name must be indorsed upon an indictment for petty larceny (State *v.* Hurt, 7 Mo. 321), or riot (State *v.* McCourtney, 6 Mo. 649; McWaters *v.* State, 10 Mo. 167); but it need not be indorsed upon an indictment against a slave for arson (Lucy *v.* State, 8 Mo. 134), nor on an indictment for a disturbance by making loud noises (State *v.* Moles, 9 Mo. 685); and it is a sufficient indorsement if the prosecutor's name be written on the face of the bill. Williams *v.* State, 9 Mo. 270.

In Tennessee, the name of the prosecutor must, by statute, be marked on the back of the bill, and an omission to do so need not be pleaded in abatement, but may be taken advantage of at any time. Medaris *v.* State, 10 Yerg. 239. But if the indictment be founded on a presentment, the name of the prosecutor need not be indorsed on the bill. State *v.* McCann, 1 Meigs, 91.

In Iowa, it is said that although the names of the witnesses should be indorsed on the indictment, they need not be made a part of the record. Harriman *v.* State, 2 Greene, 1270.

In Arkansas, the name of the prosecutor need not be indorsed on a bill for passing counterfeit coin, that offence not being a trespass upon the person or property of another less than felony. Gabe *v.* State, 1 Eng. 519.

It is not the practice, it is said, in the courts of the United States, that the name of the prosecutor should be written on the indictment (U. S. *v.* Mundel, 6 Call, 245; see U. S. *v.* Flanakin, Hemp. 30; State *v.* Lupton, 63 N. C. 483), though this depends on the local practice.

In Virginia, the usual practice is to indorse the names. Haught *v.* Com. 2 Va. Cases, 3; Com. *v.* Dove, Ibid. 29. It is not there essential, however, in an indictment for a trespass or misdemeanor, to insert the name of a prosecutor, if it appears that the indictment was found on the evidence of a witness sent to the grand jury, either at their request, or by direction of the court; and that whether there was a previous presentment or not. Wortham *v.* Com. 5 Randolph, 669.

In Kentucky, it is held that the omission of the name of the prosecutor, his addition, and residence, in cases of trespass, is fatal. Com. *v.* Gore, 3 Dana, 474; Bartlett *v.* Humphreys, Hardin, 513.

[1] King *v.* State, 5 How. Miss. 730; Moore *v.* State, 13 Sm. & M. 259; State *v.* Courtney, 6 Mo. 649; McWaters *v.* State, 10 Mo. 167; State *v.*

VI. EVIDENCE.

§ 358 *a*. By the old practice, witnesses to be sent to the grand jury must be previously sworn in open court.[1] If a witness who is sent to a grand jury be thus sworn, though not in the immediate presence of the judge, or even in his temporary absence from the bench, it is good.[2] In Connecticut, witnesses before a grand jury, according to settled and uniform practice, are sworn by a magistrate, in the grand jury room, and not in the court; and this is pronounced a lawful mode of administering the oath.[3] In the United States Circuit Courts, the practice has been to summon a justice of the peace as one of the grand jury, and permit him to swear the witnesses in the jury room.[4] In many of the States power is given to the foreman to swear witnesses whose names are given to him by the prosecuting officer.[5]

Witnesses must be duly sworn.

§ 359. In England, it has been held that a *conviction* will not be shaken, although the bill was found on illegal testimony, if on the trial the evidence against the prisoner is sufficient; and in a case where it appeared the witnesses before the grand jury had not been sworn at all, the twelve judges held that the objection, as raised in arrest of judgment, should be overruled,[6] but at the same time unani-

Defects in this respect may be met by plea.

Joiner, 19 Mo. 224; Com. *v.* Gore, 3 Dana, 474; Medaris *v.* State, 10 Yerg. 239; Towle *v.* State, 3 Fla. 262, and cases cited above. See *contra*, State *v.* Hughes, 1 Ala. 655.

In Pennsylvania, as has been seen, the objection cannot be taken after verdict. Jillard *v.* Com. *ut supra;* S. P., Hayden *v.* Com. 10 B. Monroe, 125.

[1] So in South Carolina. State *v.* Kilcrease, 6 Rich. 444. In England, the omission is fatal. Middlesex Commis. 6 C. & P. 90; Harriman *v.* State, 2 Greene (Iowa), 270.

[2] Jetton *v.* State, 1 Meigs, 192.

[3] State *v.* Fassett, 16 Conn. R. 457.

[4] 7 Smith's Laws, 686.

[5] See Bird *v.* State,, 50 Ga. 585; Allen *v.* State, 77 Ill. 484.

In Pennsylvania, by the Act of April 5, 1826, as incorporated in the revised Act of 1860, the foreman of the grand jury, or *any member* thereof, is authorized to administer the oath to witnesses. It will be observed, however, that in the latter State the authority is expressly limited to such witnesses "*whose names are marked by the attorney general on the bill of indictment;*" and, consequently, all others must be sworn in open court. See Jillard *v.* Com. 26 Penn. St. 169. See *contra*, Ayrs *v.* State, 5 Cold. (Tenn.) 26.

[6] R. *v.* Dickinson, R. & R. Crown Cases, 401.

mously made application for a pardon, recognizing, in fact, the irregularity of the finding, though regarding the plea as a waiver of the technical error. In this country it has been several times determined that a motion in arrest of judgment cannot be sustained on the ground that it does not appear from the indorsement on the indictment that the witnesses were sworn before they were sent to the grand jury; for the judgment can be arrested only for matter appearing, or for the omission of some matter which ought to appear on the record, and such indorsements form no part of the bill.[1] But where the objection is taken before plea, on a motion to quash, it has in England been sustained.[2] It is true that the English practice has varied, and that afterwards it was declared that it would be improper for a court to inquire whether the witnesses were regularly sworn, as the grand jury, supposing such may not have been the case, were competent to have found the bill on their own knowledge;[3] but this limitation has not been recognized in this country, and in England it has not been always applied.[4] Thus, where an irregularity was shown in the swearing, Story, J., exclaimed with great emphasis, that if such irregularities were allowed to creep into the practice of grand juries, the great object of their institution was destroyed.[5] Where a defendant was called before a grand jury, and required to testify on a prosecution against himself, the indictment found on such testimony was properly quashed.[6] And in a case in North Carolina, the law was pushed still further, it being held that where a bill was found on the information of one of their own body, it was essential that the prosecuting juror should be regularly sworn, and so noted.[7]

Evidence confined to the prosecution.

§ 360. The question before the grand jury being whether a bill is to be found, the general rule is that they should hear no other evidence but that adduced by the prosecution.[8] But it has been doubted whether, as they

[1] State v. Roberts, 2 Dev. & Bat. 540; State v. McEntire, Car. L. R. 287; King v. State, 5 How. Miss. R. 730; Gilman v. State, 1 Humph. 59. See Jillard v. Com. 26 Penn. St. 169.

[2] 6 C. & P. 90.

[3] R. v. Russell, 1 C. & M. 247; State v. Hatfield, 3 Head, 231.

[4] R. v. Dickinson, R. & R. 401. See 6 C. & P. 90.

[5] U. S. v. Coolidge, 2 Gall. 364. Infra, § 363.

[6] State v. Froiseth, 16 Minn. 296. Infra, § 363.

[7] State v. Cain, 1 Hawks, 352.

[8] 2 Hawk. c. 25, s. 145; 2 Hale,

are sworn to "inquire," they may not, if the case of the prosecution appear imperfect, call for such witnesses as the evidence they have already heard indicates as necessary to make out the charge.[1] Under such a suggestion, it would become the duty of the prosecuting officer to cause the requisite witnesses to be summoned; and it is his duty in any view to bring before the grand jury all competent witnesses to the *res gestae*.[2] But it is not the usage to introduce, in matters of confession and avoidance, witnesses for the defence, unless their testimony becomes incidentally necessary to the prosecution.[3]

Probable cause enough.

§ 361. The question was in former times much considered whether the sole inquiry of a grand juror should not be whether sufficient ground has been adduced by the prosecution to require a defendant to account for himself on a public trial. On the one hand, it has been laid down by high authority that the inquest, as far as in them lies, should be

257; 4 Bla. Com. 303; U. S. *v.* Palmer, 2 Cranch C. C. R. 11; U. S. *v.* Lawrence, 4 Ibid. 514.

[1] 1 Chitty C. L. 318. See Dickenson's Quar. Ses. 174, 175.

[2] Infra, § 565.

[3] Supra, §§ 71–3; 1 B. & C. 37, 51; 3 B. & A. 432; 1 Chit. Rep. 214; Addison's Charges, 42; U. S. *v.* White, 2 Wash. C. C. 29; U. S. *v.* Palmer, 2 Cranch C. C. R. 11; U. S. *v.* Blodgett, 35 Ga. 336; Resp. *v.* Schæffer, 1 Dallas, 236. See infra, §§ 361–2.

In Lawson *v.* Labouchere, in the Queen's Bench Division (L. R.), the facts, as stated by the Law Times, Nov. 29, 1879, were as follows: —

"Mr. Labouchere was charged before Sir Robert Carden with libelling Mr. Lawson, and in the course of the inquiry the defendant proposed to cross-examine the complainant with a view to show the truth of the statements which constituted the alleged libel. The magistrate refused to permit this, holding that it was not competent to the defendant at that stage of the proceedings to give evidence of the truth of the statements. A mandamus was applied for to the Court of Queen's Bench to compel the magistrate to receive this evidence. With regard to their power generally to grant a mandamus in such cases, the court said they undoubtedly had the power, where a magistrate having authority to hear and determine refuses to exercise the jurisdiction he possesses, or, where his interpretation is a frustration of justice, to direct him to hear and determine, but no power to control him in the conduct of the case, or to prescribe to him the evidence which he shall receive or reject. The argument of the defendant was that in this case the magistrate had declined jurisdiction, and that, said the court, 'is a matter which involves the question whether he had jurisdiction to receive the evidence tendered,' upon which point the court was unanimous that he had not, and, therefore, that they could not grant a mandamus."

satisfied of the guilt of a defendant;[1] and Judge Wilson, in examining the position that a *primâ facie* case is all that is necessary for a grand juror's purpose, remarked, "It is a doctrine which may be applied to countenance and promote the vilest and most oppressive purposes; it may be used, in pernicious rotation, as a snare in which the innocent may be entrapped, and as a screen under cover of which the guilty may escape."[2] The same position is taken by Professor J. A. G. Davis, in his elaborate examination of criminal law in Virginia.[3] Sir E. Coke, far more humane in the study than on the bench, in speaking of the reign of Edward I., said: "In those days (as yet it ought to be) indictments, taken in the absence of the party, were formed on plain and direct proof, and not upon probabilities and inferences."[4] Such, also, was the standard adopted by the first learned editor of the laws of Pennsylvania;[5] of Mr. Daniel Davis, for many years solicitor general of Massachusetts, to whose excellent treatise on grand juries allusion has more than once been made;[6] and of the first Judge Hopkinson, so far as a tract published by him anonymously, but afterwards avowed, may be taken as an index of his views.[7] And this rule has been adopted by statute in California,[8] and has been accepted by Field, J., in the practice of the federal Circuit Court in that State.[9]

§ 362. On the other hand, it is said by Sir Matthew Hale that "in case there be *probable* evidence, the grand jury ought to find the bill, because it is but an accusation, and the party is put on his trial afterwards,"[10] and such is the conclusion we may draw from the initiatory proceedings before magistrates.[11] The arguments which lead to such a position were recapitulated with great

[1] 4 St. Tr. 183; 4 Bl. Com. 303; Lord Somers on Grand Juries, &c.; People *v.* Hyler, 2 Park. C. R. 570. This question is examined in relation to the duty of committing magistrates, supra, §§ 71–73.

[2] 2 Wilson's Works, 365.

[3] Davis's C. L. in Va. 426.

[4] 2 Inst. 384. For a specimen of the style in which Coke procured convictions by smuggling in hearsay and declarations of third parties, see Amos's Great Oyer.

[5] Smith's Laws, vol. 7, p. 687.

[6] Davis's Prec. 25. See also 1 Ch. C. L. 318.

[7] 1 Hopkinson's Works, 194.

[8] People *v.* Tinder, 19 Cal. 539.

[9] See Treason Cases, Pamphlet, 28; 2 Sawyer, 660–7.

[10] 2 Hale, P. C. 157. See supra, § 73; and see, to same effect, R. *v.* Hodges, 8 C. & P. 195.

[11] Supra, § 73.

force by McKean, C. J., in an early charge to a grand jury in Pennsylvania: "The bills or presentments found by a grand jury," he said, "amount to nothing more than an official accusation, in order to put the party accused upon his trial; till the bill is returned, there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here then is the just line of discrimination. It is the duty of the grand jury to inquire into the nature and probable grounds of the charge; but it is the exclusive province of the petit jury to hear and determine, with the assistance and under the direction of the court, upon points of law, whether the defendant is or is not guilty, on the whole evidence for and against him. You will therefore readily perceive that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must consequently be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for, by the law, it is declared that no man shall be twice put in jeopardy for the same offence; and yet it is certain that the inquiry now proposed by the grand jury would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but, I think, likewise upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely on the testimony in support of the prosecution, the petit jury receive no bias from the sanction which the indorsement of the grand jury has conferred upon it. But, on the other hand, would it not, in some degree, prejudice the most upright mind against the defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient, which would then be the natural inference from every true bill? Upon the whole, the court is of opinion that it would be improper and illegal to examine the witnesses, on behalf of the defendant, while the charge against him lies before the grand jury." Upon one of the grand inquest remarking, that "there was a clause in the qualification of the jurors, upon which he and some of his brethren wished to hear the interpretation of the judges, to wit: What is the legal acceptation of

the words "diligently inquire?'" the chief justice replied that "the expression meant, diligently to inquire into the circumstances of the charge, the credibility of the witnesses who support it, and from the whole to judge whether the person accused ought to be put upon his trial. For," he added, "though it would be improper to determine the merits of the cause, it is incumbent upon the grand jury to satisfy their minds, by a diligent inquiry, that there is a probable ground for the accusation, before they give it their authority, and call upon the defendant to make a public defence."[1] This view derives much countenance from the English rule, that a grand jury have no authority by law to ignore a bill for murder on the ground of insanity, though it appear plainly from the testimony of the witnesses, as examined by them on the part of the prosecution, that the accused was in fact insane; but that if they believe the acts done, if they had been done by a person of sound mind, would have amounted to murder, it is their duty to find the bill.[2]

Legal proof only to be received.

§ 363. A grand jury, it has been said, is bound to take the best legal proof of which the case admits; and it is the duty of the prosecuting officer of the State to take care that no evidence is received by them which would not be admissible at trial.[3] But an accomplice, even though uncorroborated, is adequate to the finding of a bill, though he may have been taken from prison by an order altogether surreptitious and illegal.[4] It seems, however, that if a bill is found on the sole evidence of a person rendered incompetent by conviction of

[1] Resp. *v.* Schæffer, 1 Dallas, 237. See also remarks of Judge Addison, Addison's Charges, 39; People *v.* Hyler, 2 Park. C. R. 570; S. P., State *v.* Cowan, 1 Head, 280; U. S. *v.* Blodgett, 35 Ga. 336; State *v.* Boyd, 2 Hill S. C. 288; Sparrenberger *v.* State, 53 Ala. 481; Spratt *v.* State, 8 Mo. 247. See Parker *v.* Com. 12 Bush, 191.

[2] R. *v.* Hodges, 8 C. & P. 195.

Such was the course taken in 1879, in Connecticut, in State *v.* Lounsbury, a case in which the wife of a clergyman, in an insane paroxysm, killed him by a pistol shot. The grand jury found the bill for murder in the first degree, on evidence on which the prosecuting officers afterwards advised an acquittal. The evidence made a *primâ facie* case of guilt, and the bill was therefore properly found; but this case was one on which no conviction could be based, and on which an acquittal was proper. In no other way could the defendant be protected from subsequent prosecutions, and the case exhibited in such a way as to satisfy the public sense of justice.

[3] 1 Leach, 514; 2 Hawk. c. 25, ss. 138, 139; Davis's Precedents, 25.

[4] 1 Leach, 155.

an infamous crime, it will be quashed before plea, though the objection will be too late after conviction.[1] And so, in a case already noticed, where a defendant was compelled to testify against himself.[2]

On the other hand, the fact that one of several witnesses, who testified to an offence before the grand jury, was incompetent, is not sufficient to sustain a plea in abatement to the indictment, since it is impossible to show that an indictment was found on the testimony of one witness alone.[3] And as a general rule, the court will not inquire into the sufficiency or technical admissibility of the evidence before the grand jury.[4]

The practice when there has been irregularity in swearing of witnesses has been already discussed.[5]

Grand jury may ask advice of court.

§ 364. The grand jury, if they have any doubts as to the propriety of admitting any part of the evidence submitted to them, may pray the advice of the court to which they are attached;[6] though it is usual to apply to the counsel of the State, who is bound to be at hand, and ready to communicate to them any information that may be required.[7]

New bill may be found on old testimony.

§ 365. Wherever a former bill, found by the same grand jury, has been superseded, a new bill may be found as a substitute without examining witnesses.[8]

VII. POWERS OF PROSECUTING ATTORNEY.

Prosecuting officer usually in attendance.

§ 366. In New York, it seems to have been considered that the functions of the *district* attorney, so far as the grand jury are concerned, are exhausted at the moment of the bill reaching their hands, unless revived by a

[1] 2 Hawk. c. 25, s. 145, *in notis*; State *v.* Fellows, 2 Hayw. 340.

[2] State *v.* Froiseth, 16 Minn. 296. Supra, §§ 359–60.

[3] Bloomer *v.* State, 3 Sneed, 66; State *v.* Tucker, 20 Iowa, 508. Supra, §§ 359–60.

[4] U. S. *v.* Reed, 2 Blatch. 435; People *v.* Hulbert, 4 Denio, 133; State *v.* Dayton, 3 Zab. 49; Turk *v.* State, 2 Hammond, part 2, 240; State *v.* Cole, 19 Wis. 129; State *v.* Logan, 1 Nev. 509.

[5] Supra, §§ 359–60.

[6] Dalton, J., c. 185, s. 9; 4 Bla. Com. 303, n. 1; 2 Hale, 159, 160. As to their sitting in open court, under direction of the judges, see 5 St. Tr. 771; 3 Camp. 337.

[7] Davis's Precedents, 21; 7 Cowen, 563; Davis's Virg. Crim. Law, 425; Lung's case, 1 Conn. 428; Kel. 8; 1 Ch. C. L. 816.

[8] Com. *v.* Woods, 10 Gray, 477. Infra, § 372.

subsequent call for information; and that he has no right to be present at their sessions and assist in the examination of witnesses.[1] What are the rights of the attorney general in the premises is not there determined. In England, as a general rule, the clerk of the assizes is the attendant of the grand jury, and is expected not only to aid them in their examinations, but to place before them each several item of business as it successively arises. In the other courts, as is stated by Mr. Chitty, it is not unusual to permit the prosecutor to be present to conduct the evidence on the part of the crown,[2] though this appears to be at the grand jury's option, to be exercised where a case of difficulty requires the marshalling of evidence or the leading of unwilling witnesses.[3] And one case is on record where the grand jury refused to allow this privilege.[4] The practice in Massachusetts, as stated by Mr. Davis, is for the officer having charge of the preparation of the indictments to attend the grand jury, to open each particular case as it arises, to commence the examination of each witness, and to meet any question as to the law of the case which may be given to him. But it is his duty, "during the discussion of the question, to remain perfectly silent, unless his advice or opinion in a matter of law is requested. The least attempt to influence the grand jury in their decision upon the effect of the evidence is an unjustifiable interference, and no fair and honorable officer will ever be guilty of it. It is very common, however, for some one of the grand jury to request the opinion of the public prosecutor as to the propriety of finding the bill. But it is his duty to decline giving it, or even any intimation on the subject; but in all cases to leave the grand jury to decide independently for themselves. It may be thought that this is too great a degree of refinement in official duty. But the experience of thirty years furnishes an answer most honorable to the intelligence and integrity of that body of citizens from which the grand jury are selected; and that is, that they almost universally decide correctly."[5]

[1] 7 Cowen, 563. See infra, §§ 554 *et seq.*

[2] 1 Ch. C. L. 816.

[3] 4 Black. C. 126, note by Christian; Dick. Q. S. 6th ed. 1837.

[4] Crossfield's case, 8 St. Tr. 773.

[5] Davis's Precedents, 21. See also M'Lellan *v.* Richardson, 13 Me. 82, where it appears that the same usage exists in Maine.

This is the uniform practice in Pennsylvania. In the United States courts the practice is thus stated by Judge Field, in a charge delivered to a California grand jury in August, 1872:[1] "The district attorney has the right to be present at the taking of testimony before you for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you, but he has no right to be present pending your deliberations on the evidence. When your vote is taken upon the question whether an indictment shall be found or a presentment made, no person besides yourselves should be present." The privilege of attendance should be strictly limited to the prosecuting officer officially clothed with this high trust, and not extended to mere temporary assistants; and in South Carolina, in 1872, an indictment was properly quashed, because attorneys temporarily representing the solicitor general entered the room of the grand jury when they were deliberating as to the bill, and advised them as to their action.[2] It is proper in this connection to keep in mind the fact, already noticed,[3] that the only valid basis on which the institution of grand juries rests is that they are an independent and impartial tribunal between the prosecution and the accused; and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality.

Defendant and others not entitled to attend.

§ 367. In England, and in the courts of each of the several States, with one exception, neither the defendant, nor any person representing him, is permitted to attend the examination of the grand jury.[4] And Judge King, in an opinion marked with his usual good sense, held that the sending of an unofficial volunteer communication to the grand jury, inviting them to start on their own authority a prosecution, is a contempt of court, and a misdemeanor at common law.[5] Any

[1] See Pamph. Rep. 9 *et seq.*; 2 Sawyer, 663–7.

[2] State *v.* Addison, 2 S. C. 356.

[3] Supra, § 339.

[4] 1 B. & C. 37, 51; 3 B. & A. 432; 1 Ch. R. 217; 1 Ch. C. L. 317; McCullough *v.* Com. 67 Penn. R. 30; Com. *v.* Simons, 6 Phil. R. 167. See supra, § 338.

[5] Com. *v.* Crans, 3 Penn. L. J. 443. "There has hardly been a session," said Judge Field, of the Supreme Court of the United States, in addressing a grand jury in California in 1872 (Pamph. Rep. 2 Sawyer, 663–7), "of the grand jury of this court for years, at which instances have not occurred of personal solicitation to some

volunteer attendance is by the same rule subject to the same law.[1] In Connecticut, however, it has been held by the Supreme Court that a prisoner is entitled to be present during the examination in his particular case, and to ask the witnesses such questions as he thinks proper.[2]

In Maine, it is said that the presence of a stranger does not vitiate an indictment if he does not interfere.[3]

VIII. FINDING AND ATTESTING OF BILL.

Twelve must concur in bill.

§ 368. The examination being over, it becomes the duty of the grand jury to pass upon the bill; and unless *twelve* of their number agree to find a true bill,[4] the return is "ignoramus," or, as is more commonly the case,

of its members to obtain or prevent the presentment or indictment of parties. And communications to that end have frequently been addressed to the grand jury, filled with malignant and scandalous imputations upon the conduct and acts of those against whom the writers entertained hostility, and against the conduct and acts of former and present officers of this court, and of previous grand juries of this district.

"All such communications were calculated to prevent and obstruct the due administration of justice, and to bring the proceedings of the grand jury into contempt. 'Let any reflecting man,' says a distinguished judge, 'be he layman or lawyer, consider of the consequences which would follow, if every individual could, at his pleasure, throw his malice or his prejudice into the grand jury room, and he will, of necessity, conclude that the rule of law which forbids all communication with grand juries, engaged in criminal investigations, except through the public instructions of courts and the testimony of sworn witnesses, is a rule of safety to the community. What value could be attached to the doings of a tribunal so to be approached and influenced? How long would a body, so exposed to be misled and abused, be recognized by freemen as among the chosen ministers of liberty and security? The recognition of such a mode of reaching grand juries would introduce a flood of evils, disastrous to the purity of the administration of criminal justice, and subversive of all public confidence in the action of these bodies.' Judge King, in Commonwealth *v.* Crans, in 3 Penn. Law Jour. pp. 459–464." "Eaves-dropping" on a grand jury is said to be indictable at common law. State *v.* Pennington, 3 Head, 299. By an act of Congress, passed in 1872, such solicitations are indictable. Infra, §§ 729, 966.

In New York, such interference with a grand jury is, under statute, only a contempt when marked by contemptuous action to the court in its presence. Bergh's case, 16 Abb. Pr. N. S. 266.

[1] McCullough *v.* Com. *ut supra.*

[2] Lung's case, 1 Conn. 428; State *v.* Fassett, 16 Conn. 458.

[3] State *v.* Clough, 49 Me. 573.

[4] Sayer's case, 8 Leigh, 722. As to U. S. courts see supra, § 340.

ignored," or "not found." If the finding be by less than twelve, the indictment may be quashed by motion made before plea.[1]

Foreman usually attests the bill.

§ 369. The usual practice is for the foreman to sign the return; and the words "true bill," with his name attached, have been frequently considered a good finding,[2] though it was held not an error where the indorsement was simply "a bill," omitting the word true.[3] And in some States it has been held sufficient to omit the words, "a true bill" altogether, where the signature of the foreman is given.[4] There are several rulings, however, to the effect that the omission of the words "true bill," if excepted to before plea, will be fatal.[5] An indorsement on the envelope (though not on the bill itself) has been held good after verdict.[6] And it is said that the foreman's certificate of true bill is no part of indictment and need not be certified. Absence of the entry is no proof that there was no finding.[7]

[1] People v. Shattuck, 6 Abb. New Cas. 33. As to whether juror may be examined to this, see infra, § 379.

[2] 1 Ch. C. L. 324; Arch. C. P. by Jervis, 39; State v. Davidson, 12 Vt. 300; Hopkins v. Com. (14 Wright) 50 Penn. St. 9; State v. Elkins, 1 Meigs, 109; Bennett v. State, 8 Humph. 118; Spratt v. State, 8 Mo. 247; McDonald v. State, 8 Mo. 283; Gardner v. People, 3 Scam. 83; Harriman v. State, 2 Greene (Iowa), 270; State v. Onnmacht, 10 La. R. 198.

[3] Sparks v. Com. 9 Barr, 354; State v. Mertens, 14 Mo. 94. So when the indorsement was a true "gun," written by mistake for "bill." White v. Com. 29 Grat. 294.

[4] State v. Freeman, 13 N. H. 488; Com. v. Smyth, 11 Cush. 473; Price v. Com. 21 Grat. 846; White v. Com. 29 Grat. 824; State v. Axt, 6 Iowa (Clarke), 511; State v. McCartey, 17 Minn. 76; State v. Chandler, 2 Hawks, 439; Brotherton v. People, infra.

[5] State v. Webster, 5 Greenl. 373; Harriman v. State, 2 Greene (Iowa), 270; Gardner v. People, 3 Scam. 83; Nomague v. People, Breese, 109; Johnson v. State, 23 Ind. 32; Garaway v. State, 23 Ala. 772; Spratt v. State, 8 Mo. 247; McDonald v. State, 8 Mo. 283; Com. v. Walters, 6 Dana, 290; Bennett v. State, 8 Humph. 118; Smith v. State, 28 Miss. 728; Wankon-chaw-neck-kaw v. U. S. 1 Morris, 332.

[6] Burgess v. Com. 2 Va. Cas. 483. See Com. v. Betton, 5 Cush. 427.

[7] Brotherton v. People, 75 N. Y. 159.

The only proper indorsement on an indictment being "a true bill," or "not a true bill," with the name of the foreman, anything else is not a part of the finding of the grand jury. Thompson v. Com. 20 Grat. 724.

A bill of indictment, indorsed a true bill, where, to the subscription of A. B., the foreman, the letters F. G. J. were added, was held sufficient to indicate that he acted as foreman, when it appears from the record that A. B. was in fact the foreman of the grand jury when the bill was found. It was also said that if no letters had

§ 370. When the bill has been thus verified, it is brought publicly into court, and the clerk of the court calls all the jurymen by name, who severally answer to signify that they are present; and then the clerk proceeds in order

Bill to be brought into court.

been added after his name, his subscription to the indorsement could only be referred to his official acts as foreman, and would therefore be sufficient. State *v.* Chandler, 2 Hawks, 439; McGuffie *v.* State, 17 Ga. 497. See State *v.* Brown, 31 Vt. 603; Wassels *v.* State, 26 Ind. 30; Wall *v.* State, 23 Ind. 150.

In Massachusetts, the signing the name of the foreman to the indorsement "a true bill," on a bill of indictment, is essential to its validity; Com. *v.* Sargent, Thach. Crim. Cases, 116; Com. *v.* Hamilton, 15 Gray, 480; Com. *v.* Gleason, 110 Mass. 66; but although this is a judicious check, it is not everywhere essential. Thus, in North Carolina, South Carolina, Georgia, Florida, New Hampshire, and Kentucky, it is even said his name may be omitted altogether. State *v.* Freeman, 13 N. H. 488; State *v.* Cox, 6 Ired. 440; Com. *v.* Walters, 6 Dana, 290; State *v.* Creighton, 1 Nott & McC. 256; McGuffie *v.* State, 17 Ga. 497; Cherry *v.* State, 6 Fla. 679. See State *v.* Shippey, 10 Minn. 223. In Louisiana, we are informed that the rule does not apply to a foreman who cannot write. State *v.* Tinney, 26 La. An. 460. And so, too, a variance between the name of the foreman, as appearing upon the record of his appointment, and his signature upon the bill, is immaterial, for his identity must necessarily be known to the court, and the receiving and recording the bill with his indorsement establishes it. State *v.* Calhoun, 1 Dev. & Bat. 374; State *v.* Collins, 3 Dev. 117. Nor is it material in what part of the indictment the signature of the foreman is placed. Overshiner *v.* Com. 2 B. Mon. 344. An indorsement by the foreman of the grand jury, of the initial letter of his first name, where the record of the appointment states his name at length, is not a material variance. Com. *v.* Hamilton, 15 Gray, 480; Com. *v.* Gleason, 110 Mass. 66; State *v.* Collins, 3 Dev. 117; State *v.* Taggart, 38 Me. 298. Where Alexander R. Hutcheson was appointed foreman of the grand jury, and a bill of indictment was indorsed "Alexander R. Hutchinson," it was held that, if necessary, the court would intend the two names to indicate the same person. State *v.* Stedman, 7 Port. 496. The fact that the appointment of the foreman of the grand jury was not entered on the minutes of the court is not material, where the indictment is not indorsed by the foreman and returned to court. People *v.* Roberts, 6 Cal. 214.

The signature of the foreman, it has been ruled, may be attached after the filing. Bassham *v.* State, 38 Tex. 622. And going to trial waives the defect. People *v.* Johnston, 48 Cal. 549.

Where it appeared by the record that A. B. was sworn as foreman, such was held sufficient evidence of appointment. Woodsides *v.* State, 2 How. Miss. R. 655.

When the finding is in writing, and publicly announced by the clerk, in the presence of the grand jury, this has been in some States held to be sufficient, without the signature of the foreman. State *v.* Creighton, 1 N. & McCord, 256; Com. *v.* Walters, 6 Dana, 290.

to ask the jury whether they have agreed upon any bills, and bids them present them to the court;[1] and then the foreman of the jury hands the indictments to the clerk, who asks them if they agree the court shall amend matter of form, altering no matter of substance, to which they signify their assent.[2] This form is necessary in order to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation, without the consent of the accusers.[3]

§ 371. The finding should then be recorded by the clerk, *ignoramus*,[4] as well as true bill, and an omission in that respect cannot be supplied by the indorsement of the foreman, nor by the recital in the record that the defendant stands indicted, nor by his arraignment, nor by his plea of not guilty, nor by the minutes of the judge.[5] It cannot be intended that he was indicted; it must be shown by the record of the finding. The recording of the finding of the grand jury, it is said, is as essential as the recording of the verdict of the petit jury.[6]

Finding must be recorded.

§ 372. It seems that if an existing indictment be altered by the prosecuting officer, and submitted, thus changed, to the grand

It would seem not to be necessary that the indictment should show when it was found. Burgess *v.* Com. 2 Virg. Cases, 483. The indorsement of the name of the offence on the indictment is no part of the finding of the grand jury. State *v.* Rohfrischt, 12 La. An. 382.

[1] 4 Bla. Com. 366; Cro. C. C. 7. See form, Cro. C. C. 7.

[2] Cro. C. C. 7; Dick. Sess. 158. See form, Cro. C. C. 7; Dick. Sess. 158, last vol. London edition. As to Alabama statutes see Wesley *v.* State, 52 Ala. 182.

[3] R. T. H. 203; 2 Stra. 1026; 1 Ch. C. L. 324. See Willey *v.* State, 46 Ind. 363. That the return may be inferred see State *v.* Gratz, 68 Mo. 22.

[4] State *v.* Brown, 81 N. C. 516.

[5] Heacock *v.* State, 42 Ind. 393; Sattler *v.* People, 59 Ill. 68. See Crookham *v.* State, 5 W. Va. 510; Fitzcox *v.* State, 53 Miss. 585; Terrell *v.* State, 41 Tex. 463; Rasberry *v.* State, 1 Tex. Ap. 664.

[6] Com. *v.* Cawood, 2 Va. Cas. 527; State *v.* Glover, 3 Iowa (Greene), 249; State *v.* Davidson, 2 Cold. (Tenn.) 184; State *v.* Cox, 6 Ired. 440; State *v.* Brown, 81 N. C. 516.

Where the record did not show that the grand jury returned the indictment into court, it was held that the judgment was erroneous and should be reversed. Rainey *v.* People, 3 Gilm. 71; Chappel *v.* State, 8 Yerg. 166; Brown *v.* State, 7 Humph. 155.

An indictment indorsed as a true bill, and returned by the authority of the whole grand jury, is sufficient, without the special appointment of a foreman. Friar *v.* State, 3 How. Miss. 422; Peter *v.* State, 3 How. Miss. 433.

jury, who again return "true bill" thereon, such informality will not destroy the indictment.[1] The practice in such cases, however, is for a new and more regular bill to be framed and sent to the grand jury for their finding.[2]

Bill may be amended by grand jury.

§ 373. In England, if the grand jury at the assizes or sessions has ignored a bill, they cannot find another bill against the same person for the same offence at the same assizes or sessions; and if such other bill is sent before them, it has been said that they should take no notice of it.[3] But a bill may be sent up if the emergency require, after an *ignoramus*, at the discretion of the court.[4]

Finding may be reconsidered.

§ 374. Usually the jury cannot find one part of the same count to be true and another false, but they must either pass or reject the whole; and, therefore, if they ignore one part and find another, the finding is bad,[5] though there is no reason why, when a count contains a lower offence enclosed in a higher, the grand jury should not ignore the higher offence and find the lower. Where there are several counts, they can find any one count and ignore the others.[6] So in an indictment against several, they can distinguish among the defendants, and find as to some and reject as to the rest.[7]

Jury cannot usually find part only of a count.

§ 375. If the finding be incomplete or insensible, it is bad.[8]

Insensible finding is bad.

[1] State *v.* Allen, Charlton's Ga. R. 518.

[2] 1 Ch. C. L. 335. See State *v.* Davidson, 2 Cold. (Tenn.) 184. Supra, § 365.

[3] R. *v.* Humphreys, Car. & M. 601 — Patteson; S. P., R. *v.* Austin, 4 Cox C. C. 385. See *contra*, R. *v.* Newton, 2 M. & Rob. 506 — Wightman. See infra, §§ 390, 452.

[4] Rowand *v.* Com. 82 Penn. St. 405. Supra, § 333; infra, § 446.

[5] 2 Hale, 162; Bac. Ab. Indictment, D. 3; Bulst. 206; 2 Hawk. c. 25, s. 2; 5 East, 304; 2 Camp. 134, 584; 2 Leach, 708; Com. *v.* Keenan, 67 Penn. St. 203; State *v.* Wilburne, 2 Brev. 296; State *v.* Creighton, 1 Nott & McC. 256; State *v.* Cowan, 1 Head, 280; State *v.* Wilhite, 11 Humph. 602.

[6] 1 Chit. C. Law, 323.

[7] 2 Hale, 158; 1 Ch. C. L. 323.

[8] 2 Hawk. c. 25, s. 2; 1 Ch. C. L. 323.

Where the grand jury returned a bill of indictment which contained ten counts for forging and uttering the acceptance of a bill of exchange, with an indorsement, "A true bill on both counts," and the prisoner pleaded to the whole ten counts; and where, after the case for the prosecution had concluded, the prisoner's counsel pointed this out, the finding was held bad, and the grand jury was discharged; in such case the court will not allow one of the grand jurors to

§ 376. When the grand jury are in session, they are under the control of the court, and the court may at any time recommit an imperfect finding to them,[1] or may poll them, or take any other method, on the suggestion of a defendant, of determining whether twelve assented to the bill.[2]

Grand jury may be polled.

IX. MISCONDUCT OF GRAND JUROR.

§ 377. In case of misconduct or neglect of duty on the part of any of the grand jurors, when on duty, an indictment will be maintained against him, or he may be proceeded against by the court for contempt.[3] So, also, it has been held a misdemeanor and a high contempt in any individual acting as a volunteer to approach or communicate with the grand jury in reference to any matter which either is or may come before them.[4]

Grand juror may be punished for misconduct.

X. HOW FAR GRAND JURORS MAY BE COMPELLED TO TESTIFY.

§ 378. At common law, a member of the grand jury was held incompetent to testify as to what had been the evidence of witnesses examined before them. The principle was first invaded, it is said by Mr. Christian, in his notes to Blackstone, as follows: "A few years ago, at York, a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed, and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury. It was held that the object of the concealment was only to prevent the testimony

Grand juror may be examined as to what witness said.

be called as a witness to explain their finding. R. *v.* Cooke, 8 C. & P. 582. See People *v.* Hulbut, 4 Denio, 133.

[1] State *v.* Squire, 10 N. H. 558.

[2] Lowe's case, 4 Greenl. 448; State *v.* Symonds, 36 Me. 128; *contra*, State *v.* Baker, 20 Mo. 338. Infra, § 379.

[3] Penn. *v.* Keffer, Addison, 290.

[4] Com. *v.* Crans, 3 Penn. L. J. 442. See 1 Greenl. on Ev. § 252. Supra, § 338. As to contempt of court see generally infra, § 948.

produced before them from being contradicted by subornation of perjury on the part of persons against whom the bills were found. This is a privilege, which may be waived by the crown."[1] A witness, it is said, may now be indicted for perjury on account of false testimony before a grand jury,[2] and grand jurors are competent witnesses to prove the facts;[3] and so may be the prosecuting attorney.[4] In New Jersey, however, it is said a grand juror is not admissible to prove that a witness who had been examined swore differently in the grand jury room,[5] though the contrary is now the general and better opinion.[6]

Cannot be admitted to impeach finding.

§ 379. But the affidavit of a grand juror will not be received to impeach or affect the finding of his fellows,[7] even for the purpose of showing how many were present when the bill was found, or how many voted in its favor.[8] But where a grand juror was guilty of gross intoxica-

[1] 4 Black. Com. 126, note; Sykes *v.* Dunbar, 2 Selw. N. P. 1059; Whart. Crim. Ev. § 510.

[2] 1 Ch. C. L. 322; State *v.* Fassett, 16 Conn. 457; Huidekoper *v.* Cotton, 3 Watts, 56; Thomas *v.* Com. 2 Robinson, 795; State *v.* Offutt, 4 Blackf. 355; People *v.* Young, 31 Cal. 564, and cases cited infra.

[3] Ibid.; Crocker *v.* State, Meigs, 127. See R. *v.* Hughes, 1 C. & K. 519; Com. *v.* Hill, 11 Cush. 137, and cases cited infra, note 6.

[4] State *v.* Van Buskirk, 59 Ind. 384. Infra, § 380.

[5] Imlay *v.* Rogers, 2 Halsted, 347. See State *v.* Baker, 20 Mo. 338.

[6] Whart. Crim. Ev. § 510; Sykes *v.* Dunbar, 2 Selw. N. P. 1059; U. S. *v.* Charles, 2 Cranch C. C. 76; State *v.* Benner, 64 Me. 267; State *v.* Wood, 53 N. H. 484; Com. *v.* Hill, 11 Cush. 137; Com. *v.* Mead, 12 Gray, 167; Way *v.* Butterworth, 106 Mass. 75; State *v.* Fassett, 16 Conn. 457; People *v.* Hulbut, 4 Denio, 133; Huidekoper *v.* Cotton, 3 Watts, 56; Thomas *v.* Com. 2 Robinson (Va.), 795; Little *v.* Com. 25 Grat. 921; Burnham *v.* Hatfield, 5 Blackf. 21; Perkins *v.* State, 4 Ind. 222; Burdick *v.* Hunt, 43 Ind. 384; State *v.* Broughton, 7 Ired. 96; State *v.* Boyd, 2 Hill S. C. 288; Sands *v.* Robison, 20 Miss. 704; Rocco *v.* State, 37 Miss. 357; Beam *v.* Link, 27 Mo. 261; White *v.* Fox, 1 Bibb, 369; Crocker *v.* State, 1 Meigs, 127; Jones *v.* Turpin, 6 Heisk. 181; People *v.* Young, 31 Cal. 564. In several States, *e. g.* Missouri, the privilege is regulated by statute.

[7] R. *v.* Marsh, 6 Ad. & El. 236; 1 N. & P. 187; State *v.* Doon, R. M. Charl. 1; State *v.* McLeod, 1 Hawks, 344; State *v.* Baker, 20 Mo. (5 Bennett), 338; State *v.* Gibbs, 39 Iowa, 318; State *v.* Davis, 41 Iowa, 311; State *v.* Beebe, 17 Minn. 241. As to jurors generally see infra, § 847.

[8] State *v.* Fassett, 16 Conn. 457; People *v.* Hulbut, 4 Denio, 133; State *v.* Baker, 20 Mo. 238; State *v.* Mewherter, 46 Iowa, 88; aff. State *v.* Gibbs, 39 Iowa, 318; *contra*, Lowe's case, 4 Greenl. 439; People *v.* Shattuck, 6 Abb. N. C. 33. Compare infra, § 847; supra, § 368; State *v.* Oxford, 30 Tex. 428. See infra, § 847.

tion while in the discharge of his duty as such, the court, on a presentment of such fact by the rest of the grand jury, ordered a bill to be preferred against him.[1]

§ 380. As a grand juror ought not to be received to testify

[1] Penns. *v.* Keffer, Addis. 390.

Where, on the trial of an indictment for selling liquor without a license, which charged five offences in separate counts, the defendant, in order to limit the proof to a single count, offered to show, by one of the grand jury, that only one offence was sworn to before that body, it was held that the evidence was inadmissible. People *v.* Hulbut, 4 Denio, 133. See R. *v.* Cooke, 8 C. & P. 582.

As a rule, grand jurors cannot be examined to prove that a bill was validly found. State *v.* Oxford, 30 Tex. 428.

In Massachusetts, it is provided by statute "that no grand juror or officer of a court shall disclose the fact that an indictment for a felony has been found against any person, not in custody or under recognizance," otherwise than by issuing or executing process on the indictment, and that "no grand juror shall be allowed to state, or testify in any court, in what manner he, or any other member of the jury, voted on any question before them, or what opinion was expressed by any juror in relation to such question." Rev. Stat. Mass. c. 136, §§ 13, 14; Gen. Stat. c. 171, § 13. See Com. *v.* Mead, 12 Gray, 167, and cases cited supra.

In New York, members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with, or different from, the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offence: but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he, or any other member of the jury, voted on any question before them, or what opinions were expressed by any juror in relation to any such question. Rev. Stat. part iv. c. 2, tit. 4, art. 2, § 31. A grand juror may be examined to prove that less than twelve united in the finding. People *v.* Shattuck, 6 Abb. N. C. 33.

In Missouri, it is provided by statute that no grand juror shall disclose any evidence given before the grand jury. See State *v.* Baker, 20 Mo. 338. But it has been held that a grand juror is not prohibited by the statute from stating that a certain person, naming him, testified before the grand jury, and the subject matter upon which he testified. State *v.* Brewer, 8 Mo. 373; Tindle *v.* Nichols, 20 Mo. 326; Beam *v.* Link, 27 Mo. 261.

In Indiana, it has been decided that the oath of grand jurors to keep their proceedings secret does not prevent the public or an individual from proving by one of them, in a court of justice, what passed before the grand jury. Burnham *v.* Hatfield, 5 Blackf. 21. And so, too, where grand jurors are not required to take an oath of secrecy, they are competent witnesses to prove general facts which came to their knowledge while acting as grand jurors. Granger *v.* Warrington, 3 Gilman, 299.

to any fact which may invalidate the finding of his fellows, an attorney general is incompetent to testify to the same effect.[1] But as has been already seen, he should be received to state what was the issue before the jury, and what was testified to by witnesses.[2]

Prosecuting officer inadmissible to impeach finding.

[1] 1 Bost. Law Rep. 4; McClellan v. Richardson, 13 Me. 82; Clark v. Field, 12 Vt. 485.

[2] See Whart. Crim. Ev. § 513; White v. Fox, 1 Bibb, 369; State v. Van Buskirk, 59 Ind. 384.

CHAPTER V.

NOLLE PROSEQUI.

Nolle prosequi a prerogative of sovereign, § 383. | Will be granted in vexatious prosecutions, § 384.

§ 383. A NOLLE PROSEQUI is the voluntary withdrawal by the prosecuting authority of present proceedings on a particular bill, and at common law is a prerogative incident to the sovereign.[1] At common law it may be at any time retracted, and is not only no bar to a subsequent prosecution on another indictment, but it must become a matter of record in order to preclude a revival of proceedings on the original bill.[2] It may, at common law, be entered at any time before judgment;[3] and the practice is usual, during trial or after conviction, to enter it on objectionable counts, or part of counts, so as to confine the verdict to those which are good.[4] Courts have, it is true, frequently held that

Nolle prosequi a prerogative of sovereign.

[1] U. S. *v.* Watson, 7 Blatch. 60. See State *v.* Tufts, 56 N. H. 137; Com. *v.* Smith, 98 Mass. 10.

[2] U. S. *v.* Shoemaker, 2 McLean, 114; Com. *v.* Wheeler, 2 Mass. 172; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Miller, 2 Ashm. 61; Wortham *v.* Com. 5 Rand. 669; Com. *v.* Lindsay, 2 Virg. Cas. 345; State *v.* McNeill, 3 Hawks, 183; State *v.* Hasket, 3 Hill S. C. 95; State *v.* Blackwell, 9 Ala. 79; Clark *v.* State, 23 Miss. 261. As to position of attorney general on trial see infra, § 554. As to law see infra, § 447.

[3] East, 307; State *v.* Burke, 38 Me. 574; State *v.* Roe, 12 Vt. 93; State *v.* Smith, 49 N. H. 155; Com. *v.* Briggs, 7 Pick. 179; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Jenks, 1 Gray, 490; Levison *v.* State, 54 Ala. 520.

[4] R. *v.* Rowlands, 2 Den. C. C. 367; 17 Q. B. 671; R. *v.* Hempstead, R. & R. 344; R. *v.* Butterworth, R. & R. 520; U. S. *v.* Peterson, 1 W. & M. 305; U. S. *v.* Shoemaker, 2 McLean, 114; State *v.* Bruce, 24 Me. 71; Anonymous, 31 Me. 592; State *v.* Burke, 38 Me. 524; State *v.* Merrill, 44 N. H. 624; State *v.* Roe, 12 Vt. 93; Com. *v.* Briggs, 7 Pick. 177; Com. *v.* Cain, 102 Mass. 487; Jennings *v.* Com. 105 Mass. 586; Com. *v.* Wallace, 108 Mass. 512; Com. *v.* Dean, 109 Mass. 349; People *v.* Porter, 4 Parker C. R. 524; State *v.* Fleming, 7 Humph. 152; Com. *v.* Gillespie, 7 S. & R. 469; though see Agnew *v.* Commissioners, 12 S. & R. 94; Mount *v.* State, 14 Oh. 295; Wright *v.* State, 5 Ind. 290; Barnett *v.* State, 54 Ala. 579; Lacey

the prerogative is one subject to their control, while the case is on trial, and that the attorney general has no right, after the jury is empanelled and witnesses called, to withdraw the case without their sanction.[1] In some States no *nolle prosequi* is operative by statute without such consent.[2] Be this as it may, if the case be withdrawn when on trial, without the defendant's consent, this operates as an acquittal in all cases in which the defendant was in jeopardy at the trial.[3]

v. State, 58 Ala. 385; Grant *v.* State, 2 Cold. 216.

[1] U. S. *v.* Shoemaker, 2 McLean, 114; U. S. *v.* Stowell, 2 Curtis C. C. 153; State *v.* I. S. S. 1 Tyler, 178; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Briggs, 7 Pick. 179; Jennings *v.* Com. 103 Mass. 586; State *v.* Moody, 69 N. C. 529; Statham *v.* State, 41 Ga. 507; Donaldson, ex parte, 44 Mo. 149; State *v.* McKee, 1 Bailey, 651. See State *v.* Kreps, 8 Ala. 951. See, as to duties of prosecuting attorney, infra, §§ 555, *et seq.*

[2] People *v.* McLeod, 1 Hill, 377.

[3] Infra, § 447. In New Hampshire, in prosecutions instituted in the name of the State, a general discretionary power exists in the prosecuting officer to enter a *nolle prosequi*. Before a jury is empanelled, or, after a verdict in favor of the State, this power may be exercised without the respondent's consent, and with his consent at any time during the trial, and before the verdict of the jury. State *v.* Smith, 49 N. H. 155 (Nesmith, J., 1869).

In the United States courts, the attorney general or district attorney has only power to dismiss a prosecution, or enter a *nolle prosequi* after indictment found. U. S. *v.* Schumann, 2 Abbott U. S. 523.

In Massachusetts, a *nolle prosequi* may be entered after the empanelling of the jury, against the objection of the defendant, if he does not demand a verdict. Charlton *v.* Com. 5 Met. (Mass.) 532; Com. *v.* Kimball, 7 Gray, 328. See Com. *v.* McMonagle, 1 Mass. 517; Com. *v.* Tuck, 20 Pick. 356; Kite *v.* Com. 11 Met. 581; Com. *v.* Cain, 102 Mass. 214. But if the defendant objects, and demands a verdict, no *nolle prosequi* can be entered. Com. *v.* Scott, 121 Mass. 33.

In Pennsylvania, by the Revised Act of 1860: —

"*Nolle prosequi.* — No district attorney shall, in any criminal case whatsoever, enter a *nolle prosequi*, either before or after bill found, without the assent of the proper court in writing first had and obtained." Rev. Act, 1860, Pamph. 437. See Com. *v.* Seymour, 2 Brewst. 567. Before the Revised Act it was held permissible, as it still continues to be with leave of court, to enter a *nolle prosequi* even after conviction. Com. *v.* Gillespie, 7 Serg. & R. 469. In this case, a *nolle prosequi* was entered on a particular count of an indictment, after conviction, judgment being rendered on the other counts. Compare Agnew *v.* Commissioners, 12 Serg. & R. 94, where the power of the attorney general, in case of perjury, under the Act of 29th March, 1819, to enter a *nolle prosequi*, even with leave of court, is doubted. So in New York. People *v.* McLeod, 1 Hill, N. Y. 377. As to Connecticut see State *v.* Garvey, 42 Conn. 232.

After a *nolle prosequi*, the indict-

§ 384. In the English practice, a *nolle prosequi* will be granted either where in cases of misdemeanor a civil action is depending for the same cause;[1] or where any improper or vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence;[2] or if it be clear that an indictment be not sustainable against the defendant.[3] And where an indictment is preferred against a defendant for an assault, and at the same time an action of trespass is commenced in one of the civil courts for identically the same assault, upon affidavit of the facts and hearing the parties, the attorney general may, if he sees fit, order a *nolle prosequi* to be entered to the indictment, or compel the prosecutor to elect whether he will pursue the criminal or civil remedy.[4]

Nolle prosequi granted in vexatious suits.

ment on which it is entered is extinct. R. *v.* Mitchell, 3 Cox C. C. 93; R. *v.* Allen, 1 B. & S. 850 (though see State *v.* Thompson, 3 Hawks, 613; State *v.* Howard, 15 Rich. 274). But a new indictment may ordinarily be found for the same offence. Infra, § 447.

No personal agreement by the attorney general will make a *nolle prosequi* a bar. A circuit attorney, in open court, agreed with a defendant, against whom several indictments were pending, that if he would plead guilty as to some, he should be discharged from the others. The defendant accordingly pleaded guilty to four of the indictments, and a *nolle prosequi* in the ordinary form was entered on the record as to the remainder. It was held that the entering of a *nolle prosequi* could not have the legal effect of a *retraxit* by reason of the agreement. State *v.* Lopez, 19 Mo. 254. Infra, § 447.

In Wisconsin, it is said that an agreement by a public prosecutor, without the sanction of the court, for immunity to several defendants, on condition of one of them becoming state's evidence in other cases, is void as against the policy of the law. Wight *v.* Rindskopf, 43 Wis. 344. See infra, § 536.

In Maine, a *nolle prosequi* can be withdrawn during the term when entered. State *v.* Nutting, 39 Me. 359.

[1] 1 Bos. & Pul. 191.

[2] 1 Black. Rep. 545.

[3] Com. Rep. 312; 1 Chitty's Crim. Law, 479.

[4] 2 Burr. 270; 1 Chitty's Crim. Law, 479. See infra, §§ 453–4.

The following is the form of the affidavit in such a case: —

I, A. B., of the county of ——, &c., make oath and say that I did see the clerk of the peace of the county of —— sign a certificate hereto annexed, on the —— day of ——, at ——, and that since (or before) the time of preferring the indictment, on the said certificate mentioned, I was served with a copy of a writ of summons, issuing out of —— court —— at the suit of C. D., the prosecutor of the said indictment, requiring me within eight days to cause an appearance to be entered for me in the court of ——, in an action of trespass, at the suit of the said C. D., and that on the —— day of ——, I, this deponent, did

The effect of a *nolle prosequi*, as a bar, is hereafter discussed.[1]

receive notice of a declaration being filed against me at the suit of the said C. D., the prosecutor of the said indictment in the —— office of the ——, for assaulting him, the said C. D., which said declaration and indictment, I say, are for the same assault, and not for different offences.

A certificate from the clerk of the peace stating the substance of the indictment, and the time when it was preferred, must be annexed to this affidavit. Cro. C. C. 25. And if the attorney general think the case a proper one for his interference, he will sign a warrant, under his hand and seal, directed to the clerk of the peace, and if the indictment has been found at sessions, directing him to enter a *stet processus*. R. *v.* Fielding, 2 Burr. 719; Jones *v.* Clay, 1 Bos. & P. 191. If the cause of the application be the vexatious conduct of the prosecutor, the attorney general may direct the proceedings to be removed into the Queen's Bench, where the counsel will be heard in support of the *nolle prosequi*. 1 Bla. Rep. 545; Archbold's C. P. (13th ed.) 92, 93.

The following is the form of entering a *nolle prosequi* on record: —

And now, that is to say, on ——, in this said term, before ——, cometh the said C. F. R., attorney general (as the case may be), who for the said State in this behalf prosecuteth, and saith that the said C. F. R. will not further prosecute the said A. B. on behalf of the said State on the said indictment (or information). Therefore, let all further proceedings be altogether stayed here in court against him, the said A. B., upon the indictment aforesaid. Archbold's C. P. 13th ed. 92. See, as to practice in Massachusetts, infra, § 549.

[1] Infra, § 447.

CHAPTER VI.

MOTION TO QUASH.

Indictment will be quashed when no judgment can be entered on it, § 385.
Quashing refused except in clear case, § 386.
Quashing usually matter of discretion, § 387.
Extrinsic facts no ground for quashing, § 388.
Defendants may be severed in quashing, § 389.
When two indictments are pending one may be quashed, § 390.
Quashing ordered in vexatious cases, § 391.
Bail may be demanded after quashing, § 392.
Pending motion *nolle prosequi* may be entered, § 393.
One count may be quashed, § 394.
Quashing may be on motion of prosecution, § 395.
Time usually before plea, § 396.
Motion should state grounds, § 397.

§ 385. THE court will quash an indictment when it is plain no judgment can be rendered in case of conviction.[1] Thus an indictment found in a court having no jurisdiction will be quashed in a superior court;[2] and so where the finding is on its face bad,[3] or the bill charges an offence excluded by a statute of limitation.[4] The same course will be taken where the offence is charged to have been committed on a day which is yet to come, or where no time is laid; such an error being as fatal as if there were no day laid;[5] and so of indictments alleging time as "on or about."[6] Where there is no Christian name given, or no addition, and no allega-

Indictment will be quashed when no judgment could be entered on it.

[1] State *v.* Robinson, 9 Foster (N. H.), 274; State *v.* Sloan, 67 N. C. 357; State *v.* Roach, 2 Hay. 352; State *v.* Williams, 2 Hill (S. C.), 382; State *v.* Albin, 50 Mo. 419. Supra, §§ 99, 106.

[2] R. *v.* Bainton, 2 Str. 1088; R. *v.* Hewitt, R. & R. 158; R. *v.* Heane, 4 B. & S. 947; 9 Cox, 433.

[3] Supra, §§ 350 *et seq.*; State *v.* Kilcrease, 6 Rich. 444.

[4] State *v.* J. P. 1 Tyler, 283; State *v.* Robinson, 9 Foster (N. H.), 274; State *v.* English, 2 Mo. 182; *contra*, State *v.* Howard, 15 Rich. (S. C.) 274. Supra, §§ 136, 318 *et seq.*; and this cannot be regarded as settled law.

[5] State *v.* Sexton, 3 Hawks, 184. Supra, § 134.

[6] U. S. *v.* Crittenden, 1 Hemp. 61.

tion that there is none, or that it is unknown, the defect may be availed of by a motion to quash, as well as by a plea in abatement.[1] There are several instances, also, where indictments have been quashed, because the facts stated in them did not amount to an offence punishable by law;[2] as, for instance, an indictment for contemptuous words spoken to a justice of the peace, not stating that they were spoken to him whilst in the execution of his office.[3] In cases of this general class, the trial judge may quash the indictment on his own motion.[4]

Quashing refused except in clear case.

§ 386. It is in the discretion of the court to quash an indictment for insufficiency, or put the party to a motion in arrest; but where the question is doubtful, the first remedy must be refused.[5] The court will not quash an indictment except in a very clear case;[6] and this reluctance is peculiarly strong in cases of crimes such as treason, felony,[7] forgery, perjury, or subornation.[8] The courts have also refused to quash indictments for cheats,[9] for selling flour by false weights,[10] for extortion,[11] for not executing a magistrate's warrant,[12] against

[1] State v. McGregor, 41 N. H. 407; Gardner v. State, 4 Ind. 632; Prell v. McDonald, 7 Kans. 454. Supra, § 98.

[2] R. v. Burkett, Andr. 230; R. v. Sarmon, 1 Burr. 516; Huff's case, 14 Grat. 648.

[3] R. v. Leafe, Andr. 226.

It has been ruled in the United States Circuit Court for Michigan, under the special procedure prescribed in federal courts, that a motion will be sustained to quash on the allegation that no evidence whatever was adduced in support of the application for a warrant of arrest; though the court will not inquire into the sufficiency of such evidence if any was produced. U. S. v. Shepard, 1 Abbott U. S. 431; but see infra, § 388.

[4] R. v. Wilson, 6 Q. B. 620; R. v. James, 12 Cox C. C. 127; U. S. v. Pond, 2 Curt. C. C. 268.

[5] U. S. v. Stowell, 2 Curtis C. C. 153; State v. Burke, 38 Me. 574; State v. Putnam, Ibid. 296; Com. v. Eastman, 1 Cush. 189; Lambert v. People, 7 Cow. 166; People v. Eckford, 7 Cow. 535; People v. Davis, 56 N. Y. 95; State v. Beard, 1 Dutch. 384; State v. Rickey, 4 Halst. 293; State v. Hageman, 1 Green (N. J.) 314; State v. Dayton, 3 Zab. 49; Horne v. State, 39 Md. 552; Click v. State, 3 Tex. 282; State v. Wishon, 15 Mo. 503.

[6] Resp. v. Cleaver, 4 Yeates, 69; Resp. v. Buffington, 1 Dallas, 61; Bell v. Com. 8 Grat. 726; State v. Mathis, 3 Pike, 84; State v. Baldwin, 1 Dev. & Bat. 198.

[7] Com. Dig. Indictment (H.); and see R. v. Johnson, 1 Wils. 325; People v. Waters, 5 Parker, 661; State v. Colbert, 75 N. C. 368.

[8] R. v. Belton, 1 Salk. 372; 1 Sid. 54; 1 Vent. 370; R. v. Thomas, 3 D. & C. 290.

[9] R. v. Orbell, 6 Mod. 42.

[10] R. v. Crookes, 3 Burr. 1841.

[11] R. v. Wadsworth, 5 Mod. 13.

[12] R. v. Bailey, 2 Str. 1211.

overseers for not paying money over to their successors,[1] and the like; and a party in such cases will be left to his demurrer for demurrable defects.[2] An indictment for not repairing highways or bridges, or for other public nuisances, will not be quashed,[3] unless there be a certificate that the nuisance is removed.[4] The same rule applies to indictments for a forcible entry,[5] unless, perhaps, where the possession has been afterwards given up.[6]

§ 387. It has been frequently ruled that as quashing is a discretionary act, error does not lie on its refusal.[7]

Quashing usually matter of discretion.

Even *granting* the motion has been held a matter of discretion as to which there is no revision.[8] But an examination of the cases will show that error has been sustained in numerous instances to such rulings, either directly or indirectly.[9] And it would be monstrous to assume that an inferior court could defeat revision by putting its judgment in the shape of quashing. And the reason for review is peculiarly strong in those States in which defendants are required to avail themselves of certain formal defects exclusively in motions to quash.[10]

§ 388. It is error to quash for matter not apparent in the indictment or in the caption; extrinsic matter being proper for defence only on trial by jury.[11] Hence the

Extrinsic facts no ground

[1] R. *v.* King, 2 Str. 1268.

[2] Maguire *v.* State, 47 Md. 485.

[3] R. *v.* Belton, 1 Salk. 372; 1 Vent. 370; R. *v.* Bishop, Andr. 220.

[4] R. *v.* Leyton, Cro. Car. 584; R. *v.* Wigg, 2 Salk. 460; 1 Ld. Raymond, 1165.

[5] R. *v.* Dyer, 6 Mod. 96.

[6] R. *v.* Brotherton, 2 Str. 702. See Com. Dig. Indictment (H.); 3 Bac. Abr. 116.

In Massachusetts, it is provided by statute that no indictment shall be quashed or otherwise affected by reason of the omission or misstatement of the title, occupation, estate, or degree of the defendant, or of the name of the city, town, county, or place of residence; nor by reason of the omission of the words "force and arms," or the words "against the statute," &c. Rev. Stat. c. 138, § 14.

[7] State *v.* Putnam, 38 Me. 296; State *v.* Hurley, 54 Me. 562; Com. *v.* Eastman, 1 Cush. 189; State *v.* Conrad, 21 Mo. (6 Bennett) 271. See infra, § 777.

[8] State *v.* Hurley, 54 Me. 562; State *v.* Jones, 5 Ala. 666. Infra, § 777.

[9] See, as illustrating revision by mandamus, People *v.* Stone, 9 Wend. 182; and see State *v.* Barnes, 29 Me. 561; State *v.* Maloney, S. C. R. I. 1879; Com. *v.* Church, 1 Barr, 105; State *v.* Wall, 15 Mo. 208.

[10] Com. *v.* McGovern, 10 Allen, 193; Com. *v.* Walton, 11 Allen, 238.

[11] U. S. *v.* Pond, 2 Curtis C. C. 265; Wickwire *v.* State, 19 Conn. 477; State *v.* Rickey, 4 Halst. 293; Com. *v.* Church, 1 Barr, 105; State *v.* Foster, 9 Tex. 65; and see also U. S. *v.* Shepard, supra, § 385. By consent,

for quashing.

illegal selection of the grand jurors may be no cause for quashing an indictment on motion,[1] and an indictment will not be quashed on the ground of irregularities in the arrest;[2] nor for technical irregularities in the conduct of the grand jury.[3]

Defendants may be severed in quashing.

§ 389. Wherever an indictment is divisible as to defendants, it may be quashed as to one defendant, remaining in force as to the others.[4] It is otherwise where, as in conspiracy, there can be no such severance.[5]

When two indictments are pending one may be quashed.

§ 390. If a prior indictment be pending in the same court, the course is to quash one before the party is put to plead on the other.[6] If in different courts, the defendant may abate the latter, by plea that another court has cognizance of the case by a prior bill.[7] It is said, however, that the finding of a bill does not confine the State to that single bill. Another may be preferred and the party put to trial on it, although the first remains undetermined.[8]

Quashing ordered in vexatious case.

§ 391. Quashing is also sometimes ordered in vexatious cases, as where an indictment contains an unnecessarily cumbrous combination of counts, or where incongruous offences are improperly joined;[9] or where, after a return

however, extraneous matter may be brought in. R. v. Heane, 4 B. & S. 947; 9 Cox, 433; State v. Cain, 1 Hawks, 352.

[1] State v. Hensley, 7 Blackf. 324; but see supra, § 344.

[2] People v. Rowe, 4 Parker C. R. 253. Supra, § 27. But see supra, § 385.

[3] State v. Tucker, 20 Iowa, 508; State v. Cole, 19 Wis. 129; State v. Fee, 19 Wis. 562; State v. Logan, 1 Nev. 509.

The provision of Massachusetts, in the Rev. Sts. c. 136, § 9, that a list of all witnesses, sworn before the grand jury during the term, shall be returned to the court under the hand of the foreman, is directory merely; and a non-compliance therewith is no ground for quashing an indictment. Com. v. Edwards, 4 Gray, 1.

[4] Supra, § 301; State v. Compton, 13 W. Va. 852.

[5] People v. Eckford, 7 Cow. 535.

[6] In New York, if there be at any time pending against the same defendant two indictments for the same offence, or two indictments for the same matter, although charged as different offences, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed. Rev. Stat. part iv. chap. ii. tit. 4, art. 2, § 42. Infra, § 452.

[7] State v. Tisdale, 2 Dev. & Bat. 159.

[8] Ibid.; Com. v. Drew, 3 Cush. 279; Dutton v. State, 5 Ind. 533. Supra, §§ 372-3; infra, § 452.

[9] Supra, § 290; Weinzorplin v. State, 7 Blackf. 186.

of *ignoramus*, a second bill, without special ground laid, is sent in by the prosecution.[1]

Bail may be demanded after quashing.

§ 392. On quashing an indictment on formal grounds, when no second indictment has been found, the court will continue the defendant on bail to meet the finding of the second.[2]

Pending motion *nolle prosequi* may be entered.

§ 393. After a motion to quash an indictment containing two counts, one of which is defective, the prosecutor may enter a *nolle prosequi* as to the defective count, which will remove the grounds for the motion to quash, and leave the defendant to be tried upon the charge contained in the good count.[3]

One count may be quashed.

§ 394. In clear cases, a judge may, at his discretion, quash a defective count in an indictment, without quashing the entire indictment.[4] But if there be one good count, the motion to quash, as a general rule, will not be sustained in those States in which a single good count will sustain a verdict.[5]

Quashing may be on motion of prosecution.

§ 395. The practice is to prefer a new bill against the same defendant, before an application to quash is made on the part of the prosecution.[6] And when the court, upon such an application, orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of such former indictment;[7] that the second indictment shall stand in the same condition to all intents and purposes that the first would have stood if it were not quashed;[8] and particularly where there has been any vexatious delay upon the part of the prosecutor,[9] that the prosecutor be

[1] Rowand *v.* Com. 82 Penn. St. 405.

[2] Crumpton *v.* State, 43 Ala. 31.

[3] State *v.* Buchanan, 1 Ired. 59. Supra, § 383–4.

[4] Scott *v.* Com. 14 Grat. 687; Jones *v.* State, 16 Humph. 435; State *v.* Woodward, 21 Mo. 266.

[5] Com. *v.* Hawkins, 3 Gray, 463; Kane *v.* People, 3 Wend. 364; State *v.* Wishon, 15 Mo. 503; State *v.* Woodward, 21 Mo. (5 Bennett) 265; State *v.* Mathis, 3 Pike, 84; State *v.* Rutherford, 13 Tex. 24; State *v.* Staker, 3 Ind. 570; Jarrell *v.* State, 58 Ind. 293; State *v.* Buchanan, 1 Ired. 59.

[6] R. *v.* Wynn, 2 East, 226.

[7] R. *v.* Webb, 3 Burr. 1469.

[8] R. *v.* Glen, 3 B. & Ald. 373; R. *v.* Webb, 3 Burr. 1468; 1 W. Bl. 460.

[9] 3 Burr. 1468; 1 W. Bl. 460.

put on terms.[1] And, at all events, as has been seen, the court, when the exceptions are technical, will hold the defendant to bail to await a second indictment.[2]

Time usually before plea.

§ 396. The application, if made by the defendant, must be made before plea pleaded.[3] Should the application be made upon the part of the prosecution, it would seem that it may be made at any time before the defendant has been actually tried upon the indictment;[4] and the right as to formal defects continues until after arraignment and the empanelling of the jury.[5] After empanelling, for formal defects it is too late.[6] But in cases where the indictment is plainly bad, as where there is clearly no jurisdiction, or where there are other plain substantial defects, the court will quash at any time, even after plea.[7]

Motion should state grounds.

§ 397. The motion should specifically state the ground of objection.[8]

[1] R. *v.* Glen, 3 B. & Ald. 372. For exceptions see Mentor *v.* People, 30 Mich. 91.

[2] Crumpton *v.* State, 43 Ala. 31.

[3] Fost. 261; R. *v.* Rookwood, Holt, 684; 4 St. T. R. 677; State *v.* Burlingham, 15 Me. 104; Nicholls *v.* State, 5 South. 539; Weinzorpflin *v.* State, 7 Blackf. 186; State *v.* Jarvis, 63 N. C. 556; Thomasson *v.* State, 22 Geo. 499; State *v.* Riffe, 10 W. Va. 794; though see Com. *v.* Chapman, 11 Cush. 422; R. *v.* Heane, 4 B. & S. 947; 9 Cox C. C. 433.

In England, where the indictment had already, upon application of the defendant, been moved into the Court of King's Bench, by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment, after a forfeiture of his recognizance, by not having carried the record down for trial. Anon. 1 Salk. 380.

[4] See R. *v.* Webb, 3 Burr. 1468.

[5] Clark *v.* State, 23 Miss. 261.

[6] Com. *v.* Fitchburg R. R. 126 Mass. 472.

In this case it was held that if a jury has once been empanelled in a criminal case, it is too late, under the St. of 1864, c. 250, § 2, to move to quash the indictment for formal defects apparent on its face, although the motion is made before the empanelling of the jury for a new trial of the case, the former verdict having been set aside.

[7] R. *v.* Heane, 4 B. & S. 433; 9 Cox C. C. 433; R. *v.* Wilson, 6 Q. B. 620; R. *v.* James, 12 Cox C. C. 127; Com. *v.* Chapman, 11 Cush. 422; Nicholls *v.* State, 2 Southard, 539. See Wilder *v.* State, 47 Ga. 522.

[8] State *v.* Van Houten, 37 Mo. 357. See, under statute, State *v.* Berry, 62 Mo. 595.

CHAPTER VII.

DEMURRER.

Demurrer reaches defects of record, § 400.
Demurrer may be to particular counts, but not to parts of counts, § 401.
Demurrer brings up prior pleadings, § 402.
Demurrer admits facts well pleaded, § 403.
In England, judgment for crown on general demurrer is final, § 404.
Otherwise in this country, § 405.
Ordinarily judgment against prosecution not final, § 406.
Demurrer to evidence brings up sufficiency of prosecution's case, § 407.
Joinder in demurrer formal, § 407 *a*.
Demurrer should be prompt, § 407 *b*.

§ 400. DEMURRER, from *demorare*, is a mode by which a defendant may object to an indictment as insufficient in point of law.[1] Wherever an indictment is defective in substance or in form, it may be thus met;[2] but as at common law all errors which can be thus taken advantage of are equally fatal in arrest of judgment, demurrers, as a means of testing indictments, were, in England, but rarely used until the 7 Geo. 4, c. 64, ss. 20, 21, by which all defects, purely technical, must be taken advantage of before verdict.[3] In this country, demurrers, except under similar statutes, are in but little use,[4] and will not avail when the offence is set forth with substantial accuracy.[5]

Demurrer reaches defects of record.

§ 401. A demurrer may be sustained as to a bad count without in any way affecting a good count in the same indictment;[6] though if a demurrer be *general* to the whole indictment, one good count will prevent a general judgment for the defendant.[7] That a part of a

Demurrer may be to particular counts, but not to parts of counts.

[1] Co. Lit. 71, *b*; 4 Bl. Com. 333; Burn's Just. 29th ed. tit. Demurrer; Ch. C. L. 439.

[2] Lazier *v.* Com. 10 Grat. 708.

[3] Archbold's C. P. 9th ed. 78. Supra, § 90. See, as to Maryland practice, 6 Md. 410.

[4] See supra, § 90. That a demurrer will not be sustained for defects in indorsing and filing indictment see State *v.* Brandon, 28 Ark. 410.

[5] Deckard *v.* State, 38 Md. 186; Harne *v.* State, 39 Md. 352.

[6] Turner *v.* State, 40 Ala. 21.

[7] Ingram *v.* State, 39 Ala. 247. Infra, § 909.

count is defective is, however, no ground for demurrer, if the residue of the count sets forth an indictable offence. Hence, where a count contains two offences, one of which is properly stated, and the other of which can be rejected as surplusage, there must be a judgment on demurrer for the prosecution.[1]

Demurrer brings up the validity of all prior pleadings.

§ 402. A demurrer puts the legality of the whole proceedings in issue, and compels the court to examine the validity of the whole record;[2] and, therefore, in an indictment removed from an inferior court, if it appear from the caption that the court before which it was taken had no jurisdiction over it, it will be adjudged to be invalid.[3]

Judgment is to be rendered against the party committing the first error in pleading.[4]

Demurrer admits facts.

§ 403. Although a demurrer admits the facts demurred to and refers their legal sufficiency to the court, it does not admit allegations of the legal effect of the facts therein pleaded.[5] Nor does it admit any facts that are not well pleaded.

In England, judgment on general demurrer for prosecution may be final.

§ 404. Whether a judgment for the prosecution, on a demurrer, is final, depends upon whether the demurrer admits the facts charged in the indictment in such a way as to constitute a confession of guilt. If a defendant virtually says: "I did this, but in doing it I did not break the law," then, if the conclusion of the court is that if he did break the law, judgment is to be entered against him.[6] On the other hand, when the demurrer is special, pointing out particular alleged flaws in the indictment, and not confessing that the facts charged as constituting the offence are true, then, if the judgment is for the prosecution, the defendant is

[1] Mulcahy *v.* R. L. R. 3 H. L. 306; Wheeler *v.* State, 42 Md. 563.

In Pennsylvania, by the revised act, objections to indictment must be made before the jury is sworn. Rev. Act, 1860, 433; Com. *v.* Frey, 50 Penn. St. 245.

A similar provision exists in Massachusetts. Gen. Stat. 1864, c. 250, § 2.

[2] Saund. 285, n. 5; Com. *v.* Trimmer, 84 Penn. St. 65.

[3] 1 T. R. 316; 1 Leach, 425; Andr. 137, 138.

[4] State *v.* Sweetsir, 53 Me. 438.

[5] Com. *v.* Trimmer, 84 Penn. St. 18.

[6] Burn's Just. 29th ed. tit. Demurrer; 2 Hale, 225, 257, 315; 2 Inst. 178; 2 Hawk. c. 31, s. 5; 4 Bla. Com. 334; Starkie's C. P. 297; 2 Leach, 603; Ch. C. L. 439.

entitled to plead over.[1] We have, indeed, several cases when judges at *nisi prius* held that the defendant was entitled to have judgment of *respondeat ouster*, in every case of felony where his demurrer was adjudged against him; for it was said that where he unwarily discloses to the court the facts of his case, and demands their advice whether it amounts to felony, they will not record or notice the confession;[2] and a demurrer was said to rest on the same principle.[3] In 1850, however, the question was finally put to rest by a solemn judgment of the Court of Criminal Appeal, that a judgment for the crown on a general (as distinguished from a special) demurrer interposed by the defendant, under such circumstances, is final.[4] At the same time it is within the discretion of the court to permit the defendant to withdraw his demurrer, and to plead as it were *de novo* to the indictment.[5]

Otherwise in this country.

§ 405. In this country the distinction above taken is not recognized, and the practice has been in all cases where there is on the face of the pleading no admission of criminality on the part of the defendant, to give judgment, *quod respondeat ouster*, and the English distinction does not seem to be recognized.[6] In some jurisdictions, however,

[1] 1 Salk 59; Cro. Eliz. 196; Dyer, 38, 39; Hawk. b. 2, c. 31, s. 6; R. *v.* Faderman, 1 Den. C. C. 360; T. & M. 286; 3 C. & K. 359; overruling R. *v.* Duffy, *ut supra;* Foster *v.* Com. 8 Watts & Serg. 77.

[2] Archbold, by Jervis, 9th ed. 429; 2 Hale, 225, 257; 4 Bla. Com. 334.

[3] R. *v.* Duffy, 4 Cox C. C. 326; R. *v.* Phelps, 1 C. & M. 180; R. *v.* Purchase, 1 C. & M. 617; Fost. 21; 4 Bla. Com. 334; 8 East, 112; 2 Leach, 603; 2 Hale, 225, 257; 1 M. & S. 184; Burn, J., Demurrer; Williams, J., Demurrer; but see Starkie's C. P. 297-8; and in R. *v.* Odgers, 2 M. & Rob. 479, and the cases there cited in note, it was held that it is within the discretion of the court, even in felonies, to refuse a *respondeat ouster*.

[4] R. *v.* Faderman, 4 Cox C. C. R. 357; 3 C. & K. 359; 1 Den. C. C. 565.

[5] R. *v.* Smith, 4 Cox C. C. 42; R. *v.* Brown, 1 Den. C. C. 293; 2 C. & K. 509; R. *v.* Birmingham R. R. 3 Q. B. 233; R. *v.* Houston, 2 Craw. & Dix, 310. See 1 Bennett & Heard's Lead. Cas. 336.

A distinction, however, has been taken between felonies and misdemeanors; for in the latter, if the defendant demur to the indictment, whether in abatement or otherwise, and fail on the argument, it is said that he shall not have judgment to answer over, but the decision will operate as a conviction. 8 East, 112; Hawk. b. 2, c. 31; though see R. *v.* Birmingham R. R. 3 Q. B. 223, where the defendant was allowed to withdraw the demurrer.

[6] Com. *v.* Goddard, 13 Mass. 456 (*sed quaere*, Com. *v.* Eastman, 1 Cush. 189); Com. *v.* Barge, 3 Pen. & W. 262;

it has been held, that when a general demurrer to an indictment for a misdemeanor has been overruled, the defendant will not be permitted to plead to the indictment as a matter of right; he must lay a sufficient ground before the permission will be granted.[1] In New York, where the defendant demurred to an indictment for a misdemeanor in the court below, and judgment was there given *against the People*, which was in the Supreme Court reversed on error, it was held that the court in error must render final judgment for the People on the demurrer, and pass sentence on the defendant; and that he could not be permitted to withdraw the demurrer and plead.[2] But this is now corrected by statute, and the proper course, even independently of statutes, is, in such case, to permit a plea in bar, and a trial by jury.[3] And now, even where the disposition is to treat the judgment on a general demurrer as final, the courts in this country generally agree with those of England in reserving the right to permit the demurrer to be withdrawn at their discretion.[4]

Foster *v.* Com. 8 Watts & S. 77; Ross *v.* State, 9 Mo. 687. See Evans *v.* Com. 3 Met. 453; McGuire *v.* State, 35 Miss. 366; Maeder *v.* State, 11 Mo. 363; Austin *v.* State, Ibid. 366; Lewis *v.* State, Ibid. 366; Fulkner *v.* State, 3 Heisk. 33. See for other cases infra, §§ 419–421. By act of Congress of May 23, 1872, the judgment is *respondeat ouster*. Rev. Stat. § 1026.

[1] State *v.* Merrill, 37 Me. 329; State *v.* Dresser, 54 Me. 569; State *v.* Wilkins, 17 Vt. 151; Wickwire *v.* State, 19 Conn. 478; Bennett *v.* State, 2 Yerg. 472; State *v.* Rutledge, 8 Humph. 32. See People *v.* King, 28 Cal. 265; People *v.* Jocelyn, 29 Cal. 562; Com. *v.* Foggy, 6 Leigh, 688. See infra, § 419.

[2] People *v.* Taylor, 3 Denio, 91; but see People *v.* Corning, 2 Comst. 1.

"In Stearns *v.* People, 21 Wend. 409, the prisoner was indicted for a felony. He demurred to the indictment, and judgment was given upon the demurrer against him *to answer over*. He refused to do so, when the court directed a plea of not guilty to be entered for him, and a trial upon the plea of not guilty was had. Upon error the court seems to have held, and it seems to us properly, that as he had not voluntarily pleaded over he had not waived the right to review the judgment on his demurrer, but could take advantage of the error, if any, in overruling it. This, it seems to us, is a very proper course for a fair-minded court to take in a case where a demurrer is interposed in good faith." Note to 13 Eng. R. 662. For practice in writ of error in such cases see infra, § 773.

[3] R. *v.* Houston, 2 Crawf. & Dix, 310.

[4] State *v.* Wilkins, 17 Vt. 152; Evans *v.* Com. 3 Met. (Mass.) 453; Bennett *v.* State, 2 Yerg. 472. See infra, §§ 419, 477, 478, 773.

§ 406. Where the prosecution demurs to the plea of *autrefois convict*, or other special plea of confession and avoidance to an indictment, and the demurrer is overruled, the defendant is not entitled to be discharged, and the prosecution may rejoin.[1] But if the defendant plead in abatement in matter of form, and the plea is demurred to, and the demurrer overruled, the judgment of the court is that the prosecution abate, reserving the right to bring in an amended bill.[2]

Ordinarily judgment against prosecution not final.

Judgment against the prosecution on a special demurrer to the indictment is not final, when the defects are merely formal, but a new bill may be sent in, with the defect cured.[3] And the defendant, in cases of this class, will be held over to await a second indictment.[4] A writ of error lies to a judgment against the prosecution.[5]

But where the demurrer is general, going to the merits of the offence, then a judgment for the defendant relieves him from further prosecution.

§ 407. By the practice of several States, the defendant may demur to the evidence, though it is optional for the prosecutor to join or not.[6] The object is to ascertain the law on an admitted state of facts, the demurrer admitting every fact which the evidence legitimately tends to establish.[7] In such cases a judgment against the defendant is a final judgment for the Commonwealth.[8]

Demurrer to evidence brings up sufficiency of prosecution's whole case.

§ 407 *a*. The omission of the record to show a joinder of issue cannot be objected to after the determination of the issue of law.[9]

Joinder in demurrer formal.

§ 407 *b*. A demurrer should be promptly made, and is too late

[1] Barge *v.* Com. 2 Pen. & W. 262; State *v.* Barrett, 54 Ind. 434; State *v.* Nelson, 7 Ala. 610.

[2] Rawls *v.* State, 8 Sm. & M. 590.

[3] U. S. *v.* Watkyns, 3 Cranch C. C. R. 441; State *v.* Barrett, 54 Ind. 434. Infra, §§ 425, 487; though see supra, § 404, and State *v.* Dresser, 54 Me. 569.

[4] Crumpton *v.* State, 43 Ala. 31.

[5] Infra, § 773.

[6] Com. *v.* Parr, 5 Watts & S. 345; Doss *v.* Com. 1 Grat. 557; Brister *v.* State, 26 Ala. 108.

[7] Bryan *v.* State, 26 Ala. 65.

[8] Hutchison *v.* Com. 82 Penn. St. 472.

[9] 1 Chit. Crim. Law, 481, 482; U. S. *v.* Gibert, 2 Sumn. 19, 66; Com. *v.* McKenna, 125 Mass. 397.

after plea is entered; though there may be cases of substantial error in which, when a plea has been entered inadvertently, it may in the discretion of the court be withdrawn, in order to enable the question of law to be determined in advance of the trial of the issue on the plea of not guilty.[1]

Must be prompt.

[1] R. *v.* Purchase, C. & M. 617; Com. *v.* Chapman, 11 Cush. 422. Supra, § 396. For Pennsylvania statute see supra, § 401.

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I. GUILTY AND NOT GUILTY.

§ 408. WHEN brought to the bar, in capital cases, and at strict practice in all offences whatever, the defendant is formally arraigned, by the reading of the indictment, and the calling on him for a plea. The clerk, immediately after the reading asks, "How say you, A. B., are you guilty or not guilty?"[1] Upon this, if the defendant confess to the charge, the confession is recorded, and nothing is done till judgment.[2] But if he deny it, he answers, "Not guilty," upon which the clerk of assize, or clerk of the arraigns, replies, that the defendant is guilty, and that the State (or Commonwealth)

Plea of not guilty is general issue.

[1] 2 Hale, 119; R. *v.* Hensey, 1 Burr. 643; Cro. C. C. 7. Infra, §§ 545, 698.

[2] 4 Harg. St. Trials, 779; Dalt. c. 185. Infra, §§ 545, 698.

is ready to prove the accusation.[1] After issue is thus joined, the clerk usually proceeds to ask the defendant, "How will you be tried?" to which the defendant replies, "By God and my country;" to which the clerk rejoins, "God send you a good deliverance."[2]

Plea is essential.

§ 409. The right of arraignment on a criminal trial may, in some cases, be waived, but a plea is always essential. The court cannot supply an issue after verdict where there has been no plea, notwithstanding that the defendant consented to go to trial.[3]

The practice in respect to arraignment will be hereafter more fully detailed.[4]

Omission of *similiter* not fatal.

§ 410. An omission to insert the *similiter*, in joining issue in criminal cases, may be corrected, as it is usually only added when the record is made up.[5] In any view, going to trial without a joinder of issue by the prosecution to a plea in bar waives any objection to such non-joinder.[6]

In felonies pleas must be in person.

§ 411. A plea by an attorney of a party indicted for a felony is a nullity; the defendant must plead in person.[7] It is otherwise, however, in misdemeanors.[8]

Pleas must be several.

§ 412. Defendants in an indictment have a right to plead severally not guilty; but a general plea of not guilty by all the defendants is, in law, a several plea.[9]

[1] 4 Bla. Com. 339; 4 Harg. St. Trials, 779; Whart. Prec. 1138.

[2] 2 Hale, 219; 4 Bla. Com. 341; Cro. C. C. 7. Infra, §§ 545, 698.

Though the defendant persists in saying he will be tried by his king and his country, and refuses to put himself on his trial in the ordinary way, it will not invalidate a conviction. R. *v.* Davis, Gow's R. N. P. 219, and notes there. When, however, the clerk of the court, upon the arraignment of the defendants, did not further proceed, upon their pleading not guilty, to ask them how they would be tried, so that they did not make the usual reply, "By God and their country," it was held that, under the laws of the United States, the plea of "Not guilty" put the defendants upon the country, by a sufficient issue, without any further express words. U. S. *v.* Gibert, 2 Sumn. 20.

[3] Hoskins *v.* State, 84 Ill. 87; Gould *v.* People, 89 Ill. 216; Douglass *v.* State, 3 Wis. 820; People *v.* Gaines, 52 Cal. 480. Infra, § 698.

[4] Infra, § 698.

[5] Com. *v.* McCormack, 126 Mass. 258; Berrian *v.* State, 2 Zabr. 9; State *v.* Swepson, 81 N. C. 571. Infra, § 698.

[6] Com. *v.* McCauley, 105 Mass. 69.

[7] McQuillan *v.* State, 8 Sm. & M. 587. See infra, §§ 541, 698.

[8] U. S. *v.* Mayo, 1 Curtis C. C. 433. See fully infra, §§ 541, 550, 698, 912.

[9] State *v.* Smith, 2 Ired. 402. Supra, § 309.

§ 413. By a plea of guilty, defendant first confesses himself guilty in manner and form as charged in the indictment; and if the indictment charges no offence against the law, none is confessed.[1] But formal defects may be cured by this plea.[2]

Plea of guilty reserves motion in arrest.

§ 414. The court may, at its discretion, allow a plea of guilty to be withdrawn, even after the overruling of a motion in arrest of judgment, and this is not subject for error.[3] And a plea of guilty drawn out by the court, by telling the defendant that if he do not plead guilty he will be heavily punished, will be treated as a nullity by the court in error.[4]

Plea of guilty may be at discretion withdrawn.

§ 415. Pleas entered by mistake, in plain cases, can be amended by court. Thus, where a defendant, against whom several indictments have been found, intending to plead guilty to one, by mistake pleaded guilty to another, it was held that the error could be corrected after entry of the plea on the minutes of the court.[5]

Mistakes can be corrected.

§ 416. When there is a plea of guilty, the court may ascertain by witnesses the degree of the offence.[6]

Witnesses may prove degree.

§ 417. At common law, when a prisoner stood mute, a jury was called to inquire whether he did so from dumbness *ex visitatione Dei*, or from malice; and unless the former was the case, he was sentenced as on conviction.[7] In England, and in each of the United States, however, statutes now exist enabling the court, where the prisoner stands mute, to direct a plea of not guilty to be entered, whereupon the trial proceeds as if he had regularly pleaded not guilty in person.[8]

Plea of not guilty can be entered by order of court.

[1] Fletcher *v.* State, 7 Eng. Ark. 169.

[2] Carper *v.* State, 27 Oh. St. 572. Supra, § 90. See infra, § 759.

[3] R. *v.* Brown, 17 L. J. M. C. 145; State *v.* Cotton, 4 Foster, 143. See State *v.* Salge, 2 Nev. 321.

[4] O'Hara *v.* People, 41 Mich. 623. Compare article in London Law Times, Dec. 14, 1879.

[5] Davis *v.* State, 20 Ga. 674.

[6] Infra, §§ 918, 945.

[7] 1 Ch. C. L. 425; Turner's case, 5 Oh. 542; Com. *v.* Moore, 9 Mass. 402.

[8] R. *v.* Schleter, 10 Cox C. C. 409; Dyott *v.* Com. 5 Whart. R. 67; Brown *v.* Com. 76 Penn. St. 319; where it was held that such course waives jury defects. That such course cures other defects, see Com. *v.* McKenna, 125 Mass. 397.

In R. *v.* Bernard, 1 F. & F. 240, the finding of the jury, that the de-

Such a refusal to plead, however, does not admit in any way the jurisdiction of the court.[1]

The entry must be made before the trial opens.[2]

Plea of *nolo contendere* equivalent to not guilty.

§ 418. *The plea of nolo contendere* has the same effect as a plea of guilty, so far as regards the proceedings on the indictment; and a defendant who is sentenced upon such a plea to pay a fine is convicted of the offence for which he is indicted.

The advantage, however, which may attend this plea is, that when accompanied by a protestation of the defendant's innocence, it will not conclude him in a civil action from contesting the facts charged in the indictment.[3]

It is held within the discretion of the court to accept such a plea, or to require a plea of guilty or not guilty.[4]

fendant was mute from nature, was dispensed with. See U. S. *v.* Hare, 2 Wheel. C. C. 299.

In an English case, where a dumb person was to be tried for a felony, the judge ordered a jury to be empanelled, to try whether he was mute by the visitation of God. The jury found that he was so; they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant by a sign pleaded not guilty; the judge then ordered the jury to be empanelled to try whether the defendant was now sane or not, and on this question directed them to say, whether the defendant had sufficient intellect to understand the course of the proceedings, to make a proper defence, to challenge the jurors, and comprehend the details of the evidence, and that if they thought he had not, they should find him of non-sane mind. R. *v.* Pritchard, 7 C. & P. 303; 1 W. & S. Med. J. § 95. See further for English practice, R. *v.* Berry, 13 Cox C. C. 189. In Massachusetts, a deaf and dumb prisoner was arraigned through a sworn interpreter, his incapacity having first been suggested to the court by the solicitor general, and the trial then proceeded as on a plea of not guilty. Com. *v.* Hill, 14 Mass. 207.

[1] People *v.* Gregory, 30 Mich. 371.

[2] Davis *v.* State, 38 Wis. 387.

[3] U. S. *v.* Hartwell, 3 Cliff. 221; Com. *v.* Horton, 9 Pick. 206; Com. *v.* Tilton, 8 Met. Mass. 232. See Whart. Ev. § 783.

[4] Com. *v.* Tower, 8 Met. Mass. 527.

In Massachusetts, under St. 1855, c. 215, § 35, a defendant in a prosecution on that statute cannot be adjudged guilty on a plea of *nolo contendere*, unless it appears by the record that the plea was received with the consent of the prosecutor. Com. *v.* Adams, 6 Gray, 359.

II. SPECIAL PLEAS.

§ 419. *Can a defendant plead simultaneously the general issue, and one or more special pleas?* At common law this must be answered in the negative, whenever such pleas are repugnant; as at common law all the pleas filed in a case are regarded as one. This is the strict practice in England, where the judges in review have solemnly ruled that special pleas cannot be pleaded in addition to the plea of not guilty.[1] And in this country, in cases where *not guilty* has been pleaded simultaneously with *autrefois acquit*, the same course has been followed, and the plea of *not guilty* stricken off until the special plea is disposed of.[2]

Repugnant pleas cannot be pleaded simultaneously.

§ 420. In such case, after determining the special plea against the defendant, the present practice in the United States is to enter simply a judgment of *respondeat ouster*, in all cases in which the special plea is not equivalent to the general issue. This, which is technically the correct practice, is not, however, always pursued. A short cut is often taken to the same result, by directing when special pleas and the general issue are filed simultaneously, or are found together on the record before trial, that the special pleas should be tried first, and if they are found against the defendant, then the general issue.[3] But, under any circumstances, it is error to try the special pleas and the general issue simultaneously. The special pleas must be always disposed of before the general issue is tried.[4]

In practice special plea is tried first.

[1] R. *v.* Charlesworth, 9 Cox C. C. 40; R. *v.* Strahan, 7 Cox C. C. 85; R. *v.* Skeen, 8 Cox C. C. 143; Bell C. C. 97; *contra*, 1 Stark. C. P. 339.

The defendant, it should be remembered, is entitled to enter as many pleas as he has matter of defence. The difference noticed in the text relates to the order of their presentation and disposition.

[2] Infra, § 479; State *v.* Copeland, 2 Swan, 626; Hill *v.* State, 2 Yerg. 248. As to pleas in abatement see infra, § 425.

[3] State *v.* Inneas, 53 Me. 536; Hartung *v.* People, 26 N. Y. 154; People *v.* Roe, 5 Parker C. R. 231; People *v.* Gregory, 30 Mich. 371; State *v.* Greenwood, 5 Port. 474; Buzzard *v.* State, 20 Ark. 106. As sanctioning this view see 2 Hawk. P. C. c. 23, ss. 128–9; *contra*, 1 Ch. C. L. 463.

[4] Com. *v.* Merrill, 8 Allen, 545; Solliday *v.* Com. 28 Penn. St. 13; Foster *v.* State, 39 Ala. 229; Henry *v.* State, 33 Ala. 389; Nonemaker *v.* State, 34 Ala. 211; Mountain *v.* State, 40 Ala. 344; Fulkner *v.* State, 3 Heisk. 33; Clem *v.* State, 42 Ind. 420. See R. *v.* Charlesworth, *ut supra;* R. *v.* Roche, 1 Leach, 160. Infra, §§ 477, 478.

§ 421. *If a special plea is determined against the defendant, is the judgment always respondeat ouster?* Unless upon a trial by jury on a special plea which embraces the general issue, this question ought now to be answered in the affirmative. The old distinction taken in this respect between felonies and misdemeanors, being no longer founded in reason, should be rejected in practice. And the only consistent as well as just course is to harmonize the present fragmentary rulings in this relation, on the principle that in all cases the question of guilty or not guilty is one which the defendant is entitled of right, no matter how many technical antecedent points may have been determined against him, to have squarely decided by a jury.[1]

Judgment against defendant on special plea is *respondeat ouster.*

III. PLEA TO THE JURISDICTION.

§ 422. Where an indictment is taken before a court that has no cognizance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged;[2] as, if a man be indicted for treason at the quarter sessions, or for rape at the sheriff's tourn, or the like;[3] or, if another court have exclusive jurisdiction of the offence.[4] Such pleas are not common, the easier and simpler course being writ of error or arrest of judgment.

Jurisdiction may be excepted to by plea.

[1] Infra, § 486; 2 Hale P. C. 255; U. S. *v.* Williams, 1 Dillon, 485; Barge *v.* Com. 3 Pen. & Watts, 262; Foster *v.* State, 8 W. & S. 77; Harding *v.* State, 22 Ark. 210; Buzzard *v.* State, 20 Ark. 106; Ross *v.* State, 9 Mo. 687. As to demurrer see conflicting decisions, supra, § 406. As to misdemeanors, when the special plea involves facts of general issue, see *contra*, State *v.* Allen, 1 Ala. 442; Guess *v.* State, 1 Eng. 147; and see *dicta* of Gibson, C. J., in Barge *v.* Com. 3 Pen. & W. 262.

[2] 2 Hale, 286.

[3] Ibid.

[4] 4 Bla. Com. 383. See Wh. Prec. 1145, for forms.

A. was indicted in the city of New York for obtaining money from a firm of commission merchants in that city, by exhibiting to them a fictitious receipt signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce, for the use of, and subject to the order of the firm. The defendant pleaded that he was a natural born citizen of Ohio, had always resided there, and had never been within the State of New York; that the receipt was drawn and signed in Ohio, and the offence was committed by the receipt being presented to the firm in New York by an innocent agent of the defendant, employed by him, while he was a resident of, and actually within the State of Ohio. It was held that the plea was bad, and that the defendant was properly indicted in the city of New

IV. PLEA IN ABATEMENT.

§ 423. When the indictment assigns to the defendant a wrong Christian name or surname, he can only take advantage of the error by a plea in abatement,[1] though when there is a blank in name a motion to quash is equally good. Such a plea should be verified by affidavit, and should expose the defendant's proper name.[2] What particularity is necessary in setting forth the name and addition of the defendant has been considered in another place.[3] Any misnomer, in general, is matter for abatement;[4] thus, where the indictment charged the defendant as George Lyons, it was held he could abate it by showing his true name was George Lynes.[5]

Error in defendant's name may be met by plea in abatement.

§ 424. Want of addition is at common law ground for abatement,[6] though the proper course is motion to quash.[7] But a wrong addition is only to be met by plea in abatement.[8] And in an indictment on the statute of Maine, prohibiting the sale of lottery tickets, giving the accused the name of lottery vendor when his proper addition was broker, furnishes good cause for abatement.[9]

And so of error in addition.

§ 425. If a plea of misnomer be put in, the usual course is to reindict the defendant by the new name, without pushing the old bill further.[10] The prosecutor may, however, if he think fit, deny the plea, or reply that the defendant is known as well by one Christian name or

Judgment for defendant no bar to new indictment in right name.

York. Adams *v.* People, 1 Comst. 173; S. C., 1 Denio, 190. See Com. *v.* Gillespie, 7 S. & R. 469. Supra, § 119.

[1] Scott *v.* Soans, 3 East, 111; Com. *v.* Dedham, 16 Mass. 146; Turns *v.* Com. 6 Met. (Mass.) 225; Com. *v.* Fredericks, 119 Mass. 199; Lynes *v.* State, 5 Port. 236. See supra, §§ 119, 385.

[2] O'Connell *v.* R. 11 Cl. & Fin. 155; Com. *v.* Sayres, 8 Leigh, 722; R. *v.* Granger, 3 Burr. 1617; Rev. St. Mass. c. 136, § 31; Gen. Stat. c. 171, § 31; State *v.* Farr, 12 Rich. 24. See Wh. Prec. 1141-2, for forms. Supra, §§ 98 *et seq.*

[3] See supra, §§ 96 *et seq.*

[4] State *v.* Lorey, 2 Brev. 395.

[5] Lynes *v.* State, 5 Port. 236.

[6] State *v.* Hughes, 2 Har. & McH. 479; 1 Chit. C. L. 204. See State *v.* Newman, 2 Car. Law Rep. 74.

[7] Supra, § 119.

[8] Supra, §§ 106, 119.

[9] State *v.* Bishop, 15 Me. (3 Shepley) 122. See Com. *v.* Clark, 2 Va. Cas. 401. The plea, however, must supply the true addition. R. *v.* Checkets, 6 M. & S. 88.

[10] 2 Hale, 176, 238; Burn, Indictment ix.; Williams, J., Misnomer and Addition, ii.; Dick. Quart. Sess. 167.

surname as another, and, if he succeed, judgment will be given for the State,[1] or the prosecutor may demur to the plea, and in cases of felony, the demurrer and joinder may be *ore tenus*.[2] When the issue is joined upon a plea in abatement or replication thereto, the venire may be returned, and the trial of the point by a jury of the same county proceed *instanter*.[3] If judgment be found for him, this is no bar to an indictment for the same offence in his true name.[4]

It is not a good replication that the defendant is the same person mentioned in the indictment.[5]

Two pleas in abatement, when not repugnant, may be pleaded at the same time.[6]

After not guilty, plea in abatement is too late.

§ 426. Without leave of court, which is granted only in very strong cases, the plea of not guilty cannot be withdrawn to let in a plea in abatement, for on principle, a plea of not guilty admits all that a plea in abatement contests, and after a plea of not guilty, a plea in abatement is too late.[7]

Plea to be construed strictly.

§ 427. A plea in abatement is a dilatory plea, and must be pleaded with strict exactness.[8] It is consequently essential that the facts should be stated out of which the defence arises, or that there should be a negation of the facts which are presumed from the existence of a record.[9]

Defendant may plead over.

§ 428. In England, the rule is that on a plea of abatement on ground of misnomer, the judgment, if for the crown, is final, and that the defendant cannot plead over.[10]

[1] 2 Leach, 476; 2 Hale, 237, 238; Cro. C. C. 21. See form, 2 Hale, 237; State *v.* Dresser, 54 Me. 569; Lewis *v.* State, 1 Head, 329. See, as to practice and evidence, Com. *v.* Gale, 11 Gray, 320. Supra, §§ 119, 385.

[2] Foster, 105; 1 Leach, 476; and see supra, § 406.

[3] 2 Leach, 478; 2 Hale, 238; 22 Hen. 8, c. 14; 28 Hen. 8, c. 1; 32 Hen. 8, c. 3; 3 Inst. 27; Starkie, 296.

[4] Com. *v.* Farrell, 105 Mass. 189; State *v.* Robinson, 2 Lea, 114.

[5] Com. *v.* Dockham, Thach. C. C. 238.

[6] Com. *v.* Long, 2 Va. Cases, 318. Supra, § 419.

[7] R. *v.* Purchase, C. & M. 617; Com. *v.* Butler, 1 Allen, 4; State *v.* Farr, 12 Rich. 24.

[8] O'Connell *v.* R. 11 Cl. & Fin. 155; 9 Jurist, 25; Dolan *v.* People, 64 N. Y. 485.

[9] State *v.* Brooks, 9 Ala. 10.

On a trial of fact in a plea in abatement of misnomer, the fact, that to an indictment by the same name the defendant had pleaded not guilty, is proper for the consideration of the jury. State *v.* Homer, 40 Me. 438.

[10] R. *v.* Gibson, 8 East, 107.

It seems otherwise, however, where the plea is to matter of law.[1] In this country the practice is to require the defendant to plead over.[2]

How far errors in the grand jury can be thus noticed has already been considered.[3]

V. OTHER SPECIAL PLEAS.

§ 429. Special pleas, with the exception of pleas to the jurisdiction, pleas of abatement, and pleas of *autrefois acquit*, but rarely occur in practice, as in general they amount in character to the general issue. Thus, the plea of non-identity, which is pleaded *ore tenus*, is never allowed, except in cases where the prisoner has escaped after verdict and before judgment, or after judgment and before execution. On review, to render the plea valid, the record must show an escape.[4]

Plea of non-identity only allowed in cases of escape.

§ 430. Special pleas as to constitution of grand jury must be good on their face. Thus where, on a presentment for gaming, the defendant pleaded in abatement that the clerk *de facto*, who administered the oath to the grand jury that made the presentment, was not clerk *de jure* at the time, it was held the plea was bad.[5] How far error in the constitution of the grand jury may be pleaded specially to an indictment has been already considered.[6]

Pleas to constitution of grand jury must be sustained in fact.

§ 431. The pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause.[7]

Pendency of other indictment no bar.

§ 432. A plea in abatement, or a special plea, not involving a statement of fact, is exclusively for court.[8]

Plea of law is for court.

§ 433. When the prosecution is sustained in an objection to a special plea, on the ground that it is defec-

Ruling for prosecution on special

[1] R. *v.* Duffy, 4 Cox C. C. 190; R. *v.* Johnson, 6 East, 583; 1 Bennett & Heard's Lead. Cases, 340. See supra, § 404; Wh. Prec. 1147, for forms.

[2] U. S. *v.* Williams, 1 Dillon, 485. Supra, §§ 404–5; infra, § 477.

[3] Supra, §§ 344, 350, 352, 357, 388 *a*. Infra, § 430.

[4] Thomas *v.* State, 5 How. Mis. R. 20.

[5] Hord *v.* Com. 4 Leigh, 674.

[6] See supra, §§ 344, 350, 352 *et seq.*

[7] Com. *v.* Drew, 3 Cush. 279; State *v.* Tisdale, 2 Dev. & Bat. 159. Infra, § 453.

[8] Chase *v.* State, 46 Miss. 683. Infra, § 477.

plea equivalent to judgment on demurrer.

tive, this is equivalent to a judgment for the prosecution on demurrer to the plea.[1]

VI. AUTREFOIS ACQUIT OR CONVICT.

§ 434. It remains to examine what, in this country, form the most important of special pleas, those of *autrefois convict*, *autrefois acquit*, and *once in jeopardy*. The first two may be considered together, the law applicable to *autrefois convict* being generally applicable to *autrefois acquit*.[2]

1. *As to Nature of Judgment.*

Acquittal without judgment a bar, but not so always convictions.

§ 435. An acquittal, even without the judgment of the court thereon, is a bar;[3] but such is not necessarily the case with a conviction on which there is no judgment;[4] as where a prosecuting officer, after conviction, concedes the badness of an indictment and proceeds to trial upon a second;[5] where the case is pending on error;[6] where an indictment was stolen after verdict of guilty but before judgment,[7] and where the defendant pleaded a decision against him on a plea to the jurisdiction to a former indictment for the same offence.[8] Ordinarily, however, a verdict of guilty will sustain the plea.[9] A plea of guilty need not, to be a bar, have a judgment entered on it.[10]

In Maine, it has been held that the plea of *autrefois convict* is good where it appears that after verdict at the former trial

[1] Com. *v.* Lannan, 13 Allen, 563. As to plea of insanity see Whart. Crim. Law, 8th ed. §§ 57–8.

[2] See, for forms of pleas of *autrefois acquit*, &c., Whart. Prec. 1150, &c.

[3] State *v.* Elden, 41 Me. 165; West *v.* State, 2 Zab. 212; R. *v.* Reed, 1 Eng. L. & Eq. R. 595. See 2 Russ. on Cr. 4th ed. 64, note.

[4] U. S. *v.* Herbert, 5 Cranch C. C. R. 87; Com. *v.* Fraher, 126 Mass. 265; West *v.* State, 2 Zab. 212; Penn. *v.* Huffman, Addis. 140; State *v.* Mount, 14 Ohio, 295; Brennan *v.* People, 15 Ill. 511; State *v.* Norvell, 2 Yerg. 24; State *v.* Spear, 6 Mo. 644; Lewis *v.* State, 1 Tex. App. 323; though see Preston *v.* State, 25 Miss. 383; Ratzky *v.* People, 29 N. Y. 124.

[5] Penn. *v.* Huffman, Addis. 140.

[6] Com. *v.* Fraher, 126 Mass. 265. See R. *v.* Reid, 20 L. J. M. C. 70; Coleman *v.* U. S. 97 U. S. 530; People *v.* Casborus, 13 Johns. 351.

[7] State *v.* Mount, 14 Ohio, 295.

[8] Gardiner *v.* People, 6 Park. C. R. 155. Supra, § 421.

[9] State *v.* Parish, 43 Wis. 395.

[10] People *v.* Goldstein, 32 Cal 432.

the indictment was dismissed, and the defendant discharged without day.[1]

In New York, in 1862, in the Court of Appeals, it was determined that when judgment is reversed for an illegal sentence, on a conviction where there was no error, there can be no new trial, but that the plea of *autrefois convict* is good.[2]

In those States where a defendant is held to be in jeopardy by a conviction, a conviction without judgment is a bar.[3]

In Wisconsin an order erroneously arresting judgment does not vacate such judgment so as to enable the defendant to be freshly proceeded against.[4] On a plea of *autrefois acquit*, if the supreme appellate court holds that the defendant could have been lawfully convicted on the former procedure, the plea is good, though such procedure had been regarded as fatally defective in the court below.[5]

Arbitrary discharge may operate as acquittal.

§ 436. How far a court has a right to discharge a jury is hereafter considered more fully. In capital cases, as will be seen,[6] the tendency of opinion is that such discharge, unless necessary, works an acquittal.[7] In misdemeanors, and sometimes in felonies, the court, on strong ground shown, may withdraw a juror or discharge the jury. But an arbitrary discharge, or one without adequate cause, operates as an acquittal.[8]

[1] State *v.* Elden, 41 Me. 165.

[2] Shepherd *v.* People, 25 N. Y. 407. See also Hartung *v.* People, 26 N. Y. 167; S. C., 28 N. Y. 400; Ratzky *v.* People, 29 N. Y. 124.

[3] See infra, §§ 490 *et seq.*

[4] State *v.* Parish, 43 Wis. 395.

[5] State *v.* Norvell, 2 Yerg. 24; State *v.* Parish, 43 Wis. 395. Infra, § 457.

[6] Infra, §§ 487 *et seq.*

[7] Infra, §§ 490–512.

[8] Infra, §§ 722, 815, 821.

In U. S. *v.* Watson, 3 Benedict, 1, Judge Blatchford said: "The illness of the district attorney, it not appearing by the minutes that such illness occurred after the jury was sworn, or that it was impossible for the assistant district attorney to conduct the trial, and the motion to put off the case for the term being made by such assistant, cannot be regarded as creating a manifest necessity for withdrawing a juror. So, too, as to the absence of witnesses for the prosecution; it does not appear by the minutes that such absence was first made known to the law officer of the government after the jury was sworn, or that it occurred under such circumstances as to create a plain and manifest necessity justifying the withdrawing of a juror. The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a court can,

§ 437. To avail himself of the plea, the defendant should produce an exemplification of the record of his acquittal under the public seal of the State or kingdom where

Record of former

on the trial of an indictment, properly discharge a jury, without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendant. When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is for any reason not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper. On this point is cited by the judge Whart. Crim. Law, ed. 1852, p. 213. It is impossible, within this definition, to lay down any inflexible rule as to what causes would and what causes would not be sufficient to warrant the exercise of the discretion which the court possesses. It is sufficient to say that in no case to be found in the books has any such reason as is spread upon the record in this case been admitted, in the absence of the consent of the defendant, to be a proper ground for discharging a jury after they have been sworn and empanelled to try an indictment. To hold now that the record of the proceedings of the court on the former trial amounts to a verdict of acquittal, is to do just what the court would have done at that time on the facts stated in the record. If I had any doubt as to the propriety of this course, I should resolve it in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion. But the weight of all the authorities on the subject is, that the position of this case, as it stood when the juror was withdrawn, entitled the defendants, in the absence of their express consent to any other course, to a verdict of acquittal, and therefore entitles them to the action of the court, at this time, on their application to the same effect. An order will, therefore, be entered, declaring that the proceedings on the former trial are held to be equivalent to a verdict of not guilty, and discharging the defendants and their bail from further liability in respect of the indictment."

But in England, where, in case of misdemeanor, the jury is improperly, and against the will of a defendant, discharged by the judge from giving a verdict after the trial has begun, this is not equivalent to an acquittal, nor does it entitle the defendant *quod eat sine die*. R. *v.* Charlesworth, 1 B. & S. 460; 9 Cox C. C. 44; S. C., at *nisi prius*, 2 F. & F. 326. Acting on this general principle, where it appeared that in the course of the trial and during the examination of witnesses one of the jurors had, without leave, and without it being noticed by any one, left the jury-box and also the court-house, whereupon the court discharged the jury without giving a verdict, and a fresh jury was empanelled and the prisoner was afterwards tried and convicted before a fresh jury, it was held that the course pur-

judgment to be produced.

he has been tried and acquitted, there being cases in which an acquittal in a foreign jurisdiction is equally effective for this purpose with one at home.[1]

Court must have had jurisdiction.

§ 438. The court, however, must have been competent, having jurisdiction,[2] and the proceedings regular.[3] Thus, a conviction of a breach of the peace before a magistrate, on the confession or information of the offender himself, is no bar to an indictment by the grand jury for the same offence.[4] Again, an acquittal by a jury, in a court of the United States, of a defendant who is there indicted for an offence of which that court has no jurisdiction, is no bar to an indictment against him for the same offence in a state court.[5] It is also no bar that the defendant has before been acquitted or convicted of the same offence before a court of the same State, where the offence is one of which the court has not jurisdiction.[6] Thus, a former examination before a magistrate, and a discharge upon a complaint under the New Hampshire Bastardy Act, do not bar further proceedings, as the magistrate has strictly no power to try, but only to examine and discharge or to bind over.[7]

sued was right. R. *v.* Ward, 17 L. T. N. S. 220; 10 Cox C. C. 573; 16 W.R. 281, C. C. R. See R. *v.* Winsor, infra, § 722.

When a trial is brought to a standstill before verdict, by the close of the term of the court, this in some jurisdictions is a necessary discharge of the jury, and the trial may be recommenced at a subsequent term. Infra, § 513.

Jury discharged from Sickness or Surprise.— The discussion of this question falls more properly under a subsequent head. Infra, § 508.

[1] Infra, § 481; Hutchinson's case, 3 Keb. 785; and see Beak *v.* Thyrwhit, 3 Mod. 194; 1 Show. 6; Bull. N. P. 245; R. *v.* Roche, 1 Leach, 134; Whart. Crim. Ev. § 153.

[2] R. *v.* Bowman, 6 C. & P. 337; Com. *v.* Myers, 1 Va. Cas. 188; State *v.* Hodgkins, 42 N. H. 475; Com. *v.* Goddard, 13 Mass. 456; Com. *v.* Peters, 12 Met. 387; Canter *v.* People, 38 How. (N. Y.) Pr. 91; Dunn *v.* State, 2 Pike, 229; State *v.* Odell, 4 Blackf. 156; O'Brian *v.* State, 12 Ind. 369; Norton *v.* State, 14 Tex. 387; State *v.* Payne, 4 Mo. 376; Thompson *v.* State, 6 Neb. 102. See Mikels *v.* State, 3 Heisk. 321. As to judgment in unauthorized term see § 513.

[3] See Com. *v.* Bosworth, 113 Mass. 200.

[4] Com. *v.* Alderman, 4 Mass. 477. See State *v.* Morgan, 62 Ind. 35. Infra, § 440.

[5] Com. *v.* Peters, 12 Met. (Mass.) 387. See Whart. Crim. Law, 8th ed. §§ 471 *et seq.*

[6] Com. *v.* Goddard, 13 Mass. 455; State *v.* Payne, 4 Mo. 376; State *v.* Odell, 4 Blackf. 156; Rector *v.* State, 1 Eng. (Ark.) 187.

[7] Marston *v.* Jenness, 11 N. H. 156. See Hartley *v.* Hindmarsh, L. R. 1 C P. 553. Infra, § 440.

But where a justice has final jurisdiction, a conviction or acquittal before him is a bar, although the proceedings before the justice were so defective that they might have been reversed for error.[1]

Judgment by court-martial no bar.

§ 439. It has been ruled in Tennessee that an acquittal by a federal court-martial, established by act of Congress for the punishment of offences against the United States, is no bar to an indictment for murder under the laws of the State of Tennessee.[2] And it has been said by two eminent attorneys general (Legare and Cushing), that proceedings by state tribunals are no bar to courts-martial instituted by the military authorities of the United States.[3] The tribunals are coördinate when there is no legislation giving courts-martial exclusive jurisdiction.[4] At the same time, the judgment of a court-martial may constitute *res adjudicata*, so far as concerns the government by which it is pronounced.[5] And a judgment of conviction by a *military* court, established by law in an insurgent State, is a bar to a subsequent prosecution by a state court for the same offence.[6]

And so of police or municipal conviction.

§ 440. A police summary conviction, for breach of a municipal ordinance, is not a bar to a prosecution by the State for a breach of the public peace;[7] nor is a conviction in the name of a township, to recover a penalty, a bar

[1] Stevens *v.* Fassett, 27 Me. 266; Com. *v.* Loud, 3 Met. (Mass.) 328. See State *v.* Thornton, 37 Mo. 360; Com. *v.* Miller, 5 Dana, 320. Compare cases cited supra, § 435, and infra, § 440.

[2] State *v.* Rankin, 4 Cold. (Tenn.) 145. See Whart. Confl. of L. §§ 934, 935. Supra, § 443.

[3] 3 Opin. Atty. Gen. 750; 6 Ibid. 413.

[4] U. S. *v.* Cashiel, 1 Hugh. 552.

[5] Dynes *v.* Hoover, 20 Howard U. S. 65; Woolley *v.* U. S. 20 Law Rep. 631; U. S. *v.* Reiter, 4 Am. Law Reg. N. S. 534; Hefferman *v.* Porter, 6 Cold. 391.

[6] Coleman *v.* State, 97 U. S. 509. In this case it was said by Field, J., that while the plea of former conviction was not a proper plea in the case, as it admitted the jurisdiction of the state court to try the offence if it were not for the former conviction, yet such irregularity would not prevent the courts giving effect to the objection attempted to be raised. The judgment of the Supreme Court of Tennessee, sustaining a conviction of the defendant, was therefore reversed, and defendant ordered to be delivered up to the military authorities of the United States, to be dealt with as required by law on the judgment of the court-martial. See also Woolley *v.* U. S. 20 Law Rep. 631; U. S. *v.* Reiter, 4 Am. Law Reg. 534. Supra, § 283.

[7] Levy *v.* State, 6 Ind. 281; Greenwood *v.* State, 6 Bax. 567; State *v.* Bergman, 6 Oregon, 341. But see State *v.* Thornton, 37 Mo. 360.

to proceedings by indictment in the name of the State.[1] Of course, when a police court has no power to enter a final criminal judgment, such action is a nullity.[2] The magistrate's judgment is not conclusive to the effect that the crime is one of which he has jurisdiction.[3]

§ 441. Where a concurrent jurisdiction exists in different tribunals, the one first exercising jurisdiction rightfully acquires the control to the exclusion of the other.[4] Of courts with concurrent ju-

[1] Wragg *v.* Penn Township, S. C. Ill. 1879, 10 Cent. L. J. 87.

In this case, Dickey, J., said: —

"The decisions on this subject by the courts of the several States are apparently in hopeless conflict with each other. Dillon on Municipal Corporations, § 301, says: 'Hence the same act comes to be forbidden by general statute and by the ordinance of a municipal corporation, each providing a separate and different punishment. . . . . But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offence, one against the State and one against the corporation. Others regard the same act as constituting a single offence, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction.' In Georgia and Louisiana it is held that a municipal corporation has no power to enact an ordinance touching an offence punishable under the general law of the State. Mayor *v.* Hussey, 21 Ga. 80. In Rice *v.* State, 3 Kans. 141, the court say: 'It is not necessary in this case to decide whether both the State and the city can punish for the same act; but we have no doubt that the one which shall first obtain jurisdiction of the person of the accused may punish to the extent of its power.' In Missouri the rule is clearly announced that the same act can be punished but once, and that a conviction under a city ordinance may be pleaded in bar to an indictment under the state law. State *v.* Cowan, 29 Mo. 330. In Alabama the rule is the other way, and it is held that the same act may be punished under a city ordinance and at the same time under the general law. Mayor *v.* Allaire, 14 Ala. 400. In Indiana the rule used to be the same as it is now in Missouri, but in Ambrose *v.* State, 6 Ind. 351, it was modified, and the court there held that a single act might constitute two offences — one against the State and one against the municipal government. And in Waldo *v.* Wallace, 12 Ind. 582, it was held 'that each might punish in its own mode, by its own officers, the same act as an offence against each.'"

[2] State *v.* Morgan, 62 Ind. 35. Supra, § 438.

[3] Com. *v.* Goddard, 13 Mass. 456; Com. *v.* Curtis, 11 Pick. 134.

Under the Virginia practice, a discharge by an examining court of a prisoner committed on a charge of felony is not a bar to another prosecution for the same offence, except when the record shows that the discharge was upon an examination of the facts charged. McCann's case, 14 Grat. 570.

[4] Whart. Confl. of L. § 933; Com. *v.* Cunningham, 13 Mass. 245; Mize *v.* State, 49 Ga. 375; State *v.* Si-

risdiction, the court first acting has control.

Hence where, after indictment and before trial, a justice of the peace took jurisdiction of the same offence, before whom the offender was tried and sentenced, the court held that the conviction and sentence was no bar to the indictment.[1] The same position applies to prosecutions for piracy, in which the sovereign who first tries the offender absorbs the jurisdiction.[2]

monds, 3 Mo. 414; Trittipo *v.* State, 10 Ind. 343; 13 Ind. 360. But see State *v.* Tisdale, 2 Dev. & B. 159. As to conflicting pardons see infra, § 537.

[1] Burdett *v.* State, 9 Tex. 43. And see Com. *v.* Miller, 5 Dana, 320. As to conflicting jurisdiction of federal and state courts see Whart. Crim. Law, 8th ed. §§ 265, 266, 289.

[2] See U. S. *v.* The Pirates, 5 Wheat. 184.

"When two courts have concurrent criminal jurisdiction," so it is elsewhere stated, "the court that first assumes this jurisdiction over a particular person acquires exclusive control, so that its judgments, if regularly rendered, are a bar to subsequent action of all other tribunals. Whart. Confl. of L. § 933; Robinson, ex parte, 6 McLean, 355; Putney *v.* The Celestine, 4 Am. L. J. 164; Com. *v.* Goddard, 13 Mass. 455; State *v.* Davis, 1 South. 311; State *v.* Plunkett, 3 Harrison (N. J.), 5; State *v.* Simonds, 3 Mo. 414; Trittipo *v.* State, 10 Ind. 343; 13 Ind. 360; Marshall *v.* State, 6 Neb. 121. '*Ne bis in idem*,' is the Roman maxim in this relation, having the same meaning as the English doctrine that no man shall be placed twice in jeopardy for the same offence; and though this maxim is based on the Roman theory of the union of all nations under one imperial head, yet it must be allowed now to prevail in all cases where concurrent courts deal with the same subject matter under the same common law. It is here that difficulties spring up, when the question arises as to the effect of the conviction or acquittal of a defendant in a foreign court, under a distinct jurisprudence.

"Had the foreign court jurisdiction over the offence in question? If it had not, the law undoubtedly is that its action is a nullity. Even an acquittal in a court of the United States has been pronounced by the Supreme Court of Massachusetts to be a nullity in a case where, in the opinion of the latter court, the former had no jurisdiction. Com. *v.* Peters, 12 Met. 387. But who is to judge of the question of jurisdiction? Suppose a German court, in exercise of the cosmopolitan surveillance which is established in some parts of Germany (Whart. Confl. of L. § 885), should try an American in Germany for an assault committed on another American in New York. Would the judgment of the German court in this respect be final? Certainly, by the tests of the English common law, it would not. Neither in England nor in the United States could the assumption of German courts to exercise extra-territorial jurisdiction of this kind be tolerated. And yet this is a different question from that which would arise if an American citizen should be *bonâ fide* arrested and punished by a German court, exercising a jurisdiction for which it has at least a respectable show of international authority. Could such an offender be a second time

§ 442. Nor should it be forgotten that an offence may have, in such cases, two aspects, so that one sovereign may punish it in the first aspect, and another in the second. Thus, uttering of forged coin may be punished by a State as a cheat,[1] and by the federal government as forgery.[2] In such cases, it is argued by a late able fed-

Offence having distinct aspects, successive governments may prosecute.

punished for this offence? It would seem not, as a legitimate result of the maxim *Ne bis in idem*. So far as concerns penal international law, this maxim, as to offences of which the prosecuting State has international jurisdiction, may be viewed as at least establishing the position that if a person is tried by a government to which he is corporeally subject, he cannot, after punishment by that government for a particular offence, be punished for this offence elsewhere. This, indeed, seems to be a necessary corollary of the doctrine accepted even by the English common law, that every person is subject to the penal laws of the State in which he is resident, even though he owes allegiance to another country. But it is necessary, to make such a punishment a satisfaction, and a bar to a future trial, that it should be complete, and should have been executed to its full extent. Punishment only partially submitted to is only a defence *pro tanto*. It is certain, also, that in offences against the State's own sovereignty, the judgment of a foreign court would be no bar to a prosecution. Ibid. See Halleck's Int. Law, 175; Woolsey, § 77; Hélie, Traité de l'Instruction Criminelle, p. 621.

"With acquittals, however, another course of reasoning obtains. It is true that an acquittal in the *forum delicti commissi* is viewed, when the proceedings are regular and the issue of fact made, as conclusive on the question of the local criminality of the offence charged (Bar, § 143, p. 560, argues such an acquittal is to be regarded as a *lex generalis* that the case was not penal); though it would not prevent a foreign sovereign from prosecuting for offences against himself. But an acquittal in the *forum domicilii* would only be regarded as conclusive when it should appear to have been rendered by a court having local jurisdiction after a fair trial. Certainly, while a judgment of a court *delicti commissi* would be final, to the effect that the act in question was not penal in that country, no extra-territorial force can be assigned to a decision of the *Judex Domicilii*, unless he has international jurisdiction. The judgment, in such a case, could not be regarded as barring a prosecution in the *forum delicti commissi*." Whart. Confl. of L. §§ 905, 914, 934, 935, 938.

The question of conflict of jurisdictions in such cases is discussed in Whart. Crim. Law, 8th ed. §§ 264–283. Mr. Wheaton tells us that a sentence of acquittal or conviction "pronounced

[1] Fox *v.* Ohio, 5 How. U. S. 410. See Whart. Crim. Law, 8th ed. §§ 264–283.

That a fraudulent act by a bankrupt is made indictable under the federal Bankrupt Act does not preclude its prosecution under a state statute as a cheat by false pretences see Abbott *v.* State, 75 N. Y. 602.

[2] U. S. *v.* Marigold, 9 How. U. S. 560.

eral judge (Grier, J.), that one judgment cannot be pleaded in bar to the other.[1] But this is to be taken subject to the qualifications hereinbefore expressed. If the two offences be identical, then the court first seizing jurisdiction absorbs it. If, however, the offence is one capable of being broken into sections, then each sovereign may independently prosecute for the section against its laws. In such case, however, the second prosecuting sovereign should only impose such a punishment as, with that already inflicted, would be an adequate penalty for the aggregate offence.[2] If the punishment imposed by the sovereign first prosecuting be adequate, then the second should interpose a *nolle prosequi* or pardon. Supplementary *jurisdiction* is in such cases to be maintained,[3] but cumulative punishment avoided by interposition of executive clemency. This is the course advised by the German jurists just quoted, and is substantially approved by the late Chief Justice Taney.[4]

§ 443. At the same time, what is here said must be taken in connection with the conflict of opinion heretofore noticed as to the absorptive character of federal statutes.[5]

It should be added, that where a conspiracy is spread over several sovereignties each sovereign may prosecute for the overt act which is an infraction of its own laws.[6]

§ 444. A person may be indicted for an assault committed in view of the court, though previously fined for the contempt.[7] The plea of "*autrefois convict*" shall not avail him, because the same act constitutes two offences: one violates the law which protects courts of justice, and stamps an efficient character on their proceedings; the other is levelled against the general law, which maintains the public order and

Proceedings for contempt no bar.

under the municipal law of the State where the supposed crime was committed, *or* to which the supposed offender owed allegiance," is a bar to a prosecution in another State. This, however, leaves the matter unsettled when the conflict is between the court of domicil and the court of the State where the offence was committed.

[1] Moore *v.* Illinois, 14 How. U. S. 13. See infra, §§ 467–8.

[2] See Marshall *v.* State, 6 Neb. 120.

[3] See Phillips *v.* People, 55 Ill. 430; Marshall *v.* State, 6 Neb. 121; State *v.* Adams, 14 Ala. 486.

[4] Whart. Crim. Law, 8th ed. §§ 264–283, 287 *et seq.*; U. S. *v.* Amy, 14 Md. 152, n.

[5] See Whart. Crim. Law, 8th ed. §§ 264 *et seq.*

[6] Bloomer *v.* State, 48 Md. 321.

[7] R. *v.* Lord Osulston, 2 Stra. 1107. See infra, §§ 948, 973.

tranquillity.[1] Thus, where General Houston had been punished by the House of Representatives for a contempt and breach of privilege, it was held that the action of the house was no bar to an indictment for an assault growing out of the same transaction.[2]

§ 445. Proceedings on *habeas corpus* are not ordinarily a bar. It is true that a person discharged, under the *Habeas Corpus* Act of South Carolina, from prison, having been committed on a charge of murder, has been held to be protected thereby from a subsequent prosecution on the same charge.[3] This is, however, not the general rule.[4] *A fortiori* a discharge at a preliminary examination is no bar.[5]

Nor *habeas corpus.*

§ 446. If a man be committed for a crime, and no bill be preferred against him, or if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted,[6] though the sending up a second bill, after an *ignoramus*, is an extreme act of prerogative, subject to the revision of the court.[7] The same is the case with quashing,[8] even after motion for a new trial, when the indictment is defective.[9]

Ignoramus and quashing no bar.

§ 447. The entry of a *nolle prosequi* by the competent authority does not put an end to the case, and is no bar to a subsequent indictment for the same offence,[10] unless the jury has been actually empanelled, in which case, if

Nor is *nolle prosequi* or dismissal.

[1] State *v.* Yancey, 1 Car. L. R. 519. Infra, § 973; and see State *v.* Woodfin, 5 Ired. 199; State *v.* Williams, 2 Speers, 26.

[2] See Opinion of Mr. Butler, Attorney General of the United States, 2 Opinions of the Attorneys General, 958.

[3] State *v.* Fley, 2 Brev. 338.

[4] See McCann's case, 14 Grat. 570.

[5] State *v.* Jones, 16 Kans. 608.

[6] 2 Hale, 243–6; 2 Hawk. c. 35, s. 6; R. *v.* Newton, 2 M. & Rob. 503; Com. *v.* Miller, 2 Ash. 61. See supra, § 373; and see Christmas *v.* State, 53 Ga. 81.

[7] Supra, § 373.

[8] Supra, §§ 385 *et seq.*; Com. *v.* Bressant, 126 Mass. 246.

[9] State *v.* Clark, 32 Ark. 231. Infra, § 457.

In a California case, after the defendant had been bound to answer by a justice of the peace for a felony, and the grand jury recommended that it be referred to the next grand jury, and the county court then ordered that the defendant be discharged from custody, this order was held not a bar to another prosecution of the defendant for the same offence. Ex parte Cahill, 52 Cal. 463.

[10] U. S. *v.* Stowell, 2 Curt. C. C. 170; U. S. *v.* Shoemaker, 2 McLean, 114; Com. *v.* Wheeler, 2 Mass. 172;

the defendant refused to consent, or if (in some jurisdictions) he was put in jeopardy of his life by the jury being charged, or if the entry be made after the evidence closes, the entry operates as an acquittal;[1] though it may be otherwise in cases where the defendant was not in jeopardy, and where the local law authorizes a *nolle prosequi* during trial.[2]

Com. v. Tuck, 20 Pick. 356; Bacon v. Towne, 4 Cush. 234; State v. Main, 31 Conn. 572; State v. Garvey, 42 Conn. 232; Gardiner v. People, 6 Parker C. R. 155; Com. v. Lindsay, 2 Va. Cas. 345; Wortham v. Com. 5 Rand. 669; State v. McNeil, 3 Hawks, 183; State v. Thornton, 13 Ired. 256; State v. McKee, 1 Bailey, 651; State v. Haskett, 3 Hill S. C. 95; State v. Blackwell, 9 Ala. 75; Aaron v. State, 39 Ala. 75; Winston, ex parte, 52 Ala. 419; Clarke v. State, 23 Miss. 261; Donaldson, ex parte, 44 Mo. 149; Com. v. Thompson, 3 Litt. 284; State v. Ornsby, 8 Rob. La. 583; Williams v. State, 57 Ga. 478; Brown v. State, 5 English, 607; State v. Ingram, 16 Kans. 14; State v. Byrd, 31 La. An. 419. See R. v. Roper, 1 Craw. & Dix, 185; R. v. Mitchell, 3 Cox C. C. 93; Walton v. People, 3 Sneed, 687.

[1] U. S. v. Farring, 4 Cranch C. C. 465; U. S. v. Shoemaker, 2 McLean, 114; State v. Roe, 12 Vt. 93; State v. Smith, 49 N. H. 155; Com. v. Goodenough, Thacher's C. C. 132; Com. v. Kimball, 7 Gray, 328; Com. v. Tuck, 20 Pick. 356; People v. Barrett, 2 Caines, 304; People v. Vanhorne, 8 Barb. 158; McFadden v. State, 23 Penn. St. 12; Mount v. State, 14 Oh. 295; Baker v. State, 12 Oh. St. 214; Weinzorpflin v. State, 7 Blackf. 186; Harker v. State, 8 Blackf. 545; Wright v. State, 5 Ind. 290; Ward v. State, 1 Humph. 253; State v. Connor, 5 Cold. 311; Gruber v. State, 3 W. Va. 700; State v. McKee, 1 Bailey, 651; Spier's case, 1 Dev. 491; Durham v. State, 9 Ga. 306; Jones v. State, 55 Ga. 625; Reynolds v. State, 3 Kelly, 53; State v. Kreps, 8 Ala. 951; Cobia v. State, 16 Ala. 781; Grogan v. State, 44 Ala. 9; Battle v. State, 54 Ala. 93. As to *nolle prosequi* generally see supra, § 383; as to jeopardy, infra, § 570.

[2] Infra, §§ 490 *et seq.*; U. S. v. Morris, 1 Curtis C. C. 23; State v. Roe, 12 Vt. 93; State v. Garvey, 42 Conn. 432; Com. v. Seymour, 2 Brewst. 567; Taylor v. State, 35 Tex. 98. See U. S. v. Kimball, 7 Gray, 328, cited supra, § 383.

It has been held that a discharge from a former indictment upon payment of costs, in consequence of the refusal of the prosecutor to prosecute farther, is no bar. State v. Blackwell, 9 Ala. 79.

In Massachusetts, under the provision in c. 171, § 28, that in cases of assault, or acknowledgment of satisfaction by party injured, the court may discharge the defendant, the discontinuance of the prosecution is at the discretion of the court. Com. v. Dowdican, 115 Mass. 133.

In such cases the dismissal is not technically a bar. "The effect of dismissing a complaint without a trial is like that of quashing or entering a *nolle prosequi* to an indictment. By neither of these is the defendant acquitted of the offence charged against him. Com. v. Gould, 12 Gray, 171." Com. v. Bressant, 126 Mass. 246. — Morton, J.

There may be cases in which a bar will be interposed where a joint de-

In some jurisdictions the consent of the court is requisite to a *nolle prosequi*;[1] though the fact that such consent is given does not strengthen the effect of the *nolle prosequi* unless the case be before the jury, and the defendant be put in jeopardy according to the local construction of the law.[2]

§ 448. *After verdict* the entry of a *nolle prosequi*, either with or without consent of court, as the local statutes may prescribe, is a usual method either of recording executive clemency, or of disencumbering the case from embarrassing surplus charges. In either case such *nolle prosequi* may be viewed as a pardon.[3]

After verdict *nolle prosequi* a bar.

§ 449. When a defendant is discharged from an indictment for want of prosecution, by virtue of the first section of the New

fendant is discharged in order to use him as a witness against his co-defendant. People *v.* Bruzzo, 24 Cal. 41. See infra, § 520. It may be otherwise, however, when the case is withdrawn from the jury by the order of the court (U. S. *v.* Morris, 1 Curtis C. C. 23; see Whart. Crim. Ev. §§ 439 *et seq.*), though in such case, if the defendant has been put in jeopardy under the constitutional provision, he cannot be retried. See infra, §§ 490 *et seq.*

[1] See supra, § 383; State *v.* Garvey, 42 Conn. 232; People *v.* McLeod, 1 Hill (N. Y.), 377.

[2] In Maryland, in 1868, pending a motion to quash an indictment for a felony, there was received and filed in the case a *nolle prosequi*, granted by the governor, ordering "that all further proceedings against the accused on the indictment should cease and determine *upon payment of the costs accrued upon said indictment, and that no further prosecution be had or carried on against him for or on account of the said offence.*" On motion of the counsel for the traverser, the Circuit Court ordered a "*stet*" to be entered in the prosecution, and further proceedings therein to be stayed. On a writ of error from the judgment of the Circuit Court, it was held, —

1st. That the discharge of the accused was an end and determination of the suit, and such a final judgment as might be reviewed on writ of error.

2d. That the traverser was not entitled to claim the benefit of the *nolle prosequi*, until he had paid the costs of the prosecution; until that condition was performed the writ was inoperative.

3d. That as the record did not show affirmatively that the costs had not been paid, and in the absence of any objection to the discharge of the accused on that account having been made in the Circuit Court, it will be presumed by the appellate court that the condition precedent, upon which the *nolle prosequi* was made to depend, was performed by the accused. State *v.* Morgan, 33 Md. 44.

[3] State *v.* Whittier, 21 Me. 341; State *v.* Burke, 38 Me. 574; Roe *v.* State, 12 Vt. 93; Com. *v.* Briggs, 7 Pick. 177; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Jenks, 1 Gray, 490; State *v.* Fleming, 7 Humph. 152; People *v.* Van Horne, 8 Barb. 158. See infra, §§ 737–9, 907–10.

Jersey act relative to indictments, he is discharged only from his imprisonment or recognizance, but is not acquitted of the crime, or discharged from its penalty.[1] It was intimated, however, by the Supreme Court, that if a defendant be "discharged" for want of prosecution upon an indictment, he cannot be afterwards arraigned or tried under that indictment.[2] But such discharge, it was said, is no bar to a subsequent indictment for the same offence, or to the trial upon it; and a plea of such former indictment and discharge is bad upon demurrer.[3]

Discharge for want of prosecution not a bar.

Where a party was indicted for murder, but found guilty of manslaughter, and the indictment was afterwards quashed; the statute of limitations afterwards becoming a bar to the indictment for manslaughter, the defendant was discharged.[4]

Under the Virginia three term law, it is ruled that the exceptions or excuses for failure to try the prisoner, enumerated in the statute, are not intended to exclude others of a similar nature, or *in pari ratione;* but only that if the Commonwealth was in default for three terms without any of the excuses for the failure enumerated in the statute, or such like excuses fairly implicable by the courts from the reason and spirit of the law, the prisoner should be entitled to his discharge.[5] The same rule exists generally.[6]

§ 450. The general subject of the construction of limitation statutes has been already noticed.[7] An interesting question may arise as to the effect of a foreign statute of limitations in barring a crime in the *forum deprehensionis*. It may be enough here to say, that in cases of conflict, a liberal interpretation of the law, such as that heretofore vindicated, would require the interposition of the statute most favorable to the defendant. If by the *lex delicti commissi* the statute falls, he should not elsewhere be held responsible. But a foreign statute of limitations will not be regarded by our courts as affecting offences distinctively within our jurisdiction.[8]

Foreign statute of limitations may bar.

[1] State *v.* Garthwaite, 3 Zab. (N. J.) 143.
[2] Ibid.
[3] Ibid.
[4] Hurt *v.* State, 25 Miss. 378.
[5] Adcock's case, 8 Grat. 662.
[6] Supra, § 328.
[7] Supra, §§ 316 *et seq.*
[8] Supra, § 329.

§ 451. We shall have hereafter occasion to see that a conviction fraudulently obtained by the prosecution will be set aside by the courts.[1] It has also been held that a former conviction or acquittal procured by the fraud of the defendant is no bar to a subsequent prosecution.[2] There must be some fraud, however, in the procurement of the intermediate trial, as otherwise it will be a bar.[3] A mere resort to a fraudulent defence cannot shake a verdict of acquittal thereby induced; nor can a conviction under which a full penalty has been imposed be treated as a nullity.[4]

Fraudulent prior judgment no bar.

§ 452. It has been ruled that though the defendant has pleaded to a former indictment for the same offence, the fact of the former indictment being still pending is no bar to a trial on the second.[5] The better practice, however, is

Nor prior pending indictment.

[1] Infra, § 849.

[2] R. v. Duchess of Kingston, 2 How. St. Tr. 544; Strange R. 707; R. v. Furser, Say. 90; State v. Little, 1 N. H. 257, per Woodbury, J.; Com. v. Alderman, 4 Mass. 477; Com. v. Dascom, 111 Mass. 404; State v. Brown, 16 Conn. 54; State v. Reed, 26 Conn. 202; State v. Atkinson, 9 Humph. 677; State v. Colvin, 11 Humph. 599; State v. Clenny, 1 Head, 270; State v. Lowry, 1 Swan (Tenn.), 34; State v. Jones, 7 Ga. 422; State v. Davis, 4 Blackf. 345; Bulson v. People, 31 Ill. 409; State v. Green, 16 Iowa, 239; State v. Cole, 48 Mo. 70; Bradley v. State, 32 Ark. 722. In North Carolina it is said that an acquittal obtained by fraud may be contested only in cases of misdemeanor. State v. Swepson, 79 N. C. 632. In Massachusetts a plea of guilty to an assault, followed by a fine, when the prosecution was fraudulently got up by the defendant, has been held no bar. People v. Dascom, 111 Mass. 404.

In a case in Virginia, where a person charged with an assault and battery was recognized to appear at the then next Superior Court, to answer an indictment to be then and there preferred against him for the said offence, but in the mean time fraudulently procured himself to be indicted for the same offence in the county court, and there confessed his guilt, and a small amercement was thereupon assessed against him, such fraudulent prosecution and conviction was held to present no bar to the indictment preferred against him in the Superior Court. Com. v. Jackson, 2 Va. Cas. 501; and see State v. Colvin, 11 Humph. 599.

[3] State v. Casey, 1 Busbee, 209. See Burdett v. State, 9 Tex. 43.

[4] State v. Casey, Busbee, 209.

[5] U. S. v. Herbert, 5 Cranch C. C. 87; Com. v. Drew, 3 Cush. 279; Com. v. Murphy, 11 Cush. 472; Com. v. Berry, 5 Gray, 93; Com. v. Fraher, 126 Mass. 265; People v. Fisher, 14 Wend. 9; Stewart v. Com. 28 Grat. 950; State v. Tisdale, 2 Dev. & B. 159; State v. Nixon, 78 N. C. 558; Dutton v. State, 5 Ind. 532; Hardin v. State, 22 Ind. 347; Miazza v. State, 36 Miss. 614.

to withdraw the first indictment.[1] It is in the discretion of the court to quash the former indictment, which act of quashing constitutes no bar to further proceedings on the subsequent bill.[2] As will hereafter be seen, a defective verdict does not bar further proceedings on the same indictment,[3] nor does the discharge of a jury from legal necessity.[4] It should be remembered that where two courts have concurrent jurisdiction, the court which first obtains possession of a case absorbs the jurisdiction.[5]

Nor do prior civil proceedings.

§ 453. According to the prevalent view in England, a person who, when injured by a felony committed by another, fails to prosecute such other person, cannot proceed in a civil suit to recover damages for his injury. "The policy of the law requires that, before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence."[6] To this the following qualification was proposed by Baggallay, L. J., in 1879:[7] "It appears to me that the following propositions are affirmed by the authorities, many of which, however, are *dicta*, or enunciations of principle, rather than decisions: (1.) That a felonious act may give rise to a maintainable action; (2.) That the cause of action arises upon the commission of the offence; (3.) That, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing the felon to justice; (4.) That this rule has no application to cases in which the offender has been brought to justice at the instance of some other person injured by a similar offence, as in Fauntleroy's case,[8] or in which prosecution is impossible by reason of the death of the offender, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence; (5.) That the remedy by proof in bankruptcy is sub-

[1] People *v.* Vanhorne, 8 Barb. 160; Clinton *v.* State, 6 Bax. 507. See supra, §§ 373–78, 390.

[2] R. *v.* Houston, 2 Cr. & D. 310; Com. *v.* Gould, 12 Gray, 171.

[3] Infra, § 756.

[4] Infra, §§ 508–11.

[5] Supra, § 441.

[6] Ellenborough, C. J., Crosby *v.* Lang, 12 East, 409, 413.

[7] Ball, ex parte, 40 L. T. (N. S.) 141; L. R. 10 Ch. D. 667; note 19 Am. Law Reg. 48.

[8] Stone *v.* Marsh, 6 B. & C. 551.

ject to the same principles of public policy as those which affect the seeking of civil redress by action." [1]

To misdemeanors the objection has been held not to apply,[2] and in this country it has been doubted whether the rule holds good even as to felonies.[3]

Supposing, however, a civil or *quasi* civil suit to be pending, whose object is to obtain compensation for an injury, it is no bar, either in felonies or misdemeanors, to a subsequent criminal prosecution for such injury as a public offence.[4]

[1] Wellock *v.* Constantine, 2 H. & C. 146; and Elliott, ex parte, 3 Mont. & A. 110, are cited by Bramwell, L. J., in the same case, as the only two cases "in which it (the rule) has operated to prevent the debt being enforced," and as to the latter of these cases he expresses doubts. See discussion of these cases in London Law Times for April 12, 1879.

[2] Ibid.; Fissington *v.* Hutchinson, 15 L. T. R. N. S. 390.

[3] The authorities are thus grouped by Walton, J., in Nowlan *v.* Griffin, 68 Me. 235: —

"In Boody *v.* Keating, 4 Me. 164, and again in Crowell *v.* Merrick, 19 Me. 392, the court say that the rule, that a civil action in behalf of the party injured is suspended until a criminal prosecution has been commenced and disposed of, 'is limited to larcenies and robberies.' The same opinion had before been expressed in Boardman *v.* Gore, 15 Mass. 331, 336. In Boston & Worcester R. R. Co. *v.* Dana, 1 Gray, 83, where the defendant had made himself comparatively rich by stealing from the railroad company, the question was fully examined, and the court held that, while it is undoubtedly the law in England that the civil remedy of the party injured by a felony is suspended till after the termination of a criminal prosecution against the offender, such had never been the law here. And such is the prevailing opinion in this country. Boston & W. R. R. Co. *v.* Dana, 1 Gray, 83; Pettingill *v.* Rideout, 6 N. H. 454; Piscat. Bank *v.* Turnley, 1 Miles, 312; Foster *v.* Com. 8 W. & S. 77; Cross *v.* Guthery, 2 Root, 90; Patton *v.* Freeman, Coxe, 143; Hepburn's case, 3 Bland, 114; Allison *v.* Farmers' Bank, 6 Rand. 223; White *v.* Fort, 3 Hawks, 251; Robinson *v.* Culph, 1 Comst. 231; Story *v.* Hammond, 4 Ohio, 376; Ballew *v.* Alexander, 6 B. Monr. 38; Lofton *v.* Vogles, 17 Ind. 105; Boardman *v.* Gore, 15 Mass. 331, 338; Hawk *v.* Minnick, 19 Oh. St. 462; S. C., 2 Am. R. 413." To same effect is Short *v.* Baker, 23 Ind. 555; Cannon *v.* Barris, 1 Hill S. C. 372; Mitchell *v.* Mimms, 1 Tex. 8. The English distinction has been sustained in Maine (Crowell *v.* Merrick, 19 Me. 392; Belknap *v.* Milliken, 23 Me. 381; *aliter* by statute; Newton *v.* Griffin, 68 Me. 235); in Alabama (Martin *v.* Martin, 25 Ala. 201; Bell *v.* Troy, 35 Ala. 104); and Georgia. Neal *v.* Farmer, 9 Ga. 555. But the reason for the English rule, that the duty of prosecuting in felonies falls on the party injured, fails in this country where the responsibility is thrown on the prosecuting officer of the State.

[4] People *v.* Stevens, 13 Wend. 341; Beatchly *v.* Moser, 15 Wend. 215; Robinson *v.* Culp, 1 Const. R. 231; Buckner *v.* Beek, Dudley S. C. 168; Chiles *v.* Drake, 2 Metc. (Ky.) 147;

It has consequently been held, that when the statute provides a penalty as well as fine and imprisonment for an offence, a judgment for the amount of the penalty does not bar a criminal prosecution to enforce the fine and imprisonment.[1] Nor is the case varied by the fact that there has been a settlement in the civil suit in favor of the prosecutor.[2]

§ 454. How far a prior civil suit is cause for a *nolle prosequi* is elsewhere considered.[3]

Whether a case will be continued in consequence of the pendency of civil proceedings, is noticed hereafter.[4]

After conviction of minor, indictment is barred as to major.

§ 455. As we shall soon have occasion to see more fully,[5] when there has been a conviction of a minor offence, on an indictment for a major enclosing a minor, the defendant cannot afterwards be put on trial for the major.

2. *As to Form of Indictment.*

If former indictment could have sustained a verdict the judgment is a bar.

§ 456. If the defendant *could* have been legally convicted on the first indictment upon any evidence that *might* have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment for the same offence; and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not.[6] In other words, where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good,[7]

State *v.* Blennerhasset, 1 Walk. 7. See Jones *v.* Clay, 1 B. & P. 191; R. *v.* Rhodes, 2 Stra. 703; State *v.* Frost, 1 Brev. 385; State *v.* Blyth, 1 Bay, 166.

[1] Lesynski, in re, Blatchford, J., 1879, 7 Reporter, 358; citing U. S. *v.* Claflin, 25 Int. Rev. Rep. 465. But see Com. *v.* Howard, 13 Mass. 222; Com. *v.* Murphy, 2 Gray, 514; 2 Hawk. P. C. c. 26, s. 63.

[2] Fagnan *v.* Knox, 66 N. Y. 526.

In Massachusetts, under certain circumstances, reparation acknowledged in open court by the prosecutor in a misdemeanor, and a consequent staying of proceedings by the court, bar a civil action. Rev. Stat. Mass. c. 136, § 27; Ibid. c. 198, § 1. Supra, § 447.

[3] Supra, § 447.

[4] Infra, § 599 *a*.

[5] Infra, § 465.

[6] R. *v.* Sheen, 2 C. & P. 634; R. *v.* Clark, 1 Brod. & B. 473; R. *v.* Emden, 9 East, 437; Heikes *v.* Com. 26 Penn. St. R. (2 Casey) 513; R. *v.* Vandercomb, 2 Leach C. C. 708; Com. *v.* Clair, 7 Allen, 525; Com. *v.* Trimmer, 84 Penn. St. 65; and cases cited infra, §§ 465, 471.

[7] Jervis's Archbold, 82; Keeler, 58; 1 Leach, 448; R. *v.* Emden, 9 East,

but not otherwise. Even where the first trial is for a misdemeanor and the second for a felony, the test holds good that the plea is sufficient if the evidence requisite to support the second indictment must necessarily have supported a conviction on the first. Where the doctrine of merger obtains, the evidence of the consummated felony would have secured an acquittal on the first indictment, and such acquittal would be no bar. Thus, it has been said, that where on an indictment for an assault to rob, murder, or ravish, the felony turned out to have been completed, the defendant's acquittal, which the court would have been bound to direct, would have been no bar to an indictment for the felony.[1] On the other hand, where the doctrine of merger is not held, the prior judgment bars; since, as the defendant in such case could have been convicted of the attempt on evidence of the felony, the felony cannot be prosecuted after acquittal of the attempt.[2]

Judgment on defective indictment no bar.

§ 457. A conviction under a defective indictment is no bar, unless the conviction has been followed by judgment and execution of the sentence.[3] Hence, after judgment has been arrested or reversed on a defective indictment, or after an indictment has been quashed, or a judgment for the defendant has been entered on demurrer, a new indictment may be found, correcting the defects in the prior indictment, and to the second indictment the proceedings under the first are no bar.[4] But an erroneous acquittal (if not fraudulent)

437; Com. v. Cunningham, 13 Mass. 245; Com. v. Wade, 17 Pick. 395; Com. v. Tenney, 97 Mass. 50; Com. v. Hoffman, 121 Mass. 369; Com. v. Trimmer, 84 Penn. St. 65; State v. Reed, 12 Md. 263; Price v. State, 19 Oh. 423; Gerard v. People, 3 Scam. 363; Guedel v. People, 43 Ill. 226; State v. Moon, 41 Wis. 684; State v. Ray, Rice, 1; State v. Risher, 1 Richards. 219; State v. Birmingham, 1 Busbee, 120; Holt v. State, 38 Ga. 187.

[1] State v. Murray, 15 Me. 100; Com. v. Kingsbury, 5 Mass. 106; Com. v. Parr, 5 Watts & Serg. 345; People v. Mather, 4 Wend. 265. Infra, §§ 464–5–7.

[2] See infra, §§ 465–6.

[3] Com. v. Loud, 3 Met. 328; Com. v. Keith, 8 Met. 531; Fritz v. State, 40 Ind. 18.

[4] Writhpole's case, Cro. Car. 147; R. v. Drury, 3 Cox C. C. 544; R. v. Houston, 2 Craw. & D. 310; Campbell v. R. 11 Q. B. 799; R. v. Wildey, 1 Maule & S. 188; Com. v. Fischblatt, 4 Met. (Mass.) 354; Com. v. Gould, 12 Gray, 171; Com. v. Chesley, 107 Mass. 223; People v. Casborus, 13 Johns. R. 351; People v. McKay, 18 Johns. 212; Com. v. Zepp, 5 Penn. L. J. 256; Cochrane v. State, 6 Md. 400; Allen v. Com. 2 Leigh, 727; Page v. Com. 9 Leigh, 683; Com. v. Hatton,

is conclusive so that the defendant cannot be retried for any offence of which he could have been convicted under the indictment on which there was an acquittal.[1]

It is otherwise when the acquittal is on an indictment which is so inadequate or defective that under it the offence charged in the second indictment could not have been legally proved.[2] The same rule is held to apply to a new trial on defendant's application.[3]

As we have seen, a defective arrest of judgment on a good indictment is a bar in all cases where the State could have obtained a reversal of the arrest; since there is still pending against the defendant a good indictment, on which he has been put in jeopardy.[4]

Same test applies to acquittal as principal or accessary.

§ 458. Whether an acquittal as principal bars an indictment as accessary depends upon the question whether an accessary can be convicted on an indictment charging him as principal. That he cannot, was the common law doctrine;[5] and where this is the law, an acquittal

3 Grat. 623; Sutcliffe *v.* State, 18 Oh. 469; Guedel *v.* People, 43 Ill. 226; State *v.* Knouse, 33 Iowa, 365; State *v.* Ray, 1 Rice, 1; Oneil *v.* State, 48 Ga. 66; State *v.* Phil, 1 Stew. 31; Cobia *v.* State, 16 Ala. 781; Turner *v.* State, 40 Ala. 21; Jeffries *v.* State, 40 Ala. 381; Robinson *v.* State, 52 Ala. 587; State *v.* Owens, 28 La. An. 5. See Com. *v.* Gould, 12 Gray, 171; People *v.* Casborus, 13 Johns. 352, as to barring effect of final defective arrest.

A prior indictment, quashed after conviction and motion for new trial on it, is no bar to a subsequent indictment for the same offence. State *v.* Clark, 32 Ark. 231. Supra, § 446.

[1] 2 Inst. 318; 2 Hale, 274; R. *v.* Sutton, 5 B. & Ad. 52; R. *v.* Praed, 4 Burr. 2257; R. *v.* Mann, 4 M. & S. 337; State *v.* Kittle, 2 Tyler, 471; State *v.* Brown, 16 Conn. 54; People *v.* Maher, 4 Wend. 229; State *v.* Taylor, 1 Hawks, 462; Black *v.* State, 36 Ga. 447; State *v.* Dark, 8 Blackf. 526; State *v.* Norvell, 2 Yerg. 24; Slaughter *v.* State, 6 Humph. 410. Supra, § 435.

[2] Vaux's case, 4 Coke R. 44 *a*; Com. *v.* Clair, 7 Allen, 525; People *v.* Barrett, 1 Johns. R. 66; Com. *v.* Somerville, 1 Va. Cas. 164; State *v.* Ray, 1 Rice, 1; Whitley *v.* State, 38 Ga. 50; Black *v.* State, 36 Ga. 447; Waller *v.* State, 40 Ala. 325; State *v.* McGraw, 1 Walker, 208; Munford *v.* State, 39 Miss. 558; Mount *v.* Com. 2 Duvall, 93.

That a former conviction of petit larceny may be no bar to indictment for grand larceny see Good *v.* State, 61 Ind. 69.

[3] Lawrence *v.* People, 1 Scam. 414; State *v.* Redman, 17 Iowa, 329; State *v.* Walters, 16 La. An. 400. See infra, § 518.

[4] State *v.* Norvell, 2 Yerg. 24. Supra, §§ 405, 435.

[5] Whart. Crim. Law, 8th ed. § 238–45.

as principal is no bar to an indictment as accessary.[1] And on the same reasoning an acquittal as accessary is no bar, in felonies, to an indictment as principal.[2] It is otherwise under recent codes in which accessaries may be indictable as principals.

§ 459. Where the counts are for distinct offences, a defendant who has been acquitted upon one of several counts is entirely discharged therefrom, nor can he a second time be put upon his trial upon that count. The new trial can only be had on the count as to which there was a conviction. It is otherwise when the variation between the counts is merely formal.[3] When there is a conviction on one count, and no verdict as to the others, a *nolle prosequi* may be entered as to the others, or the court may regard the action as an acquittal on such counts.[4]

Acquittal on one count does not affect other counts. Conviction on one count may be an acquittal as to others.

§ 460. An acquittal from misnomer or misdescription is no bar. Thus an acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county.[5] And, as a general rule, an acquittal on a former indictment on account of a variance between pleading and proof, is no bar.[6] But a conviction, followed by an endurance of punishment, will bar a future prosecution for the same offence.[7]

Acquittal from misnomer or misdescription no bar.

[1] Supra, §§ 238–245; 2 Hale, 244; Fost. 361; 2 Hawk. c. 35, 511; R. *v.* Plant, 7 Car. & P. 575; State *v.* Larkin, 49 N. H. 36; State *v.* Buzzell, S. C. N. H. 1879.

[2] Ibid.; Reynolds *v.* People, 83 Ill. 479.

[3] See infra, § 895.

[4] Bonnell *v.* State, 64 Ind. 498.

[5] Vaux's case, 4 Co. 45 *a*, 46 *b*; Com. Dig. Indictment, 1; Methard *v.* State, 19 Ohio St. 363.

[6] R. *v.* Green, Dears. & B. 113; State *v.* Sias, 17 N. H. 558; Com. *v.* Sutherland, 109 Mass. 342; Com. *v.* Trimmer, 84 Penn. St. 65; Burres *v.* Com. 27 Grat. 934; Martha *v.* State, 26 Ala. 72.

In a case where the prisoner was on his trial for burning the barn of Josiah Thompson, the prosecutor was asked his name, who replied Josias Thompson, on which the prisoner was acquitted without leaving the box; on being indicted for burning the barn of Josias Thompson he cannot plead *autrefois acquit.* Com. *v.* Mortimer, 2 Va. Cas. 325; 2 Hale, 247. Supra, § 456.

Where the defendant was formerly indicted for forging a will, which was set out in the indictment thus: "*I, John Styles,*" &c., and was acquitted for variance, the will given in evidence commencing "*John Styles,*" without the "*I,*" it was ruled that he could not plead this acquittal in bar of another indictment, reciting the will correctly, "*John Styles,*" &c. R. *v.* Cogan, 1 Leach, 448. It is other-

[7] See Com. *v.* Loud, 3 Met. 328; Com. *v.* Keith, 8 Met. 531; Fritz *v.* State, 40 Ind. 18. See supra, § 443.

Nor is acquittal from variance as to intent.

§ 461. When a particular intention is essential to the proof of the case, an acquittal from a variance as to such intention is no bar to a second indictment stating the intention accurately.[1]

wise when the defendant could have been convicted on the first indictment. Com. *v.* Loud, 3 Met. 328; Com. *v.* Keith, 8 Met. 531; Fritz *v.* State, 40 Ind. 18; Durham *v.* People, 4 Scam. 172.

The following additional illustrations may be here given: —

The defendant was charged with having stolen and carried away one bank note of the Planters' Bank of Tennessee, payable on demand at the Merchants' and Traders' Bank of New Orleans. Upon this he was acquitted. The second indictment charged him with having stolen, taken, and carried away one bank note of the Planters' Bank of Tennessee, payable on demand at the Mechanics' and Traders' Bank of New Orleans. The former acquittal was pleaded in bar, but it was held to be no bar to the prosecution of the second indictment. Hite *v.* State, 9 Yerg. 357. The same result took place where the defendant had been indicted for stealing the cow of J. G. and acquitted, and was again indicted for stealing the same cow, at the same time and place, and of the same owner, but by the name of J. G. A., which was his proper name; it was held that the acquittal was no bar to the second indictment. State *v.* Risher, 1 Richards. 219. See also U. S. *v.* Book, 2 Cranch C. C. 294. In an English case bearing on the same point, the evidence was that the prisoner stole the goods of J. B., from his stall, which at the time was in charge of R. B., his son, a child of fourteen, who lived with his father, and worked for him. The first indictment against him for stealing the goods described them as the property of R. B. The sessions thinking this a wrong description directed an acquittal, and caused a new bill to be sent up laying the property in J. B. To this indictment he pleaded *autrefois acquit*. It was held that the plea could not be sustained, for the prisoner could not, on the evidence, have been convicted on the first indictment, charging the property as that of R. B., and that the court could only look at the first indictment, as it stood, without considering whether the allegation as to the ownership of the goods might not have been amended so as to have warranted a conviction. R. *v.* Green, Dears. & B. C. C. 113; 2 Jur. N. S. 1146; 26 L. J. M. C. 17; 7 Cox C. C. 186.

An acquittal on an indictment charging the defendant with setting fire to the premises of A. and B. is no bar to an indictment charging him with setting fire to the premises of A. and C. Com. *v.* Wade, 17 Pick. 395.

An acquittal upon one indictment for receiving stolen goods is no bar to the prosecution of the same defendant upon another, without further proof of the identity of the offences than that the goods described in the second indictment are such that the averments of the first indictment might describe them. Com. *v.* Sutherland, 109 Mass. 342.

[1] State *v.* Jesse, 3 Dev. & Bat. 98. See State *v.* Birmingham, 1 Busbee, 120. Whart. Crim. Ev. § 125.

§ 462. The variance as to time, between the two indictments, must be in matter of substance to defeat the plea. If the difference be in a point immaterial to be proved, the acquittal on the first is a bar to the second.

Otherwise as to variance as to time.

Thus, as to the point of time, if the defendant be indicted for a murder as committed on a certain day, and acquitted, and afterwards be charged with killing the same person on a different day, he may plead the former acquittal in bar notwithstanding this difference, for the day is not material, and this is an act which could not be twice committed.[1] And the same rule applies to accusations of other felonies, for though it be possible for several acts of the same kind to be committed at different times by the same person, it lies in averment, and the party indicted may show that the same charge is intended.[2]

A trial and acquittal on an indictment for stealing a particular article misnamed is no bar to a subsequent prosecution for stealing such article correctly described. Com. *v.* Clair, 7 Allen, 525; State *v.* McGraw, 1 Walk. 208.

An acquittal on a charge of embezzling cloth and other materials of which overcoats are made is no defence to an indictment for embezzling overcoats, although the same facts which were proved on the trial of the first indictment are relied upon in support of the second. Com. *v.* Clair, 7 Allen, 525.

The court: "The obvious and decisive answer to the defendant's plea in bar of *autrefois acquit* is, that the first indictment charges a different offence from that set out in the indictment on which the defendant is now held to answer. The principle of law is well settled, that, in order to support a plea of *autrefois acquit*, the *offence* charged in the two indictments must be identical. The test of this identity is, to ascertain whether the defendant *might* have been *convicted* on the first indictment by proof of the *facts* alleged in the second."

An insolvent debtor, acquitted on a former indictment for omitting goods from his schedule, may be again indicted for omitting other goods not specified in the former indictment; but such a course ought not to be taken except under very peculiar circumstances. R. *v.* Champneys, 2 M. & R. 26.

What misnomers are a variance is considered more fully in another work. Whart. Crim. Ev. §§ 94 *et seq.*

In Virginia, by statute, "a person acquitted of an offence, on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the force or substance thereof, may be arraigned again on a new indictment, or other proper accusation, and tried and convicted for the same offence, notwithstanding such former acquittal." Code, 1860, c. 199, § 16, p. 814; Robinson *v.* Com. Sup. Ct. Va. 1879.

[1] 2 Hale, 179, 244; 2 Hawk. 35.

[2] Ibid.

On an indictment for keeping a gaming-house, *tempore* G. 4, the defendant pleaded that at the sessions, 4 G. 4, he was indicted for keeping a

§ 463. When several are jointly indicted for an offence which may be joint or several, and all are acquitted, no one can again be indicted separately for the same offence, since on the former trial any one might have been convicted, and the others acquitted.[1] Where, however, the former joint indictment is erroneous, for joining persons for an offence which could not be committed jointly, as for perjury, an acquittal thereon will be no bar to a subsequent prosecution against each.[2]

Acquittal on joint indictment a bar if defendant could have been legally convicted.

§ 464. It has been often held in this country, that where, on an indictment for an assault, attempt, or conspiracy, with intent to commit a felony, it appears that the felony was actually consummated, it is the duty of the court to charge the jury that the misdemeanor merged, and that the defendant must be acquitted.[3] It used to be supposed that at common law, whenever a lesser offence met a greater, the former sank into the latter;[4] and hence, in a large class of prosecutions, the defendant would succeed in altogether escaping conviction by a subtle fiction having no origin either in common sense or policy.[5] Conceiving, however, the principle to be too deeply settled to be overruled, the courts of several States[6] have held that at common law where a felony is

Acquittal from merger at common law no bar.

gaming-house on the 8th of January, 47 Geo. 3, and on divers other days and times between that day and the taking of the inquisition, against the peace of our lord the said king, with an averment that the offence in both indictments was the same; it was holden no bar, because the *contra pacem* tied the prosecutor to proof of an offence in the reign of Geo. 3, the only king named in that indictment. R. *v.* Taylor, 3 B. & C. 502.

[1] R. *v.* Dann, 1 Moody, C. C. 424; R. *v.* Parry, 7 C. & P. 836. Infra, § 483.

[2] See Com. *v.* McChord, 2 Dana, 244. Supra, § 313.

[3] See, as to conspiracy, Whart. Crim. Law, 8th ed. § 1334.

[4] Hawk. b. 2, c. 47, s. 6; 1 Ch. C. L. 251, 639; R. *v.* Walker, 6 C. & P. 657; R. *v.* Eaton, 8 C. & P. 417; R. *v.* Woodhall, 12 Cox C. C. 240; R. *v.* Cross, 1 Ld. Ray. 711; 3 Salk. 193; though see R. *v.* Carradice, Rus. & R. 205. The reason given was, that by trying the defendant for the misdemeanor, he lost his right to a special jury, and to a copy of the bill of indictment; and that consequently the crown could not prejudice him for the misdemeanor by putting him on trial for a felony. This reason, however, does not apply to cases where the defendant is put on trial for the misdemeanor.

[5] See Whart. Crim. Law, 8th ed. § 1344.

[6] State *v.* Murray, 15 Me. 100; Com. *v.* Kingsbury, 5 Mass. 106; Com. *v.* Newell, 7 Mass. 245; Com. *v.* Roby, 12 Pick. 496; People *v.* Mather, 4

proved, the defendant is to be acquitted of the constituent misdemeanor, and though the notion has been sturdily resisted elsewhere,[1] it has taken deep and general root. The result has been the accumulation of pleas of *autrefois acquit*, in which, through the labyrinth of subtleties thus opened, the defendant has frequently escaped; an acquittal being ordered in the first case because there was doubt as to the misdemeanor, and in the second because there was doubt as to the felony. In 1848, however, under the stress of particular statutes, all the judges of England agreed that the doctrine that a misdemeanor, when a constituent part of a felony, merges, is no longer in force; that the statutory misdemeanor of violating a young child does not merge in rape;[2] nor a common law conspiracy to commit a larceny, in the consummated felony.[3] The same position was taken in Massachusetts in 1872.[4] It has, however, been held that the principle of these statutes did not apply to cases where the offences are distinct, but only to those where one offence slides into and is part of the proof of another.[5]

It is conceded on both sides that a felony of low grade does

Wend. 265; Johnson *v.* State, 2 Dutch. 313; Com. *v.* Parr, 5 Watts & S. 345, Com. *v.* McGowan, 2 Pars. 341; Black *v.* State, 2 Md. 376; Com. *v.* Blackburn, 1 Duvall, 4; Wright *v.* State, 5 Ind. 527; People *v.* Richards, 1 Mann. (Mich.) 216; State *v.* Lewis, 48 Iowa, 578; State *v.* Durham, 72 N. C. 447. Compare comments in § 456.

[1] State *v.* Scott, 24 Vt. 127; State *v.* Shepard, 7 Conn. 54; People *v.* Jackson, 3 Hill, 92; People *v.* White, 22 Wend. 175; Lohman *v.* People, 1 Comst. 379; Hess *v.* State, 5 Ohio, 6; Stewart *v.* State, 5 Ohio, 241; State *v.* Sutton, 4 Gill, 494; Canada *v.* Com. 22 Grat. 899; State *v.* Taylor, 2 Bailey, 49; Laura *v.* State, 26 Miss. 174; Hanna *v.* People, 19 Mich. 316; Cameron *v.* State, 13 Ark. 712.

[2] R. *v.* Neale, 1 Den. C. C. 36.

[3] R. *v.* Button, 11 Ad. & El. N. S. 929. See R. *v.* Evans, 5 C. & P. 553; R. *v.* Anderson, 2 M. & R. 469.

The bearing of these cases on the question of *autrefois acquit* is thus stated by Lord Denman, C. J., 11 Ad. & El. N. S. 946: "The same act may be part of several offences; the same blow may be the subject of inquiry in consecutive charges of murder and robbery. The acquittal on the first charge is no bar to a second inquiry where both are charges of felonies; neither ought it to be when the one charge is of felony and the other of misdemeanor. If a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction."

[4] Com. *v.* Dean, 109 Mass. 349; citing Com. *v.* Bakeman, 105 Mass. 53; Morey *v.* Com. 108 Mass. 433.

[5] R. *v.* Simpson, 3 C. & K. 207; R. *v.* Shott, Ibid. 206.

not merge in a felony of higher;[1] nor does a misdemeanor merge in a misdemeanor.[2] Thus the intent to commit an injury within the statute under which the prisoner is indicted, as a means to the accomplishment of another ultimate and unlawful object, is not taken out of the operation of the statute by the existence of such ultimate design.[3]

§ 465. Most indictable offences comprise two or more grades, of any one of which, either at common law or by statute, a jury may

In Pennsylvania, by the Revised Act of 1860, persons tried for misdemeanor are not to be acquitted if the offence turn out to be felony. A similar statute exists in other States. Com. *v.* Squires, 1 Met. 258; Prindeville *v.* People, 42 Ill. 217.

Two were indicted in England for having on the 10th November, 1849, assaulted P. They pleaded *autrefois acquit*, and in their plea set out an indictment for murder, the third count of which alleged that they had murdered the deceased, by beatings on the 5th November and 1st December, 1849, and 1st January, 1850, and on divers other days between the 5th November and 1st January; and the plea averred that the assaults charged in the second indictment were identically the same as those of which they had been acquitted on the trial of the first. The replication was that the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the indictment. On the first trial the counsel for the crown had stated the assaults as conducing to the death, and had given them in evidence to sustain the charge of murder. It was proved, however, that the cause of death was a blow inflicted shortly before the death of the deceased, which occurred on the 4th January, but there was no evidence to show by whom the blow was struck, and the prisoners were acquitted. The judge, on the second trial, told the jury that if they were satisfied that there were several distinct and independent assaults, some or any one of which did not in any way conduce to the death of the deceased, it would be their duty to find the prisoners guilty. The jury found the prisoners guilty. It was held that the conviction was right, as the prisoners could not, on the trial for murder, have been convicted, under 7 Will. 4 & 1 Vict. c. 83, s. 11, of the assaults for which they were indicted on the second trial. R. *v.* Bird, T. & M. 437; 2 Den. C. C. 94; 5 Cox C. C. 11; 2 Eng. L. & Eq. 448.

The Michigan statute, providing that no person shall be acquitted of a misdemeanor because the proofs show a felony, cannot apply to a statutory offence where the misdemeanor could not be included in any felony, and where the offence proved would be inconsistent with that charged, instead of being an aggravation of it. People *v.* Chappell, 27 Mich. 486.

[1] Com. *v.* McPike, 3 Cush. 181; People *v.* Smith, 57 Barb. 46; Barnett *v.* People, 54 Ill. 325; Bonsall *v.* State, 35 Ind. 460; People *v.* Bristol, 23 Mich. 118. Infra, § 1344.

[2] Infra, § 1346. See State *v.* Damon, 2 Tyler, 387.

[3] People *v.* Carmichael, 5 Mich. 10; People *v.* Adwards, Ibid. 22; Whart. Crim. Law, 8th ed. § 119.

convict.[1] Under an indictment for murder, for instance, a defendant may be convicted of murder in the second degree, of manslaughter, and, in some jurisdictions, of assault and battery. Under an indictment for burglary, he may be convicted of larceny. Under an indictment for assault with intent, he may be convicted of a simple assault. Under an indictment for the consummated offence, he may, in several States, be convicted of the attempt. It becomes, therefore, a question of interest to determine how far a conviction or an acquittal on an indictment for an offence comprising several stages affects a subsequent charge for one of these stages. The answer is, that if there could have been a conviction on the first indictment of the offence prosecuted under the second, then the conviction or acquittal under the first indictment bars the second. Where on the first trial the conviction or acquittal is of the minor offence, this rule has been frequently recognized.[2] Thus where under an indictment for murder the defendant could have been convicted of murder or of manslaughter, then his conviction of manslaughter bars a subsequent prosecution for the murder.[3] On the same

Where an indictment contains a minor offence enclosed in a major, a conviction or acquittal of minor bars major.

[1] Whart. Crim. Law, 8th ed. § 27.

[2] Infra, §§ 789, 896; R. v. Oliver, 8 Cox C. C. 384; R. v. Yeadon, 9 Cox C. C. 91; R. v. Bird, T. & M. 437; 3 Den. C. C. 94; 5 Cox C. C. 11; State v. Waters, 39 Me. 54; State v. Dearborn, 54 Me. 442; Com. v. Griffin, 21 Pick. 523; Com. v. Stuart, 28 Grat. 950; Stewart v. State, 5 Oh. 242; Bell v. State, 48 Ala. 184; Swinney v. State, 8 S. & M. 576; State v. Ross, 29 Mo. 32; State v. Smith, 53 Mo. 139; State v. Brannon, 55 Mo. 63; State v. Chaffin, 2 Swan, 493; Conner v. Com. 13 Bush, 714; State v. Delaney, 28 La. An. 434; State v. Byrd, 31 La. An. 419; State v. Dennison, 31 La. An. 847; Cameron v. State, 8 Eng. 13 Ark. 712; Jones v. State, 13 Tex. 168; State v. Taylor, 3 Oregon, 10.

[3] Infra, §§ 789, 896; 2 Hale, 246; Fost. 329; State v. Payson, 37 Me. 362; Com. v. Herty, 109 Mass. 348; State v. Flannigan, 6 Md. 167; Davis v. State, 39 Md. 365; Kirk v. Com. 9 Leigh, 627; Livingston's case, 14 Grat. 592; Wroe v. State, 20 Oh. St. 460; Brennon v. People, 15 Ill. 511; Barnett v. People, 54 Ill. 325; People v. Knapp, 26 Mich. 112; Gordon v. State, 3 Iowa, 410; State v. Tweedy, 11 Iowa, 350; State v. Commis. 3 Hill S. C. 241; Jordan v. State, 22 Ga. 545; Miller v. State, 58 Ga. 200; Bell v. State, 48 Ala. 685; Morris v. State, 8 Sm. & M. 762; Hurt v. State, 25 Miss. 378; Rolls v. State, 52 Miss. 391; Watson v. State, 5 Mo. 497; State v. Ross, 29 Mo. 32; State v. Sloan, 47 Mo. 604; State v. Smith, 53 Mo. 139; State v. Delaney, 28 La. An. 434; Slaughter v. State, 6 Humph. 410; State v. Lessing, 16 Minn. 80; State v. Martin, 30 Wis. 216; People v. Gilmore, 4 Cal. 376; State v. Mc-

reasoning a conviction of murder in the second degree is an acquittal of murder in the first degree;[1] a conviction of larceny, on an indictment for burglary and larceny, is an acquittal of the burglary;[2] a conviction of robbery in the second degree bars a subsequent prosecution for robbery in the first degree.[3] A defendant, also, who is convicted of assault with intent to ravish, under an indictment for rape, cannot subsequently be tried for the rape;[4] and a defendant who is convicted of an assault under an indictment for an assault with intent to kill, or for assault and battery, cannot be subsequently tried for the assault with felonious intent, or for the assault and battery.[5] On the other

Cord, 8 Kans. 232; Wornock *v.* State, 6 Tex. Ap. 450. See, however, U. S. *v.* Harding, 1 Wall. Jr. 147; State *v.* Beheimer, 20 Oh. St. 579.

In R. *v.* Tancock, 13 Cox C. C. 217, the prisoner, having been previously convicted for the manslaughter of A., was shortly after his trial indicted for wilful murder upon the same facts. The prisoner pleaded *autrefois convict.* The facts of identity of the prisoner and deceased having been given in evidence, and the judge (Denman, J.) having read the depositions, which, as he thought, disclosed a case of manslaughter, he held the plea to be proved, at the same time stating that, if he thought the case would ultimately have resolved itself into one of murder, he should have tried the prisoner, and, if necessary, reserved the point for the consideration of the court for crown cases reserved. But this last point was merely intimated and cannot be accepted as of authority.

In this case, however, the first indictment was for manslaughter, and the view of Denman, J., is in accordance with the distinction taken infra.

As dissenting from the text see U. S. *v.* Keen, 1 McLean, 429; Bailey *v.* State, 26 Ga. 579; Veatch *v.* State, 60 Ind. 291. The argument in the text is, of course, strengthened when there has been a direct acquittal of the major.

[1] Clem *v.* State, 42 Ind. 420; State *v.* Belden, 33 Wis. 120; Slaughter *v.* Com. 6 Humph. 410; State *v.* Smith, 53 Mo. 139; Johnson *v.* State, 29 Ark. 31; Lewis *v.* State, 51 Ala. 1; Field *v.* State, 52 Ala. 348. Compare People *v.* Lilly, 38 Mich. 270.

[2] State *v.* Kittle, 2 Tyler, 471; State *v.* Morris, 1 Blackf. 37; Morris *v.* State, 8 S. & M. 762; Esmon *v.* State, 1 Swan (Tenn.), 14.

Compare State *v.* Brannon, 55 Mo. 63, as stated fully infra, § 466.

[3] State *v.* Brannon, 55 Mo. 63; People *v.* Jones, 53 Cal. 58.

[4] State *v.* Shepard, 7 Conn. 54.

[5] R. *v.* Dawson, 3 Stark. 62; State *v.* Dearborn, 54 Me. 442; State *v.* Handy, 47 N. H. 538; State *v.* Coy, 2 Aiken, 181; State *v.* Reed, 40 Vt. 603; Com. *v.* Fischblatt, 4 Met. 350; State *v.* Johnson, 1 Vroom, 185; Francisco *v.* State, 4 Zabr. 30; State *v.* Townsend, 2 Harring. 543; Stewart *v.* State, 5 Oh. R. 242; White *v.* State, 13 Oh. St. 569; State *v.* Shepard, 10 Iowa, 126; Clark *v.* State, 12 Ga. 350; State *v.* Stedman, 7 Port. 495; Carpenter *v.* State, 23 Ala. 84; Gardenheir *v.* State, 6 Tex. 348; Rey-

hand, where, under the first indictment, there could have been no conviction of the major offence, then a conviction or acquittal of the minor on the first indictment does not bar a second indictment for the major offence.[1] Thus a conviction or acquittal on an indictment for an assault with intent to kill or ravish (the acquittal being on the ground of merger) will be no bar to an indictment for the consummated offence.[2] And when after a trial for assault the assaulted person dies, a prosecution for the murder is not barred by the prior prosecution of the assault.[3] We must at the same time remember that the prosecution, as will presently be seen more fully,[4] by selecting a minor stage, and prosecuting it with the evidence of the major stage, declining to present an averment of the latter, may preclude itself from afterwards prosecuting for the major offence in a distinct indictment. Otherwise the prosecution might arbitrarily subject a defendant to trials for a series of progressive offences on the same proof tentatively applied until at last a conviction should be reached.

nolds *v.* State, 11 Tex. 120; McBride *v.* State, 2 Eng. 374; State *v.* Robey, 8 Nev. 312; People *v.* Apgar, 35 Cal. 389.

The reason is, the conviction of the minor is the acquittal of the major. Infra, § 742.

[1] R. *v.* Morris, L. R. 1 C. C. 90; R. *v.* Salvi, 10 Cox C. C. 481, n.; R. *v.* Button, 11 Ad. & El. (N. S.) 929; Josslyn *v.* Com. 6 Met. 236; Com. *v.* Evans, 101 Mass. 25; Com. *v.* Herty, 109 Mass. 348; Wilson *v.* State, 24 Conn. 57; People *v.* Saunders, 4 Parker C. R. 197; People *v.* Smith, 57 Barb. 46; State *v.* Nathan, 5 Richards. 213; State *v.* Warner, 14 Ind. 572; Freeland *v.* People, 16 Ill. 380; Severin *v.* People, 37 Ill. 414; Scott *v.* U. S. 1 Morris, 142; People *v.* Knapp, 26 Mich. 112; State *v.* Martin, 30 Wis. 216; Duncan *v.* Com. 6 Dana, 295. See Roberts *v.* State, 14 Ga. 8. See, however, R. *v.* Elvington, 10 W. R. 13; R. *v.* Thompson, 9 W. R. 203.

[2] R. *v.* Morris, L. R. 1 C. C. R. 90; State *v.* Murray, 15 Me. 100; Com. *v.* Kingsbury, 5 Mass. 106; People *v.* Mather, 4 Wend. 265; People *v.* Saunders, 4 Parker C. R. 197; Com. *v.* Parr, 5 W. & S. 345. Supra, § 456.

In State *v.* Hattabough, Supreme Court of Indiana, 1879, it was held that a conviction or acquittal of a simple assault and battery, before a court of competent jurisdiction to try the same, does not bar a subsequent prosecution for the same assault and battery with intent to commit a felony. Citing People *v.* Saunders, 4 Parker C. R. 197; Severin *v.* People, 37 Ill. 414.

[3] R. *v.* Morris, L. R. 1 C. C. 90; R. *v.* Salvi, 10 Cox C. C. 481, n.; Com. *v.* Evans, 101 Mass. 25; Burns *v.* People, 1 Parker C. R. 182; Wright *v.* State, 5 Ind. 527.

[4] See infra, § 467.

§ 466. Of the rule just expressed the converse is in a large measure true. Thus whenever, under an indictment containing successive stages of an offence, the defendant could have been convicted on the minor offences at the trial, his conviction of the major offence protects him from a further prosecution of the minor. And the same rule applies to acquittals, whenever the defendant could have been convicted of the minor offence and the acquittal goes to the aggregate charge.[1] It is otherwise when there could have been no conviction of the minor offence under the first indictment.[2]

Conviction of major offence bars minor when on first trial defendant could have been convicted of minor.

Thus an acquittal of burglary with intent to steal has been held not to bar a prosecution for larceny;[3] and an acquittal of

[1] 4 Co. R. 45; 2 Hale, 246; Fost. 339; R. *v.* Gould, 9 C. & P. 64; R. *v.* Barrett, 9 C. & P. 387; State *v.* Smith, 43 Vt. 324; People *v.* McGowan, 17 Wend. 386; People *v.* Loop, 3 Parker C. R. 561; People *v.* Smith, 57 Barb. 56; Lohman *v.* People, 1 Comst. 379; State *v.* Cooper, 1 Green, 361; Res. *v.* Roberts, 2 Dall. 124; Dinkey *v.* Com. 17 Penn. St. 126; State *v.* Reed, 12 Md. 263; Murphy *v.* Com. 23 Grat. 460; Fritz *v.* State, 40 Ind. 18; State *v.* Lewis, 2 Hawks, 98; State *v.* Cowell, 4 Ired. 231; Johnson *v.* State, 14 Ga. 55; Bell *v.* State, 48 Ala. 684; State *v.* Smith, 15 Mo. 550; State *v.* Pitts, 57 Mo. 85; State *v.* Keogh, 13 La. An. 243; Wilcox *v.* State, 31 Tex. 586; Thomas *v.* State, 40 Tex. 36.

[2] 2 Hawk. c. 25, s. 5; 1 Leach, 12; R. *v.* Campbell, 3 C. & P. 418; R. *v.* Henderson, 1 C. & M. 328; R. *v.* Taylor, L. R. 1 C. C. 194; 11 Cox C. C. 261; R. *v.* Reid, 15 Jur. 181; Com. *v.* Hudson, 14 Gray, 11; State *v.* Nichols, 8 Conn. 496; Reynolds *v.* People, 83 Ill. 479; Heller *v.* State, 23 Oh. St. 582; State *v.* Jesse, 2 Dev. & B. 297; Wood *v.* State, 48 Ga. 192; State *v.* Standifer, 5 Port. 523; State *v.* Wightman, 26 Mo. 515. See, however, R. *v.* Gould, 9 C. & P. 364. Infra, § 467.

[3] See State *v.* Warner, 14 Ind. 572; Fisher *v.* State, 46 Ala. 717; though see *contra*, State *v.* Lewis, 2 Hawks, 98; Roberts *v.* State, 14 Ga. 8; State *v.* De Graffenried, Sup. Ct. Tenn. 1878; People *v.* Garnett, 20 Cal. 622.

In State *v.* Brannon, 55 Mo. 63, the defendant was indicted "for robbery in the first degree," which was held to be a sufficient indictment for larceny. The conviction was for robbery "in the second degree." The verdict was set aside, as there were no degrees in robbery. When, subsequently, the defendant was again tried upon the same indictment, and convicted of larceny, this was held error; it being held that as the defendant could, upon the first trial, have been convicted of either robbery or larceny, but was lawfully convicted of neither, the verdict was an acquittal.

In Wilson *v.* State, 24 Conn. 57, a conviction for larceny was held no bar to statutory house-breaking; and see infra, § 471.

But a conviction for larceny has been held a bar to an indictment for subsequently receiving the same goods. U. S. *v.* Harmison, 1 Hugh. 552.

murder, on the ground that the assaults averred did not contribute to the murder, does not bar a subsequent indictment for the assaults.[1]

Prosecutor may bar himself by selecting a special grade.

§ 467. Upon the doctrines above stated an interesting qualification has been proposed. Suppose the prosecution could, if it chose, have presented the two offences in a single count (*e. g.* assault, with assault with intent to wound), but did not do so, yet at the same time put the aggravated offence in evidence, and obtained a conviction on the aggravated case, and a sentence accordingly. Can a second indictment be maintained for the aggravated offence? The answer must be in the negative; since the prosecution cannot take advantage of its own negligence in the imperfect pleading of its case, and since the defendant has been tried and convicted on the basis of the aggravated offence.[2]

Should the defendant be *acquitted* on the first trial, the whole case of the second prosecution being before the jury, then, as he has been acquitted of the essential ingredients of the second case, the second case cannot proceed.[3]

3. *As to Nature of Offence.*

When one unlawful act operates on separate objects, conviction as to one object does

§ 468. Concurrent injuries to distinct persons may be classified as follows: —

(1.) *Concurrent Negligent Injuries.* — Suppose a railroad corporation, by negligence in the construction of a bridge, causes the concurrent deaths of a number of passengers, is the responsibility of the corporation, or of its officers to whom the negligence is imputable, limited to a single case of death? It is alleged, by those maintaining

[1] R. *v.* Bird, T. & M. 437; 2 Den. C. C. 94; 5 Cox C. C. 11; cited supra, § 464.

[2] R. *v.* Elvington, 9 Cox C. C. 86; 1 B. & S. 689; 10 W. R. 13, citing R. *v.* Stanton, 5 Cox C. C. 324; Thompson, in re, 9 W. R. 203; U. S. *v.* Harmison, 3 Sawyer, 556; State *v.* Smith, 43 Vt. 324; State *v.* Chaffin, 2 Swan, 493; State *v.* Stanly, 4 Jones L. (N. C.) 290; though see People *v.* Warren, 1 Parker C. R. 338; Smith *v.* Com. 7 Grat. 593, and cases cited infra.

The English rulings above cited, however, took place under a statute providing that after a trial by justices there should be no further proceedings, civil or criminal, "for the same cause."

[3] To this effect see cases in preceding section, on the question whether a conviction of burglary with intent to steal bars larceny.

not extinguish prosecution as to other; *e. g.* when two persons are simultaneously killed.

the affirmative, that as the injury is but one act, there can be but one indictment and but one punishment. But is there, in such cases, only one act? In civil suits, it has been decided in multitudes of cases, that there are as many distinct acts, separately cognizable, as there are persons injured; and one of the chief checks we have upon railroad companies is that when a great disaster occurs from their negligence, they have to pay damages for every person hurt; and hence they multiply their precautions against the negligences which should produce such great disasters. If a foot-bridge crossing a brook breaks down under a single traveller, the negligent constructor of the bridge is liable to but a single suit, and this may be a sufficient penalty. If a railway bridge crossing an estuary breaks down, through the negligence of the company constructing it, and a hundred persons are swept into the sea, the company may be liable to a hundred suits; atrocious negligence hereby receiving signal and conspicuous condemnation. In no other way can care in proportion to peril be legally exacted. Why, then, should it be otherwise in criminal issues? In criminal as well as in civil issues the principle is that the guilt of neglect is in proportion to the greatness of the duty neglected. It may be said, that in cases of injuries arising from the neglect of railroad officers, a gross punishment can be inflicted in the first case tried and that the others can be dropped. But to this it may be answered as follows: (1.) It is no more just, when a man is tried for negligent misconduct towards A., to punish him for negligent misconduct to B., than it would be just when he is tried for negligent misconduct towards A., to punish him for malicious acts done subsequently to B. If the acts are separate they are to be punished separately, and that they are separate the courts, in civil suits, have repeatedly ruled. (2.) Our statutes do not ordinarily permit a series of offences to be thus lumped in their punishment. Punishments are assigned to specific objective acts of negligence. To impose the statutory punishment in such cases, if we stop with the first prosecution, is often a very inadequate penalty for the crime. To this view it may be objected that an offender may be crushed under a load of successive punishments. But this is an objection that goes, not to the responsibility of the party for each offence, but simply to the de-

gree in which he is to be punished for his misconduct. The same objection would apply to successive trials in cases where A. at intervals of a day or a month assaults murderously B., C., and D. The proper course is not to deny his responsibility for the wrongful acts, but, in cases where his punishment in the first case is adequate, to apply executive clemency. He may, for instance, in the first case, be sentenced to imprisonment for five years, and this may be regarded by the executive as a sufficient penalty to impose on a particular individual. But if he is sentenced in the first case to an imprisonment for one or two years, this may be properly followed by a second prosecution with a similar punishment. If this objection, it may be added, applies to successive criminal prosecutions, it applies still more strongly to successive civil suits, the penalties of which cannot be reduced by the executive.

(2.) *Concurrent Malice and Negligence.* — The characteristics of this concurrence are elsewhere fully discussed.[1] A. aims a pistol at B., but the ball glances and wounds C. Here, as we have seen, there is an attempt to kill B., for which the defendant is indictable, and a negligent wounding of C., for which the defendant is also indictable. The offences are distinct in purpose, in object, in effect, and ordinarily in mode of punishment. They are consequently to be tried separately. And in this way alone can a proper penalty be inflicted. A trial for neither offence would bring with it such a penalty. An attempt has usually a lenient punishment imposed on it; and such is the case with a negligent wounding. But here we have acts which, if we could join them, would present the features of a malicious wounding, and would deserve the punishment imposed on that high offence. But we cannot so join them; and if we prosecute only for the neglect or the attempt singly, the punishment would be inadequate.

(3.) *Concurrent Malicious Acts.* — A., for instance, designing to inflict severe physical injury on B. and C., waits till he finds them together. We may suppose the case of poison administered in such a way as not to kill but to seriously hurt, such being the intention. If he administers the dose to them at intervals of half an hour, there can be no question that the offences are dis-

[1] Whart. Crim. Law, 8th ed. § 120.

tinct. Do they cease to be distinct because, in this view, he manages to get them to his table together, and then to poison them by soup, for instance, distributed from the same tureen? In the Roman law we have cases in which the idea of unification of such offences is sternly rejected, and in which each poisoning is held to be distinct. The English common law tends to the same effect. There can be no question that each party injured, in such cases, supposing death not to ensue, can maintain a civil suit for the damage he has suffered individually. There can be no question, also, that by the English common law, he is obliged, before bringing the civil suit, to bring a criminal prosecution.[1] Wherever, in such cases, a civil suit lies, there, as a condition precedent, lies a criminal prosecution. It may be said that this also heaps an intolerable burden on the offender. This objection, however, if good, would limit to a single suit all civil retribution sought by the party injured. And the question here also, as in the preceding cases, is one for the executive, if it appear that immoderate penalties are about to be inflicted. The objection does not go to the severance of the offences. This severance is required, (1.) because the purpose in each case is distinct; and (2.) because the object in each case is distinct.

The question before us, as it presents itself to us in the concrete, may be treated in a series of cases, of which the following is the first to be discussed: —

If A. in shooting at B. kills both B. and C., is his conviction under an indictment for killing B. a bar to a prosecution against him for killing C.? In answering this question, let us remember that to join the killing of B. and C. in the same count would be a duplicity that would not be tolerated; and that if joined in the same indictment, in separate counts, the court would compel an election between the offences. It would be necessary, therefore, to prosecute the cases separately; and if so, it is hard to see how a conviction or acquittal of the one could bar a prosecution of the other. To the indictment for killing B., for instance, A. might set up self-defence, and be acquitted; but this might be plausibly argued to be an issue different from that which would be presented on his trial for killing B., should it appear that the killing of B. was an unprovoked or a negligent

[1] See supra, § 453.

act. The killing of B. also may be malicious, as where A. designs to shoot B., while the concurrent killing of C. may be negligent; as where the ball, after striking B., glances and strikes C., whom A. has no possible reason to expect to be at the spot, and whose death may be to him peculiarly abhorrent.[1] An acquittal or conviction, therefore, for killing C., ought not, on principle, to bar a subsequent indictment for killing B., though the killings were by the same act.[2]

§ 469. The rule being that there can be batteries, of two or more persons, introduced in the same count,[3] it follows, on technical grounds, that a conviction or acquittal on an indictment charging a battery of A. and B. is a bar

Otherwise as to two batteries at one time.

[1] Whart. Crim. Law, 8th ed. § 120.

[2] See R. *v.* Champneys, 2 M. & R. 26; R. *v.* Jennings, R. & R. 368; State *v.* Damon, 2 Tyler, 390; State *v.* Benham, 7 Conn. 414; People *v.* Warren, 1 Parker C. R. 338; Vaughan *v.* Com. 2 Va. Cas. 273; Smith *v.* Com. 7 Grat. 593; State *v.* Fife, 1 Bailey, 1; State *v.* Fayetteville, 2 Murphey, 371; State *v.* Standifer, 5 Port. 523; Teat *v.* State, 53 Miss. 439; People *v.* Alibez, 49 Cal. 452; and see State *v.* Horneman, 16 Kans. 452. See, however, State *v.* Womack, 7 Cold. 508. In Whart. Crim. Ev. § 587, other points are noticed; and, as disputing the conclusion of the text, see Clem *v.* State, 42 Ind. 420. In Whart. on Hom. §§ 28–48, will be found a discussion of whether the grade in all cases of double killing is identical.

The following supposed cases may strengthen the argument in the text:—

A. when shooting at B. with intent to kill, by the same shot negligently, as it is alleged, injures C. An acquittal on an indictment for the negligent injury to C. is no bar to an indictment for the malicious shooting of B.

A., an officer, with a warrant to arrest B., shoots B., the shooting being the only means of preventing B.'s escape. By the same shot, however, he (either negligently or maliciously) injures C. An acquittal in the former case is no bar to a prosecution in the latter.

A public executioner, when discharging his office, withdraws the platform in such a way as not only to cause the death of the convict, which he is appointed to effect, but to inflict a serious wound on a by-stander, such wound being maliciously intended by the executioner. An acquittal on an indictment for the killing is no bar to an indictment for the malicious wounding.

An artilleryman aims his gun in such a way as to kill not only soldiers of the hostile force, but persons attending a hospital, whom he knows to be non-combatants. An acquittal on an indictment for killing the former is no bar to an indictment for killing the latter.

A., attacked by B., and driven to the wall, seizes the opportunity when he can kill B. in self-defence to wound C. An acquittal in the first case is no bar to an indictment in the second.

[3] R. *v.* Benfield, 2 Bur. 984; R. *v.* Giddings, C. & M. 634; Com. *v.* McLaughlin, 12 Cush. 615; Com. *v.* O'Brien, 107 Mass. 208; Kinney *v.*

to a subsequent prosecution for a battery of B., though on the first trial the verdict went simply to the battery of A. But where the first indictment charges only the battery of A., this, for the reasons stated in the last section, does not bar a subsequent indictment for a battery of B.[1]

So when several articles are simultaneously stolen.

§ 470. Where several articles belonging to the same owner are stolen by the same person simultaneously, they may be grouped in the same count, and a conviction or acquittal on such count, or on any divisible allegation thereof, bars a future indictment for the stealing of any of the articles enumerated in the count.[2] But in States in which it is

State, 5 R. I. 385: State *v.* McClintock, 8 Iowa, 203; Shaw *v.* State, 18 Ala. 547; Fowler *v.* State, 3 Heisk. 154; though see R. *v.* Scott, 4 B. & S. 368.

In Ben *v.* State, 22 Ala. 9, it was held that it was not duplicity to include in one count the administering poison to *three* persons; but see *contra*, People *v.* Warren, 1 Parker C. R. 338.

[1] People *v.* Warren, 1 Parker C. R. 338; Vaughan *v.* Com. 2 Va. Cas. 273; Smith *v.* Com. 7 Grat. 593; Greenwood *v.* State, 64 Ind. 250; State *v.* Standifer, 5 Port. 523.

The exception in the text is extended in a New York case, where it is held that an indictment charging as a single act the burning of a number of designated dwelling-houses is not bad for duplicity. The criminal act, it was said, is kindling the fire with felonious intent to burn the houses specified, and is consummated when the burning is effected; and the facts that the houses did not burn at the same time, and that but one was set on fire, the fire communicating therefrom to the others, do not make the burning of each a separate offence. It was further argued, that if the indictment charges as a distinct offence the burning of each house, it is subject to the objection of duplicity, and the defect is not cured by a withdrawal, upon the trial, of all claim to convict the prisoner for burning any house but one. Woodford *v.* People, 62 N. Y. 117, affirming 3 Hun, 310, 5 Thomp. & Cooke, 539. The houses in this case, it should be observed, were burned in a block.

[2] R. *v.* Carson, R. & R. 303; Furneaux's case, R. & R. 335; State *v.* Snyder, 50 N. H. 150; State *v.* Cameron, 40 Vt. 555; Com. *v.* Williams, 2 Cush. 583; Com. *v.* O'Connell, 12 Allen, 451; Com. *v.* Eastman, 2 Gray, 76; People *v.* Wiley, 3 Hill (N. Y.), 194; Jackson *v.* State, 14 Ind. 327; Fisher *v.* Com. 1 Bush, 211; Nichols *v.* Com. Sup. Ct. Ky. 1879, 9 Rep. 114; State *v.* Williams, 10 Humph. 101; Lorton *v.* State, 7 Mo. 55; State *v.* Augustine, 29 La. An. 119; Quitzow *v.* State, 1 Tex. App. 47; Hatch *v.* State, 6 Tex. App. 384; State *v.* Clark, 32 Ark. 231; though see 1 Hale, 241; State *v.* Thurston, 2 McMul. 382. See also Woodward *v.* People, 62 N. Y. 117; State *v.* Egglesht, 41 Iowa, 574.

Compare Woodward *v.* People, 62 N. Y. 117, supra.

In Fontaine *v.* State, 6 Bax. 514, it was held that selling several lottery tickets, in one sheet, was a single offence. The same view was taken in

held that there can be no joinder of larcenies of articles belonging to distinct owners,[1] it follows that a conviction or acquittal for stealing or feloniously receiving the goods of B. does not bar a prosecution for stealing or receiving the goods of C., though the acts were simultaneous. Indeed, though the offences were nominally the same, they may be substantially different, since one article may be taken under a claim of right and the other with felonious intent, the only point in common being concurrence in time.[2]

Another reason for the conclusion just given is, that if, in those jurisdictions which hold the joinder of articles belonging to different owners to be duplicity, we should bar a subsequent indictment for goods stolen from an owner different from the owner named in the first indictment, we would deprive the owner in the second case of his right to a restoration of the goods by sentence of court, when it might be that he had no notice of the first prosecution. But whatever may be the force of this reasoning, the weight of authority now is that the prosecution, wherever it is at liberty to join in one indictment all articles simultaneously stolen, may be treated, when it selects only one of them for trial, as barring itself from indicting for the others.[3]

U. S. *v.* Miner, 11 Blatch. 511, as to possessing in one block two connected plates for counterfeiting.

[1] State *v.* Newton, 42 Vt. 537; Com. *v.* Andrews, 2 Mass. 409; State *v.* Thurston, 2 McMull. 382. As ruling that stealing several articles belonging to different owners is to be treated as one offence see R. *v.* Bleasdale, 2 C. & K. 765; Com. *v.* Williams, Thach. C. C. 84; State *v.* Nelson, 29 Me. 329; State *v.* Merrill, 44 N. H. 624; Com. *v.* Dobbin, 2 Pars. 380; State *v.* Egglesht, 41 Iowa, 574; Fisher *v.* Com. 1 Bush, 212; Nichols *v.* Com. Sup. Ct. Ky. 1879; Ben *v.* State, 22 Ala. 9; Lorton *v.* State, 7 Mo. 55; State *v.* Daniels, 32 Mo. 558; State *v.* Morphin, 37 Mo. 373; Wilson *v.* State, 45 Tex. 76.

[2] R. *v.* Knight, L. & C. 378; 9 Cox C. C. 439; R. *v.* Brettel, C. & M. 609; Com. *v.* Andrews, 2 Mass. 409; Com. *v.* Sullivan, 104 Mass. 552; People *v.* Warren, 1 Parker C. R. 338; State *v.* Thurston, 2 McMul. 382. See State *v.* Lambert, 9 Nev. 321. As to divisibility in this respect see Whart. Crim. Law, 8th ed. § 27.

[3] U. S. *v.* Beerman, 5 Cranch C. C. 412; State *v.* Nelson, 29 Me. 329; State *v.* Merrill, 44 N. H. 624; State *v.* Hennessy, 23 Oh. St. 339; Bell *v.* State, 42 Ind. 335; State *v.* Egglesht, 41 Iowa, 574; State *v.* Lambert, 9 Nev. 321; Lowe *v.* State, 57 Ga. 171; Ben *v.* State, 22 Ala. 9; State *v.* Morphin, 37 Mo. 373; Wilson *v.* State, 45 Tex. 170. See supra, § 252. That a prosecutor may be estopped by selecting a particular phase of an offence see infra, § 471; and see Whart. Crim. Law, 8th ed. §§ 931–948.

§ 471. We have heretofore noticed cases in which a minor offence, being a stage in the consummation of a major offence, is united in the same count with the major. We have now to approach another class of cases, — those in which one particular act has two or more indictable aspects. Although the question has been the subject of much difference of opinion, we may venture to hold that when one act has two or more aspects, if the defendant could have been convicted of either under the first indictment he cannot be convicted of the two successively. In other words, where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the second is barred, but not otherwise.[1] If, for instance, the defendant is indicted for holding and uttering forged paper, a conviction for holding, the acts being simultaneous, bars a subsequent prosecution for uttering the same paper, or the converse.[2] If he is indicted for a riot, of which the overt act is an assault, and if on the trial of the riot the assault is put in evidence, and he is convicted and sentenced on the basis of the assault, the assault cannot afterwards be made the basis of an indepen-

When one act has two or more indictable aspects, if the defendant could have been convicted of either under the first indictment he cannot be convicted of the two successively.

In State *v.* Clark, 32 Ark. 231, it was held that stealing several articles simultaneously from the same owner forms but one offence, and after one conviction for stealing a part no further prosecution can be pursued for the rest.

[1] Archbold's C. P. by Jervis, 82; 1 Leach, 448; R. *v.* Emden, 9 East, 437; 2 N. Y. Rev. Stat. 1856; State *v.* Inness, 53 Me. 536; Com. *v.* Cunningham, 13 Mass. 245; Com. *v.* Wade, 17 Pick. 395; Com. *v.* Trickey, 13 Allen, 559; Morey *v.* Com. 108 Mass. 433; Com. *v.* Tenney, 97 Mass. 50; People *v.* Barrett, 1 Johns. R. 66; Canter *v.* People, 38 How. N. Y. Pr. 91; State *v.* Reed, 12 Md. 263; Price *v.* State, 19 Oh. 423; Gerard *v.* People, 3 Scam. 363; Durham *v.* People, 4 Scam. 172; Guedel *v.* People, 43 Ill. 226; State *v.* Ray, 1 Rice, 1; State *v.* Risher, 1 Richards. 219; State *v.* Revels, 1 Busbee, 200; Holt *v.* State, 38 Ga. 187; Hite *v.* State, 9 Yerger, 357; State *v.* Keogh, 13 La. An. 243. See State *v.* Inness, 53 Me. 536; Buell *v.* People, 18 Hun, 487.

[2] State *v.* Benham, 7 Conn. 414; People *v.* Van Keuren, 5 Parker C. R. 66. See State *v.* Egglesht, 41 Iowa, 574, where the defendant was held guilty of but one offence in passing four checks at the same time to the same person. Otherwise as to stealing and receiving, and as to forging and uttering. Foster *v.* State, 39 Ala. 229; Harrison *v.* State, 36 Ala. 248. As to forging a certificate of deposit on one bank, and obtaining money from another bank, by forwarding the certificate in a forged letter, see People *v.* Ward, 15 Wend. 231.

dent prosecution;[1] nor when a riot consists in breaking up a religious meeting can the defendant be prosecuted for the two offences successively.[2] Nor can there be a prosecution for an assault when the defendant has been already convicted of a breach of the peace which constituted the assault.[3] But where he is convicted of an assault, this does not, for the reasons already given, bar a subsequent prosecution for a riot of which the assault was one of the overt acts, as he could not, under the indictment for the assault, have been convicted of the riot.[4] Nor does an acquittal for obstructing a steam-engine, by putting a rail across the track, bar a prosecution for putting the rail across the track with intent to obstruct, if the defendant could not have been convicted of the latter offence on the indictment for the former;[5] nor does a prosecution for threatening to kill bar an indictment for assault with intent to murder, being part of the same transaction;[6] nor does a conviction for larceny, on an indictment for larceny, bar a prosecution for the burglary to which the larceny was an incident,[7] though it may be that where the prosecution elects to prosecute to conviction a particular phase of a crime (*e. g.* larceny in a case of robbery,[8] or arson in a case where killing was an incident to the arson),[9] it may be regarded as entering a *nolle prosequi* as to the other phases. But so far as the strict rule of law is concerned, the proceedings on the first trial cannot bar a prosecution for an offence on which there could be no conviction on the first trial.[10]

[1] R. *v.* Champneys, 2 Mood. & R. 26; Com. *v.* Kinney, 2 Va. Cas. 139; Smith *v.* Com. 7 Grat. 593; State *v.* Stanly, 4 Jones L. (N. C.) 290; State *v.* Fife, 1 Bailey, 1; State *v.* Standifer, 5 Port. 523; though see Scott *v.* U. S. 1 Morris, 142; Duncan *v.* Com. 6 Dana, 295.

[2] State *v.* Townsend, 2 Harring. (Del.) 548.

[3] Com. *v.* Hawkins, 11 Bush, 603. See Com. *v.* Miller, 5 Dana, 320.

[4] Freeland *v.* People, 16 Ill. 380.

[5] Com. *v.* Bakeman, 105 Mass. 53.

[6] Lewis *v.* State, 1 Tex. Ap. 323.

[7] See Wilson *v.* State, 24 Conn. 57; State *v.* Warner, 14 Ind. 572.

[8] State *v.* Lewis, 2 Hawks, 98. See Roberts *v.* State, 14 Ga. 8; though see, *contra*, § 466.

[9] People *v.* Smith, 3 Weekly Digest, 162; State *v.* Cooper, 1 Green (N. J.), 361. See, however, R. *v.* Greenwood, 23 Up. Can. Q. B. 250; and see, as justly criticising, State *v.* Cooper, note to R. *v.* Tancock, 13 English R. 659; S. C., 13 Cox C. C. 217.

[10] Supra, § 456. See, however, State *v.* Lewis, State *v.* Cooper, *ut supra;* State *v.* Fayetteville, 2 Murph. 371; Fiddler *v.* State, 7 Humph. 508; in which cases the courts departed from the strict rule of law, and took ground more properly belonging to

An acquittal for larceny, for instance, does not bar an indictment for obtaining the same goods by false pretences, or by conspiracy to cheat,[1] nor, at common law, for being an accessary before or after the fact to the stealing.[2] Whether an acquittal for larceny bars a prosecution for burglary to which the larceny was incident has been already noticed.[3]

So in liquor cases.

§ 472. In liquor cases we have the rules before us abundantly illustrated. Where, under an indictment for a nuisance, the defendant could not be convicted of keeping or selling intoxicating liquors, a conviction or acquittal of the former offence will not bar a prosecution for the latter.[4] Under the same circumstances, an indictment for a specific sale under one statute is not barred by a conviction under another statute of being a common seller, or of keeping a tippling-house.[5] But where the conviction is of being a "common seller of liquor," and on the trial, to prove this, several sales are put in evidence, and the defendant is sentenced on the aggregate case, he cannot be subsequently convicted on an indictment charging a sale within the period covered by the first trial.[6] But for distinct successive sales there may be distinct indictments, if the evidence in the subsequent cases is not part of the proof of the first.[7] This is

the executive, namely, that when a defendant has been adequately punished for one of a series of offences, further prosecutions may be stopped.

[1] R. v. Henderson, 1 C. & M. 328; State v. Sias, 17 N. H. 558; Dominick v. State, 40 Ala. 680.

[2] State v. Larkin, 49 N. H. 36; Foster v. State, 39 Ala. 229. Supra, § 458.

[3] Supra, § 466.

An acquittal of fornication with A. has been held no bar to a prosecution for refusal to support bastard child begotten with A. Davis v. State, 58 Ga. 173.

An acquittal on a charge of killing an unborn child, when attempting to produce a miscarriage of the mother, is no bar to an indictment for attempting the miscarriage. State v. Elder, 65 Ind. 282.

[4] State v. Inness, 53 Me. 536; Com. v. McCauley, 105 Mass. 69; Com. v. Hardiman, 9 Allen, 487; Com. v. Cutler, 9 Allen, 586; State v. Williams, 1 Vroom, 102; Martin v. State, 59 Ala. 34. See Whart. Crim. Law, 8th ed. § 1508.

[5] State v. Coombs, 32 Me. 527; State v. Maher, 35 Me. 225; State v. Innes, 53 Me. 536; Com. v. Cutler, 9 Allen, 486; Com. v. Hudson, 14 Gray, 11; Com. v. Kennedy, 97 Mass. 224; State v. Johnson, 3 R. I. 94; Heikes v. Com. 26 Penn. St. 513; Roberts v. State, 14 Ga. 8; Morman v. State, 24 Miss. 54. See *contra*, under varying statutes, State v. Nutt, 28 Vt. 598; Miller v. State, 3 Ohio St. 475.

[6] State v. Nutt, 28 Vt. 598; and see Com. v. Welch, 97 Mass. 593; Com. v. Connors, 116 Mass. 35; State v. Andrews, 27 Mo. 267.

[7] State v. Brown, 49 Vt. 437; State

eminently the case when the sales are to distinct persons.[1] It is otherwise, however, when the first indictment is for a continuous offence of which the second indictment presents an ingredient.[2]

Severance of identity by place.

§ 473. When the performance of a continuous act runs through successive jurisdictions, then it is broken into separate offences cognizable in each jurisdiction.[3]

Severance of identity by time.

§ 474. The mere passage of time does not by itself break up into parts an offence otherwise continuous. If the transaction is set on foot by a single impulse, and operated by an unintermittent force, it forms a continuous

v. Cassety, 1 Rich. 90. See Com. *v.* Mead, 10 Allen, 396.

[1] Ibid; State *v.* Ainsworth, 11 Vt. 91. See Com. *v.* Mead, 10 Allen, 396.

[2] Com. *v.* Robinson, 126 Mass. 259. In this case, Lord, J., said: "In Morey *v.* Com. 108 Mass. 433, Gray, C. J., says 'a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.' In Com. *v.* Armstrong, 7 Gray, 49, as well as in several other cases, it is decided that an indictment for being a common seller of intoxicating liquors, from a day named to the day of the finding of the indictment, is supported by proof of three sales made on any one day between the days named in the indictment. That case further decides that, although where the offence consists of but a single act, the day on which the act is alleged to have been committed is immaterial if it appears to have been a day on which the offence charged might have been committed; but when, on the other hand, the offence charged is continuous in its nature and requires a series of acts for its commission, the time within which the offence is alleged to have been committed is material, and must be proved as alleged. So when a person is charged with an offence continuous in its nature and requiring for its commission a series of acts, and such offence is alleged to have been committed upon a single day, evidence of any facts tending to establish the offence at any other time than upon the day named is inadmissible. Applying these principles to the case at bar, the same evidence which would have warranted a conviction upon the first complaint would have warranted a conviction upon the present complaint, for upon the second complaint the jury would have been required to convict the defendant if it should appear that he committed the acts complained of at any time between the first day of January and the first day of June, 1878."

In Com. *v.* McShane, 110 Mass. 502, it was held that a conviction may be had on an indictment upon the Gen. Stats. c. 87, §§ 6, 7, for maintaining a tenement for the illegal keeping and sale of intoxicating liquors, although the only evidence is as to liquors for keeping which with intent to sell the defendant has been already indicted, and punished.

[3] Whart. Confl. of L. § 931; Whart. Crim. Law, 8th ed. §§ 27, 287. Supra, § 442; infra, § 475, note; Moore *v.* Ill. 14 How. U. S. 13; State *v.* Rankin, 4 Cold. 145.

act, no matter how long a time it may occupy. So has it been held in reference to gas abstracted continuously for a long period from the prosecutor's pipes,[1] and to ore fraudulently quarried for several years through innocent agents by means of one orifice in the defendant's quarry, such orifice being made at one specific time.[2] And when inculpatory facts rapidly succeeding each other are put in evidence in one case by the prosecution, it cannot bring a second indictment for a part of these facts, relying on evidence which was introduced at the first trial.[3]

But continuous maintenance of nuisances can be successively indicted.

§ 475. Where, however, there is each day new action on the part of the inculpated parties, adding to the offence, then for each day's increment there can be a new indictment. Thus, an acquittal for a prior stage of the same nuisance is no bar to an indictment for a nuisance at the present time, though the offences on the record are identically the same, each day's continuation of the nuisance being a repetition of the offence.[4] And a conviction of selling illegally at one time is no bar to a conviction for selling illegally at another time.[5] But the periods of time in which the offence is charged must not in any point coincide, or the second prosecution fails.[6]

[1] R. *v.* Firth, L. R. 1 C. C. 172; 11 Cox C. C. 234. See R. *v.* Jones, 4 C. & P. 217.

[2] R. *v.* Bleasdale, 2 C. & K. 765.

[3] Com. *v.* Robinson, 126 Mass. 259; cited supra, § 472.

[4] People *v.* Townsend, 3 Hill (N. Y.), 479; R. *v.* Fairie, 8 E. & B. 466; 8 Cox C. C. 66; though see U. S. *v.* M'Cormick, 4 Cranch C. C. R. 104; Whart. Crim. Law, 8th ed. § 1419; and see State *v.* Ainsworth, 11 Vt. 91; State *v.* Cassety, 1 Rich. 90.

[5] State *v.* Derichs, 42 Iowa, 196. Supra, §§ 462, 472.

[6] Com. *v.* Robinson, 126 Mass. 259; cited supra, §§ 472–4.

The several theories on this topic are thus given by Berner, Lehrbuch, § 140: —

Formal concurrence, which exists when a particular act has several criminal aspects. A particular sexual transaction, for instance, may be both rape or incest. A stealing may be both larceny and an attempt.

Material concurrence, where several successive acts form part of the same apparently continuous transaction.

In cases of formal concurrence, the rule, as has been seen, is, that there should be a conviction only of the crime to which the higher penalty is attached, though the minor crime may be taken into consideration in adjusting punishment.

In cases of material concurrence the following theories have been propounded: —

1. *Absorption or Merger.* — By this view the lesser offence is lost sight of in the greater. *Poena major absorbet minorem.* Only the most heinous of the concurrent crimes is to be punished, and the others are only to be consid-

§ 476. Where, after a conviction of assault, the assaulted person dies, the conviction of assault is no bar to a conviction for murder.[1] The reason is that as at the time of the conviction of assault there could have been no conviction of the murder, the prosecution for the murder is not barred by the conviction of the assault.

Conviction of assault no bar to murder, when death is after conviction.

4. *Practice Under Plea.*

§ 477. A former conviction for the same offence, even though in the same court, should be specially pleaded.[2] It cannot be put in evidence under the general issue,[3] or avail in arrest of judgment,[4] or on *habeas corpus*.[5]

Plea must be special.

§ 478. When *autrefois acquit* and *not guilty* are pleaded together, the former must be tried first.[6] In strict practice, the two pleas cannot be concurrently pleaded.[7]

Autrefois acquit must be

ered as affording grounds for the adjustment of the sentence. Against this view it is argued that it violates the public sense of justice that any crime, proved in a court of justice, should go unpunished, and that the commission of a greater crime should not be a free pass to the commission of a lesser crime.

2. *Cumulation.* Each distinct offence, though these follow each other in rapid succession as part of the same transaction, is to be punished separately, and for this is invoked the maxim, *Quot delicta, tot poenae.* To this the objection is made that public justice is sufficiently satisfied if the criminal has applied to him in his sentence such an increase of punishment as the aggravation of the transaction requires, and that this is one of the objects of giving to the judges discretion in the dispensing of punishment.

3. *Intermediate View.*—By this view the cumulation of the entire penalties of the several concurrent crimes is rejected, while the theory of the merger of the lesser in the greater is repudiated. The criminal is sentenced on the heaviest of the imputed crimes (*poena major*), while in the sentence due consideration is taken of the lesser crimes, provided they appear in evidence as part of the aggravating circumstances of the case.

[1] R. *v.* Salvi, 10 Cox C. C. 481, n.; Com. *v.* Evans, 101 Mass. 25. See R. *v.* Morris, L. R. 1 C. C. 90; Wright *v.* State, 5 Ind. 527; Burns *v.* People, 1 Park. C. R. 182; Com. *v.* Roby, 12 Pick. 496. See supra, § 466.

[2] State *v.* Buzzell, S. C. New H. 1879.

[3] Com. *v.* Chesley, 107 Mass. 223; State *v.* Washington, 28 La. An. 129; though see Clem *v.* State, 42 Ind. 420.

[4] State *v.* Barnes, 32 Me. 530; State *v.* Salge, 2 Nev. 321.

[5] Pitner *v.* State, 44 Tex. 578.

[6] Supra, § 420; Com. *v.* Merrill, 8 Allen, 545; Foster *v.* State, 39 Ala. 229; Solliday *v.* Com. 28 Penn. St. 13; Clem *v.* State, 42 Ind. 421; Davis *v.* State, 42 Tex. 494; and cases cited supra, § 420. But see Faulk *v.* State, 52 Ala. 415.

[7] R. *v.* Roche, 1 Leach C. C. 135.

pleaded first.

Autrefois acquit comes first; and if determined against the defendant, he then pleads over.[1]

Verdict must go to the plea.

§ 479. A verdict of guilty on the two is bad,[2] and so, when tried together, of a verdict upon one plea alone.[3]

Identity of offender and offence to be established.

§ 480. The plea must consist of two matters: first, matter of record, to wit, the former indictment and acquittal, or conviction; second, of matters of fact, to wit, the identity of the person acquitted, and of the offence of which he was acquitted.[4] To support the first matter, it is necessary to show that the defendant was legally acquitted or convicted on an indictment free from error in a court having jurisdiction.[5]

Identity may be proved by parol.

§ 481. The prosecution, however, may tender an issue as to the identity of the defendant, or the identity of the offence, as well as to the existence of the record.[6] In this case the burden of identity is on the defendant.[7]

[1] Supra, § 421; infra, § 486.

[2] Mountain *v.* State, 40 Ala. 344.

[3] Solliday *v.* Com. 28 Penn. St. 13; Nonemaker *v.* State, 34 Ala. 211. See, as to waiver, Dominic *v.* State, 40 Ala. 680.

[4] 2 Hale P. C. 241; Hawk. b. 2, c. 35, s. 3; Burn, J., Indictment, xi.; 1 M. & S. 188; 9 East, 438; 2 Leach, 712; 4 Co. Rep. 44; Com. *v.* Myers, 3 Wheel. C. C. 550; Smith *v.* State, 52 Ala. 407; Rocco *v.* State, 37 Miss. 357.

That such a plea is sufficient see Austin *v.* State, 2 Mo. 393; State *v.* Cheek, 63 Mo. 364.

[5] 4 Black. Com. 335; 2 Hawk. c. 35, s. 1; Com. *v.* Sutherland, 109 Mass. 342. Supra, §§ 435 *et seq.* See, for forms of replication and rejoinder, Whart. Prec. 1155, 1156.

[6] Whart. Crim. Ev. § 593. As to identity of defendant see R. *v.* Crofts, 9 C. & P. 219; as to identity of offence, infra, § 483. See, for forms of pleas, Whart. Prec. as follows: —

(1150.) Plea of *autrefois acquit.*

(1151.) *Autrefois acquit*, another form.

(1152.) Replication to same. (To be made *ore tenus.*)

(1153.) Plea that defendant was duly charged, examined, and tried for the murder of the deceased before a court legally constituted, and upon this trial and examination was duly and legally acquitted of the said murder and felony with which he stood charged, and was adjudged by the court not guilty thereof.

(1154.) *Autrefois convict*, plea of, where the original indictment, on which the defendant was convicted, was one for arson, and the second indictment was for murder in burning a house whereby one J. H. was killed, &c.

(1155.) Replication to said plea.

(1156.) Rejoinder to said replication.

(1157.) Plea of once in jeopardy.

[7] Com. *v.* Daley, 4 Gray, 209; Bainbridge *v.* State, 30 Oh. St. 264; Cooper *v.* State, 47 Ind. 61; State *v.* Small, 31 Mo. 197; State *v.* Moore, 66 Mo. 372; though see State *v.* Smith, 22 Vt. 74.

To prove it, he has, first, to prove the record;[1] and, secondly, to prove, orally or otherwise, the averment of identity contained in his plea.[2] Hence, in cases of dispute, parol testimony is admissible to prove (what the record cannot sufficiently show) that the offences were or were not identical.[3]

§ 482. Unless the plea on its face shows that it is the same offence of which the prisoner was before acquitted, the plea may be demurred to, or advantage may be taken of it upon a replication of *nul tiel record*.[4]

Plea if not identical may be demurred to.

Where the only issue is the identity of the offences, a technical difference between the description of property in the first indictment and the second will be disregarded, when no proof is offered as part of the prosecution to show the offence was the same.[5]

§ 483. The burden of proving a prior conviction of the offence charged against a defendant being upon him,[6] it is not shifted by *primâ facie* evidence of the identity of an offence of which he has been previously convicted with that now charged upon him.[7]

Burden of proof is on defendant.

[1] Supra, § 437.

Where the second indictment is preferred at the same term, the original indictment and minutes of the verdict are receivable in evidence in support of the plea of *autrefois acquit*, without a record being drawn up. R. *v.* Parry, 7 C. & P. 836. But where the previous acquittal was at a previous term in the same jurisdiction or in a different jurisdiction, it can only be proved by the entire record. R. *v.* Bowman, 6 C. & P. 101, 337.

[2] See 2 Russ. 721, n.; Faulk *v.* State, 52 Ala. 415; State *v.* Thornton, 37 Mo. 360.

[3] Whart. Crim. Ev. § 693. Supra, § 480; R. *v.* Bird, 2 Den. C. C. 94; 5 Cox C. C. 20; Flitters *v.* Allfrey, L. R. 10 C. P. 29; Com. *v.* Dillane, 11 Gray, 67; Porter *v.* State, 17 Ind. 415; Duncan *v.* Com. 6 Dana, 295; State *v.* Andrews, 27 Mo. 267; State *v.* Small, 31 Mo. 197.

[4] R. *v.* Bowman, 6 C. & P. 101, 337; Hite *v.* State, 9 Yerg. 357; McQuoid *v.* People, 3 Gilm. 76.

[5] People *v.* McGowan, 17 Wend. 386. See Whart. Crim. Ev. § 593.

[6] Hozier *v.* State, 6 Tex. Ap. 501.

[7] Supra, § 481; R. *v.* Parry, 7 C. & P. 836; Com. *v.* Daley, 4 Gray (Mass.), 209. See 2 Hale, 241; Rake *v.* Pope, 7 Ala. 161; Page *v.* Com. 27 Grat. 954; State *v.* Small, 31 Mo. 197; State *v.* Thornton, 37 Mo. 360.

Where four persons were tried for rape, upon an indictment containing counts charging each as principal and the others as aiders and abettors, they were acquitted; and it being proposed on the following day to try three of them for another rape upon the same person (the second indictment being exactly the same as the first, with the omission only of the fourth prisoner), they pleaded *autrefois acquit* to the second indictment, averring the iden-

If there be a replication of fraud, the burden of such replication is on the prosecution.[1]

If there be no replication, the *similiter* will be assumed.[2]

When replication is *nul tiel record*, issue is for court.

§ 484. Wherever the offences charged in the two indictments are capable of being legally identified as the same offence by averments, it is a question of fact for a jury to determine whether the averments be supported and the offences be the same. In such cases the replication ought to conclude to the country. But when the plea of *autrefois acquit* upon its face shows that the offences are legally distinct, and incapable of identification by averments, as they must be in all material points, the replication of *nul tiel record* may conclude with a verification. In the latter case, the court, without the intervention of a jury, may decide the issue.[3]

§ 485. Where the former conviction was effected by fraud,

tity of the offences, and to this plea there was a replication that the offences were different. The prisoners' counsel put in the commitment and the former indictment, and also the minutes of the former acquittal written on the indictment. On this evidence the jury found that the offences were the same; and it being referred for the opinion of the judges whether there was any evidence to justify and support the verdict, and if not, whether such verdict was final, and operated as a bar to any further proceedings by the crown upon the second indictment, the court held that the verdict of the jury was final, and the prisoners were discharged. R. *v.* Parry, 7 C. & P. 836. Supra, § 463.

[1] State *v.* Buzzell, S. C. New Hamp. 1879. In this case, Allen, J., said: "It being new affirmative matter, and not a denial of any allegation of the indictment, the burden of proof, on a traverse of the plea, is on the defendant; Com. *v.* Daley, 4 Gray, 209, 210; State *v.* Small, 31 Mo. 197; R. *v.* Parry, 7 C. & P. 836, 839; 1 Arch. Cr. Pr. & Pl. 113, n.; and he has the opening and close. R. *v.* Sheen, 2 C. & P. 634, 638, 639. But if the State replies fraud (State *v.* Little, 1 N. H. 257), or other new affirmative matter, the burden of proof on the latter issue is on the State. In some jurisdictions, when, after an acquittal on part of an indictment, there is a new trial of the rest, a special plea in bar of the further maintenance of so much of the charge as has been disposed of is not required. State *v.* Martin, 30 Wis. 216, 222, 223; S. C., 11 Am. Rep. 567."

[2] Supra, § 411; Swepson *v.* State, 81 N. C. 571.

[3] Hite *v.* State, 9 Yerger, 357. It is the duty of the court to declare the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or discontinuance, and the record itself cannot be gainsaid by parol evidence; therefore, the court may charge the jury that the pleas are not sustained by the proof when that is the fact. Martha *v.* State, 26 Ala. 72. See State *v.* Haynes, 36 Vt. 667; Foster *v.* State, 39 Ala. 229.

the plea of *autrefois convict*, in such case, being replied to specially, the replication, which sets forth such fraudulent prosecution and conviction being well drawn, is a sufficient answer to the defendant's plea, and should be adjudged good on demurrer.[1]

A replication of fraud is good on demurrer.

§ 486. When the plea of *autrefois acquit* or *convict* is determined against the defendant, in this country, in most cases, he is allowed to plead over, and to have his trial for the offence itself.[2] In England, however, though

On judgment against defendant he

[1] State *v.* Little, 1 N. H. 257; State *v.* Brown, 16 Conn. 54; State *v.* Reed, 26 Conn. 202; Com. *v.* Jackson, 2 Va. Cas. 501; State *v.* Clenny, 1 Head, 270. Supra, § 451.

Cases of Practice under Plea and Replication. — To an indictment for larceny in a dwelling-house, the defendant pleaded a former conviction of pilfering, on a complaint before a police court, averring that the articles and the stealing mentioned in the indictment were the same mentioned in said complaint, and that the police court had jurisdiction of the offence. The replication averred that the stealing charged in the said complaint was a larceny in the dwelling-house, which was a high and aggravated crime, and that the police court had not jurisdiction thereof. The rejoinder traversed the several averments in the replication. It was held, on special demurrer, that the rejoinder was good, being neither a departure, nor double, and that though the plea was defective in form, for not directly traversing the charge of larceny in a dwelling-house, yet that the defect was cured by the pleading over. Com. *v.* Curtis, 11 Pick. 134. The proper plea would have been former conviction of the larceny, and not guilty of the residue of the charge. Ibid.

A party being indicted for a misdemeanor pleaded a former acquittal, but his counsel could not find the record, nor could the solicitor general find the former indictment. The court ordered the trial to proceed, and the prisoner was found guilty. Afterwards the former indictment and record of acquittal were found, the two indictments being identical, with the exception that in the former the offence was charged on the 1st of June instead of May, and the words "a wagoner" were added to the description of a negro. It was held that there could be no doubt of the identity of the offence, and a new trial must be granted notwithstanding the laches of counsel. Dacy *v.* State, 17 Geo. 439.

Judge Cooley, in his book on Constitutional Limitations (p. 327), states the law to be that "if by any overruling necessity the jury are discharged without a verdict, which might happen from the sickness or death of the judge holding the court, or of a juror, *or of the inability of the jury to agree upon a verdict after a reasonable time for deliberation and effort;*" . . . . "the accused may again be put on trial."

In Massachusetts, by Gen. Stat. 1864, c. 250, § 4, it is sufficient in *autrefois acquit* or *convict* to set forth simply a prior lawful acquittal or conviction.

[2] Com. *v.* Goddard, 13 Mass. 455; Barge *v.* Com. 3 Penrose & Watts, 262; Foster *v.* Com. 8 Watts & S. 77; Hirn *v.* State, 1 Oh. St. R. 16; Falkner *v.* State, 3 Heisk. 33. See supra, §§ 404–5, 421.

is usually allowed to plead over.

this is allowed in felonies, it is not in misdemeanors.[1] Of the injustice of this distinction a pregnant illustration is found in a case which, in 1850, attracted great attention in England.[2] On the plea of *autrefois acquit* to an assault, issue was taken by the crown, and after verdict, judgment entered against the prisoner, who was thereupon sentenced to hard labor for two years. In pronouncing sentence, Martin B., did not hesitate to express his compunctions at sentencing a man for an offence for which he was never tried. "I cannot but feel," he said, addressing the prisoners, "that you stand in the condition of persons whose case has not been heard. If you wish me to postpone the sentence, I will do so. I feel it to be a great hardship that the prisoners should be punished without a trial, and with no opportunity given to them of answering or explaining the charge laid against them."[3] It was the hardship of a judge thus sentencing a man of whose guilt he knew nothing, that led Judge Grier and Judge Kane, in the U. S. Circuit Court in Philadelphia, to decline sentencing a man who had been convicted capitally before Judge Randall, the district judge, who since the conviction and the application for sentence had died.[4] This difficulty, however, has not deterred the Supreme Court of New York from holding that where, in an inferior tribunal, judgment against the People had been entered on a demurrer, on reversing the judgment, they would not permit the defendant to withdraw his demurrer, but would sentence him themselves.[5]

Prosecution may rejoin on its demurrer being overruled.

§ 487. Where the prosecution demurs to the plea of *autrefois convict* to an indictment for a capital felony, and the demurrer is overruled, the defendant is not entitled to be discharged, and the State may rejoin.[6]

Issue of fact for jury.

§ 488. In cases where the defendant pleads over to the felony at the same time with the issue in the plea of *autrefois acquit*, the jury are charged again to inquire of the sec-

[1] R. *v.* Gibson, 8 East, 107; R. *v.* Taylor, 3 B. & C. 502; S. C., 5 Dow. & R. 422. See fully supra, § 421.

[2] R. *v.* Bird, 15 Jur. 193; 2 Eng. L. & E. R. 448; 2 Den. C. C. 94; 5 Cox C. C. 11. For a fuller report of this case see supra, § 464. Compare, as to pleading over, supra, §§ 404–7, 421.

[3] Supra, §§ 420–1.

[4] U. S. *v.* Harding, 6 P. L. J. 14; and see People *v.* Shaw, 63 N. Y. 36; State *v.* Abram, 4 Ala. 272. Infra, § 898.

[5] People *v.* Taylor, 3 Denio, 91. See State *v.* Green, 16 Iowa, 239; and see supra, § 408–11–12.

[6] State *v.* Nelson, 7 Ala. 610. Supra, § 406.

ond issue, and the trial proceeds as if no plea in bar had been pleaded.[1] But when both pleas are submitted to the jury at the same time, there must be a verdict on each, and it is error to take a verdict on the plea of not guilty alone.[2]

Novel assignment not admissible.

§ 489. A *novel assignment* is not admissible in a criminal case, and the proper mode of replying to a plea of a former conviction is to traverse the alleged identity.[3]

VII. ONCE IN JEOPARDY.[4]

Constitutional limitation taken from common law.

§ 490. By the Constitution of the United States it is provided: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb;"[5] and, although this restriction does not affect cases arising distinctively in the States,[6] yet the same restriction, taken from the federal Constitution, exists in the constitutions of most of the States. Whether this amounts to anything more than the common law doctrine involved in the plea of *autrefois acquit* has been much doubted. What that doctrine is has been already stated. It is founded, to adopt the summary of Mr. Chitty, upon the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation.[7] It has, therefore, been generally agreed, that after a verdict of either acquittal or conviction on a valid indictment or appeal, the party indicted cannot afterwards be indicted again upon a charge of having committed the same supposed offence.[8] In other words, at common law, as the rule is applied in England, when there has been a final verdict, either of acquittal or conviction, on an adequate indictment, the defendant cannot a second time be placed in jeopardy for the particular offence; and at the first

[1] R. *v.* Vandercomb, 2 Leach, 708; R. *v.* Cogan, 1 Leach, 448; R. *v.* Sheen, 2 C. & P. 635. Supra, §§ 420–1.

[2] Soliday *v.* Com. 28 Penn. St. 14. See People *v.* Kinstrey, 51 Cal. 278. Supra, § 479.

[3] Duncan *v.* Com. 6 Dana, 295.

[4] See, for plea of "Once in Jeopardy," Wharton's Prec. 1157. See also this subject further examined infra, §§ 712, 821.

[5] Const. U. S. Amend. art. 5.

[6] See Fox *v.* Ohio, 5 Howard, 410; U. S. *v.* Gibert, 2 Sumner, 19; Barker *v.* People, 3 Cow. 686; Com. *v.* Cook, 6 S. & R. 577.

[7] 4 Co. Rep. 40; 4 Bla. Com. 335; 2 Hawk. c. 35, s. 1. Infra, §§ 518, 712, 821.

[8] 2 Hawk. c. 35, s. 1; 4 Bla. Com. 335. For English rule see supra, §§ 835 *et seq.*; infra, § 518.

glance the constitutional provision appears nothing more than a solemn asseveration of the common law maxim.[1]

"Thus we see," says Mr. Justice Story, in commenting on the rule, "that the maxim is imbedded in the very elements of the common law; and has been uniformly construed to present an insurmountable bar to a second prosecution where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment.[2]

But in some courts held more extensive.

§ 491. In this country the constitutional provision has, in some instances, been construed to mean more than the common law maxim, and in several of the States it has been held that where a jury in a capital case has been discharged without consent before verdict, after having been sworn and charged with the offence, the defendant, under certain limitations, may bar a second prosecution by a special plea setting forth the fact that his life has already been put in jeopardy for the same offence.[3] But between the pleas of *autrefois acquit* or *convict*, and *once in jeopardy*, there is this impor-

[1] Ned *v.* State, 7 Porter, 188; U. S. *v.* Gibert, 2 Sumner, 41.

In the leading case of Richard and William Vaux, reported in 4 Coke, 44, it was held, "that the reason of *autrefois acquit* was because the maxim of the common law is, that the life of a man shall not be twice put in jeopardy for one and the same offence; and that is the reason and cause why autrefois acquitted or convicted of the same offence is a good plea; yet it is intended of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the indictment in this case was insufficient, for this reason, he was not *legitimo modo acquietatus*," &c. And in England it is settled that the maxim, that a man cannot be put in peril twice for the same offence, means that a man cannot be tried again for an offence upon which a verdict of acquittal or conviction has been given, and not that a man cannot be tried again for the same offence where the first trial has proved abortive, and no verdict was given. Hence, as a judge has, by the English law, a discretionary power, in cases of necessity, to discharge the jury, even without the prisoner's consent, this discharge is no bar to a second trial. And such necessity exists when the jury have shown themselves unable to agree. The exercise of this discretion cannot be renewed on error affirmed on appeal. R. *v.* Winsor, 6 B. & S. 143; 1 L. R. Q. B. 289; 1 L. R. Q. B. 390; S. C., in Ex. Ch. 7 B. & S. 490. See also R. *v.* Ward, 10 Cox C. C. 573; R. *v.* Charlesworth, 1 B. & S. 460; S. C., 9 Cox C. C. 44.

[2] U. S. *v.* Gibert, 2 Sumn. 42. See, for a learned article on this head, 4 West. L. J. 97.

[3] Williams' case, 2 Grat. 567; Com. *v.* Cook, 6 S. & R. 577; Com. *v.* Clue, 3 Rawle, 498; State *v.* Garrigues, 1 Hayw. 241; Spier's case, 1 Dev. 491; Ned *v.* State, 7 Port. 187.

tant distinction, that the former presupposes a verdict, the latter, the discharge of the jury without verdict, and is in the nature of a plea *puis darrein continuance*. The cases in this respect may be placed in two general classes: First. Where any separation of the jury, except in case of such overruling necessity as may be considered the act of God, is held a bar to all subsequent proceedings. Secondly. Where it is held that the discharge of the jury is a matter of sound discretion for the court, and that when, in the exercise of a sound discretion, it takes place, it presents no impediment to a second trial.[1]

§ 492. In Pennsylvania the rule is now held to be applicable only to such cases as are capital in that State.[2] In other States it has been extended to all infamous crimes.[3] And there are authorities, in States holding the first view, which apply it to all cases except misdemeanors.[4]

Extended to all infamous crimes.

§ 493. In 1822 the question was brought before the Supreme Court of Pennsylvania (a State whose Constitution contains a provision precisely the same as that in the Constitution of the United States), in a case where the defendant pleaded specially, that the jury had been discharged on a former trial because they were unable to agree. The court held, that the discharge of the jury because they could not agree was unlawful, and was not a case of necessity within the meaning of the rule on the subject. Chief Justice Tilghman said, where a party "is tried and acquitted on a bad indictment he may be tried again, because his life was not in jeopardy. The court could not have given judgment against him, if he had been convicted. But where the indictment is good, and the jury are charged with the

In Pennsylvania any separation in capital cases, except from actual necessity, bars further proceedings.

[1] For a discussion of the general question how far a jury may be allowed to separate see infra, §§ 722, 729, 784, 814, 821, 831, 836, 956, &c.

[2] Infra, §§ 493 *et seq.*

[3] State *v.* Connor, 5 Coldw. 315; Williams *v.* Com. Ky. 1879.

[4] Infra, § 519.

In Lange, ex parte, 18 Wall. 163, it was held that under the constitutional provision, when a court has imposed a fine *and* imprisonment, where the statute only conferred power to punish by fine *or* imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence. And Miller, J., in the opinion of the court, argues that the provision is applicable to misdemeanors where corporal punishment is inflicted.

prisoner, his life is undoubtedly in jeopardy during their deliberation. I grant that in case of necessity they (the jury) may be discharged; but if there be anything short of absolute necessity, how can the court, without violating the Constitution, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time?" [1] It was accordingly held that in that case, the jury having been discharged without giving any verdict, without absolute necessity, the prisoner was not liable to be tried again.[2] In 1831, in a case where the defendant interposed a similar plea, the doctrine was pushed by the same court still further. It was argued by Gibson, C. J., with his usual vigor, that "no discretionary power whatever exists with the court in such a case to discharge." [3]

In a later case (April, 1851), however, where the jury were allowed to separate by consent, *after* being sworn, but *before* the case was opened, the court, while reversing the judgment, remanded the prisoner for another trial.[4] "The law is undoubtedly settled," said Gibson, C. J., "that a prisoner's consent to the discharge of a previous jury is an answer to a plea of a former acquittal."

It has since been held that the plea of "once in jeopardy for

[1] Duncan, J., in this case, in commenting on the position taken in People *v.* Goodwin, hereafter to be cited, said: "I feel a strong conviction that the construction here [there] given to this provision of the Constitution of the United States, engrafted into the constitutions of Delaware, Kentucky, and Tennessee, and made an article in the Bill of Rights of this State, is not the true one; and that the provision, that no person can be put twice in jeopardy of life and limb, means something more than that he shall not be twice tried for the same offence. It is borrowed from the common law, and a solemn construction it had received in the courts of common law ought to be given it. This is not the signification of the words in their common use, nor in their grammatical or legal sense. 'Twice put in jeopardy,' and 'twice put on trial,' convey to the plainest understanding different ideas. There is a wide difference between a verdict given and a jeopardy of a verdict. Hazard, peril, danger of a verdict, cannot mean a verdict given. Whenever the jury are charged with a prisoner, where the offence is punishable by death, and the indictment is not defective, he is in jeopardy of life."

[2] Com. *v.* Cook, 6 Serg. & Rawle, 577; but see Com. *v.* McFadden, 23 Penn. St. 12. Infra, §§ 517, 722, 814, 824.

[3] Com. *v.* Clue, 3 Rawle, 498.

[4] Peiffer *v.* Com. 15 Penn. St. 468.

the same offence" will not avail where the jury were discharged on account of disagreement, in a case of burglary.[1]

§ 494. In Virginia, mere inability to agree is not such a necessity as will justify the court in discharging a jury, and in such case the defendant cannot be again put in jeopardy;[2] though where, after nine days' confinement, one of the jurors suffered materially in health, it was held the jury were properly discharged, and the second trial was regular.[3]

The same view obtains in Virginia.

§ 495. The same question came before the Supreme Court of North Carolina in a very early case,[4] and again at a much later period,[5] where it was alleged that the jury in a capital case had been discharged without legal necessity, having given no verdict. The court held that the prisoner could not be again tried. On the last occasion the cases in the Supreme Courts of Massachusetts, New York, and Pennsylvania were cited; and the court adopted that of the Supreme Court of Pennsylvania, and affirmed the exposition of the clause given by that court, that no man shall be twice put in jeopardy, &c., for the same offence, holding, therefore, where a jury were charged with the trial of a prisoner for murder, and before they returned their verdict the term of the court expired, and the jury separated, that the prisoner could not be tried again.[6] In a still later case in the same State, it was held that a jury, charged in a capital case, cannot be discharged before returning the verdict, at the discretion of the court; they cannot be discharged without the prisoner's consent, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial which was beyond human foresight and control; and, generally speaking, such necessity must be set forth in the record.[7] Honest inability to agree, for six days, however, is ground

And in North Carolina.

[1] McCreary *v.* Com. 29 Penn. St. 323.

[2] Williams *v.* Com. 2 Grat. 568.

[3] Com. *v.* Fells, 9 Leigh, 613. As to West Virginia, *contra* by statute, Crookham *v.* State, 5 W. Va. 510.

[4] State *v.* Garrigues, 1 Hayw. 241.

[5] Spier's case, 1 Dever. 491.

[6] Spier's case, 1 Dever. 491; State *v.* McGimpsey, 80 N. C. 377. The general rule, however, is the contrary, Infra, § 513.

[7] State *v.* Ephraim, 2 Dev. & Bat. 162. See, to same effect, State *v.* Prince, 63 N. C. 528; State *v.* Alman, 64 N. C. 364; State *v.* Jefferson, 66 N. C. 309; State *v.* Wiseman, 68 N. C. 203; State *v.* McGimpsey, 80 N. C. 397.

for discharge.[1] And when one of the jurymen procured himself to be fraudulently empanelled on a jury, in a capital case, in order to secure an acquittal, the jury should be discharged; nor is the defendant put in jeopardy by such act.[2] On the other hand, a new trial granted, in a capital case, at request of the prisoner during the first trial, upon a juror being withdrawn, does not vitiate the procedure.[3]

And in Tennessee.

§ 496. In Tennessee, on the first examination of the subject, it appears to have been held, Peck, J., dissenting, that it was discretionary in the court, even in capital cases, to discharge the jury;[4] but that opinion was subsequently reviewed in a case of great deliberation. In the latter case,[5] the jury were empanelled on Thursday evening at two o'clock; they came in once or twice during the same evening, and declared that they could not agree; they were, however, kept together all night by the court, and at nine o'clock the next morning, upon their declaring they could not agree, the court discharged them. The term was not concluded until the next day (Saturday). It was held, that this was not such a case of necessity as authorized the court to discharge them. It was out of the power of the court, it was said, to discharge them without consent, *except in case of sickness, insanity, or exhaustion, among themselves.*

And in Alabama.

§ 497. In Alabama, after a careful review of the subject, the following points were made: 1. That courts have not in capital cases a discretionary authority to discharge a jury after evidence given. 2. That a jury is, *ipso facto*, discharged by the determination of the authority of the court to which it is attached. 3. That a court does possess the power to discharge, in any case of pressing necessity, and should exercise it whenever such a case is made to appear. 4. That sudden illnesses of a prisoner or juror, so that the trial cannot proceed, are ascertained cases of necessity, and that many others exist, which can only be defined when particular cases arise.

[1] State *v.* Honeycutt, 74 N. C. 391.

[2] State *v.* Bell, 81 N. C. 591. Infra, § 844.

[3] State *v.* Davis, 80 N. C. 384.

[4] State *v.* Waterhouse, 1 Mart. & Y. 278.

[5] Mahala *v.* State, 10 Yerg. 532. See State *v.* Rankin, 4 Cold. (Tenn.) 145, cited supra, § 439.

5. That a court does not possess the power, in a capital case, to discharge a jury because it cannot or will not agree.[1] 6. That therefore the unwarrantable discharge of a jury, after the evidence is closed, in a capital case, is equivalent to an acquittal.[2] In the same State where, after a trial is commenced, the judge withdraws and the trial is completed by another judge, and the judgment is reversed for that cause, the prisoner cannot be said to have been in jeopardy, and he may be tried again; and this although the judgment of reversal does not award a *venire de novo*.[3]

§ 498. In California it is held that a discharge, without the prisoner's consent, unless from a legal necessity, or from cause beyond the control of the court, such as death, sickness, or insanity of some one of the jury, of the prisoner, or of the court, protects the defendant from a re-trial.[4] But absolute inability to agree is such a necessity.[5] A discharge on the ground that the defendant, on a trial for manslaughter, was guilty of murder, is a bar.[6]

And in California.

§ 499. On the other hand, we have a series of courts holding that the separation of the jury, when it takes place in the exercise of a sound discretion, is no bar to a second trial. This is substantially the view of the Supreme Court of the United States, of Washington, J., Story, J., and McLean, J., sitting in their several circuits; and of the courts of Massachusetts, New York, Iowa, Maryland, Ohio, Indiana, Nebraska, Nevada, Georgia, Missouri, Illinois, Kentucky, Texas, and Mississippi.

§ 500. "It is contended," said Washington, J., in a case where the jury, on a homicide trial, had been discharged in consequence of the alleged insanity of one of them, "that although the court may discharge in cases of misdemeanor, they had no such authority in capital cases; and the fifth amendment to the Constitution of the United States is relied upon as justifying the distinction. We think otherwise; because we are clearly of opinion that the jeopardy spoken of in this article can be interpreted to mean

In the federal courts a discretionary discharge is no bar.

[1] Ned *v.* State, 7 Porter, 188.

[2] Ibid. 187. See infra, §§ 722, 821.

[3] State *v.* Abram, 4 Ala. 272. See infra, §§ 896–8, as to judge sitting in a case in which he heard only part of the evidence.

[4] People *v.* Webb, 38 Cal. 467.

[5] People *v.* Cage, 48 Cal. 324.

[6] People *v.* Hunckeler, 48 Cal. 331.

nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon. This was the meaning affixed to the expression by the common law, notwithstanding some loose expressions to be found in some elementary treatises on the opinions of some judges, which would seem to intimate a different opinion. Upon this subject we concur in the opinion expressed by the Supreme Court of New York in Goodwin's case, although the opinion of the Supreme Court of this State in Cook's case is otherwise. We are, in short, of opinion that the moment it is admitted, that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the Constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception of necessity is not to be found in any part of the Constitution; and I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the Constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction. If we are correct in this view of the subject, then there can be no difference between misdemeanors and capital cases, in respect to the discretion possessed by the court to discharge the jury in cases of necessity; and, indeed, the reasoning before urged in relation to a plea of this kind, if sound, is equally applicable to capital cases as to misdemeanors. By reprobating this plea, we do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal, since he may have all the benefit of the error, if committed, by a motion for the discharge, or upon a motion in arrest of judgment."[1]

In the Supreme Court of the United States, the subject was brought up in 1824, upon a certificate of division in the opinions of the judges of the Circuit Court for the Southern District of New York. The jury were discharged in the court below on account of mere disagreement. "The question arises," was the language of the court, "whether the discharge of the jury by the court from giving any verdict upon the indictment with

[1] U. S. v. Haskell, 4 Wash. C. C. 409. See also U. S. v. Gibert, 2 Sumner, 19; U. S. v. Coolidge, 2 Gall. 364; U. S. v. Shoemaker, 2 McLean, 114; U. S. v. Watson, 3 Ben. 1, cited supra, § 436. Compare infra, §§ 722, 814, 821.

which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But after all they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put on trial." [1]

It has been held in the United States Circuit Court for New York, that a man is not put in jeopardy by the empanelling and swearing of a jury by inadvertence, when it was dismissed before he is arraigned.[2]

§ 501. In Massachusetts, the practice, from an early period, was to discharge juries at the discretion of the court, in cases both capital and otherwise.[3] But in 1823 a case came up where a jury, in a capital trial, having

So in Massachusetts.

[1] U. S. *v.* Perez, 9 Wheaton, 579.

[2] U. S. *v.* Riley, 5 Blatch. C. C. 204.

[3] Com. *v.* Bowden, 9 Mass. 494. See Com. *v.* Sholes, 13 Allen, 554; and infra, §§ 722, 814, 821.

been out eighteen hours, were discharged on account of inability to agree. The defendant was tried again, and convicted of manslaughter, and the point was argued on arrest of judgment. Parker, C. J., in delivering the opinion of the court, after maintaining that there was no jeopardy till verdict, said: "By necessity cannot be intended that which is physical only; the cases cited are not of that sort, for there is no application of force upon the court or the jury which produced the result. It is a moral necessity, arising from the impossibility of proceeding with the cause without producing evils which ought not to be sustained."[1] And the practice in this State is to regard the constitutional provision as a mere expression of the common law rule.

So in New York.

§ 502. In New York, the point arose and was elaborately argued on an indictment for manslaughter, where the jury, after the whole cause was heard, being unable to agree, were discharged by the court without the consent of the prisoner. The question was whether, under these circumstances, the defendant could be again put on his trial. On the part of the defendant, it was contended that he could not, among other reasons, because the Constitution of the United States had declared, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" and that putting the party upon trial was putting him in jeopardy of life and limb. The argument on the other side was, that this clause did not apply to state courts; and, if it did, it was inapplicable to the cause, for if the cause was sent to another jury, the defendant would not be twice in jeopardy, nor twice tried, for there never had been a trial in which the merits had been decided on. The court inclined to the opinion that the clause was operative upon the state courts; and, at all events, that it was a sound and fundamental principle of the common law; that the true meaning of the clause was that no man shall be twice tried for the same offence; that the true test by which to decide the point whether tried or not, is by the plea of *autrefois acquit* or *autrefois convict;* and, finally, that a "defendant is not once put in jeopardy until the verdict is rendered for or against him, and if for or against him, he can never be drawn in question again for the same offence." And the court accordingly held, that the dis-

[1] Com. *v.* Purchase, 2 Pick. 521. Infra, §§ 722, 821.

charge of the jury before giving a verdict was no bar to another trial of the defendant.[1]

In 1862, however, in the Court of Errors, it was held, that when the defendant had been once put in jeopardy and convicted, and the judgment reversed *for an error in the sentence*, the other proceedings being regular, he could not afterwards be tried.[2] And in 1863, in the same court, the same rule was applied to a case of murder, and in aid of the rule the constitutional provision was expressly invoked.[3] But as a general rule, under the statute, a discharge of the jury without rendering a verdict is no bar to a second trial.[4]

§ 503. In Maryland, in 1862, the view of the Supreme Court of the United States was expressly adopted.[5] So in Maryland.

§ 504. In Mississippi, after a cursory review of the authorities, the same result was reached.[6] In 1860 it was held, that though a discharge, because the jury were "unable to agree on a verdict," worked an acquittal, yet it is otherwise when the term of the court is about to expire, and there is no possibility of agreement.[7] An illegal or improper discharge is in any view a bar.[8] So in Mississippi.

§ 505. In Illinois, the same view was taken, and in this State the rule laid down by the federal courts must be considered as obtaining.[9] So in Illinois, Ohio, Indiana,

[1] People *v.* Goodwin, 18 Johns. R. 187. See also People *v.* Olcott, 2 John. Cas. 301.

[2] Shepherd *v.* People, 25 N. Y. 407. Supra, § 435.

[3] People *v.* Hartung, 26 N. Y. 167; S. C., 28 N. Y. 400; 23 How. Pr. 314.

[4] Canter *v.* People, 38 How. Pr. 91 (1867).

Where the jury, after the cause was committed to them, and before they had rendered or agreed upon a verdict, had separated without having been legally discharged; it was held in 1871, that, as any verdict in the case, to be afterwards rendered by that jury, would have been invalid and set aside, there was a necessity for the exercise of the power of the court in its discretion, and in furtherance of justice, to discharge the jury. And that such power having been exercised by a competent court, the discharge constituted no bar to a new trial of the prisoner. People *v.* Reagle, 60 Barb. 527. See also S. P., McKenzie *v.* State, 26 Ark. 334.

[5] Hoffman *v.* State, 20 Md. 425.

[6] Moore *v.* State, 1 Walker, 134; Price *v.* State, 36 Miss. 533.

[7] Josephine *v.* State, 39 Miss. 613; Woods *v.* State, 43 Miss. 364.

[8] Finch *v.* State, 53 Miss. 363; Teat *v.* State, 53 Miss. 439.

[9] State *v.* Stone, 2 Scam. 326.

Iowa, Nebraska, Nevada, and Texas.

In Ohio, in 1863, it was determined that when the jury had been long enough together "to leave very little doubt that their opinions must have been inflexibly formed," and were unable to agree, the court, at its discretion, could discharge.[1] And now, by the Code of Criminal Procedure, this is established by statute. But the record should set forth the necessity of the discharge.[2]

The same test is now adopted in Indiana, though after some vacillation in the earlier cases.[3] But there should be no discharge as long as the court thinks agreement possible; and a discharge without good cause shown on record operates as an acquittal.[4]

In Iowa,[5] Nebraska,[6] Nevada,[7] and Texas,[8] the same views prevail.

So in Kentucky, Georgia, and Missouri.

§ 506. In Kentucky it was originally ruled that it is not possible to support the defence of a former acquittal, by anything short of a final judgment or verdict, on a second indictment for the same offence.[9] But recently this view has been recalled, and it is now held that an arbitrary discharge may be a bar.[10]

[1] Dobbins *v.* State, 14 Ohio St. R. 493.

[2] Hines *v.* State, 24 Ohio St. 134; and see infra, § 815.

[3] State *v.* Nelson, 26 Ind. 366; Shaffer *v.* State, 27 Ind. 131. But allowing the jury to go unattended to a public square, operates as a discharge. State *v.* Leunig, 42 Ind. 541. Infra, §§ 727, 814.

[4] State *v.* Walker, 26 Ind. 346; Shaffer *v.* State, 27 Ind. 131.

[5] State *v.* Redman, 17 Iowa, 329; State *v.* Vaughan, 29 Iowa, 286.

[6] Card *v.* People, 3 Neb. 357.

[7] Maxwell, ex parte, 11 Nev. 428. The record, however, must show the necessity.

[8] Moseley *v.* State, 33 Tex. 671.

[9] Com. *v.* Olds, 5 Little, 140; S. P., O'Brian *v.* Com. 6 Bush, 563. See Wilson *v.* Com. 3 Bush, 105.

[10] O'Brian *v.* Com. 9 Bush, 333. In Williams *v.* Com., November, 1879, the court was called on to act on § 243 of the Criminal Code, which provides that "the attorney of the Commonwealth, with permission of the court, may, at any time before the case is finally submitted to the jury, dismiss the indictment as to all or a part of the defendants, and such dismissal shall not bar a future prosecution for the same offence." This was held to be unconstitutional so far as it attempts to authorize, after jeopardy attaches, dismissal of an indictment for felony so that it may not operate as a bar to a future prosecution for the same offence. It was, however, conceded that even after jeopardy has attached, and in cases of necessity, an indictment may be dismissed or a prosecution discontinued without operating as a bar to a future prosecution for the same offence.

A discharge, in Georgia, on account of disability to agree, does not necessarily work an acquittal.[1]

In Missouri, the Constitution provides that "if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had may, in its discretion, discharge the jury, and commit or bail the accused for trial at the next term of such court."[2]

The same general position is taken by Judge Story in his treatise on the Constitution,[3] and by Judge Tucker in his notes to Blackstone.[4]

§ 507. Where, however, the indictment has been defective, even in a capital case, it is agreed on all sides the defendant has never been in jeopardy, and consequently, if judgment be arrested, a new indictment can be preferred, and a new trial instituted, without violation of the constitutional limitation.[5] Even endurance of punishment under a defective indictment will be no bar when the proceedings are reversed on the defendant's motion;[6] though it is otherwise when the judgment is unreversed.[7]

No jeopardy on defective indictment.

Whether a judgment is necessary to the plea is elsewhere discussed.[8]

A defendant is not in jeopardy who has had leave to withdraw a plea in law, and to plead in abatement, which plea is

[1] Lester *v.* State, 33 Ga. 329.

[2] Const. Missouri, art. 11, § 10. See, as applying this provision, State *v.* Jeffers, 64 Mo. 376; State *v.* Copeland, 65 Mo. 497.

[3] 3 Story on the Const. 660.

[4] 1 Tuck. Black. App. 305.

[5] Supra, § 436; infra, §§ 722, 821; Com. *v.* Purchase, 2 Pick. 521; Com. *v.* Loud, 3 Met. 328; Com. *v.* Keith, 8 Met. 531; State *v.* Woodruff, 2 Day, 504; Com. *v.* Cook, 6 S. & R. 577; Com. *v.* Clue, 3 Rawle, 498; People *v.* Barrett, 1 Johns. R. 66; Gerard *v.* People, 3 Scam. 363; Bedee *v.* People, 73 Ill. 320; Phillips *v.* People, 88 Ill. 160; State *v.* Garrigues, 1 Hayw. 241; Pritchett *v.* State, 3 Sneed, 285; State *v.* England, 78 N. C. 552; White *v.* State, 49 Ala. 344; Kohlheimer *v.* State, 39 Miss. 548; State *v.* Check, 25 Ark. 206; People *v.* March, 6 Cal. 543; People *v.* McNealy, 17 Cal. 333. As English rulings to same effect see Vaux's case, 4 Co. 44; R. *v.* Richmond, 1 C. & K. 240. Even a judgment arrested on motion of the prosecution is no bar when indictment is defective. R. *v.* Houston, 2 Craw. & D. 311. See People *v.* Corning, 2 Comst. 9.

[6] Jeffries *v.* State, 40 Ala. 382.

[7] Supra, § 435.

[8] See Gardiner *v.* People, 6 Park. C. R. 155, and cases cited supra, § 435.

found for him; and he may be indicted a second time in his true name.[1]

Generally, illness or death of juror forms sufficient ground for discharge.

§ 508. It is submitted, in conclusion, that the two classes of opinions which have been the subject of discussion may be reconciled, should it be conceded that the "discretion," in exercise of which a court, when intrusted with it, is justified in discharging a prisoner, must be a "legal necessity," such as would, if spread on the record, enable a court of error to say that the discharge was correct. The cases are clear that the term "legal necessity" is not confined to cases such as death, &c., when the discharge becomes inevitable.[2] Thus if a juryman, during the trial, be taken so ill as to be unable to attend to the evidence or deliberate on the verdict, the jury must be discharged, and the prisoner tried afresh; and even in those States where the law of "once in jeopardy" is most stringent, "serious illness" is enough.[3] The escape of a juryman,[4] the sickness of the judge,[5] or that of a party,[6] and the closing of the term of the court,[7] have been said to have the same effect.[8]

[1] Com. *v.* Farrell, 105 Mass. 189. See Com. *v.* Sholes, 13 Allen, 554. Supra, § 425.

[2] People *v.* Webb, 38 Cal. 467.

[3] R. *v.* Scalbert, 2 Leach, 620; R. *v.* Barrett, Jebb, 106; R. *v.* Leary, 3 Crawford & Dix, 212; R. *v.* Edwards, R. & R. 224; U. S. *v.* Haskell, 4 Wash. C. C. 402; Com. *v.* Fells, 9 Leigh, 613; Mahala *v.* State, 10 Yerg. 532; State *v.* Curtis, 5 Humph. 601; Fletcher *v.* State, 6 Humph. 249; Mixon *v.* State, 55 Ala. 129; Hector *v.* State, 2 Mo. 135; People *v.* Webb, 38 Cal. 467. Infra, §§ 712, 821, 953.

[4] State *v.* Hall, 4 Halst. 256; State *v.* McKee, 1 Bailey, 651; Hanscom's case, 2 Hale P. C. 295.

[5] Infra, § 514.

[6] Infra, § 511.

[7] Infra, § 513.

[8] Powell *v.* State, 19 Ala. 577.

According to the English practice, a sick juror may be attended by another juror, or a surgeon, accompanied by a bailiff, sworn to remain constantly with him. The juror or surgeon, on his return, may be questioned on oath, to make true answer to such questions as the court shall demand of him respecting the state of the absent juror. If it appear that he will in all probability speedily recover, he is to have whatever refreshment may be beneficial (see Com. *v.* Clue, 3 Rawle, 498; Rulo *v.* State, 19 Ind. 298); but if not, or if he die, the eleven jurors must be discharged from giving any verdict. Their names should then be called over again *instanter*, and another person on the panel of jurors called into the box. The prisoner must then be offered his challenges to all twelve, after which each of them, or of those substituted for them on challenge, must be sworn *de novo*, and be charged with the prisoner. The trial must then begin again. See,

What has been said of sickness of juror applies to misconduct of juror, breaking up the trial. Were it not so, it would be in the power of any one juror, by misconduct, to work an acquittal.[1]

§ 509. Judge Curtis, on a trial for a misdemeanor (in which, however, according to the doctrine of the federal courts, the same restriction applies as in capital felonies), held that it was no bar that a juror had been withdrawn and the jury discharged on a prior trial, on the motion of the prosecuting attorney, on the ground of the then discovered evidence of the juror's bias.[2] The same rule has been extended to other cases of incapacity.[3] But it has been elsewhere held that the court has no power to discharge the jury on such grounds, unless upon application of the defendant, or unless the defect was such that the defendant was really never in jeopardy.[4] In the latter case a discharge is a bar to a subsequent trial.

Discharge of jury from intermediately discovered incapacity of juror no bar.

§ 510. A conviction set aside, on the defendant's motion, on account of erroneous ruling by the judge, is no bar to a second trial. The defendant, by setting up the posi-

Conviction no bar when set

by eleven judges, in R. *v.* Edwards, 3 Camp. 207. See R. *v.* Scalbert, Leach, 620; 1 Chit. Cr. L. 1st ed. 414, 655; 2 Hale, 216; 1 Shower, 131; How's case, 1 Vent. 210; R. *v.* Woodfall, 5 Burr. 2667; R. *v.* Beere, 2 M. & Rob. 472. See infra, §§ 722, 821. In an English case where the eleven were all resworn without challenge, the evidence which had been given was read by consent, from the judge's notes, before them and the twelfth juror; and each witness was asked whether it was true. See R. *v.* Edwards, R. & Ry. 224; 2 Leach, 621, n.; 3 Camp. 207, n.; 4 Taunt. 309; 1 Ch. Cr. L. 629; Foster, 31.

[1] R. *v.* Ward, 10 Cox C. C. 574; State *v.* Hall, 4 Halst. 256.

[2] U. S. *v.* Morris, 1 Curtis, 23. See also People *v.* Damon, 13 Wend. 351; Stone *v.* People, 2 Scam. 326. Infra, § 844.

[3] R. *v.* Phillips, 11 Cox C. C. 142; U. S. *v.* Haskell, 4 Wash. C. C. 402.

[4] R. *v.* Wardle, C. & M. 647; R. *v.* Sullivan, 8 Ad. & El. 831; R. *v.* Sutton, 8 B. & C. 417; Poage *v.* State, 3 Oh. St. 239; Stone *v.* People, 2 Scam. 327; Com. *v.* Jones, 1 Leigh, 399; State *v.* McKee, 1 Bailey S. C. 651; O'Brian *v.* Com. 9 Bush, 333; McClure *v.* State, 1 Yerg. 219; Johnson *v.* State, 29 Ark. 31. Infra, § 793.

In O'Brian *v.* Com. 9 Bush, 333, after the jury had been sworn, and while the evidence was being taken, one of the jurors arose and said that he had formed one of the grand jury which found the indictment, and thereupon the court, of its own motion and against the objection of the prisoner, discharged the juror and had another summoned. The court held that this amounted to an acquittal, and that the plea of *autrefois acquit* to a further trial was good.

aside from defective ruling of judge.

tion that the ruling was erroneous, is afterwards estopped from disputing this. He affirms that he never was in legal jeopardy, and that the ruling of the judge against him, putting him in jeopardy, was not law. When he gains his point he cannot afterwards plead jeopardy.[1]

And so of discharge from sickness of defendant.

§ 511. *Sickness of* defendant has been sometimes held a sufficient ground, on the defendant's request, to discharge a jury; and this consent may, it seems, be implied from sudden incapacitating illness. In such case, the first trial is no bar to the second.[2]

Discharge from surprise a bar.

§ 512. *Surprise in sudden breaking down of case of prosecution*, in New York and North Carolina, has been held, in *misdemeanors*, to be ground for withdrawing a juror.[3] But this is contrary to the better opinion, which is that in no criminal trial can such a power be exercised.[4]

Discharge from statutory close of court no bar.

§ 513. *Statutory close of term of court*, except in North Carolina,[5] has been held to justify a discharge, which is no bar to a second trial.[6] A court, however, can adjourn beyond the term to receive a verdict.[7]

[1] See infra, § 793.

[2] R. *v.* Stevenson, 2 Leach, 546; R. *v.* Streek, 2 C. & P. 413; R. *v.* Kell, 1 Craw. & Dix, 151; People *v.* Goodwin, 18 Johns. 187; State *v.* McKee, 1 Bailey, 651; Lee *v.* State, 26 Ark. 260. See also Sperry *v.* Com. 9 Leigh, 623; State *v.* Wiseman, 68 N. C. 204. See infra, §§ 724, 821.

Mr. Justice Talfourd (Dickins. Quar. Sess. 570) thus states the law on this point: "Where, after the jury have been charged, a prisoner indicted for felony becomes, from sudden illness, incapable of remaining at the bar during the trial, the jury must be discharged. If he recovers during the session, he may be retried, the whole of the proceedings in his trial being commenced *de novo;* R. *v.* Stevenson, 2 Leach C. C. 546; R. *v.* Streek, 2 C. & P. 413. See R. *v.* Fitzgerald, 1 C. & K. 201 — Creswell, J.; Foster's Crown Law, 22, Wedderburn's case; if not, the recognizances must be respited till the next session."

[3] People *v.* Ellis, 15 Wend. 371 (though see Klock *v.* People, 2 Park. C. R. 676); State *v.* Weaver, 13 Iredell, 203. See infra, §§ 516, 724, 821.

[4] Supra, § 436; Kinlock's case, Fost. 16; R. *v.* Jeffs, 2 Strange, 984; U. S. *v.* Shoemaker, 2 McLean, 114; People *v.* Barrett, 2 Caines, 305; Klock *v.* People, 2 Park. C. R. 676.

[5] Spier's case, 1 Devereux, 491; State *v.* McGimpsey, 80 N. C. 377; though see State *v.* Tillotson, 7 Jones, 114.

[6] R. *v.* Newton, 13 Q. B. 716; S. C., 3 Cox C. C. 489; R. *v.* Davison, 2 F. & F. 250; People *v.* Thompson, 2 Wheel. C. C. 473; Wright *v.* State, 5

[7] Briceland *v.* Com. 74 Penn. St. 463.

§ 514. *Sickness of judge*, as has been already noticed, is as sufficient ground, under the same limitation, as the sickness of a juror.[1] And so from sickness of judge.

§ 515. The death of a judge, to whom a case was submitted by consent, for decision without a jury, such death being before decision rendered, does not relieve a defendant, in an indictment for misdemeanor, from a second trial.[2] And the same rule exists as to the death of a judge during a trial before a jury.[3] And so from death of judge.

§ 516. The sickness of a witness is held not to constitute ground to discharge the jury, even though the witness was essential to the prosecution; and when a discharge was made in such case, it was held that the defendant could not be tried again.[4] Such sickness has been held in America ground for *postponing* a trial, but not, unless corruption be shown, for *discharging* a *jury*.[5] But not from sickness or incapacity of witness.

Whether the court will adjourn a trial on account of the incapacity of a witness is hereafter discussed.[6]

§ 517. However discordant the cases may be as to what legal necessity justifies a discharge, they unite in the position that until the jury are "charged" with the offence, the jeopardy does not begin.[7] Until they are sworn, it is not necessary that they should be kept together as "empanelled." The general court of Virginia, which adopts, as has been seen, the extreme view of the "once in jeopardy" guarantee, has held that, until the oath was administered, the Until jury are "charged" jeopardy does not begin.

Ind. 290; Com. *v.* Thompson, 1 Va. Cas. 319; State *v.* McLemore, 2 Hill S. C. 680; Ned *v.* State, 7 Porter, 187; State *v.* Battle, 7 Ala. 259; Powell *v.* State, 19 Ala. 577; State *v.* Moor, 1 Walker, Miss. 134; Josephine *v.* State, 39 Miss. 613; State *v.* Jeffers, 64 Mo. 376; Mahala *v.* State, 10 Yerg. 132; State *v.* Brooks, 2 Humph. 70; Himes *v.* State, 8 Humph. 597; People *v.* Cage, 48 Cal. 323. See R. *v.* Bowman, 9 C. & P. 438.

[1] Nugent *v.* State, 4 Stew. & P. 72.

[2] Bescher *v.* State, 32 Ind. 480. See People *v.* Webb, 38 Cal. 467. Infra, §§ 898, 929.

[3] People *v.* Webb, 38 Cal. 467. Infra, §§ 898, 929.

[4] R. *v.* Kell, 1 Crawford & Dix, 151. See R. *v.* Wade, 1 Mood. C. C. 86; R. *v.* Oulaghan, Jebb's C. C. 270. Supra, § 512.

[5] U. S. *v.* Coolidge, 2 Gallis. 364; Com. *v.* Wade, 17 Pick. 397. See infra, §§ 722, 821–4.

[6] Infra, §§ 722, 821.

[7] See Nolan *v.* State, 55 Ga. 521.

jury were not in the custody of the sheriff, because they were not "charged;" [1] and the Tennessee Supreme Court, also holding the same view, has sustained a conviction where *after* a juryman was selected, but *before* he was sworn, he was withdrawn by the court, because found to be a minor; [2] and in Illinois it was held correct, in a capital case, as has been observed, to strike off a juryman, *after* the jury were sworn, on the ground that he was an alien.[3] The same view has been taken in Pennsylvania,[4] in a case where the court, after the jury had been sworn, struck off a juryman on the ground that he was incompetent from irreligion and prejudice.[5] *A fortiori*, therefore, neither a *nolle prosequi*, when entered before empanelling a jury,[6] nor an ignoring by a grand jury,[7] nor a discharge on *habeas corpus*,[8] has the effect of relieving the defendant from further prosecution.

"Charging" the jury is addressing the jury as follows: —

"Gentlemen of the jury, look upon the prisoner and hearken to his charge; he stands indicted by the name of A. B., late of the parish of, &c., laborer, for that he, on, &c. [*reading the indictment to the end.*] Upon this indictment he hath been arraigned; upon his arraignment he hath pleaded not guilty; your charge, therefore, is to inquire whether he be guilty or not guilty, and hearken to the evidence." [9]

This does not take place until after the jury are sworn,[10] and is not usual in misdemeanors.[11]

A plea is an essential prerequisite to "charging." [12]

The subject of the seclusion of the jury is hereafter discussed.[13]

§ 518. It has been frequently ruled that the defendant may waive his constitutional privilege by a consent to the discharge

[1] Epes's case, 5 Grat. 676. Infra, § 821.

[2] Hines *v.* State, 8 Humph. 597.

[3] Stone *v.* State, 2 Scam. 326.

[4] Com. *v.* McFadden, 23 Penn. St. 12.

[5] As further rulings to same effect see People *v.* Damon, 13 Wend. 351; State *v.* Redman, 17 Ind. 329; Bell *v.* State, 44 Ala. 10.

[6] Supra, § 447.

[7] Supra, § 446.

[8] Supra, § 445.

[9] See, for a shorter form, Trial of R. Smith, Philadelphia, 1816, Wharton on Homicide, App.

[10] 1 Ch. C. L. 555; Dickin. Q. Sess. 493.

[11] Ibid. Infra, § 817.

[12] U. S. *v.* Riley, 6 Blatch. 204.

[13] Infra, §§ 727, 814.

of the jury,[1] or to their separation,[2] and that this may be by a motion in arrest or vacation of judgment.[3] It is conceded that this may be done by a motion for a new trial, which pervades the whole case, asking that it may begin *de novo*.[4] But that such consent can be made operative by motions in arrest, or agreements that do not go to vacate all prior proceedings, has, in capital cases, been denied by courts of high authority.[5] In general, as we have seen,

Conflict of opinion as to whether defendant may waive his privilege in this respect.

[1] See infra, § 817; R. *v.* Deane, 5 Cox C. C. 501; State *v.* Gurney, 37 Me. 156; Com. *v.* Andrews, 3 Mass. 126; People *v.* Rathbun, 21 Wend. 509; Stewart *v.* State, 15 Oh. St. R. 161; People *v.* Webb, 38 Cal. 467; but see State *v.* Tuller, 34 Conn. 280.

A defendant not excepting to the irregular discharge of a juror, *after* swearing, but before case opened, is deemed to consent to the discharge, and cannot after conviction except. Kingen *v.* State, 46 Ind. 132.

[2] R. *v.* Stokes, 6 C. & P. 151; Com. *v.* Sholes, 13 Allen, 555; Stephens *v.* People, 19 N. Y. (5 Smith) 549; Dye *v.* Com. 7 Grat. 662; Williams *v.* Com. 2 Grat. 567; Spencer *v.* State, 15 Ga. 562; Nolan *v.* State, 55 Ga. 521; Friar *v.* State, 3 How. Miss. 422; Loper *v.* State, 3 How. Miss. 429; State *v.* Mix, 15 Mo. 153; Quinn *v.* State, 14 Ind. 589; Elijah *v.* State, 1 Humph. 102; Murphy *v.* State, 7 Cold. 516.

When a jury gives in its verdict in the defendant's absence, a motion to set aside this verdict is not such a waiver as will preclude the defendant from setting up on a second trial the plea of once in jeopardy. Nolan *v.* State, 55 Ga. 521.

[3] Supra, § 457; Com. *v.* Fischblatt, 4 Met. 354; Page *v.* Com. 9 Leigh, 683; State *v.* Arrington, 3 Murph. 571.

[4] U. S. *v.* Perez, 9 Wheat. 579; Com. *v.* Clue, 3 Rawle, 500; Com. *v.* Brown, 3 Rawle, 207; Com. *v.* Murray, 2 Ashm. 41; Ball's case, 8 Leigh, 726; State *v.* Greenwood, 1 Hayw. 141; State *v.* Jeffreys, 3 Murph. 480; State *v.* Lipsey, 3 Dev. 485; State *v.* Davis, 80 N. C. 384; State *v.* Sims, 2 Bailey, 29. Infra, §§ 729–31, 818, 821.

[5] R. *v.* Perkins, Holt, 403; R. *v.* Kell, 1 Craw. & Dix, 151; Peiffer *v.* Com. 15 Penn. St. 468; Nolan *v.* State, 55 Ga. 521; Wesley *v.* State, 11 Humph. 502; Wiley *v.* State, 1 Swan, 256; State *v.* Populus, 12 La. An. 710; Woods *v.* State, 43 Miss. 364; People *v.* Backus, 5 Cal. 275; People *v.* Shafer, 1 Utah, 260; but see infra, §§ 821–30.

"We think the motion in arrest of judgment is not a waiver of the right to plead the former jeopardy. The order arresting judgment does not set aside the verdict. That remains a part of the record, and we see no good reason why the defendants may not be heard to allege at all times that such record shows they were in jeopardy of punishment for the offence charged in the information. If any case holds the contrary, we are not willing to follow it. Had the verdict been set aside on motion of the defendants, there is no doubt of the power of the court to order another trial on the same information; but the distinction between setting aside a verdict and arresting judgment, leaving the verdict intact, is obvious. When a verdict of guilty in a criminal case is set aside, all the proceed-

consent will not justify the taking of life or liberty.[1] Yet we must not forget that there are a multitude of cases in which a defendant may receive much benefit by arrangements between counsel to facilitate the trial of a case. To say that in capital cases such agreements on his behalf are not binding would prevent any such agreements from being made. It is obvious, therefore, that no general rule to this effect can be imposed.[2]

Whether on a new trial being granted after a conviction for manslaughter the offence of murder is reopened has been already considered.[3]

In misdemeanors separation of jury permitted.

§ 519. It is settled law, as we will see hereafter, that *in misdemeanors the jury may be allowed to separate at any time*.[4] That it is in some States extended to felonies has been already seen.[5]

ings on the trial are necessarily set aside and vacated with the verdict. So, when the verdict is set aside on motion of the accused, and he afterwards alleges that the trial and verdict put him in jeopardy of punishment, it may well be replied that the portions of the record by which alone the jeopardy can be proved have been set aside and vacated at his request, and that he has thereby deprived himself of the means of proving his allegation of jeopardy. But here no such reply can be made; for, as already observed, the record of the trial and verdict remain intact. To the proposition that the order arresting judgment for the alleged insufficiency of the record is conclusive that the record is fatally defective, some cases are cited which seem so to hold. But the contrary has been held in other cases, and we think the latter are supported by the better reasons. It seems to us inevitable that the court which is called upon to decide upon the sufficiency of such a plea must determine for itself whether the jeopardy has existed, and to do so it must necessarily pass upon the sufficiency of the record on which the plea is founded, independently of the rulings of the court in which the former trial was had. For a very satisfactory decision of this subject, see State *v.* Norvell, 2 Yerg. 24. It is conceded that the first information was sufficient. The record shows that all of the proceedings which resulted in the conviction of the defendants on that information were regular. Had judgment been rendered pursuant to the verdict, it would have been a valid judgment. It must be held, therefore, that the defendants were put in jeopardy of punishment by their trial on the first information, and hence that their special plea to the second information was sufficient, and should have been sustained as a good plea in bar thereto." Lyon, J., State *v.* Parish, 43 Wis. 395.

[1] See Whart. Crim. Law, 8th ed. §§ 143 *et seq.*

[2] See infra, § 733.

[3] Supra, § 465; infra, §§ 788, 896.

[4] This subject will be considered more fully under a future head. Infra, §§ 722, 816, 821, 823.

[5] Supra, § 492.

§ 520. It has been held that an allegation "that the said defendant had once before been put in jeopardy of his life for said offence, upon said indictment," is demurrable, if it does not show how or in what manner;[1] though it is otherwise if the facts constituting the jeopardy are alleged.[2] And when the record shows, in a case in which jeopardy attaches, that the jury was discharged, the record must also specially state the ground of discharge, so that the court in error may understand the ground of discharge.[3] The defendant, on proper application, is entitled to have such special facts incorporated in the record.[4] Whatever the record avers is subject of revision in an appellate court,[5] though in those jurisdictions where the whole matter is left to the discretion of the judge trying the case, a record of the discharge will not be ordinarily ground for reversal.[6]

Plea must be special. Record must specify facts.

VIII. PLEA OF PARDON.

§ 521. Pardon, in its technical legal sense, is a declaration on record by the sovereign that a particular individual is to be relieved from the legal consequences of a particular crime.[7] It is susceptible of being viewed in three distinct relations: —

Pardon is a relief from legal consequences of crime.

§ 522. *First.* Pardon before conviction, or *abolitio*, as it is called by the old writers, is prohibited by the constitutions of several of the United States as well as by those

Pardon before con-

[1] See forms of pleas in Wh. Prec. 1157.

[2] Atkins *v.* State, 16 Ark. 568; Wilson *v.* State, 16 Ark. 60.

[3] See Com. *v.* Purchase, 2 Pick. 521; Com. *v.* Townsend, 5 Allen, 216; People *v.* Goodwin, 18 Johns. 187; Dobbins *v.* State, 14 Oh. St. 493; Poage *v.* State, 3 Oh. St. 230; Dobbins *v.* State, 14 Oh. St. 494; Hines *v.* State, 24 Oh. St. 134; State *v.* Walker, 26 Ind. 347; State *v.* Nelson, 26 Ind. 366; State *v.* Bullock, 63 N. C. 571; State *v.* Almon, 64 N. C. 364; State *v.* Jefferson, 66 N. C. 309; Avery *v.* State, 26 Ga. 233; Powell *v.* State, 19 Ala. 577; Barrett *v.* State, 35 Ala. 406; McLaughlin, ex parte, 41 Cal. 211; Cage, ex parte, 45 Cal. 248; People *v.* Cage, 48 Cal. 323; People *v.* Lightfoot, 49 Cal. 226; Moseley *v.* State, 33 Tex. 67.

[4] R. *v.* Middlesex Justices, 3 Nev. & Man. 110; R. *v.* Bowman, 6 C. & P. 101. As to English practice see Winsor *v.* R. L. R. 1 Q. B. 289.

[5] See cases cited supra, §§ 490 *et seq.* Infra, § 779.

[6] See Winsor *v.* R. L. R. 1 Q. B. 289; U. S. *v.* Perez, 9 Wheat. 579; People *v.* Green, 13 Wend. 55.

[7] U. S. *v.* Wilson, 7 Pet. 150; Osborn *v.* U. S. 91 U. S. 474.

viction to be rigidly construed.

of most of the modern European sovereignties, *e. g.* Prussia, Belgium, Bavaria,[1] &c. Wherever the power exists, it should be cautiously exercised, and its grants rigidly construed, for the reason that it breaks the course of even public justice, and selects an individual as the object of capricious executive favor.[2]

Pardon after conviction more indulgently construed.

§ 523. *Second.* Pardon after conviction, which is either full or conditional, — *plena vel minus plena.* This is the ordinary form of pardon, and is granted sometimes because the sentence requires revision, sometimes from the good conduct of the defendant since conviction, sometimes from general motives of clemency. To this, and the following kind of pardons, applies the position that in cases of doubt the presumption is to be in favor of the grantee.[3]

Rehabilitation is restoration to *status.*

§ 524. *Third.* Rehabilitation — *Restitutio ex capite gratiae.* This consists in a restoration to the pardoned person of the *status* and rights he possessed before his pardon. In our own practice this is illustrated by the removal of the technical infamy which incapacitates him as a witness, and the restoration of confiscated effects not vested in others.[4] But a pardon has been held not to rehabilitate so as to entitle an alien to naturalization.[5]

[1] A verdict of guilty, however, is a "conviction" in such sense that a pardon after it is a pardon "after conviction." See Blair *v.* Com. 25 Grat. 850; State *v.* Alexander, 76 N. C. 231, and cases cited infra, § 527.

Thus, in Massachusetts, the governor, with the advice of the council, may grant a pardon of an offence after a verdict of guilty and before sentence, and while exceptions are pending in the Supreme Court for argument; and the convict, upon pleading the pardon, is entitled to be discharged. Com. *v.* Lockwood, 109 Mass. 323. See Com. *v.* Mash, 7 Met. 472; State *v.* Alexander, 76 N. C. 231.

[2] For cases of pardon before sentence see Garland, ex parte, 4 Wall. 333; Armstrong's case, 13 Wall. 154; Pargoud's case, 13 Wall. 156; Duncan *v.* Com. 4 S. & R. 449; Com. *v.* Hitchman, 46 Penn. St. 357; Blair *v.* Com. 25 Grat. 850; Com. *v.* Bush, 2 Duvall, 264; U. S. *v.* Athens, 35 Ga. 354; State *v.* Benoit, 16 La. An. 273; State *v.* Dyches, 28 Tex. 535.

[3] Wyrral's case, 5 Co. 49; Com. *v.* Roby, 12 Pick. 196; State *v.* Blaisdell, 33 N. H. 388; Com. *v.* R. R. 1 Grant, 301; State *v.* Shelton, 64 N. C. 294; Jones *v.* Harris, 1 Strobh. 160. See Leyman *v.* Latimer, 3 Exch. D. 352; 14 Cox C. C. 51; Hawkins *v.* State, 1 Port. 475. That the pardon must recite the conviction see U. S. *v.* Stetter, reported in 7th ed. of this work, § 766; People *v.* Brown, 43 Cal. 439.

[4] Whart. Crim. Ev. § 525.

[5] Spencer, in re, 18 Alb. L. J. 153, where it was held by Deady, J., that

§ 525. *Amnesty* differs from pardon in some essential particulars. It is addressed not to an individual but to a population; and it is as much in the nature of a compact as of a grant. It says, "Lay down your arms, and your rebellion shall be treated as if it did not exist." Nor is this altered by the fact that the party addressed is at the time conquered. No State that retains within its borders a perpetual revolt can last; and it is to close the revolt, and to transmute enemies into willing subjects, that an amnesty is issued. Another chief point of distinction between pardon and amnesty is, that the former merely relieves from the legal consequences of the guilty act, while the latter cancels the guilty act itself. It is an extinction even of the *memory* of the past, — an *amnestia*, — an act of oblivion. Hence amnesties are always construed indulgently towards those by whom they are accepted.[1] *In dubio mitius*, is a maxim which applies to them as well as to pardons. But to amnesties belongs the additional consideration that no government, without forfeiting all confidence in its faith, can prosecute those whom it induces to surrender themselves to it on the plea that the offence prosecuted should be treated as if it did not exist.[2]

Amnesty is addressed to a class of people, and is more in nature of compact.

§ 526. Pardons may be viewed as either statutory or executive. A statutory pardon, or act of grace or amnesty, need not, it is said, be pleaded, but may be put in evi-

Executive pardon must be

where an alien has, during the time of his residence here, been convicted of perjury, he is not entitled to naturalization; and a pardon being only prospective, and not doing away with the fact of his conviction, does not relieve him from his disability.

[1] The President's amnesty proclamation of December 8, 1863, extended to persons who, prior to the date of the proclamation, had been convicted and sentenced for offences described in the proclamation. Greathouse's case, 2 Abbott U. S. 382 (1864); S. C., 4 Sawyer, 487. See Lapeyre *v.* U. S. 17 Wall. 191. But the amnesty acts do not, in general, apply to crimes not growing out of the war. State *v.* Haney, 67 N. C. 467; State *v.* Blalock, Phil. N. C. 242; State *v.* Shelton, 65 N. C. 294.

A plea setting up an amnesty proclamation containing exceptions must aver that the respondent is not within the exceptions. St. Louis Street Foundry, 6 Wall. 770.

[2] See Herrman, de abolitionibus criminum; Bentham, Rat. *in loco;* Mittermaier, note to Feuerbach, § 63; and, for construction of American amnesty acts, Brown *v.* U. S. McCahon, 229; State *v.* Keith, 63 N. C. 140; Haddix *v.* Wilson, 3 Bush, 523. Infra, §§ 535 *et seq.*

specially pleaded, otherwise amnesty.

dence under the general issue.[1] If a public act, the courts, under such circumstances, are bound to take notice of it.[2] But it is more prudent specially to plead an act of amnesty, since, if the court should refuse to receive it under the general issue, the error might be too late to be repaired.[3]

An *executive* pardon should be specially pleaded, and should be produced under the great seal. It is said that it may be orally pleaded,[4] but it is better that it should be pleaded formally in writing. Unless specially pleaded, it will not be noticed by the court.[5] And it may be pleaded at any period of the case, whenever it is received;[6] though if not pleaded, it will not, as has been seen, be noticed in arrest of judgment.[7]

Pardons cannot be prospective.

§ 527. Pardons are not applicable to offences committed *after* the proclamation of pardon. That no sovereign in a State where the law-making power is distinct from the executive can dispense with a penal statute was established in England by the overthrow of James II., and the subsequent refusal of the courts to recognize his dispensations as valid. It is true that an executive may say, "under certain circumstances, I will decline to prosecute." This has been sometimes done in England by order of council. But this is not a *pardon*, *i. e.* it could not be pleaded in bar. It is simply a promise by a particular executive, that for a certain time, under the stress of a particular public exigency, he will decline to prosecute. He may at any time revoke such promise; and at the best, it is the exercise of a high and questionable prerogative, which the courts, should the matter come before them, would hold to be superseded by a prosecution subsequently brought.[8]

But when an offence has been committed, a pardon may be at common law interposed at any period of time, before prosecu-

[1] 2 Hawk. P. C. 37, s. 58.

[2] See State *v.* Keith, 63 N. C. 140; State *v.* Blalock, Phill. N. C. 242.

[3] As to statutes of amnesty see State *v.* Cook, Phil. N. C. 535; and State *v.* Shelton, 65 N. C. 294.

[4] R. *v.* Garside, 4 Nev. & M. 33; 2 Ad. & El. 266.

[5] U. S. *v.* Wilson, 7 Pet. 150; S. C., Bald. 78; State *v.* Blalock, *ut supra;* Com. *v.* Shisler, 2 Phila. 256; Whart. Prec. 1457.

[6] R. *v.* Morris, L. R. 1 C. C. 92.

[7] U. S. *v.* Wilson, *ut supra;* Com. *v.* Lockwood, 100 Mass. 339.

[8] See 12 Coke, 29; 2 Hawk. P. C. 540; R. *v.* Williams, Comb. 18; R. *v.* Wilcox, 2 Salk. 458; R. *v.* Garside, 4 N. & M. 33; 2 Ad. & El. 266.

tion, during trial, and after conviction;[1] though by the constitutions of some States pardons prior to conviction are prohibited.

Pardon before sentence remits costs and penalties.

§ 528. Even in indictments partaking of the nature of civil process, a pardon before sentence, by the executive having jurisdiction, is a bar to costs and penalties, as well as to corporal punishment.[2] Thus a pardon by the governor of Pennsylvania of a person convicted of fornication and bastardy, when pleaded before sentence, discharges, in Pennsylvania, the defendant from liability for costs, as well as from the maintenance of the child.[3] *After* judgment, however, a pardon does not discharge costs due elsewhere than to the State, or penalty on informer's claim.[4] Even costs due the State must be specially remitted by such pardon, or they will remain due.[5] Of course these remarks do not apply to *qui tam* actions, or to cases where the informer's interest attaches *in limine*, by proceedings *in rem*. To these cases pardons, issued after commencement of suit, do not reach.[6] But, under the United States statutes, a pardon operates to bar confiscation be-

[1] R. *v.* Reilly, 1 Leach, 454; R. *v.* Crosby, 1 Ld. Raym. 39; Com. *v.* Mash, 7 Met. 472; Com. *v.* Lockwood, 109 Mass. 323; U. S. *v.* Wilson, 7 Pet. 150; Garland, ex parte, 4 Wall. 333; Duncan *v.* Com. 4 S. & R. 449; Woollery *v.* State, 29 Mo. 300. Compare supra, § 522.

[2] Armstrong's case, 13 Wall. 154; Pargoud's case, 13 Wall. 156; U. S. *v.* Thomasson, 4 Biss. 336; U. S. *v.* McKee, 4 Dillon, 1, 128; State *v.* Underwood, 64 N. C. 600; Com. *v.* Bush, 2 Duvall, 264; White *v.* State, 42 Miss. 635; State *v.* Dyches, 28 Tex. 535.

[3] Com. *v.* Ahl, 43 Penn. St. 53. See Com. *v.* Hitchman, 46 Penn. St. 357; U. S. *v.* Athens Armory, 35 Ga. 344. A pardon *after* sentence discharges penalties due even to the county. Cope *v.* Com. 28 Penn. St. 297. See Com. *v.* Shisler, 2 Phila. 256.

[4] Pool *v.* Trumbal, 3 Mod. 56; Brown *v.* U. S., McCahon, 229; Garland, ex parte, 4 Wall. 334; Deming, in re, 10 Johns. R. 232; Duncan *v.* Com. 4 S. & R. 449; McDonald, ex parte, 2 Whart. 440; Schuylkill *v.* Reifsnyder, 46 Penn. St. 445; Shoop *v.* Com. 3 Barr, 126; Estep *v.* Lacy, 35 Iowa, 419; Anglea *v.* Com. 10 Grat. 698; State *v.* Mooney, 74 N. C. 98; State *v.* Williams, 1 Nott & McC. 27; State *v.* McO'Blemis, 21 Mo. 272; though see Cope *v.* Com. 28 Penn. St. 297; and as to revenue forfeitures, U. S. *v.* Morris, 10 Wheat. 246.

In U. S. *v.* Harris, 1 Abb. U. S. 110, it was held that the pardoning power of the President does not extend to the remission of moieties adjudged to informers. This is disapproved in U. S. *v.* Thomasson, 4 Biss. 336.

[5] See Libby *v.* Nicola, 21 Oh. St. 415, and cases cited above.

[6] McLane *v.* U. S. 6 Pet. 405; U. S. *v.* Lancaster, 4 Wash. C. C. 64; State *v.* Youmans, 5 Ind. 280; 2 Hawk. P. C. 543-4.

fore seizure.[1] It is otherwise as to pardon after judgment of forfeiture and delivery.[2]

Limited in impeachments.

§ 529. In *impeachments*, the pardoning power of the executive is usually restrained by constitutional limitation.[3]

And so as to contempts.

§ 530. *Commitments for contempt*, whether legislative or judicial, have been said in England to be out of the reach of the crown; though so far as concerns parliamentary contempt, imprisonment may be relieved by prorogation. There is a strong reason for this limitation in the fact that if the executive could discharge from imprisonment witnesses imprisoned for contempt, no trial, legislative or judicial, could proceed without executive consent. In our American practice, however, the right of executive pardon in cases of contempt has been asserted,[4] and there are English intimations to the same effect.[5]

Must be delivered.

§ 531. To give effect to a pardon, it must be delivered either to the pardoned party or his agent,[6] or the officer having him in charge.[7] After such delivery it cannot be revoked.[8] But a delivery to the marshal has been held not to be a delivery to the prisoner.[9] And a conditional pardon, not delivered, may be revoked by the successor in office of the executive by whom it was granted.[10]

Void when fraudulent.

§ 532. A pardon fraudulently procured will be treated by the courts as void.[11] And this fraud may be by suppression of the truth as well as by direct affirmation of false-

[1] Brown *v.* U. S., McCahon, 229; U. S. *v.* Fifteen Hundred Bales, &c. 16 Pitts. L. J. 130; U. S. *v.* Padelford, 9 Wall. 531; U. S. *v.* Armory, 35 Ga. 344.

[2] See Confiscation Cases, 20 Wall. 92.

[3] See R. *v.* Boyes, 1 B. & S. 311.

[4] Hickey, ex parte, 4 Sm. & Mar. 751. See Mullee, in re, 7 Blatch. 23–25. See infra, § 975.

[5] See R. *v.* Watson, 2 Ld. Raym. 818.

[6] Reno, ex parte, 66 Mo. 260.

[7] Com. *v.* Halloway, 44 Penn. St. 210. See State *v.* Baptiste, 26 La. An. 134; otherwise as to amnesties. Lapeyre *v.* U. S. 17 Wall. 191; U. S. *v.* Hughes, 1 Bond, 574.

[8] Reno, ex parte, 66 Mo. 260.

[9] De Puy, ex parte, 10 Int. Rev. Rec. 34.

[10] See cases cited in prior notes to this section.

[11] R. *v.* Maddocks, 1 Sid. 430; Com. *v.* Halloway, 44 Penn. St. 210; Com. *v.* Kelly, 9 Phila. 586; State *v.* Leak, 5 Ind. 359; State *v.* McIntire, 1 Jones N. C. 1; 2 Hawk. P. C. ss. 9, 10, p. 535.

hood.[1] Yet this test should be cautiously applied by the courts, for there are few applications for pardon in which some suppression or falsification may not be detected. It is natural that it should be so, when we view the condition of persons languishing in prison, or under sentence of death; and if departure from rigid accuracy in appealing for pardon be a reason for cancelling a pardon, there would be few pardons that would stand. The proper course is to permit fraud to be set up to vacate a pardon only when it reaches the extent in which it would be admissible to vacate a judgment. And an erroneous recital is no proof of fraud.[2]

Conditional pardons are valid.

§ 533. Whether an executive can impose conditions in pardons has been doubted. It may now, however, be considered as settled law that such conditions may, at common law, be made, and that on their violation the pardon is suspended, and the original sentence revives.[3] This is eminently the case when the offender, after being released on condition he leaves the country, refuses to go, or surreptitiously returns.[4] But allowance in calculating departure will be made for sickness or incapacity.[5]

By the Massachusetts statute of 1867, c. 301, convicts violating the conditions of conditional pardons may be rearrested, but the rearrest does not prolong the sentence.[6]

When a pardon is granted with a condition annexed, the fact

[1] State *v.* Leak, 5 Ind. 359.

[2] Com. *v.* Ahl, 43 Penn. St. 53.

[3] R. *v.* Foxworthy, 7 Mod. 153; R. *v.* Thorpe, 1 Leach, 391; R. *v.* Madan, 1 Leach, 224; R. *v.* Aickless, 1 Leach, 294; Wells, ex parte, 18 How. U. S. 307; Osborn *v.* U. S. 91 U. S. 474; U. S. *v.* Six Lots of Ground, 1 Woods, 234; Haym *v.* U. S. 7 Ct. of Cl. 443; Scott *v.* U. S. 7 Ct. of Cl. 457; West, in re, 111 Mass. 443; People *v.* Potter, 1 Parker C. R. 47; S. C., 1 Edm. Sel. Cas. 235; Flavel's case, 8 W. & S. 197; Com. *v.* Philadelphia, 4 Brewst. 320; Com. *v.* Haggerty, 4 Brewst. 329; State *v.* Twitty, 4 Hawks, 248; State *v.* Smith, 1 Bailey, 283; State *v.* Addington, 2 Bailey, 516; State *v.* Chancellor, 1 Strobh. 347; State *v.* Fuller, 1 McCord, 178; Arthur *v.* Craig, 48 Iowa, 264; Roberts *v.* State, 14 Mo. 138; Opin. of Atty. Gen. 1, 341–8, 368; 5 J. Q. Adams's Memoirs, 392. As to Ohio Constitution see Libby *v.* Nicola, 21 Oh. St. 414. See, however, Com. *v.* Fowler, 4 Call (Va.), 35. For a case of rejection of conditional pardon see O'Brien's case, 1 Towns. St. Tr. 469.

[4] Ibid. Such condition, however, will be strictly construed in favor of liberty. Hunt, ex parte, 5 Eng. Ark. 284.

[5] People *v.* James, 2 Caines, 57.

[6] West's case, 111 Mass. 443.

that the person pardoned is in prison, and must accept the condition before availing himself of the pardon, does not constitute such duress as will vacate his acceptance of the condition.[1] When the condition is for the defendant's benefit, acceptance is presumed without proof of action on the criminal's part.[2]

An inoperative or illegal condition is worthless, and the pardon to which it is attached is unconditional.[3] But a condition that the party (convicted of larceny) should abstain from the use of intoxicating liquors is not inoperative or illegal.[4] Nor is a condition that the party will not by virtue of it claim confiscated property.[5]

Pardons do not reach second conviction.

§ 534. A person convicted for the second time of a felony, and liable to be sentenced to a cumulative statutory punishment, cannot plead, in exoneration of the increased punishment, an executive pardon of the former conviction.[6]

Pardon must recite conviction.

§ 535. As we have already seen, retrospective pardons are construed indulgently, and if the offence pardoned be substantially described this will be enough. Yet when it is sought to rehabilitate a convict, or to otherwise cancel a conviction by means of a pardon, the pardon must accurately recite the conviction.[7]

Calling a witness as state's evidence is not a pardon.

§ 536. That an accomplice was called as a witness by the prosecution is not a ground for a plea in bar.[8] The practice is in such case to grant a pardon; but this is solely for the discretion of the executive.[9]

[1] Greathouse's case, 2 Abbott U. S. 383.

[2] Victor, in re, 31 Oh. St. 206.

[3] See People v. Potter, 1 Parker C. R. 47; S. C., 1 Edm. S. C. 235.

[4] Craig, in re, Sup. Ct. Iowa, 1878.

[5] Osborn v. U. S. 91 U. S. 474.

[6] Mount v. Com. 2 Duvall, 93.

[7] R. v. Gillis, 11 Cox C. C. 69; R. v. Harrod, 2 C. & K. 294; 2 Cox C. C. 242; People v. Bowen, 43 Cal. 439; Stetter's case, supra, § 523.

[8] Whart. Crim. Ev. § 439; U. S. v. Ford, 99 U. S. 594; Com. v. Brown, 103 Mass. 422; Dabney's case, 1 Robinson (Va.), 696; Newton v. State, 15 Fla. 610. See Com. v. Woodside, 105 Mass. 594; Lindsay v. People, 63 N. Y. 143; State v. Graham, S. Ct. N. J. 1879; State v. Lyon, 81 N. C. 600; People v. Bruzzo, 24 Cal. 41.

[9] See fully Whart. Crim. Ev. § 443. In Wight v. Rindskoff, 43 Wis. 344, it was said that it would be a fraud upon the court and an obstruction of public justice, if the public prosecutor should enter into an agreement, unsanctioned by the court (if such sanction could be given in such a case), offering immunity or clemency to several defendants, in several indictments, upon the condition that one of

§ 537. To *foreign* pardons, the analogy of foreign convictions may be applied:[1] "Was the defendant within the jurisdiction of the pardoning sovereign at the time of the pardon? Was the offence committed within the territory of such sovereign? In the latter case, a pardon, based on the ground that no offence was committed, is a *lex generalis*, declaring that the act is not in that land to be made liable to criminal punishment. But in the former case it should appear, to give extra-territorial force to such pardon, first, that the offender was in the territory of the pardoning prince to such effect that he could there be prosecuted by the laws of such territory for the particular offence; secondly, that by the law of the country of the second trial the courts of the country of the first trial had jurisdiction; and thirdly, that the pardon should have been regular and fair, and after a due examination of the facts. Should these conditions exist, the tendency is, in municipal prosecutions, to regard a foreign pardon as conclusive. In prosecutions political, or semi-political, however, the case would be reversed. It would be preposterous, for instance, to suppose that a prosecution in the United States for treasonable offences against the United States committed in Germany, or for perjury in Germany before a United States consul, could be barred by a pardon by the German sovereign within whose territory the offence was committed. The true issue, both here and in respect to acquittals, is, had the sovereign thus intervening the jurisdiction to pronounce a *lex generalis* as to the particular case? If so, his action is final. If otherwise, it is not."[2]

Foreign pardons operative as to crimes within sovereign's jurisdiction.

A federal pardon, therefore, cannot remove penalties imposed by a state court.[3]

The question of removal of disability of witnesses by pardon is discussed in another volume.[4]

them become a witness for the prosecution upon still other indictments.

[1] Supra, § 441.

[2] Whart. Confl. of L. § 938.

[3] See Hunter, ex parte, 2 W. Va. 122; Ridley *v.* Sherbrook, 3 Cold. (Tenn.) 569.

[4] Whart. Crim. Ev. § 365.

CHAPTER IX

PRESENCE OF DEFENDANT IN COURT.

Defendant's appearance must be in person, § 540.
In felonies must be in custody, § 540 *a*.
Right may be waived in misdemeanors of nature of civil process, § 541.
In such cases waiver may be by attorney, § 542.
Removal of defendant for turbulent conduct does not militate against rule, § 543.
Involuntary illness not a waiver, § 544.
Presence essential at arraignment and empanelling, § 545.
Also at reception of testimony, § 546.
Also at charge of court, § 547.
But not at making and arguing of motions, § 548.
Presence essential at reception of verdict, § 549.
And at sentence, § 550.

§ 540. In trials for cases in which corporal punishment is assigned, the defendant's appearance must ordinarily be in person, and must so appear on record. There can be no judgment of conviction taken by default.[1] Nor does the necessity for the defendant's presence cease with the opening of the case. Absence on his part during the trial, unless the absence be necessary and temporary, will be ground for a new trial; and the fact that the presence does not appear on record is ground for writ of error.[2]

Defendant's appearance must be in person.

[1] Dunn *v.* Com. 6 Barr, 387; Hamilton *v.* Com. 16 Penn. St. 121; Sperry *v.* Com, 9 Leigh, 623; Brooks *v.* People, 88 Ill. 327; Scaggs *v.* State, 8 S. & M. 722; State *v.* Cross, 27 Mo. 332; Gladden *v.* State, 12 Fla. 562; and other cases cited, § 875.

[2] See infra, § 875. But a formal averment of defendant's presence during trial is not necessary, when it can be inferred from the record. Lawrence *v.* Com. 30 Grat. 845.

"Never has there heretofore been a prisoner tried for felony," said a late eminent judge, "in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment should not be pronounced against him. These things are matters of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime." Gibson, C. J., in Prine *v.* Com. 18 Penn. St.

In misdemeanors, as will presently be seen, this right may be waived in cases in which no corporal punishment is imposed. In felonies, or cases involving corporal punishment, it can ordinarily neither be waived nor dispensed with.

§ 540 *a*. In felonies and high misdemeanors, the defendant, though previously on bail, is in custody when the trial opens. His bail bring him to court, and their duty is then discharged.[1] In offences of a lighter grade, where the punishment is not necessarily corporal, this strictness is not exacted.[2] If violent and obstreperous, or if escape be threatened, the defendant may be placed in shackles during trial.[3] Such restraint, however, should not be imposed except in cases of immediate necessity.[4] The usual position of a prisoner is at the bar, or in the "dock," as it is sometimes called.[5]

Defendant to be in custody at trial.

§ 541. As to arraignment and plea, the defendant can waive this right, it has been ruled, in such misdemeanors as partake of the nature of civil process, or in which the punishment is not necessarily corporal, in which cases he can appear and plead by attorney, and even be absent during trial.[6] But this privilege will not be al-

Right may be waived in misdemeanors of the nature of civil process.

104, as quoted and adopted by Williams, J., in Dougherty *v.* Com. 69 Penn. St. 286. See, to same effect, Hooker *v.* Com. 13 Grat. 763; State *v.* Craton, 6 Ired. 164; Dyson *v.* State, 26 Miss. 362; Rolls *v.* State, 52 Miss. 391.

In Massachusetts, by statute, "no person indicted for a felony shall be tried unless personally present during the trial; persons indicted for smaller offences may, at their own request, by leave of the court, be put on trial in their absence, by an attorney duly authorized for the purpose." Gen. Stat. c. 172, § 8.

In Ohio, by statute, "no person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for a misdemeanor may, at their own request, by leave of court, be put on trial in their absence. The request shall be in writing, and entered on the journal of the court." See Rose *v.* State, 20 Ohio, 31; Laws, vol. 66, p. 307. In Arkansas a similar statutory provision exists. Sweeden *v.* State, 19 Ark. 205.

[1] R. *v.* Simpson, 10 Mod. 248; R. *v.* Douglass, C. & M. 193; People *v.* Beauchamp, 49 Cal. 41.

[2] Infra, § 541; R. *v.* Carlile, 6 C. & P. 636.

[3] See Burn's Just. tit. Arraignment, Talf. ed.; Kel. 8; Faire *v.* State, 58 Ala. 74; Cent. L. J. Aug. 16, 1878; Lee *v.* State, 51 Miss. 566.

[4] State *v.* Kring, 1 Mo. Ap. 438; S. C., 64 Mo. 591.

[5] R. *v.* Egan, 9 C. & P. 485; R. *v.* Suletta, 1 C. & K. 225; 1 Cox C. C. 20.

[6] Infra, § 701; U. S. *v.* Shepherd, 1 Hugh. 520; U. S. *v.* Mayo, 1 Curt. C. C. 433; Tracy, ex parte, 25 Vt. 93; Bloomington *v.* Heiland, 67 Ill. 278;

lowed in cases where the court is not satisfied that imprisonment will not in any case be part of the sentence.[1]

In such cases may be waiver by attorney.

§ 542. On principle, the better practice would be for the defendant to appear in court and there make the waiver.[2] But it has been held that it is sufficient if he execute, in the excepted cases of *quasi* civil prosecutions, a special power of attorney for this purpose, filing it in court.[3]

Removal of defendant for turbulent conduct does not militate against rule.

§ 543. That a waiver may be so implied, it was held in a trial for perjury, in the United States Circuit Court for New York, where the defendant's conduct during a portion of the trial was so violent that it was necessary to remove him from the court-room, and place him in sequestration.[4] And unless such a check be applied, the defendant, by violent and turbulent conduct, could at any time either bring his trial to an end, or compel its extension under circumstances destructive of public decorum. On the same reasoning rests a case already noticed, in which it was held in Ohio that a defendant, in a case of counterfeiting, in which he was under bail, could not stop a trial by running away from the court.[5]

Involuntary illness not a waiver.

§ 544. Involuntary illness is not to be regarded as a waiver; and in fact, in an English trial for misdemeanor, where the defendant was taken ill, and was necessarily removed from the court-house, the judge discharged the jury, though the defendant's counsel consented to going on in his absence.[6] It is otherwise as to temporary voluntary absence during one of the speeches of counsel.[7]

§ 545. By the old common law form, each juror is required

People *v.* Ebner, 23 Cal. 158; and see, as indicating a wider range, State *v.* Reckards, 21 Minn. 47; Douglass *v.* State, 3 Wis. 820; State *v.* Epps, 76 N. C. 55; Cook *v.* State, 26 Ga. 593; State *v.* Hughes, 1 Ala. (N. S.) 657; Dixon *v.* State, 13 Fla. 744; State *v.* White, 19 Kans. 445; People *v.* Corbett, 28 Cal. 330.

[1] U. S. *v.* Mayo, 1 Curt. C. C. 433; People *v.* Ebner, 23 Cal. 158; Tracy, ex parte, 25 Vt. 93; People *v.* Taylor, 3 Denio, 98, note; Com. *v.* Shaw, 1 Crumrine (Pitts.) 492; Com. *v.* Crump, 1 Va. Cas. 172; Warren *v.* State, 19 Ark. 214; Nomaque *v.* People, Breese, 109. Infra, § 876.

[2] See People *v.* Petry, 2 Hilt. 523.

[3] U. S. *v.* Mayo, 1 Curt. C. C. 433.

[4] U. S. *v.* Davis, 6 Blatch. C. C. 464.

[5] Fight *v.* State, 7 Ohio, 180.

[6] R. *v.* Streek, 2 C. & P. 413.

[7] State *v.* Grate, 68 Mo. 22.

to look on the prisoner and the prisoner on the juryman, before the juryman is sworn. Nor can the prisoner's presence, at this period be dispensed with or waived in any cases in which corporal punishment may be inflicted.[1] Hence in felonies the record must show defendant to have been present at the arraignment.[2]

Presence essential at arraignment and empanelling.

§ 546. The constitutions of most of the United States, incorporating in this an old common law principle, provide that the accused, in criminal cases, shall have a right to meet the witnesses against him face to face. Even where this rule is not a part of the fundamental law of the land, it is held obligatory by the courts.[3] Yet, as has been seen, the defendant in misdemeanors may waive this privilege either expressly or by implication; and in California, even in a murder case, it has been held that a defendant's absence from necessity or other strong reasons, during part of a trial, was no ground for reversing the sentence, if no prejudice arose to him from his absence.[4] But ordinarily no testimony should be taken in the defendant's absence. Even if the jury go to view the place of the crime, he should be present.[5]

Also at reception of testimony.

§ 547. It is clear that the defendant must be present at the charge of the court.[6] Even where, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain questions of the court as to what had been the evidence on particular points, to which the court replied, giving the information requested in the defendant's absence, it was held that this was error, for which the conviction must be reversed.[7]

Also at charge of court.

[1] Dougherty *v.* Com. 69 Penn. St. 286; Dunn *v.* Com. 6 Barr, 385; Rolls *v.* State, 52 Miss. 391.

[2] Jacobs *v.* Com. 5 S. & R. 315; Hall *v.* State, 40 Ala. 698; State *v.* Jones, 61 Mo. 232. See Dodge *v.* People, 4 Neb. 220.

[3] See People *v.* Perkins, 1 Wend. 91; Dougherty *v.* Com. 69 Penn. St. 286; Dunn *v.* Com. 6 Barr, 385; Jackson *v.* Com. 19 Grat. 656; Andrews *v.* State, 2 Sneed, 550; State *v.* Hughes, 2 Ala. 102; State *v.* Cross, 27 Mo. 332; People *v.* Kohler, 5 Cal. 72.

[4] People *v.* Bealoba, 17 Cal. 389. And see U. S. *v.* Santos, 5 Blatch. C. C. 104.

[5] Infra, § 707.

[6] Jackson *v.* Com. 19 Grat. 656; State *v.* Blackwelder, 1 Phillips (N. C.) 38; Wade *v.* State, 12 Ga. 25; Wilt *v.* State, 5 Cold. 11; People *v.* Kohler, 5 Cal. 72. See infra, §§ 799, 830.

[7] Maurer *v.* People, 43 N. Y. 1;

§ 548. Presence at the making and arguing of motions cannot be exacted as an absolute rule, as there are some cases — *e. g.* motions to bring the prisoner into court — which presuppose his absence, and other cases, such as motions of course, in which to require his presence would be productive of great inconvenience, and might work sometimes prejudicially to himself.[1] In misdemeanors in which the punishment is not corporal, it is clear that such presence, even as to motions for new trial, is not necessary.[2] And in the higher order of misdemeanors, and in felonies, the courts are now not disposed, on the hearing of motions, to insist on the defendant's presence.[3] Hence his absence may not invalidate such proceedings,[4] unless in matters of essence.[5]

Presence not necessary during making and arguing of motions.

In motions for arrest of judgment, and in error, the old practice was to require the attendance of the defendant.[6] In the United States, this presence has not been in practice required; nor is it usual to exact it in proceedings in error;[7] and in England, at least in misdemeanors, appearance on proceedings in error will not be required, where it appears that the defendant, who is plaintiff in error, cannot attend without great inconvenience and risk of health.[8]

§ 549. In felonies presence at verdict is essential; and there have been cases where the courts have refused to permit this

Wade *v.* State, 12 Ga. 25; though see Jackson *v.* Com. 19 Grat. 656. Infra, § 830.

In Ohio, however, it has been ruled not to be ground for new trial that the court, in the absence of the parties, sent a copy of the statutes of the State to the jury, calling their attention to particular sections. Gandolfo *v.* State, 11 Ohio St. 114; and see State *v.* Pike, 65 Me. 111, and cases cited infra, § 830.

[1] See Godfreidson *v.* People, 88 Ill. 284; State *v.* Elkins, 63 Mo. 159; Hall *v.* State, 40 Ala. 698; State *v.* Outs, 30 La. An. 1155.

[2] R. *v.* Parkinson, 2 Den. C. C. 459.

[3] Jewell *v.* Com. 22 Penn. St. 94; R. *v.* Boltz, 8 D. & R. 65; 5 B. & C. 334; R. *v.* Hollingberry, 6 D. & R. 344; 4 B. & C. 329; People *v.* Van Wyck, 2 Caines, 333; though see R. *v.* Caudwell, 17 Q. B. 503; R. *v.* Scully, 1 Alc. & Napier, 262; infra, § 892.

[4] Com. *v.* Costello, 121 Mass. 371; and see Com. *v.* Andrews, 97 Mass. 543; Anon. 31 Me. 592. But see *contra*, Hooker *v.* Com. 13 Grat. 763; Long *v.* State, 52 Miss. 23.

[5] Simpson *v.* State, 56 Miss. 295.

[6] R. *v.* Spragg, 2 Burr. 930; 1 W. Black. 209.

[7] Clark *v.* People, 1 Park. C. R. 360; Donelly *v.* State, 2 Dutch. 464, 601; State *v.* Buhs, 18 Mo. 319.

[8] Murray *v.* R. 3 D. & L. 100; 7 Q. B. 700.

right to be waived.[1] Thus a verdict of burglary was set aside in Pennsylvania, when it was taken in the defendant's absence, although his counsel waived his right to be present.[2] Where, however, the defendant happens to be voluntarily absent for a few moments, during which time the jury come in and render their verdict, his counsel being present, it has been held, and not without reason, so far as concerns misdemeanors, that the inadvertence is not ground for a new trial, as the defendant is to be viewed as having waived his right to be present, and as under such circumstances the waiver would be sustained by the court.[3] It is scarcely necessary to say that in cases where corporal punishment may be assigned, absence during rendition of the verdict, without waiver, vitiates the proceedings.[4] And in fact this, as we have seen, is exacted by the common law form, which requires the jury to look on the prisoner and the prisoner to look on the jury, when the verdict is rendered.

Presence essential at reception of verdict.

The better view is that in capital, if not in all felonies, the record must show that the defendant was present at trial, ver-

[1] Infra, § 747.

[2] Prine *v.* Com. 18 Penn. St. 103; Dougherty *v.* Com. 63 Penn. St. 386; Jackson *v.* Com. 19 Grat. 656; Andrew *v.* State, 2 Sneed, 550.

[3] U. S. *v.* Santos, 5 Blatch. C. C. 104 (see, as to misdemeanors, Sawyer *v.* Joiner, 16 Vt. 497); People *v.* Stephen, 19 N. Y. 549; Holmes *v.* Com. 25 Penn. St. 221; Hill *v.* State, 17 Wis. 675; State *v.* Vaughan, 29 Iowa, 286. As doubting see R. *v.* Streek, 2 C. & P. 413.

In Lynch *v.* Com. 88 Penn. St. 189, it was held that where a prisoner on trial for larceny who is out upon bail has been present during the entire trial, but voluntarily absents himself just before the bringing in of the verdict, it is not error for the court, having had the prisoner called, to receive the verdict and sentence the prisoner without first having him brought in.

It has been held in Virginia that presence is not necessary when the jury is brought into court, during its deliberation, as a mere matter of form. Lawrence *v.* Com. 30 Grat. 845.

In Georgia it is held that ordinarily the record need not show presence. Smith *v.* State, 59 Ga. 514; Smith *v.* State, 60 Ga. 430.

[4] R. *v.* Duke, Holt, 299; 1 Salk. 400; State *v.* Hurlbut, 1 Root, 90; People *v.* Winchell, 7 Cow. 521; Tabler *v.* State, 34 Oh. St. 127 (but see Fight *v.* State, 7 Oh. 180); State *v.* Hughes, 2 Ala. 102; Stubbs *v.* State, 49 Miss. 716; State *v.* Cross, 27 Mo. 332; State *v.* Braunschwieg, 36 Mo. 397 (under statute); State *v.* Ford, 30 La. An. 311; State *v.* Bailey, 30 La. An. 326; Clark *v.* State, 4 Humph. 254; State *v.* France, 1 Tenn. 434.

dict, and sentence,[1] though as to misdemeanors less strictness is insisted on.[2]

And at sentence.

§ 550. Absence of the defendant is not permitted at sentence in any case punishable corporally.[3] Where, however, the offence is a misdemeanor, partaking of the nature of a civil process, and where the punishment is simply a fine, such absence, the defendant being under recognizance to submit to the sentence of the court, has been allowed.[4]

[1] Dunn *v.* Com. 6 Barr, 385; Dougherty *v.* Com. 69 Penn. St. 286; Stubbs *v.* State, 49 Miss. 716; Rolls *v.* State, 52 Miss. 391; Nolan *v.* State, 55 Ga. 521. Infra, §§ 741, 906.

[2] Stephens *v.* People, 19 N. Y. 549; Holmes *v.* Com. 25 Penn. St. 221; State *v.* Craton, 6 Ired. 164; Grimm *v.* People, 14 Mich. 300.

In those States and in those cases in which there is no constitutional bar, the setting aside the verdict for this cause does not interfere with a retrial. People *v.* Perkins, 1 Wend. 91; State *v.* Hughes, 2 Ala. 102; Younger *v.* State, 2 W. Va. 579.

But a verdict rendered in a felony when prisoner is not in court, and a consequent discharge of jury, works an acquittal of the defendant. Cook *v.* State, 60 Ala. 39.

[3] State *v.* Hurlbut, 1 Root, 90; Dougherty *v.* Com. 69 Penn. St. 286; Peters *v.* State, 39 Ala. 681; Stubbs *v.* State, 49 Miss. 716; Rolls *v.* State, 52 Miss. 391.

But if present when the verdict is returned, but absent when sentence is pronounced, he is not entitled to a new trial, but only to a new *sentence*. If the former judgment is reversed on error for the prisoner's absence, he is simply remanded for sentence according to law. Cole *v.* State, 5 Eng. 318; Kelly *v.* State, 3 Sm. & Mar. 518; Cent. L. J. Jan. 25, 1878.

[4] R. *v.* Templeman, 1 Salk. 55; Duke's case, Holt, 399; R. *v.* Constable, 7 D. & R. 663; R. *v.* Boltz, 8 D. & R. 663; 5 B. & C. 334; U. S. *v.* Mayo, 1 Curt. C. C. 435; Son *v.* People, 12 Wend. 344; People *v.* Winchell, 7 Cow. 525; Hamilton *v.* Com. 16 Penn. St. 129; Hughes *v.* State, 4 Iowa, 354; Price *v.* State, 36 Miss. 531; Canada *v.* Com. 9 Dana, 304; Holliday *v.* People, 4 Gilm. 111; Warren *v.* State, 19 Ark. 214.

CHAPTER X.

COUNSEL.

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- Counsel may exhibit mechanical evidence in proof, § 572.
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- Misstatements not ground for new trial if not objected to at time, § 577.
- Ordinarily counsel are not to argue law to jury, § 578.
- Party may make statement to jury, § 579.

I. COUNSEL FOR THE PROSECUTION.

§ 554. The position of the prosecuting attorney, in reference to the inception and direction of prosecutions, has been already noticed.[1] It has been seen that his sanction is essential, either expressly or by implication, to the inception of all prosecutions.

His power as to a *nolle prosequi* has also been previously discussed.[2]

[1] See supra, §§ 354, 355.

[2] Supra, § 383 *et seq.*

Prosecuting officers may employ associates.

§ 555. The right of the prosecuting officer to avail himself of the assistance of associates cannot, under ordinary circumstances, be questioned. To impose such a restriction would be an absurdity, since there are few cases in which counsel, with practice as large as that of most prosecuting attorneys, are not compelled to avail themselves, at least in the preparation of briefs, of extrinsic professional aid. We have, in addition, to observe that most prosecutions represent complex interests, to each of which may be properly awarded a distinct representative, provided always that such representative acts in subordination to the constituted officer of the law. According to the prevalent American practice the prosecuting attorney for a county is appointed by the county; but there are many cases in which the attorney general of the State may properly apply for permission to attend, to watch the interests of the State; and others in which a like privilege may be claimed by the legal representative of the United States. It is hard also to see how, where there is a distinct prosecutor, with his own particular injuries to redress or future protection to secure, the prosecuting attorney can refuse to permit such prosecutor to be represented by counsel at the trial, however strictly it may be necessary to lay down the rules by which such counsel are to be governed. Of course this is not of right but by the courtesy of the prosecuting attorney; yet cases can well be imagined in which a prosecuting attorney might incur heavy responsibility by rejecting such aid. In the practice of the courts, however, this aid is rarely declined, though the prosecuting attorney always, as a public officer, reserves to himself the direction of the case. And this practice has been repeatedly sanctioned by the courts.[1]

[1] U. S. *v.* Hanway, 2 Wall. Jr. 139; Com. *v.* Scott, 123 Mass. 122; Com. *v.* Williams, 2 Cush. 582; Com. *v.* R. R. 15 Gray, 447; Webster's case, Bemis's report; Rush *v.* Cavenaugh, 2 Barr, 187; Hopper *v.* Com. 6 Grat. 684; Griffin *v.* State, 15 Ga. 476; Byrd *v.* State, 1 How. (Miss.) 247; State *v.* Mays, 28 Miss. 706; Edwards *v.* State, 47 Miss. 581; State *v.* Hays, 23 Mo. 287; Jarnagin *v.* State, 10 Yerg. 529; State *v.* Fitzgerald, 49 Iowa, 260; People *v.* Blackwell, 27 Cal. 65; People *v.* Strong, 46 Cal. 302; People *v.* Murphy, 47 Cal. 103; State *v.* Harris, 12 Nev. 414. In People *v.* Stokes, N. Y. Sup. Ct. 1872, the appearance of "private" counsel assisting the district attorney was sustained by Judge Ingraham, who said: "It is the duty of the district attorney to conduct all prosecutions in the courts of this State. 1 R. S. 4th ed. 700. When the district attorney can-

§ 556. It is scarcely necessary to add that a prosecuting attorney is a sworn officer of the government, required not merely to execute justice, but to preserve intact all the great sanctions of public law and liberty. No matter how guilty a defendant may in his opinion be, he is

Prosecuting attorney occupies semi-judicial post.

not attend the court, he is directed to appoint a person to act in his case. Ibid. In several of the States it has been held that the trial of criminal cases may be conducted by other counsel than the public prosecutor. It does not appear in this case by whom the counsel assisting the district attorney were employed, but they are here with the consent of the district attorney. I have no doubt of the authority of the district attorney to employ counsel to assist him in the trial of cases when he thinks it necessary for the promotion of justice.

"By the Act of 1848, c. 347, the attorney general may employ additional counsel in prosecuting suits in which the people are a party. The practice has been always recognized of the power of the attorney general to employ additional counsel at the expense of the State. I have no remark to make as to the propriety of counsel receiving fees from individuals for the prosecution of criminal cases. No such case has been presented to me. I am of opinion that either the district attorney or attorney general has the authority to employ additional counsel if they see fit to do so."

In Maine, the practice is for the court, on application, to appoint any counsellor of the court it may deem suitable and proper, to assist the attorney for the State; and the fact that such counsellor may expect compensation from private persons for services thus rendered will not deprive the court of the power to appoint him. State *v.* Bartlett, 55 Me. 200.

In Com. *v.* Scott, 123 Mass. 122, the Massachusetts practice was stated to be, "that while, as a general rule, the district attorney or other prosecuting officer should conduct the trial of criminal cases, yet it is within the power of the court in particular cases, in which from peculiar circumstances the interests of public justice seems to require it, to appoint a counsellor of the court to assist the public officer in the trial. Com. *v.* Williams, 2 Cush. 582; Com. *v.* Knapp, 10 Pick. 477; Com. *v.* Gibbs, 4 Gray, 146; Com. *v.* King, 8 Gray, 501. And the questions whether the circumstances require such appointment, and whether the person recommended by the public officer is a fit and proper person, are, in a large degree, within the sound discretion of the court below, by which they must, in the first instance, be decided."

In Pennsylvania, by the Act of March 12, 1868, "if any district attorney within this Commonwealth shall neglect or refuse to prosecute, in due form of law, any criminal charge, regularly returned to him, or to the court of the proper county; or if, at any stage of the proceedings, the district attorney of the proper county and the private counsel employed by the prosecutor should differ as to the manner of conducting the trial, it shall be lawful for the prosecutor to present his or her petition to the court of the proper county, setting forth the character of the complaint, and verify the same by affidavit; whereupon, if the court shall be of the opinion that it is a proper case for a criminal proceed-

bound to see that no conviction shall take place except in strict conformity to law.[1] It is the duty, indeed, of all counsel to repudiate all chicanery and all appeal to unworthy prejudice in the discharge of their high office; but eminently is this the case with public officers, elected as representing the people at large, and invested with the power which belongs to official rank, to comparative superiority in experience, and to the very presumption here spoken of, that they are independent officers of state.[2]

ng or prosecution, it shall be lawful for it to direct any private counsel employed by such prosecutor to conduct the entire proceeding, and where an indictment is necessary, to verify the same by his own signature, as fully as the same could be done by the district attorney; and this act shall apply to all criminal proceedings heretofore commenced and still pending."

In Texas it is held that the court may appoint any competent person to assist or represent the prosecuting attorney, during the latter's temporary disability. State *v.* Gonzales, 26 Tex. 197. The post to be assigned to such counsel is for the prosecuting attorney to determine, though the order of precedence is subject to the discretion of the court. Jarnagin *v.* State, *ut supra.* Infra, §§ 560 *et seq.*

In Michigan private counsel are not admissible on behalf of the prosecution. People *v.* Hurst, 41 Mich. 328. Evidence may be offered to show prosecuting counsel to be specially retained. Sneed *v.* People, 38 Mich. 248.

[1] See infra, § 561; State *v.* Sanford, 1 Nott & McC. 512.

[2] Talfourd, in his review of Twiss's Eldon, thus speaks: "In deciding on the charges to be preferred against the parties accused of treason, for their share in the English combination of 1794, he manifested a nobleness of determination, beyond the suggestions of expediency, as, in the conduct of the prosecutions, he maintained a courtesy of demeanor which won the respect of his most ardent opponents. He believed the offence to be treason; and although a conviction for that crime was more than doubtful, while a conviction for seditious conspiracy might have been regarded as almost certain, he rejected the safer and the baser course, and acted on the severe judgment of his reason. The analysis of these trials by Mr. Twiss, — one of the most masterly and striking passages of his work, — while it may leave the prudence of the attorney general open to question, must satisfy every impartial mind of the elevation of the motive by which he was impelled. While he dreaded any relaxation of the criminal law, — as if all its old 'terrors to evil-doers' would vanish in air if its most awful penalty were removed from crimes against which it had long been threatened, — he endured the most anxious labor to prevent its falling on an innocent sufferer, or one who, however guilty, was not subjected to its infliction by the plainest construction of law." See also remarks of Gurney, B., in R. *v.* Thursfield, 8 C. & P. 269.

II. COUNSEL FOR DEFENCE.

§ 557. In England, until recently, the right of defendants in criminal cases to be represented by counsel on trial was denied or abridged. At present in that country, these restrictions are removed. In the United States they never existed. And the right to appear by counsel is guaranteed by the Constitution of the United States, and by the constitutions of most of the States.

Defendants entitled to counsel by the Constitution.

§ 558. By the usual practice a defendant has a right to be represented on a trial by any counsel admitted to practice in the court in which the trial is had. There are, however, cases in which the defendant is too poor to employ counsel; and in such cases counsel are assigned him by the court. And as officers of the court, bound by their official oath to promote justice unmoved by lucre, counsel thus assigned cannot refuse the trust. It has been said that the court will assign and compel the services of any counsel whom the defendant may suggest. But this view is incompatible with the fact that the obligatory nature of such assignment rests on the power of the court over its officers, a power which the court will not exercise in such a way that any particular officer shall be overburdened by compulsory work. The court, therefore, will not, simply because the defendant requests it, compel any one particular counsel to undertake a duty incompatible with his other engagements. The defendant has a right to *some* counsel, not to any particular counsel.[1]

Counsel, if necessary, will be assigned by court.

§ 559. *Can counsel thus assigned sustain an action against the county for their fees?* The first impression is in the negative. Counsel are officers of the court, and are obliged as such to render to the court any services that may be necessary to the maintenance of public justice. Counsel, with the emoluments, must take the burdens, of their profession. Among the burdens is the gratuitous defence of the poor; and the remuneration for this, in those cases in which no remuneration can be had from the State, must be found, it is urged, in the general income of a profession of which such service is one of the incidents, as well as in the consciousness of

Such counsel may sue county for their fees.

[1] See Com. *v.* Knapp, 9 Pick. 496; People *v.* Moice, 15 Cal. 329.

duty performed. For these and other reasons it has been held that counsel cannot recover from the county compensation for such services.[1] Yet a more careful examination teaches us that this view is not consistent either with English precedent or sound public policy.[2] Counsel for the defence are as essential to the due examination of the case as are counsel for the prosecution; and to leave the services of the one unremunerated is as impolitic as it would be to leave the services of the other unremunerated. If the State pays to convict its guilty subjects, it should also pay counsel to acquit such as are innocent.

III. DUTIES OF COUNSEL ON TRIAL.

Order and length of speeches at discretion of court.

§ 560. We may here, departing somewhat from chronological sequence, state at the outset that, so far as concerns the order in which counsel shall speak, the number and duration of their speeches, and the mode in which they shall examine witnesses, the discretion of the court is to rule.[3] Thus the court is authorized to limit within reasonable bounds an argument as to time, even in homicide cases,[4] and to stop an argument to the jury which either controverts the law laid down by the court,[5] or introduces facts unproved on the trial.[6]

[1] Wayne Co. *v.* Waller, 7 Weekly Notes, 377; Vise *v.* Hamilton, 19 Ill. 78; Rowe *v.* Yuba, 17 Cal. 61.

[2] R. *v.* Fogarty, 5 Cox C. C. 161. See, to same effect, Blythe *v.* State, 4 Ind. 525; Dane *v.* Smith, 13 Wis. 585; Hall *v.* Washington, 2 Greene (Iowa), 473. See Davis *v.* Linn, 24 Iowa, 508.

[3] R. *v.* Bernard, 1 F. & F. 240; R. *v.* Hasell, 2 Cox C. C. 220; R. *v.* Martin, 3 Cox C. C. 56. See State *v.* Waltham, 48 Mo. 55; Dobbins *v.* Oswalt, 20 Ark. 619; Hull *v.* Alexander, 26 Iowa, 569; State *v.* Beebe, 17 Minn. 241. In California, the practice is regulated by statute. People *v.* Fair, 43 Cal. 137; People *v.* Haun, 44 Cal. 96; People *v.* Ah Wee, 48 Cal. 236.

[4] Weaver *v.* State, 24 Ohio St. 584; State *v.* Collins, 70 N. C. 241; Lee *v.* State, 51 Miss. 566; State *v.* Linney, 52 Mo. 40; State *v.* Riddle, 20 Kans. 711. See, however, Hunt *v.* State, 49 Ga. 255, where it was held that a limitation to forty minutes, against the protest of counsel, in a complicated homicide case, is ground for reversal. That an arbitrary limitation is reason for reversal see further People *v.* Keenan, 13 Cal. 581; Dills *v.* State, 34 Ohio St. 617; Williams *v.* State, 60 Ga. 367. As denying right *in toto* see State *v.* Miller, 75 N. C. 73. In White *v.* State, Sup. Ct. Ill. 1879, it was held that a limitation of five minutes to counsel to address the jury on an indictment for grand larceny, where the evidence is conflicting, is an unreasonable exercise of the discretion of the court. Citing Word's case, 3 Leigh, 744; People *v.* Keenan, 13 Cal. 581.

[5] See infra, § 573.

[6] Hatcher *v.* State, 18 Ga. 460. See

All this is an inherent function of the judge, as the presiding officer of the court-room, charged with the preservation of order,[1] and is a subject for his particular discretion. If, however, he goes further, and in his interference abridges the fundamental legal rights of the parties, this is ground for revision by an appellate court.[2]

Prosecuting attorney not to open confessions, or matters of doubtful admissibility.

§ 561. The prosecuting attorney opens the case, stating the facts he proposes to prove, and the law he expects to maintain. If the defendant have no counsel, it is better for the prosecuting attorney simply to submit the facts without an address.[3] In the preannouncement of his case his duty is to be eminently cautious and exact. He has no right, either directly or indirectly, to appeal to any popular prejudice which may exist against the defendant.[4] He has no right to refer to the defendant's prior character, no matter how flagrant that may have been; because character can only be put in issue by the defence.[5] While he must open declarations as well as facts,[6] it is indecorous for him to open confessions, evidence which it is for the court to first weigh before it is admitted, and which only in strong cases can be made the basis of conviction.[7] If the prosecuting officer violates these rules, the court may order a juror to be withdrawn, or in case of conviction, a new trial may be granted when an unfair attempt to prejudice the jury has been successfully made.[8] In general, counsel for the prosecution should consider themselves not as advocates for a party on the record, struggling for a verdict, but as

R. v. Courvoisier, 9 C. & P. 362; Fry v. Bennett, 3 Bosw. 200; Thompson v. Barkley, 27 Penn. St. 263; Cluck v. State, 40 Ind. 263; State v. Caveness, 78 N. C. 484; State v. Lee, 66 Mo. 165.

[1] See Cobb v. State, 27 Ga. 648; Brooks v. Perry, 23 Ark. 32.

[2] See, as illustrating this, U. S. v. Fries, Pamph. 1800; Whart. St. Trials, 598; and the evidence on this point in Judge Chase's impeachment. See also Willey v. State, 52 Ind. 421; Brooks v. Perry, 23 Ark. 32. Infra, § 847, 881.

[3] R. v. Gascoine, 7 C. & P. 772.

[4] Ferguson v. State, 49 Ind. 33.

[5] Cluck v. State, 40 Ind. 265; State v. Smith, 75 N. C. 306. Infra, § 853.

[6] R. v. Orrell, 1 Moo. & R. 467; R. v. Davis, 7 C. & P. 785.

[7] R. v. Davis, 7 C. & P. 785; R. v. Hartel, 7 C. & P. 773. See R. v. Deering, 5 C. & P. 165.

[8] See infra, §§ 577, 849, 853; State v. Smith, 75 N. C. 306; State v. Mahly, 68 Mo. 315; Ferguson v. State, 49 Ind. 33; Shepherd v. State, 64 Ind. 43.

ministers of public justice, called upon to develop evidence for the adjudication of the court; and any attempt on their part to pervert or misstate evidence, or to insinuate facts not capable of being put in testimony, should meet with judicial rebuke.[1] Except, however, in flagrant cases of surprise or fraud, objection to such misconduct in the prosecuting attorney must be made at the time. After verdict it will be too late.[2]

Counsel on both sides should be candid in opening.

§ 562. The opening speeches for both prosecution and defence should be full and candid. Neither party has a right to take the other by surprise by reserving the disclosure of material facts or points of law until it is too late for them to be duly weighed and examined.[3] If by such surprise a conviction is unfairly obtained, a new trial will be granted.[4] And the court, in proper cases, will compel counsel to open in advance what they expect to prove by each particular witness offered, and will confine the witness to the evidence thus opened.[5]

Opening speeches not to sum up.

§ 563. Ordinarily speaking, it is not permissible for counsel to argue a case when opening it. A stratagem not unknown at the bar is to break this rule by fully arguing the case in an opening, and then, by declining to address the jury in summing up, deprive the opposite party of a final reply. But where this is attempted, the court may either restrict in his opening the counsel thus proceeding, or may give to the counsel on the other side full rights to reply at the close.[6] And while counsel, in opening, may refer hypothetically to points that may possibly be made by the defence, and answer such points,[7] yet, if this is done, counsel for the defence should be permitted to reply.

The order of speaking, as has just been seen, is at the discretion of the court.[8]

[1] R. *v.* Berens, 4 F. & F. 842; and cases cited infra, §§ 847, 881. In People *v.* Benson, 52 Cal. 381, it was said that prosecuting counsel should avoid merely technical objections to evidence.

[2] Infra, §§ 577, 847–853; and see next section.

[3] See R. *v.* Hartel, 7 C. & P. 773; R. *v.* Orrell, 1 Mood. & R. 467; Morales *v.* State, 1 Tex. Ap. 494.

[4] Infra, §§ 847, 881.

[5] People *v.* White, 14 Wend. 111. See State *v.* Waltham, 48 Mo. 55.

[6] See U. S. *v.* Mingo, 2 Curt. C. C. 1.

[7] R. *v.* Courvoisier, 9 C. & P. 362.

[8] Supra, § 560. The English practice, as stated in 1871, in the 17th

§ 564. The opening of the prosecution is followed by the introduction of the prosecution's testimony.[1] Whether more than one counsel can take part in the examining of witnesses is a matter regulated either by local usage, or by rules of court. Unless limited, the usual course is for the junior counsel, who is supposed to be more familiar with the testimony, to begin the examination of each particular witness, and for the examination to be taken up by the senior counsel on the same side.[2] It is scarcely necessary to say that it

Examination of witnesses at discretion of court.

ed. of Archbold's C. P., is as follows: "When the prisoner is given in charge to the jury, the counsel for the prosecution, or, if there be more than one, the senior counsel, opens the case to the jury, stating the leading facts upon which the prosecution rely. In doing so, he ought to state *all* that it is proposed to prove, as well declarations of the prisoner's as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them (per Parke, B., R. *v.* Hartel, 7 C. & P. 773; R. *v.* Davis, Ibid. 785); unless such declarations should amount to a *confession*, where it would be improper for counsel to open them to the jury. Per Bosanquet, J., and Patteson, J., 4 C. & P. 548; per Parke, B., 7 C. & P. 786; per Bolland, B., Ibid. 775. The reason for this rule is, that the circumstances under which the confession was made may render it inadmissible in evidence.

"The *general effect* only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecuting counsel. When any additional evidence, not mentioned in the opening speech of counsel, is discovered in the course of a trial, counsel is not allowed to state it in a second address to the jury. R. *v.* Courvoisier, 9 C. & P. 362. It may further be remarked, that, in opening a case for murder, the counsel for the prosecution may put hypothetically the case of an attack upon the character of any particular witness for the crown, and say that should any such attack be made he shall be prepared to meet it. Per Tindal, C. J., and Parke, B., Ibid. 362. He may, also, as it was ruled by the same learned judges, read to the jury the observations of a judge in a former case, as to the nature and effect of circumstantial evidence, provided he adopts them as his own opinions, and makes them part of his address to the jury.

"And in R. *v.* Dowling, Central Criminal Court, 1848, the attorney general having, in his opening address to the jury, made reference to disturbances in Ireland, Erle, J., held, on objection made, that such reference was not irregular, it being laid down in books of evidence that allusion might be made in courts of justice to notorious matters, even of contemporaneous history."

[1] See Willey *v.* State, 52 Ind. 421, where a case was reversed because the court below required the defence to open immediately after the opening of the prosecution.

[2] That the court may limit the number of impeaching witnesses see Whart. Crim. Ev. § 487.

In State *v.* Bryant, 55 Mo. 75,

is incumbent on the prosecution to prove, either expressly or by implication, all the essential ingredients of its case.[1]

Prosecution must call all witnesses to guilty act.

§ 565. The prosecution is not at liberty to put in part of the evidence making out its case, and then rest. It is bound, under ordinary circumstances, and when this can be done without undue cumulation of testimony,[2] to call the witnesses present at the commission of the act which is the subject of the indictment.[3] It is unnecessary to

where two defendants in a criminal trial were represented each by separate counsel, and required different defences, it was ruled, that a rule of court forbidding more than one counsel on either side to examine witnesses, in so far as it deprived either of said attorneys of the right to cross-examine witnesses, was null and void.

[1] Whart. Crim. Ev. § 319. The modes in which witnesses may be attacked and supported are elsewhere discussed. See Whart. Crim. Ev. §§ 481–95.

[2] That this is unnecessary see Winsett *v.* State, 56 Ind. 26; Bowker *v.* People, 37 Mich. 5.

[3] See cases cited in Whart. Crim. Ev. § 448. See also R. *v.* Holden, 8 C. & P. 609; R. *v.* Stroner, 1 C. & K. 650; State *v.* Magoon, 50 Vt. 338; State *v.* Smallwood, 75 N. C. 109.

"The prosecution," such is the opinion of the court in Hurd *v.* People, 25 Mich. 405, "can never, in a criminal case, claim a conviction upon evidence which expressly or by implication shows but a part ef the *res gestae*, or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and to throw upon him the burden of proving his innocence. It is the *res gestae*, or whole transaction, the burden of proving which rests upon the prosecution (so far, at least, as the evidence is attainable). It is that which constitutes the prosecutor's case, and as to which the defendant has the right of cross-examination; it is that which the jury are entitled to have before them, and, 'until this is shown, it is difficult to see how any legitimate inference of guilt, or the degree of the offence, can be drawn.' The prosecution in a criminal case is not at liberty, like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other part, so long as it appears at all probable, from the evidence, that there may be any other part of the transaction undisclosed, especially if it appears to the court that the evidence of the other portion is attainable. The only legitimate object of the prosecution 'is to show the whole transaction as it was, whether its tendency be to establish guilt or innocence.' The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent — his object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success; and, however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet that justice so attained is unjust and

add that all witnesses on the back of the indictment must be summoned by the prosecution.[1] The prosecutor should have all such witnesses in court, so that they can be called for the defence; but if so called, they become the defendant's witnesses.[2] The practice as to indorsing witnesses has been already discussed.[3]

§ 566. The order of testimony is for counsel to arrange, subject to the discretion of the court.[4] The general rules prescribed (*e. g.* that each party must make out its case in its evidence in chief) are founded on right reason, and will be usually maintained. But it is within the

Order of testimony discretionary with court.

dangerous to the whole community; and, according to the well established rules of the English courts, all the witnesses present at the transaction should be called by the prosecution before the prisoner is put to his defence, if such witnesses be present or clearly attainable. See Maher *v.* The People, 10 Mich. 225, 226. The English rule goes so far as to require the prosecutor to produce all present at the transaction, though they may be the near relatives of the prisoner. See Chapman's case, 8 C. & P. 559; Orchard's case, Ibid. note; Roscoe's Crim. Ev. 164. Doubtless, where the number present has been very great, the production of a part of them might be dispensed with, after so many had been sworn as to lead to the inference that the rest would be merely cumulative, and there is no ground to suspect an intent to conceal a part of the transaction. Whether the rule should be enforced in all cases, as where those not called are near relatives of the prisoner, or some other special cause for not calling exists, we need not determine; but certainly, if the facts stated by those who are called show *primâ facie*, or even probable, reason for believing that there are other parts of the transaction to which they have not testified, and which are likely to be known by other witnesses present at the transaction, then such other witnesses should be called by the prosecution, if attainable, however nearly related to the prisoner." See also R. *v.* Holden, 8 C. & P. 609; People *v.* Gordon, 40 Mich. 716.

[1] See Whart. Crim. Ev. § 448; and see, to this effect, R. *v.* Simmonds, 1 C. & P. 84; R. *v.* Whittread, Ibid. If the prosecutor does not call any witnesses so indorsed, the judge may. Ibid. R. *v.* Bodle, 6 C. & P. 186.

[2] R. *v.* Woodhead, 2 C. & K. 520; R. *v.* Cassidy, 1 F. & F. 79. See R. *v.* Gordon, 2 Dowl. 417.

[3] Supra, § 358.

[4] State *v.* Blodgett, 50 Vt. 142; State *v.* Magoon, 50 Vt. 333; Wilke *v.* People, 53 N. Y. 525; Webb *v.* State, 29 Oh. St. 351; Herring *v.* State, 1 Clarke (Iowa), 205; State *v.* Ruhl, 8 Clarke (Iowa), 447; State *v.* Porter, 34 Iowa, 241; State *v.* Bruce, 48 Iowa, 330; State *v.* Haynes, 71 N. C. 79; State *v.* Laxton, 78 N. C. 564; State *v.* Linney, 52 Mo. 40; State *v.* Colbert, 29 La. An. 715; People *v.* Cotta, 49 Cal. 166; and see, fully, Whart. Crim. Ev. § 493.

Thus, where insanity is set up as a defence, the court may require the defendant to submit his hypothetical

discretion of the court trying the case to permit these rules to be suspended for the purpose of justice; and a deviation in this re-

case to his professional witnesses, before the rebutting evidence of the State is heard on the question of insanity. If evidence materially varying the hypothetical case is afterwards introduced, the defendant must ask leave to reëxamine as to the new matter. Dove *v.* State, 3 Heisk. 348.

"Upon an indictment for a conspiracy, general evidence of a conspiracy charged may be received in the first instance, although it cannot affect the defendant unless afterwards brought home to him or to an agent employed by him. The Queen's case, 2 Brod. & B. 302." "And the same rule applies where a defendant seeks, by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of the defence (provided the proposed evidence be previously opened to the court), as in the case of a prosecution for a conspiracy. Ibid. So, if A. commit a burglary, and B. stay outside the house for the purpose of preventing an interruption; upon the trial of B., the prosecutor first proves the offence committed by A., and then brings the guilt home to B., by proving his share in it. In these cases, however, the matter to be proved naturally branches itself into two propositions: that a certain conspiracy existed, and that the defendant was engaged in it; that A. committed the burglary, and that B. aided and assisted him in the commission of it." Archbold's C. P. 17th ed. 296.

"If an irrelevant or leading question be put, the counsel on the other side should immediately interpose and object to it. So, if a witness be asked whether a certain representation was made, the opposite counsel may interpose, and ask him whether the representation in question were by parol or in writing; for, if the latter, the writing must be produced. The Queen's case, 2 Brod. & B. 292.

"It may be necessary to observe here, that when a witness is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness. Doe *v.* Roe, 2 Camp. 280." Archbold's C. P. 17th ed. (1871), 296.

"Where a witness was called, and had only answered an immaterial question, when he was stopped by the judge, Gurney, B., ruled that the opposite party had no right to a cross-examination. Creevy *v.* Carr, 7 C. & P. 64. Where A., B., and C. were jointly indicted, and separately defended, and at the close of the case for the prosecution C. was acquitted, and was then called as a witness for A., and gave evidence tending to criminate B., it was held that B.'s counsel had a right to cross-examine C., and to reply. R. *v.* Burdett, Dears. 431; 24 L. T. (M. C.) 63. See R. *v.* Woods, 6 Cox, 224." Ibid.

Formerly, it was holden that the objection for incompetency must have been made before the witness was sworn in chief; but it has been generally allowed to be made at any time during the trial. Stone *v.* Blackburn, 1 Esp. 37; Turner *v.* Pearte, 1 T. R. 717. As to competency of witnesses see Whart. Crim. Ev. §§ 357 *et seq.* "However, it is still always advisable to make the objection before the witness has been examined in chief, and if he can be examined as to it, to ex-

spect from the usual practice is not the subject for revision by an appellate court.[1] Even after a case is closed, evidence will be

amine him on the *voir dire;* and more recent cases appear to render it necessary that the objection should, in strictness, be taken at that time (see Hartshorne *v.* Watson, 5 Bing. (N. C.) 477; Wollaston *v.* Hakewill, 3 Scott N. R. 593), unless the incompetency appears only in the course of his examination in chief. Yardley *v.* Arnold, 10 M. & W. 141; Jacobs *v.* Layborn, 11 M. & W. 685. And the opposite party cannot, after the witness has been sworn and examined, adduce other evidence to show his incompetency. Dewdney *v.* Palmer, 4 M. & W. 664. If a judge has admitted a witness as competent to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and upon observation of his subsequent demeanor, the judge changes his opinion as to his competency, the judge may stop the examination of the witness, strike his evidence out of his notes, and direct the jury to consider the case exclusively upon the evidence of the other witnesses. R. *v.* Whitehead, L. R. 1 C. C. 33; 35 L. T. (M. C.) 186." Archbold's C. P. *ut supra.*

"Where a prisoner is undefended, he cross-examines the witnesses for the prosecution, if he thinks fit, or the judge does so on his behalf. It may be mentioned, also, that where the defendant himself wishes to address the jury, and to examine and cross-examine witnesses, he will be allowed to do so, and his counsel will also be allowed to argue any points of law that may arise in the course of the trial, and to suggest questions to him for the cross-examination of the witnesses (R. *v.* Parkins, Ry. & M. 168); but he cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. R. *v.* White, 3 Camp. 98." Ibid. But see infra, § 579.

"In giving his evidence, a witness tells the truth wholly or partially, or tells a falsehood. If he tells the whole truth, a cross-examination may be dangerous, as it may have the effect of rendering his story more circumstantial, and impressing the jury with a stronger opinion of its truth; it is better, in such a case, either not to cross-examine him at all, or to confine your questions to his credibility by impugning his means of knowledge, his disinterestedness, or his integrity.

"If the witness tell only part of the truth, then the opposite counsel, if the residue be favorable to his client, will immediately proceed to cross-examine him as to it; but, if unfavorable, the counsel will either refrain altogether from cross-examining him, or will confine his questions to the witness's credibility, as above mentioned.

"If, on the other hand, the evidence of the witness be false, then the whole force of the cross-examination must be directed to his credibility; and you may afterwards prove the truth by other witnesses.

"In cross-examining a witness, the counsel may ask him leading questions; that is, he may lead the wit-

[1] Mudge *v.* Pierce, 32 Me. 165; Day *v.* Moore, 13 Gray, 522; Chadbourn *v.* Franklin, 5 Gray, 312; Com. *v.* Moulton, 4 Gray, 39; Com. *v.* Dam, 107 Mass. 210; State *v.* Alford, 31 Conn. 40; Bedell *v.* Powell, 13 Barb. 184; Finlay *v.* Stewart, 56 Penn. St. 183; Webb *v.* State, 29 Oh. St. 351. Infra, § 777.

received, if the party was not able to produce it in due time.[1] But though ordinarily this is not the subject of error,[2] it is otherwise when the decision of the court invades fundamental rules of law.[3] Thus it is error to suffer to go to the jury any evidence given by a witness on direct examination, where by sudden illness or by death of such witness, or other cause without the fault of and beyond the control of the opposing party, he is deprived of his right of cross-examination.[4]

Impeaching testimony may be restricted.

§ 567. When a party introduces witnesses to impeach a witness produced by the opposing party, it is within the discretion of the court to limit the number of impeaching witnesses to be produced.[5]

Witness to see writings before cross-examination.

§ 568. When a witness is to be impeached by written statements alleged to have been made by him, the writing, at common law, should be submitted to him for examination.[6]

Witnesses may be ex-

§ 569. It is within the power of the court to order that the witnesses should be excluded from the court-room, with the exception of a particular witness under examina-

ness, so as to bring him directly to the point in which he requires the answer; and this whether the witness be a willing or an adverse one (see Parkin *v.* Moon, 7 C. & P. 408); but he will not be allowed to put into the witness's mouth the very words he is to echo back again. Per Buller, J., in R. *v.* Hardy, 24 How. St. Tr. 755. The questions, however, must be either relevant or calculated to elicit the witness's title to credit. It is not usual to cross-examine witnesses to character, unless the counsel cross-examining have some distinct charge on which to cross-examine them (see R. *v.* Hodgkiss, 7 C. & P. 298); and if the only evidence called on the prisoner's part is evidence as to character, though the counsel for the prosecution is in strictness entitled to a reply, it is not usual to exercise it, except in extreme cases. See R. *v.* Stannard, 7 C. & P. 673; R. *v.* Whiting, Ibid. 771." Archbold's C. P. *ut supra.* Infra, § 573. For American authorities as to cross-examination see Whart. Crim. Ev. §§ 481 *et seq.*

[1] See infra, § 861; Whart. Crim. Ev. §§ 446, 493 *et seq.*; Com. *v.* Blair, 126 Mass. 40.

[2] See Whart. Crim. Ev. § 495. See infra, § 779.

[3] Thompson *v.* State, 37 Tex. 121.

[4] People *v.* Cole, 43 N. Y. 508. As to negligence of counsel in this respect see infra, § 801.

[5] People *v* Murray, 41 Cal. 66. See Whart. on Ev. § 505; supra, § 560.

[6] Whart. Crim. Ev. § 156; Roscoe's Crim. Ev. § 13; Gaffney *v.* People, 50 N. Y. 416; People *v.* Finnegan, 1 Park. C. R. 147. See State *v.* George, 8 Ired. 324; Smith *v.* People, 2 Manning (Mich.), 415; Stamper *v.* Griffin, 12 Ga. 450; Cavanah *v.* State, 56 Miss. 299. *Contra*, Randolph *v.* Woodstock, 35 Vt. 291.

tion, and witnesses by whom this demand is disobeyed may be, as to credibility, open to grave criticism, and punished for contempt.[1] At the same time, the action of the court trying the case will not be revised in this respect in error, unless it appear that manifest injustice has been done.[2] And the disobedience of a witness in this respect, unless promoted by the successful party, is not ground for a new trial.[3]

Excluded from court-room.

§ 570. The opening of the defence is, by the usual American practice, assigned, when there are two counsel, to the junior. In two respects, greater liberty is allowed to counsel in this opening than is usual in the opening for the prosecution. (1.) Counsel, in opening for the defence, may comment on the prosecution's case.[4] (2.) As the defendant is at liberty to put his character in issue, so his counsel may open on the subject of character. But it was formerly held irregular for counsel to introduce into an opening the defendant's own statement of his case, except so far as this statement can be supported by testimony *aliunde*;[5] and although this restriction cannot be maintained in those States in which defendants can be examined as witnesses in their own behalf, yet the opening must, even in those States, be limited to what the defendant expects to swear to. Nor is it proper for counsel, in any stage of the case, to state their personal conviction of their client's innocence. To do so is a breach of professional privilege, well deserving the rebuke of the court. On legal evidence alone can the case be tried; and that which would be considered a high misdemeanor in third parties cannot be permitted to counsel.[6] And where any undue or irregular comment by counsel cannot be stopped at the time by the court, the mischief may be corrected by the court when charging the jury, or on a motion for a new trial.[7]

Defendant's opening to be restricted to admissible evidence.

[1] Whart. Crim. Ev. § 446; R. *v.* Wylde, 6 C. & P. 380; People *v.* Sprague, 53 Cal. 422.

[2] Laughlin *v.* State, 18 Oh. St. 99. See R. *v.* Colley, M. & M. 329; R. *v.* Murphy, 8 C. & P. 297; R. *v.* Brown, 4 C. & P. 588, n. Infra, § 777.

[3] See Whart. Crim. Ev. § 446, for cases.

[4] Such is the English practice; otherwise in New York, in civil cases. Ayrault *v.* Chamberlain, 33 Barb. 229.

[5] R. *v.* Butcher, 2 Mood. & R. 229; R. *v.* Beard, 8 C. & P. 142.

[6] See infra, §§ 577, 829, 847–52.

[7] R. *v.* Berens, 4 F. & F. 842; State *v.* Cameron, 40 Vt. 555; Dailey *v.* State, 28 Ind. 285; State *v.* O'Neal,

Reading books at discretion of court.

§ 571. Whether counsel, in argument, will be allowed to read books to the jury, is a matter resting within the discretion of the court;[1] but a court should not permit the reading law to a jury when the effect would be to mislead.[2] As a general rule, books of inductive science are *per se* inadmissible.[3]

Counsel may exhibit mechanical evidence in proof.

§ 572. Counsel have the right to handle, exhibit, and comment on any of the mechanical indicatory evidence produced in the case; *e. g.* a stick or weapon proved to have been used.[4]

If defendant has no evidence, his counsel close.

§ 573. Should the defence offer no evidence, the defendant's counsel, by the usual practice, open and close the summing up; and the same rule may be accepted where the defendant only calls witnesses to character.[5]

Otherwise when there is evidence.

§ 574. If the defendant has evidence to offer, this must be specifically opened, as has been just seen; and when the evidence on both sides is closed, the counsel for the prosecution begin the summing up, are followed by the counsel for the defence, and then reply, closing the argument of the case.

Defendants may sever.

§ 575. When there are several defendants, and they sever in their defences, if one calls witnesses and the other does not, the right of reply, where the defences are distinct, is confined to the case against the defendant who has called witnesses;[6] though it is otherwise where the offences are identical.[7]

7 Ired. 251; State *v.* Whit, 5 Jones, N. C. 224; People *v.* Tyler, 36 Cal. 522; State *v.* Mahly, 68 Mo. 315. Infra, § 577.

[1] See question generally discussed in Whart. Crim. Ev. §§ 537–9.

[2] See infra, §§ 578, 805, 813; State *v.* Klinger, 46 Mo. 224.

[3] Whart. Crim. Ev. § 538.

[4] Whart. Crim. Ev. § 312. As to presumptions in such cases see Whart. Crim. Ev. §§ 764–80.

[5] R. *v.* Dowse, 4 F. & F. 492; Pateson's case, 2 Lew. C. C. 262. See as recommending this, and yet as holding that in strict law the restriction cannot be enforced, R. *v.* Jordan, 9 C. & P. 118; and also see R. *v.* Stannard, 7 C. & P. 673; R. *v.* Christie, 1 F. & F. 75; R. *v.* Toakley, 10 Cox C. C. 406; and supra, §§ 563, 566; Farrow *v.* State, 48 Ga. 30. A contrary practice, giving the prosecution the reply in all cases, seems to be sanctioned in some jurisdictions. See Doss *v.* Com. 1 Grat. 557.

[6] R. *v.* Burton, 2 F. & F. 788. See supra, §§ 301–9.

[7] R. *v.* Blackburn, 3 C. & K. 330; 6 Cox C. C. 333.

§ 576. Where there are two or more counsel, the order in which they speak is determined by the court,[1] reserving always, when evidence has been introduced on both sides, to the counsel for the prosecution to open and close the summing up,[2] though it is otherwise, as we have seen, when no testimony (an unsworn statement not being testimony)

Priority of speeches at discretion of court.

[1] Supra, § 560.

"This right" of summing up, it is stated in the 17th edition of Jervis's Archbold (1871); was first given, and the circumstances under which it may be exercised are defined, by 28 Vict. c. 18, s. 2, the first clause of which enacts that: "If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants."

"In exercising this right of summing up evidence, it is not proper for the counsel for the prosecution to comment on the absence of witnesses for the defence, unless it might be fairly expected that witnesses should be called, or to urge on a trial for rape, as an argument for conviction, that otherwise the character of the prosecutrix would be blasted. R. *v.* Rudland, 4 F. & F. 495; R. *v.* Puddick, Ibid. 497. Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses. The statute gives him the right to do so, but that right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution is to state his case before he calls the witnesses; then when the evidence has been given, either to say simply, 'I say nothing,' or 'I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;' or, in exceptional cases, to say 'something is proved different to what I expected,' and add any suitable explanation which is required. R. *v.* Holchester, 10 Cox C. C. 226, per Blackburn, J.; R. *v.* Berens, 4 F. & F. 842, S. C. See also R. *v.* Webb, 4 F. & F. 862."

"Where two prisoners are jointly indicted, and are defended by different counsel, each counsel cross-examines and addresses the jury for his client, in the order of seniority at the bar; but where the judge thinks it desirable, he will permit the counsel to cross-examine and address the jury, not in the order of seniority, but in that in which the names stand on the indictment. Per Rolfe, B., 2 M. & Rob. 417; and this course was allowed by Creswell, J., York Spr. Ass. 1852, MS.; and see R. *v.* Barber, 1 C. & K. 434."

[2] State *v.* Smith, 10 Nev. 106.

is given for the defence.[1] One rule in this respect is particularly to be observed. Counsel for the prosecution, in the closing speech, can take no points of which notice was not given prior to the speech of the counsel for the defence. If such new points be taken, then counsel for the defence may specially reply.[2]

Misstatements not ground for new trial if not objected to at time.

§ 577. A new trial will not be granted because the prosecuting attorney in his argument states matters not in evidence, or makes improper comments, the court not at the time being called upon to interfere.[3] If the opposing counsel let the matter pass at the time without objection, after verdict objection is too late.[4] But it is otherwise when such misconduct is sanctioned by the court on trial.[5]

Ordinarily counsel not to argue law to jury.

§ 578. A new trial, it has been held in Louisiana, a State in which the jury are held to be judges of the law, will not be granted because the court refused to permit counsel to argue to the jury a question of irrelevant law.[6] And *a fortiori* is this the case where counsel, after asking the judge to charge on the law, attempt to argue against the charge.[7] But though, in such jurisdictions, counsel may argue the law under the direction of the court,[8] in those jurisdictions where the jury are bound to take the law from the court it is plainly within the power of the court to stop counsel when appealing to the jury to decide the law in opposition to the court.[9] And in the latter jurisdictions, the court will stop counsel attempting to argue questions of law, or to read legal rulings, to the jury, and will require them to address the argument to the court.[10] But while this is the case, there may never-

[1] Farrow *v.* State, 48 Ga. 30. Supra, § 573.

[2] R. *v.* Madden, 12 Cox C. C. 239.

[3] Com. *v.* Hanlon, 3 Brewst. 461; Gilloolly *v.* State, 58 Ind. 182; Richie *v.* State, 59 Ind. 121; Davis *v.* State, 33 Ga. 98; Scarborough *v.* State, 46 Ga. 26. Supra, § 561; infra, § 853.

[4] Ibid. Supra, § 561; infra, § 853.

[5] Ferguson *v.* State, 49 Ind. 33; State *v.* Smith, 75 N. C. 306; State *v.* Underwood, 77 N. C. 502. See Sullivan *v.* People, 31 Mich. 1; State *v.* Cason, 28 La. An. 40.

[6] State *v.* McCort, 23 La. An. 326.

[7] Edwards *v.* State, 22 Ark. 253. See fully infra, §§ 810–13.

[8] McMath *v.* State, 55 Ga. 303.

[9] See infra, § 810.

[10] U. S. *v.* Riley, 5 Blatch. 204; U. S. *v.* Shive, 1 Bald. 512; where counsel were stopped when arguing the constitutionality of a law; and, generally, Davenport *v.* Com. 1 Leigh, 589; People *v.* Anderson, 44 Cal. 65; and other cases cited infra, § 810. So, in State *v.* Klinger, 46 Mo. 224, it was held that counsel could not read

theless be exceptional instances in which it is permissible for counsel, by way of illustration, to read to the jury reported cases or extracts from text-books, subject to the sound discretion of the court, whose duty at the same time is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court.[1]

Party may make statement to jury.

§ 579. At common law a defendant has a right to make a statement to the jury;[2] though it has been said that when he is defended by counsel he will not, unless under peculiar circumstances, be allowed to make such

law books to jury, when the effect was to mislead.

[1] People *v.* Anderson, 44 Cal. 65.

In this case Crockett, J., said: —

"In summing up the cause, the defendant's counsel read to the jury extracts from several reported cases, on which he commented, and the facts of which he compared with those of the case at bar, stating at the time that he read these extracts to illustrate his argument. No objection to this course was made at the time; but after the argument closed, the court stated, in the presence and hearing of the jury, 'that such course was improper, and would not have been permitted if it had been objected to; that it was calculated to and might mislead the jury; and stated, at the same time, that the written instructions were the only guide on questions of law for the jury in this case.' It further appears, from the bill of exceptions, that the defendant's counsel 'argued the case fairly to the jury, and did not attempt or offer to mislead them as to the law of the case, or as to their duty to accept and be bound by the instructions or charge of the court, and was guilty of no improper conduct, unless the matters hereinbefore stated constituted improper conduct.' In this State, it is so well settled as no longer to be open to debate, that it is the duty of the jury in a criminal case to take the law from the court. The counsel for the defendant not only at the trial admitted this to be the rule, as appears from the bill of exceptions, but concedes it in argument here. He insists, however, that he did not contravene this rule, in reading to the jury, in illustration of his argument, reported cases similar in some points to the case at bar; and claims that he was entitled to do this in order to enable the jury the better to apply the law, as expounded by the court, to the facts of the case. As a general rule, the practice of allowing counsel, in either a civil or criminal action, to read law to the jury, is objectionable, and ought not to be tolerated. Its usual effect is to confuse rather than to enlighten the jury. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases, or extracts from text-books, subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court."

[2] See Whart. Crim. Ev. § 427; R. *v.* Malings, 8 C. & P. 242; De Foe *v.*

statement to the jury before his counsel addresses them.[1] It has been also said that where two defendants are indicted together, and one of them only is defended by counsel, it is in the discretion of the judge whether he will allow the defendant who is undefended to make his statement to the jury before or after the address of counsel.[2] But the prevalent opinion in England now is that he is at common law entitled in all cases to address the jury on the facts, if he desire.[3]

In jurisdictions, however, in which the defendant is entitled to be examined under oath, such unsworn statements are secondary, and cannot be received.[4]

People, 22 Mich. 224; Farrow *v.* State, 48 Ga. 30.

[1] R. *v.* Rider, 8 C. & P. 539; R. *v.* Malings, Ibid. 242; R. *v.* Manzano, 2 F. & F. 64. Compare R. *v.* White, 3 Camp. 98, cited supra, § 566.

[2] Archbold's C. P. 17th ed. (1871) p. 159. That he may cross-examine witnesses, availing himself of the suggestions of his counsel as to the proper course, see R. *v.* Parkins, Ry. & M. 168, cited supra, § 566.

[3] Whart. Crim. Ev. § 427. See London Law Times, Feb. 21, 1880, for review of cases.

[4] Com. *v.* Scott, 123 Mass. 222.

CHAPTER XI.

MOTION FOR CONTINUANCE AND CHANGE OF VENUE.

I. On Application of Prosecution.
By statute in some States trial must be prompt, § 583.
II. On Application of Defendant.
1. *Absence of Material Witness.*
Such absence ground for continuance if due diligence is shown, § 585.
And so on unauthorized withdrawal of witness, § 586.
Continuance not granted when witness was out of jurisdiction of court, § 587.
Not granted when there has been laches, § 588.
Or unless there was due diligence, § 589.
Not granted when testimony is immaterial, § 590.
Affidavit must be special, § 591.
Impeaching witnesses, and witnesses to character, not "material," § 592.
If object be delay, reason ceases, § 593.
Refusal cured by subsequent examination of witness, § 594.
Usually continuance is refused when opposite party concedes facts, § 595.
Not granted when witness had notice, unless he secretes himself, § 596.
2. *Inability of Defendant or Counsel to attend.*
Inability to attend may be a ground for continuance, § 597.
3. *Improper Prejudice of Case.*
Continuance granted when there has been undue prejudice of case, § 598.
4. *Inability of Witness to understand Oath.*
In such case continuance may be granted, § 599.
5. *Pendency of Civil Proceedings*, § 599 *a*.
III. New Trial.
For refusal to give continuance new trial may be granted, § 600.
IV. Question in Error.
Refusal to continue not usually subject of error, § 601.
V. Change of Venue.
On due cause shown venue may be changed, § 602.

I. ON APPLICATION OF THE PROSECUTION.

By statute in some States trial must be prompt.

§ 583. Provisions exist, as has been noticed, in several of the States, requiring trials in criminal cases to take place within a specified period from the institution of the prosecution.[1]

[1] See supra, § 328. As to Massachusetts see Glover's case, 109 Mass. 340.

In Virginia, it is required, "when any prisoner committed for treason or felony shall apply to the court the first day of the term by petition or motion, and shall desire to be brought to his trial before the end of the term, and shall not be indicted in that term,

II. ON APPLICATION OF THE DEFENDANT.

§ 584. Continuances on motion of the defendant, may be granted on three principal grounds: —

unless it appear by affidavit that the witnesses against him cannot be produced in time, the court shall set him at liberty, upon his giving bail in such penalty as they shall think reasonable, to appear before them at a day to be appointed, of the succeeding term. Every person charged with such crime, who shall not be indicted before or at the second term after he shall have been committed, unless the attendance of the witnesses against him appear to have been prevented by himself, shall be discharged from his imprisonment, if he be detained for that cause only; and if not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime unless such failure proceed from any continuance granted on motion of the prisoner, or from the inability of the jury to agree on their verdict." R. C. of Va. c. 169, § 28. See supra, §§ 328–30.

It has been decided that the word term, when it occurs in this act, means not the prescribed time when the court should be held, but the actual session of the court. 2 Va. Cas. 363. When the accused has been tried and convicted, and a new trial awarded to him, although he should not again be tried till after the third term from his examination, he is not entitled to a discharge. 2 Va. Cas. 162; Davis's Va. Cr. Law, 422.

In Pennsylvania, "If any person shall be committed for treason or felony, and shall not be indicted and tried some time in the next term of oyer and terminer, general jail delivery, or other court, where the offence is properly cognizable, after such commitment, it shall and may be lawful for the judges or justices thereof, and they are hereby required upon the last day of the term, session, or court, to set at liberty the said prisoner upon bail, unless it shall appear to them upon oath or affirmation that the witnesses for the Commonwealth, mentioning their names, could not then be produced; and if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment, unless the delay happen on application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment. *Provided always*, That nothing in this act shall extend to discharge out of prison any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, and who, by the confederation, ought to be delivered up to the executive power of such State, nor any person guilty of, or charged with a breach or violation of the laws of nations." Act of Feb. 18, 1785, § 3; 2 Smith's Laws, 275; Purdon's Dig. (6th ed.) 533. Supra, §§ 328–330.

The power of discharging a prisoner under this act, it has been held, where he has not been tried at the second term, is strictly confined to the court in which he was indicted, and the Supreme Court will not interfere if the commitment is unexceptionable on the face of it. Ex parte Walton, 2 Whart. 501. A prisoner who stands indicted for aiding and abetting another to commit murder, and who was not tried at the second term, is not

1. On affidavit setting forth the fact that a material witness is absent, that his presence will be procured by the next court, and that due diligence has been used to obtain his attendance.

2. On affidavit setting forth the inability of the defendant, and, in certain extreme cases, of his counsel, to attend the trial.

3. On affidavit, showing that means had been improperly taken to influence the jury and the public at large, so as to prevent, at the time in question, the chance of an impartial trial.

Continuing as to one defendant does not involve continuing as to others, when the trial may be several.[1]

1. *Absence of Material Witness.*

Such absence ground for continuance if due diligence has been shown.

§ 585. 1. The general rule is, that a continuance will be granted on an affidavit setting forth the absence of a material witness for the defence, and alleging that his attendance will be procured at the next court, and that due diligence has been used in attempting to procure his attendance.[2]

entitled to be discharged, under the third section of the act, if the principal has absconded, and the proceedings to outlawry against him were commenced without delay, but sufficient time had not elapsed to complete them. Com. *v.* Sheriff, &c., of Alleghany, 16 S. & R. 304, Gibson, C. J., dissenting. A prisoner is not entitled to demand a trial at the second term, if he has a contagious or infectious disease, which may be communicated in the court to the prejudice of those present. Ex parte Phillips, 2 Watts, 366.

In South Carolina it is at the discretion of the court to continue a cause on the part of the State. State *v.* Patterson, 1 McCord, 177.

Where a trial for a capital crime, in Massachusetts, had been continued one term, and the government was not then prepared, the court, on continuing it further, took the prisoner's single recognizance for his appearance at the next term. Com. *v.* Phillips, 16 Mass. 426. But where, at the first term after the finding of a capital indictment, it appeared that a material witness on the part of the government, duly put under recognizance to appear, had fraudulently avoided the court, though without any connivance of the prisoner, the indictment was continued Com. *v.* Carter, 11 Pick. 277.

[1] White *v.* State, 31 Ind. 262.

[2] See Morgan *v.* Com. 14 Bush, 106; Whitley *v.* State, 38 Ga. 50; State *v.* Wood, 68 Mo. 444.

Thus in England a trial for murder was put off until the next assizes, upon an application on the part of the prosecution, on the ground of the inability of a material witness to attend, although the witness was not examined before the magistrates, there being an affidavit of a medical man as to an injury to the witness, rendering it, in his opinion, unsafe that he should

§ 586. Where a party is surprised by the unauthorized withdrawal of his witnesses after the trial has commenced, the practice is to apply for a continuance or postponement of the trial; and should the court unadvisedly refuse the application, such refusal may be made the ground of application for a new trial.[1]

And so on unauthorized withdrawal of witness.

There are, however, the following qualifications to the rule admitting continuance on the ground of absence of witnesses.

§ 587. A continuance will not be granted, where the absent testimony is out of the process of the court.[2] Thus it was held by Story, J., in a leading case, not to be a sufficient ground for a delay of trial that the party wishes it in order to procure papers from a foreign country, since the court could not issue process which will be effectual in procuring such papers.[3] But in a strong

Continuance not granted when witness is out of process of court.

travel, and this even after the trial had been appointed for a particular day. R. *v.* Lawrence, 4 F. & F. 901.

And so it has been held that the court will postpone until the next assizes the trial of a prisoner charged with murder, on an affidavit by his mother that she would be enabled to prove by several witnesses that he was of unsound mind, and that she and her family were in extreme poverty, and had been unable to procure the means to produce such witnesses, and that she had reason to believe that if time were given her the requisite funds would be provided. R. *v.* Langhurst, 10 Cox C. C. 353; 4 F. & F. 969.

[1] Cotton *v.* State, 4 Tex. 260. See Lynes *v.* State, 46 Ga. 208.

[2] Com. *v.* Millard, 1 Mass. 6; State *v.* Zellers, 2 Halst. 220; Mull's case, 8 Grat. 695; State *v.* Files, 3 Brevard, 304; 1 Const. R. 234; People *v.* Cleveland, 49 Cal. 578; Guoganden *v.* State, 41 Tex. 626.

[3] U. S. *v.* Gibert, 2 Sumner, 19. The grounds for a refusal to continue in such circumstances are fully stated in a case in South Carolina. Brevard, J.: "My opinion is, that this motion ought to be rejected. On the argument, the only ground insisted on was the refusal of the court of general sessions, for Newbury district, to postpone the trial, on affidavits which stated the absence of material witnesses for the prisoner, who were beyond the limits of this State. If trials for capital offences should be postponed on affidavits of this sort, very few cases would ever be tried at all, and none at the first court after the arrest of the offender, unless he should be willing. Affidavits of this kind ought very sparingly to be admitted. For in circuit trials the prisoners, from the time of their commitment, may, and ought to be, preparing for their defence. The place where they are to be tried is, in most cases, well known, and they have likewise a reasonable certainty of the time long before the circuit commences. Foster C. L. 2. If the prisoner has had no time or opportunity to prepare for his defence, this will be a good ground for a postponement. State *v.* Lewis,

case, and when there is a reasonable ground for expecting to receive the testimony, a continuance will be granted to secure such foreign testimony, if it be admissible.[1]

§ 588. A continuance will not be granted on such an affidavit when the prisoner has been guilty of laches or delay,[2] or of any connivance.[3] Thus in a case in the Court of Errors of Virginia, it was held that where, after one continuance obtained by the prisoner, who was charged with uttering a forged note, he asked for another, the court below was right in compelling him to disclose what the absent witness would prove; and was justified in refusing the continuance, though the witness was shown to be material, due diligence not having been used to procure his attendance.[4] And where a continuance was asked on account of the absence of witnesses, but the evidence of one of them, according to the affidavit, would have been entitled to but little influence, and the others were merely to impeach the principal witness for the prosecution, the case having been continued before, and it not appearing why the witnesses were not attached, nor that they would attend at the next term, it was held that the application was properly refused.[5]

Not granted when there have been laches.

§ 589. The affidavit must itself show due diligence in summoning the absent witnesses, or good grounds for expecting their

1 Bay, 1. It must be admitted that no crime is so great, no proceedings so instantaneous, but that upon sufficient grounds the trial may be put off; but three things are necessary: 1. That the witness is really material, and appears to the court so to be. 2. That the party who appears has been guilty of no neglect. 3. That the witness can be had at the time to which the trial is deferred. The King *v.* D'Eon, 1 W. Bl. 510. The witnesses are said to be in Tennessee. No compulsory process can issue to obtain their testimony. The presumption is that they would not attend at another court, or they would have attended at the trial where the life of the defendant was in jeopardy." State *v.* Files, 3 Brev. 304. See also Mull's case, 8 Grat. 695; Hurd's case, infra, § 589.

[1] State *v.* Klinger, 43 Mo. 127.

[2] 8 East, 37; 1 Blackstone, 514; Com. *v.* Millard, 1 Mass. 9; Com. *v.* Gross, 1 Ashm. 281; Holt *v.* Com. 2 Va. Cas. 156; Bledsoe *v.* Com. 6 Rand. 673; Fiott *v.* Com. 12 Grat. 564; Roussel's case, 28 Grat. 930; State *v.* Burns, 54 Mo. 274; State *v.* Simms, 68 Mo. 305; Gladden *v.* State, 12 Fla. 562; Anderson *v.* State, 28 Ind. 22; Earp *v.* Com. 9 Dana, 302; Coward *v.* State, 6 Tex. Ap. 59; Cardova *v.* State, 6 Tex. Ap. 445; People *v.* Jocelyn, 29 Cal. 562.

[3] Wormley *v.* Com. 10 Grat. 658.

[4] Holt *v.* Com. 2 Va. Cas. 156.

[5] Earp *v.* Com. 9 Dana, 302.

attendance at a future court.[1] Thus where a prisoner indicted for felony made affidavit that he had four material witnesses who were absent, and resident in another State, without naming them, or stating that he had made any effort to procure their attendance, or that he expected to be able to procure their attendance, and thereupon prayed a continuance, it was held the motion for a continuance was properly overruled.[2] The court may examine the party as to the grounds of his affidavit.[3]

Or unless there was due diligence.

§ 590. A continuance will not be granted on such an affidavit, where, on the court's requiring such particularity (which, at least when the application is made for the second time, it is usual for it to do),[4] it appears on the face of the defendant's application that the object for which the absent witness is to be called is not material to the issue.[5]

Not granted when testimony is immaterial.

§ 591. The affidavit must be sworn a sufficient period before trial, to give notice to the opposite side, unless the facts affecting the witness were not known in time, when it may be sworn in court, and from the proof offered the judge will decide if the witness is material. The affidavit must, in general, be made by the party on whose behalf the postponement is sought; but his absence, age, sickness, or other sufficient cause, will let in his attorney, or even a third person, to swear it.[6] The illness of the absent witness, or of a child of which she is the nursing mother, is best established by the affidavit of the medical attendant, such being deemed sufficient to prevent the estreat of his recognizance. The name and place of abode of the expected witness, his continued absence or actual incapacity to attend at any time during the session, and the use of every reasonable effort to compel such attendance, must be distinctly specified, and the materiality of his evidence in the

Affidavit must be special.

[1] State *v.* Whitton, 68 Mo. 91; Murray *v.* State, 1 Tex. Ap. 417, and cases cited to last section.

[2] Hurd *v.* Com. 5 Leigh, 715.

[3] State *v.* Betsall, 11 W. Va. 703.

[4] Nelson *v.* State, 2 Swan, 482.

[5] Steel *v.* People, 45 Ill. 152; Bledsoe *v.* Com. 6 Randolph, 673; Hurd *v.* Com. 5 Leigh, 715; Earp *v.* Com. 9 Dana, 302; State *v.* Files, 3 Brev. 304; People *v.* Thompson, 4 Cal. 238; Bruton *v.* State, 21 Tex. 337; Dacy *v.* State, 17 Ga. 439.

[6] Moody *v.* People, 20 Ill. 315. But see R. *v.* Langhurst, 10 Cox C. C. 353; 4 F. & F. 969, where the affidavit of the attorney was refused.

case shown.[1] Nor will these facts suffice to postpone the trial, unless the affidavit is positive in its verification of them. Thus, it must state that the absent person is a material witness, without whose evidence the applicant cannot safely proceed to trial, and that he has endeavored, without effect, to serve on him a subpœna; specifying the exertions used. It should then state in plain terms that there is reasonable ground for believing that the delay sought for will tend to the furtherance of justice, and that the testimony of the witness may be obtained at the time to which the trial is proposed to be deferred.[2]

Impeaching witnesses and witnesses to character not generally "material."

§ 592. Unless there be auxiliary grounds, a continuance will not be granted on account of the absence of impeaching witnesses. Thus, where it appeared that two witnesses out of three, on the ground of whose absence a continuance was asked, were merely to impeach the chief witnesess for the prosecution, and that the third was immaterial, a continuance was refused.[3] On account of the absence of witnesses to character, a continuance will rarely be granted.[4] *A fortiori* the continuance will be refused in such case where the prosecution admits that to which the absent witness is to testify. Thus where in a New York case it was proved on the part of the government, and was not disputed by the accused, that no living person save the prisoner was present at the alleged murder, nor was there claim of an alibi, and it appeared by the affidavits that the absent witnesses were expected to testify to the defendant's good character before the alleged murder, which the prosecution admitted; the motion was denied.[5]

If object be delay,

§ 593. It is in the discretion of the court, even where the materiality of the absent evidence is exposed on

[1] Beavers *v.* State, 58 Ind. 530; Moody *v.* People, 20 Ill. 315.

[2] Dick. Q. S. 6th ed. 469; Foster, 40; 1 Wheel. C. C. 30; Com. *v.* Fuller, 2 Ibid. 323; Holt *v.* Com. 2 Va. Cas. 156; Mull's case, 8 Grat. 695. See, as to requisites of affidavit, Cutler *v.* State, 42 Ind. 244; Miller *v.* State, 42 Ind. 544; Jim *v.* State, 15 Ga. 535; State *v.* Lange, 59 Mo. 418; People *v.* Francis, 38 Cal. 183; People *v.* McCrory, 41 Cal. 458.

[3] Earp *v.* Com. 9 Dana, 302.

[4] R. *v.* Jones, 8 East, 34, Lawrence, J.; Rhea *v.* State, 10 Yerger, 258; State *v.* Klinger, 43 Mo. 127; but see *contra*, State *v.* Nash, 7 Iowa, 347.

[5] People *v.* Wilson, 3 Park. C. R. 199.

reason ceases.

affidavit, to refuse a continuance, if it should appear that the defendant's sole object was delay.[1]

Refusal cured by subsequent examination of witness.

§ 594. Refusal by the court to continue a capital trial because of a witness's absence, on the ground of want of diligence on the part of the defendant, is, whether erroneous or not, no ground for a new trial, if the witness was brought in and testified before the end of the trial.[2]

Usually continuance is refused when opposite party concedes facts.

§ 595. A continuance, according to the general practice, may be refused, if the adverse party will admit that such witness would testify as is supposed by the party moving for a continuance.[3] It has, however, been said that it is not sufficient that the opposite party should admit that the witness would have testified to the specific facts; there must be an admission that those facts are absolutely true.[4] But the better view is that contradictory evidence may be introduced by a party who has admitted statements made in an affidavit for continuance, and that the same questions of competency may be raised as would be allowed if the witness were sworn in court.[5] Circumstances, however, may exist, when, upon the defendant making an affidavit for a continuance, it will be held that the State cannot force him into a trial by admitting the truth of what the alleged absent witness would depose to.[6]

Not granted when witness had notice, unless he secretes himself.

§ 596. A continuance will not be granted on such an affidavit, where it appears that the absent witness had notice of the time of trial, and was duly summoned, unless he had secreted himself, or had been spirited away by the opposite party.[7]

[1] Vance *v.* Com. 2 Va. Cas. 162; Bledsoe *v.* People, 6 Randolph, 674; State *v.* Duncan, 6 Ire. 98; People *v.* Thompson, 4 Cal. 238.

[2] Mitchell *v.* State, 22 Ga. 211.

[3] People *v.* Wilson, 3 Parker C. R. 199; Van Meter *v.* People, 60 Ill. 168; Wise *v.* State, 34 Ga. 348; Browning *v.* State, 33 Miss. 48.

[4] See People *v.* Vermilyea, 7 Cow. 369; Brill *v.* Lord, 14 Johns. 341; but see cases in last note.

[5] Olds *v.* Com. 3 Marsh. 467; State *v.* Geddis, 42 Iowa, 164.

[6] Goodman *v.* State, 1 Meigs, 195; Wassels *v.* State, 26 Ind. 30; De Warren *v.* State, 29 Tex. 464; People *v.* Dodge, 28 Cal. 445.

[7] Barnes, 442.

2. *Inability of Defendant or his Counsel to attend.*

§ 597. On affidavit setting forth the inability of the defendant, and in certain extreme cases, *e. g.* sickness,[1] of his counsel, to attend the trial, the motion may be granted,[2] and the same indulgence will be granted when the defendant has been suddenly and without notice abandoned by his counsel, so that he cannot properly prepare for trial.[3] Death of counsel, occurring so suddenly as to prevent the engagement of others, is generally good ground;[4] but mere absence of counsel is rarely received as in itself adequate.[5] Certainly such excuse cannot be made available more than once in the same case.[6]

Inability to attend may be a ground.

3. *Improper Means to prejudice Case.*

§ 598. A continuance may also be granted on affidavit showing that means had been improperly taken to influence the jury and the public at large, so as to prevent, at that time, an impartial trial,[7] and that the public excitement was such as to intimidate and swerve the jury.[8] But the fact of ordinary newspaper paragraphs existing on the subject is not enough.[9] Where the excitement is the result of the defendant's own action, the application will be refused;[10] and it is not a good ground for a new trial, that at the time of trial there was a great excitement in the public mind against the accused.[11]

And so when opposite party takes improper means to prejudice case.

4. *Inability of Witness to understand the Obligation of an Oath.*

§ 599. A continuance, also, will sometimes be granted where a witness, whose evidence is material to the case, has no sense of the obligation of an oath; in such a case,

And so of inability of witness to

[1] Loyd *v.* State, 45 Ga. 57; Brown *v.* State, 38 Tex. 482; People *v.* Logan, 4 Cal. 188.

[2] Say. Rep. 63.

[3] Wray *v.* People, 78 Ill. 212.

[4] Hunter *v.* Fairfax, 3 Dall. 305.

[5] M'Kay *v.* Ins. Co. 2 Caines, 384; Hammond *v.* Haws, Wallace C. C. 1; but see Rhode Island *v.* Massachusetts, 11 Peters, 226; Long *v.* State, 38 Ga. 49; State *v.* Ferris, 16 La. An. 424.

[6] State *v.* Dubois, 24 La. An. 309.

[7] 1 Burrow, 510.

[8] Com. *v.* Dunham, Thach. C. C. 516.

[9] Com. *v.* Carson, Mayor's Court of Philadelphia, June, 1823, per Reed, Recorder; 1 Wheel. C. C. 488.

[10] U. S. *v.* Porter, 1 Baldwin, 78.

[11] Infra, § 889.

understand oath. the trial may be adjourned until the witness is instructed in the principles of moral duty.[1]

5. *Pendency of Civil Proceedings.*

§ 599 *a*. The court will not continue a prosecution because a civil suit is pending when the prosecution is the proper remedy for the wrong.[2] It is otherwise, however, when the prosecutor resorts to civil proceedings as a means of redress for which they are peculiarly suited.[3]

III. NEW TRIAL.

§ 600. If, at the conclusion of a trial, the court is convinced, after hearing all of the evidence, that the continuance should have been granted, it should allow a new trial; and if it refuses a new trial, the party excepting should embody all the evidence in his bill of exceptions, that the court above may see the bearing of the whole case, and thus judge of the weight of the application.[4]

For refusal to give continuance new trial may be granted.

IV. QUESTION IN ERROR.

§ 601. As a general rule, error does not lie to the action of the court on a motion for continuance, which is in the discretion of the court;[5] though when a bill of exceptions is taken, the decision, in a strong case, may be reviewed.[6]

But refusal not usually subject of error.

[1] 1 Leach's Cases, 430. See Whart. Crim. Ev. §§ 366, 370.

[2] Taylor *v.* Com. 29 Grat. 780. See Foster *v.* Com. 8 W. & S. 77; Drake *v.* Lowell, 13 Mich. 292.

[3] See Fielding's case, 2 Burr. 719; R. *v.* Simmons, 8 C. & P. 50; Com. *v.* Bliss, 1 Mass. 32; Com. *v.* Elliot, 2 Mass. 372; Resp. *v.* Gross, 2 Yeates, 479; Com. *v.* Dickinson, 3 Clark, Phil. 365; Com. *v.* Dickerson, 7 Weekly Notes, 433. Supra, § 453. Compare Buckner *v.* Beek, Dudley (S. C.), 168; Richardson *v.* Luntz, 26 La. An. 313; Whart. Crim. Law, 8th ed. § 618.

[4] Infra, §§ 777, 882–3, 961; McDaniel *v.* State, 8 S. & M. 401. See Malone *v.* State, 49 Ga. 212; Moody *v.* State, 54 Ga. 660.

[5] Infra, §§ 777, 883; Com. *v.* Donovan, 99 Mass. 425; State *v.* Shreve, 39 Mo. 90; State *v.* Wilson, 23 La. An. 558; Morgan *v.* State, 13 Fl. 671.

[6] Wassels *v.* State, 26 Ind. 30; Hurt *v.* State, 26 Ind. 106; State *v.* Rorabacher, 19 Iowa, 154; State *v.* Painter, 40 Iowa, 298; State *v.* Scott, 78 N. C. 465; Long *v.* State, 38 Ga. 491; Whitley *v.* State, 38 Ga. 50; Monday *v.* State, 32 Ga. 672; Barber *v.* State, 13 Fla. 675. Infra, § 771.

V. CHANGE OF VENUE.

§ 602. In some jurisdictions at common law, in others by local statute, the venue of a case may be changed at the discretion of the court, on due cause shown.[1] The application is too late when made after empanelling jury,[2] and the burden is on the petitioner to make out a case.[3] If the ground laid be objection to the judge, it has been ruled the court has no discretion, and that the application must be granted;[4] though this view cannot be sustained in its full breadth, as otherwise there is no case that could be brought to trial.[5] The better rule is that the ground for a change should be fully spread on the record, so that it can be examined by a court of error;[6] and that facts must be set forth showing that the party could not have a fair trial in the district or town in which the arraignment is proposed.[7] The arraignment once made, in the place where the indictment is found, need not be repeated in the place to which the trial is removed,[8] though a double arraignment

On due cause venue may be changed.

[1] 1 Ch. C. L. 201; R. v. Hunt, 3 B. & Ald. 444; R. v. Cowle, 2 Burr. 834; R. v. Holden, 5 B. & Ad. 347; People v. Harris, 4 Denio, 150; People v. Webb, 1 Hill N. Y. 179; Davis v. State, 39 Md. 355; State v. Spurbeck, 44 Iowa, 667; Manly v. State, 52 Ind. 215; Bissot v. State, 53 Ind. 408; Martin v. State, 35 Wis. 294; State v. Rowan, 35 Wis. 303; State v. Coleman, 8 S. C. 237; Brinkley v. State, 54 Ga. 371; Williams v. State, 48 Ala. 85; Taylor v. State, 48 Ala. 180; State v. O'Rourke, 55 Mo. 440; State v. Lawthew, 65 Mo. 454; State v. Bohan, 15 Kans. 407; McPherson v. State, 29 Ark. 225; People v. Congleton, 44 Cal. 92; People v. Perdue, 49 Cal. 425; Anshicks v. State, 45 Tex. 148; Labbaite v. State, 6 Tex. Ap. 257; State v. Adams, 20 Kans. 311.

[2] People v. Cotta, 49 Cal. 169.

[3] People v. Sammis, 3 Hun, 560.

[4] Mershon v. State, 44 Ind. 598; Curtis, ex parte, 3 Minn. 274; State v. Gates, 20 Mo. 400; a case where the judge had been counsel. See People v. Reed, 49 Iowa, 85.

[5] People v. Shuler, 28 Cal. 490.

[6] Wormeley v. Com. 10 Grat. 658; State v. Barrett, 8 Iowa, 536; Emporia v. Volmar, 12 Kans. 622. See State v. Daniels, 66 Mo. 193.

[7] R. v. Holden, 5 B. & Ad. 347; People v. Bodine, 7 Hill N. Y. 147; Wormeley v. Com. 10 Grat. 658; State v. Williams, 2 McCord, 302; People v. Graham, 21 Cal. 261. As refusing change of venue on statutory grounds see State v. Howard, 31 Vt. 414. That the right to a change of venue is not absolute see Dulany v. State, 45 Md. 100. As to its limitations see State v. Flynn, 31 Ark. 35. That defendant, after change on his petition, cannot object to jurisdiction see Perteet v. People, 70 Ill. 71. In this State the petitioner has a statutory right to the change, on making the prescribed affidavit. Brennan v. People, 15 Ill. 511.

[8] Davis v. State, 39 Md. 355; Price v. State, 8 Gill, 295; Vance v. Com.

would not be error.[1] Venue may be changed as to one of several defendants, leaving the others to be tried in the place of the finding of the bill.[2] With regard to the constitutional questions involved, it may be noticed that the provision, as it exists in most constitutions, that the defendant is to be tried by an "*impartial* jury of the *vicinage*," would forbid, if the term "vicinage" be regarded as imperative, any trial when no impartial jury of the vicinage is to be found. The term "vicinage," therefore, is to be regarded as indicatory rather than exclusive; and it is the vicinage of the place of the offence rather than that of the corporeal position of the offender.[3] And even where the guarantee is specifically given, it can be waived.[4]

2 Va. Cas. 162; Hayes *v.* State, 58 Ga. 35; Paris *v.* State, 36 Ala. 232.

[1] Gardner *v.* People, 3 Scam. 83. See infra, §§ 699 *et seq.*

[2] State *v.* Carothers, 1 C. G. Greene (Iowa), 464; State *v.* Martin, 2 Ired. 101; State *v.* Wetherford, 25 Mo. 439; though see People *v.* Baker, 3 Parker C. R. 181.

[3] See Whart. Crim. Law, 8th ed. § 284, note.

[4] See Gut *v.* State, 9 Wall. 35. Infra, § 733.

CHAPTER XII.

CHALLENGES.

I. CHALLENGES TO COURT.
Judges not open to challenge, § 605.
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Burden is on challenger, § 609.
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Challenge to array for favor is where the question is disputed fact, § 611.
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Practice is under direction of court, § 613.
Defendant may peremptorily challenge at common law, § 614.
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On preliminary issues no challenge, § 615.
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(b.) *Principal.*
Principal challenge is where case does not rest on disputed fact, § 621.
(a[1].) *Preadjudication of Case.*
Preadjudication of case is ground for challenge, § 622.
But opinions thrown out as jest, or as vague, loose talk, do not ordinarily disqualify, § 623.
Nor does a general bias against crime, § 624.
In United States courts a deliberate opinion as to defendant's guilt disqualifies, § 625.
And so in Maine, § 626.
And in New Hampshire, § 627.
In Vermont prior expression of opinion disqualifies, § 628.
In Massachusetts prejudice must go to particular issue, § 629.
So in Connecticut, § 630.
In New York, at common law, opinion, but not impression, disqualifies, § 631.
But by statute no disqualification of witness not under bias, § 632.
In New Jersey jury must be proved to be prejudiced, § 633.
In Pennsylvania, opinion, but not impression, disqualifies, § 634.
So in Delaware and Maryland, § 635.
So in Virginia, § 636.
So in North Carolina, § 637.
So in Ohio, § 638.
So in Alabama, § 639.
So in Mississippi, § 640.
So in Missouri, § 641.
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So in Indiana, § 643.
So in Illinois, § 644.
So in Arkansas, § 645.
So in Georgia, § 646.
So in Iowa, § 647.
In Wisconsin and Nebraska mere opinion is ground for challenge, § 648.
In Michigan opinion must be unqualified, § 649.
So in California, § 650.
So in Louisiana, § 651.
So in Kansas and Florida, § 652.
(b[1].) *General Propositions as to Prejudice.*
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I. CHALLENGES TO COURT.

Judges not open to challenge.

§ 605. THE Roman common law extends the right of challenges *for cause* — no peremptory challenges being allowed — to the judge as well as to the juror; and the great inclination of authority is that the same causes

which disqualify the one disqualify the other.[1] Where the judge, like the chancellor, sits to try both facts and law, as is the case with the civilians, there is peculiar reason for the application to him of a jealous test; and the cases where he may be challenged are placed in two classes: (1.) Where he is disqualified by circumstances beyond his control; *e. g.* relationship or previous connection with the subject matter. (2.) Where he is disqualified by misconduct; *e. g.* partiality or prejudice.[2] But by the common law of England and America, where the judge is a stationary officer, subject to impeachment, and where the jury is unimpeachable, and from its character is peculiarly susceptible to those influences which produce incompetency, it would be impracticable to treat each as subject to the same rule. A juryman, again, when challenged, may be readily replaced; but as a judge could not sit to try his own competency, every challenge would involve an appeal. It would also be necessary to establish a reserve court to sit subsequently in case a disqualification were found to exist; and since, as to such reserve court, there might be challenges, a trial might be indefinitely suspended for want of an ultimate arbiter. For these and other reasons, we have, in English and American practice, no case of the challenge of a judge, it being left to the sense of delicacy and of duty in such high functionaries to retire when interested in an issue brought before them for trial. Should a judge decline to retire in such cases, the remedy is a motion for a new trial,[3] or change of venue.[4] The proper course, if such interest or prejudice is claimed, is to make the objection at the outset. If the judge persist after this in sitting in the case, this lays ground for a new trial, or for impeachment of the judge.[5]

[1] Mittermaier Deutsch. Str. 1, s. 80; Hopfner ueber Anklage Process, p. 257; Wildvogel de Recusat. Jud. Ejusque usu et abusu; Granz Defens. Reor. p. 381; Seuffert von dem Rechte de Peinl. angeklagten Seinen Richter Auszuschliessen.

[2] Bentham on Judicial Organization, c. 16; Jousse, traité i. p. 555.

[3] See infra, § 844.

[4] Supra, § 602.

[5] In an article in 1877, in the Solicitors' Journal, transferred to the Alb. L. Journal, we are told that Lord Holt, on the hearing of any question in which he was personally interested, left the bench and sat by the counsel. See 21 L. J. M. C. 171. Lord Hobart, in Day *v.* Savage, Hob. 87, went so far as to lay it down, that "even an act of parliament made against natural equity, as to make a man judge in his own case, is void in itself, for *jura naturae sunt immutabilia*, and they are

II. CHALLENGES TO JURY.

§ 606. In our own practice the two principal kinds of challenge are, first, to the *array*, by which is meant the whole jury

leges legum." Compare remarks of Blackburn, J., in Mersey Dock Trustees *v.* Gibbs, L. R. 1 H. L. 110. And Lord Holt tells of a mayor of Hereford, who was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he, by the charter, was sole judge of the court. 1 Salk. 395. Lord Coke furnishes, as a ground for the rule, the curious reason that men are generally more foolish in their own concerns than in those of other people; 1 Inst. 377; but the real reason for its stringency is that given by Lord Campbell, in Dimes *v.* Canal Co. 3 H. L. 793, that tribunals should "take care, not only that in their decree they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."

In Dimes *v.* Canal Co. 3 H. L. 759, "the canal company filed a bill in equity against the lord of a manor. The vice-chancellor granted relief. The lord chancellor affirmed the order. It appeared that the lord chancellor was a shareholder partly in his own right, partly as trustee. The House of Lords held, first, that the lord chancellor having such an interest as would formerly have disqualified him as a witness, he was disqualified as a judge, and that his order was voidable; secondly, that the signature of the chancellor to the enrolment which was requisite for an appeal to the House of Lords was not affected by his interest, the case being one of necessity. Griffith's Institutes of Equity, p. 17. In R. *v.* Liverpool, it was decided that the interest must be a personal, not an official one. Times, 22d Jan. 1864."

In R. *v.* Rand, L. R. 1 Q. B. 230, "it was held that though any pecuniary interest, however small, in the subject matter, disqualifies a justice, the mere possibility of bias does not render void his judicial decision. For example, the corporation of B. were owners of water-works, and were empowered, on obtaining the certificate of justices, to take the water of certain streams. The justices granted the certificate. Two of them were interested as trustees of a hospital and friendly society, which had lent money to the corporation. The Queen's Bench held that the justices not being shown to have acted otherwise than *bonâ fide*, they were not disqualified from granting the certificate, and that a *certiorari* to quash it should be refused." London Law Times, Aug. 11, 1877. In State *v.* Mewherter, 46 Iowa, 85, the question is noticed.

It has been held that for a member of a court to absent himself for a day during the trial disqualifies him for further sitting in the case. People *v.* Shaw, 63 N. Y. 36. See Abram *v.* State, 4 Ala. 272. Turbeville *v.* State, 56 Miss. 793; Supra, § 486.

In 1879, one of the judges of the Kentucky Court of Appeal was shot dead in the court-room by Buford, a party against whom the court had ruled. Buford was convicted of this murder, and the surviving judges, by whom the original case was decided, declined to sit on his appeal after his conviction. The disqualification was put by the judges on the ground (1.) that they were witnesses; and (2.) that

as it stands *arrayed* in the *panel*, or little square *panes* of parchment, on which the jurors' names are written; or to the *polls*, by which is meant the several particular persons or *heads* in the array.

1. *To the Array.*

§ 607. Challenge to the array is based on the partiality or default of the sheriff, coroner, or other officer that made the return, and must be made in writing.[1] This may be considered under two heads.

Principal challenge to array is based on irregularity of selection.

§ 608. *Principal challenge to the array*, which, if it be made good, is cause for exemption, without resort to triers. Principal challenges to the array are such as follows: If the sheriff be the actual prosecutor or the party aggrieved;[2] if he be of actual affinity to either of the parties, and the relationship be existing at the time of the return;[3] if he return any individual at the request of the prosecutor or the defendant,[4] or any person whom he believes to be more favorable to one side than to the other;[5] if he belong at the time to an association for the prosecution of offenders of whom the defendant is claimed to be one;[6] if an action of battery be depending between the sheriff and the defendant, or if the latter have an action of debt against the former;[7] if the statutory requisitions are not complied with;[8] in each of these cases the array will be quashed on the presumption of partiality in making up the return.[9]

they concurred in the act for which the deceased judge had lost his life. 20 Alb. L. J. 361. A special court became necessary under the Kentucky Constitution.

[1] People *v.* Doe, 1 Mann. (Mich.) 451.

[2] 1 Leach, 401; Williams's J., Juries, v. Infra, § 684.

[3] Co. Lit. 156 *a*; Williams's Justice, Juries, v.; Burn's J., Jurors, iv. 1; Dick. Sess. 183, 184.

[4] Co. Lit. 156 *a*; Bac. Abr. Juries, E. 1; Burn's J., Juries, iv. 1; Williams's J., Juries, v.; Dickinson's Sess. 184.

[5] Co. Lit. 156 *a*; Bac. Abr. Juries, E. 1.

[6] R. *v.* Dolby, 2 B. & C. 104. Infra, § 686.

[7] Co. Lit. 156 *a*; Bac. Abr. Juries, E. 1; Burn's J., Jurors, iv. 1; Williams's J., Juries, v.; Dick. Sess. 184.

[8] State *v.* Da Rocha, 20 La. An. 356; State *v.* Gut, 13 Minn. 341.

[9] Under the provisions of 3d & 4th Will. 4, c. 91, it is the duty of the recorder of Dublin annually to revise the list of jurors of the county of that city, and to cause a general list of jurors to be made out and delivered over to the clerk of the peace of the said city for

The same course will be taken if the sheriff, or his bailiff who makes the return, is under the distress of the party indicting or indicted, or has any pecuniary interest in the event, or is counsel, attorney, servant, or arbitrator in the same cause.[1]

But a challenge to the array will not be allowed on the ground that all persons of a particular fraternity have been excluded from the jury, if those who are returned possess the requisite qualifications,[2] nor because a single member of the jury was prejudiced.[3]

the purposes of the ensuing year. In 1844, upon a conspicuous trial at the bar of the Court of Queen's Bench of Ireland, the defendant challenged the array of the panel on the following grounds, namely: that there had been a fraudulent omission by some person or persons unknown, in the general list of jurors for that year, of the names of sixty persons, who, on the revision of the lists, had been adjudged by the recorder to be qualified to act as special jurors; that from the said list the jurors' book had been made out and framed, and that from the said book the special jurors' list had been made up, the said names being omitted in the said book and list respectively, and that from the said special jury list the panel had been returned; that the said names had been omitted fraudulently, and not only without the privity of the defendant, or of any person on his behalf, but to his wrong and damage, and contrary to his will and desire; and that such list had been so made up with the intent of prejudicing the defendant on the said trial; and that the plaintiff had due notice of the premises before the panel was arrayed. A general demurrer to the challenge was put in by the plaintiff, which, after argument, was allowed by the court, and the trial having proceeded, judgment was given against the defendant, who sued out a writ of error in parliament thereon. The fifteen judges, being consulted, held unanimously that there was no error; but Lord Denman, C. J., Lord Cottenham and Lord Campbell in the House of Lords, held that the challenge should have been allowed. R. *v.* O'Connell, 11 Cl. & Fin. 155; 9 Jurist, 30. See Denman's Life, ii. 172.

[1] Co. Lit. 156 *a*; Munshower *v.* Patton, 10 S. & R. 334; Bac. Abr. Juries, E. 1; Burn's J., Jurors, iv. 1; Williams's J., Juries, v.; Dick. Sess. 184; Vanauken *v.* Beemer, 1 Southard, 364.

In New York, since the statute authorizing the clerk to array the jury, a challenge to the array lies for partiality or default in the clerk in the same manner as it formerly lay against the sheriff. Pringle *v.* Huse, 1 Cow. 435, 436, n. 1; Gardner *v.* Turner, 9 Johns. R. 261.

[2] People *v.* Jewett, 3 Wend. 314.

[3] Birdsong *v.* State, 47 Ala. 68.

In New York, it is no ground for challenging the array that the deputy clerk, in the clerk's absence, drew the jury and certified the panel. People *v.* Fuller, 2 Park. C. R. (N. Y.) 16.

In Pennsylvania, under the acts of assembly relating to the summoning of jurors, it was held no cause of challenge to the array that the sheriff was not present the whole time during which the selection of jurors was made; or, that the sheriff and commissioners

§ 609. The burden of proof is on the person challenging the array, who must be strictly prepared to prove the cause.[1] Burden is on challenger.

§ 610. A party who neglects before plea to challenge the array cannot take advantage of the alleged defect afterwards.[2] After plea too late.

The practice in challenging the array is hereafter discussed.[3]

§ 611. *Challenges to the array for favor* being not a principal challenge are left to the discretion of the triers.[4] Challenges of this class are based on the supposed partiality of the sheriff, when such partiality rests upon a disputed or doubtful question of fact. Thus, when the defendant is the sheriff's tenant, or where there is affinity but no relationship between the sheriff and one of the parties, or where they are united in the same office,[5] in these cases there may be a challenge for favor. Challenge to array for favor is when the question is disputed fact.

2. *To the Polls.*

Challenges to the polls are threefold.

(*a.*) *Peremptory*, where the challenge is absolute, no cause being shown.

§ 612. *By Prosecution.* — At common law, the prosecution has no peremptory challenges,[6] but, unlike the defendant, it is not required to show cause until after Prosecution has no peremptory

took up between two and three weeks in making the selection and putting the names of the jurors into the wheels; or, that it did not appear that the sheriff and commissioners wrote the names of the jurors selected by them, and put the same into the wheels, this duty having been performed by a clerk in their presence and by their order; or, that the pieces of paper, on which the names were written, were not safely kept between the time of writing and putting them into the wheels, the same having been put into a box, where they were kept until the selection was completed, when they were put into the wheels; or, that the names which were remaining in the wheels at the end of the year were taken out before the names selected for the new year were put in. Com. *v.* Lippard, 6 S. & R. 395.

[1] R. *v.* Savage, 1 Mood. C. C. 51. Infra, § 684.

[2] R. *v.* Sutton, 8 B. & C. 417; 2 M. & R. 406.

[3] Infra, § 684.

[4] 1 Inst. 155; Burn's Justice, Jurors, viii. See infra, § 684.

[5] Dyer, 367 *a*; Bac. Abr. Jur. E. 1; Co. Lit. 156 *a*; 1 Cowen, 436, n. 1.

[6] R. *v.* Frost, 9 C. & P. 129; Henries *v.* People, 1 Park. C. R. 579; People *v.* Aichinson, 7 How. Prac. Rep. 241.

challenge but may set aside jurors.

the panel is exhausted, having the power of setting aside individual jurors till that period, when, if the jury box be not then filled, the set aside jurors will be severally called, and unless adequate cause is shown against them will be chosen.[1] Such is the practice in jurisdictions in

[1] Mansell *v.* R. (in error) 8 El. & Bl. 54; Dears. & B. 375; R. *v.* Parry, 7 C. & P. 836; R. *v.* Geach, 9 C. & P. 499; 3 Harg. St. Tr. 519; 4 Ibid. 740; 2 Hale, 271; Bac. Abr. Juries, E. 10; 2 Hawk. c. 43, s. 3. Mr. Townsend (1 Mod. St. Tr. 5) thus spiritedly sketches the attempt of Frost's counsel to break down this rule in the trial of which he was the subject: —

"To prove their determination to fight *l'outrance*, Sir F. Pollock, as if leading a forlorn hope, again objected to a peremptory challenge on the part of the crown. With a startling temerity he expressed his conviction that the court would not be surprised at his objection.

"'I am aware that for a long series of years it has been considered to be the practice, and therefore to some extent the law, that the crown might postpone the cause to be assigned until the panel is gone through. With the utmost deference to your lordships, I conceive that this practice crept in at a time when there was a deference paid to the crown upon points of this description, which the law and the principles of the constitution did not warrant.' This attack on established authority was valorously followed up by Mr. Kelly, who took a supplementary objection that the challenge was not till after the book had been put into the hands of the juror, which was too late. This technical point, *inter apices juris*, what was the moment of beginning to administer an oath, was then formally discussed, and the fact left to the officer of the court, to say whether he had authorized the party to take the book, or had directed him in any manner to put his hand upon it. As Mr. Bellamy could not recollect, the court would not interfere, but intimated that the moment the oath is delivered by the officer, or began to be delivered by the officer, it is too late for either party to challenge. The principal objection was repelled with some severity, as its hardihood deserved.

"'As to the former objection, which is a question of law, are we really called upon, after a construction has been put upon this act of parliament, from the very period when it was passed in the 33d of Edw. 1, down to the present time, to put a construction different from that which prevailed at the time the statute was enacted, and different from that which all our predecessors have put? Where would be the certainty of the law of England? What safety would there be for prisoners, as well as for the public execution of justice, if judges, acting according to their own discretion, neglecting those rules of interpretation which wise men before them have laid down, and which have been sanctioned by time, were to do that for the first time which we are now called upon to do, namely, to put a construction different from that which has been put by all who have gone before us?'"

"On the trial of O'Coigley and others, for high treason, before Mr. Justice Buller, at Maidstone, in 1798," says Mr. Townsend (1 Mod. State Trials, 99, n.), "the leading counsel for the prisoner, Mr. Plumer, Mr. Dal-

which in this respect the common law is not superseded by statutes.[1] The right may be exercised by the prosecution at any period before the jury is elected;[2] and it was held no error where the prosecution, from excessive caution, set aside a juror who had been before ineffectually challenged by the prisoner.[3]

In Ireland, the right of ordering jurors to stand by, in cases of misdemeanor, may be exercised by a private prosecutor equally with the crown.[4]

Practice under direction of court.

§ 613. The practice, however, of permitting the prosecution to defer showing cause of challenge until the panel be gone through, it was said in a case in North Carolina, must be exercised under the supervision of the court, who will restrain it, if applied to an unreasonable number;[5] and in Georgia, since the adoption of the Penal Code, it is rejected altogether.[6]

las, and Mr. Gurney, declined to interpose, when the crown were exercising their peremptory right of challenge to different jurymen. At length the junior counsel, Mr. W. Scott, jumped up: 'I must be chained down to the ground, my lords, before I can sit here, engaged as I am for the life of one of the gentlemen at the bar, and submit to these challenges of the crown without cause. The crown has now challenged eleven jurors without cause; a greater number, I believe, than was ever known before.' (In Ireland it is usual to challenge fifty at least.)

"'If I had not been restrained by a reason too mighty for me to oppose, I should have resisted these challenges in the beginning.' He was then permitted to argue the point, which he did with great spirit, but at too great length, when Mr. J. Buller interposed, with the not very encouraging remark, — 'In every case you have quoted, you cannot help seeing a decision against you.' The judgment of the court was of course most prompt and decided. 'The true construction of the statute is in favor of the right to challenge, and there is no case, no period, in which a different determination has been made. It appears to me one of the clearest points that can be.'"

[1] U. S. *v.* Wilson, 1 Bald. C. C. 81; U. S. *v.* Douglass, 2 Blatch. 207; U. S. *v.* Harding, 2 Wall. Jr. 143; Pamph. Phil. 1852, p. 22; Com. *v.* Joliffe, 7 Watts, 585; Jewell *v.* Com. 22 Penn. St. 94; State *v.* Arthur, 2 Devereux, 217; State *v.* Craton, 6 Ired. 164; State *v.* Bone, 7 Jones (N. C.), 121; State *v.* Stalmaker, 2 Brev. 1; Roberts's Dig. 328. In U. S. *v.* Butler, 1 Hugh. 457, it is said that this right ceases to exist where the prosecution has the right of peremptory challenge.

[2] Otherwise under statute. State *v.* Steely, 65 Mo. 210.

[3] Wormeley *v.* Com. 10 Grat. 658.

[4] R. *v.* McCartie, 11 Ir. C. L. R. 207.

[5] State *v.* Benton, 2 Dev. & Bat. 196; though see State *v.* Craton, 6 Ired. 164.

[6] Sealy *v.* State, 1 Kelly, 213; Reynolds *v.* State, Ibid. 222.

§ 614. *By Defendant.* — At common law peremptory challenges by the defendant are taken without assigning any reason, and when made must necessarily be allowed. In cases of felony, the defendant was permitted, at common law, peremptorily to challenge thirty-five, or one under the number of three full juries.[1] But by 22 Hen. 8 c. 14, s. 7, made perpetual by 32 Hen. 8, c. 3, no person arraigned for petit treason, high treason, murder, or felony, can be admitted peremptorily to challenge more than twenty of the jurors; and by 33 Hen. 8, c. 23, s. 3, the same restriction is extended to cases of high treason. As far, however, as these statutes respect either high or petit treason, it is agreed that they were repealed by the 1 & 2 Ph. & M. c. 10, which, by enacting that all trials for treason shall be carried on as at common law, has revived the original number as far as it respects those offences.[2] At the present day, therefore, in cases of high and petit treason, the defendant has thirty-five peremptory challenges; and in murders and all other felonies, twenty.[3]

In felonies peremptory challenges allowed to defendant at common law.

In Pennsylvania, by the revised acts of 1860, the Commonwealth shall have the right, in all cases, to challenge peremptorily four persons, and every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made. See infra, § 614, note. This act is constitutional. Warren *v.* Com. 37 Penn. St. 45; Hartzell *v.* Com. 40 Penn. St. 463. See Com. *v.* Frazier, 2 Brewst. 490.

This act does not deprive the Commonwealth of its right to set aside. Warren *v.* Com. 37 Penn. St. 45.

In Ohio, the "prosecuting attorney and every defendant may peremptorily challenge two of the panel, and any of the panel for cause, of which the court shall try." Code Cr. Proc. § 133; Warren's Ohio C. L. (1870) p. 131.

The statutes regulating practice are noticed under the next head.

[1] Co. Lit. 156; Bro. Abr. Challenge, 70, 75, 217; 2 Hale, 268; 2 Hawk. c. 43, s. 7; Com. Dig. Challenge, C. 1; Bac. Abr. E. 9; 4 Bla. Com. 354; 2 Woodes. 498; Burn's J., Jurors, iv.; Williams's J., Juries, v.; Dick. Sess. 185.

[2] Co. Lit. 156; Bro. Abr. Challenge, 217; 3 Inst. 227; Fost. 106–7; 2 Hale, 269; 2 Hawk. c. 43, s. 8; Bac. Abr. Juries, E. 9; Burn's J., Jurors, iv.; Williams's J., Juries, v.; Dick. Sess. 185.

[3] 4 Mason, 159; Fost. 106–7; 4 Bla. Com. 354; 2 Hawk. c. 43, s. 8; 1 Ch. C. L. 535.

Practice in Federal Courts. — The Act of Congress passed on the 20th July, 1840 (5 Stats. at Large, 394), confers upon the courts of the United States the power to make all necessary rules and regulations for conforming the empanelling of juries to the laws and usages in force in the States. U. S. *v.* Shackleford, 18 Howard, 588. This power includes that of regulating

§ 614 *a*. Whether each of several joint defendants, when the trial is joint, is entitled to his full number of challenges is a point usually determined by local statute.[1] The

Rule as to joint defendants.

the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason or other crimes, of which the punishment is declared to be death. Ibid. See U. S. *v.* Johns, 1 Wash. C. C. 363. The Act of 1790 recognizes the right of peremptory challenge in those cases, and therefore it cannot be taken away. Ibid. See U. S. *v.* Johns, *ut supra*. The Act of July 20, 1840, does not confer, in misdemeanors, the right to a peremptory challenge in the Circuit Courts. U. S. *v.* Devlin, 6 Blatch. C. C. 71.

Under the Act of Congress, July 20, 1825 (5 Stats. at Large, 394), the courts of the United States have the power to adopt the statutes of the several States respecting the empanelling, &c., of jurors, the right of challenge, &c., except in respect to treason, and other crimes specified in § 30, Act of 1790 (1 Stats. at Large, 119), and where these statutes have been adopted, the right of peremptory challenge, either by the prisoner or the government, must depend on them. U. S. *v.* Shackleford, 18 How. U. S. 588.

By the Act of March 3, 1865, when the offence charged be treason or a capital offence, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On a trial for any other offence in which the right of peremptory challenge now exists, the defendant shall be entitled to ten and the United States to two peremptory challenges. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers. Act of March 3, 1865, § 2. 13 Stat. 500.

Challenges above the number allowed by law shall be disallowed by court. Rev. Stat. § 1031.

Under the New York Revised Statutes it has been held that the People are entitled to two peremptory challenges in a criminal prosecution. People *v.* Caniff, 2 Park. C. R. (N. Y.) 586.

Where a statute gives the right to a prisoner on trial "for an offence punishable with death, or imprisonment in a state prison ten years or any longer time," a person indicted for burglary in the second degree, which is punishable "by imprisonment in a state prison for a term not more than ten years, nor less than five years," is entitled to peremptory challenges. Dull *v.* People 4 Denio, 91. See further Granger *v.* State, 5 Yerger, 459.

Under the Pennsylvania Revised Statutes, if the Commonwealth waives the right to challenge, and the defendant exhausts his challenges, the Commonwealth cannot resume its right. Com. *v.* Frazier, 2 Brewst. 490.

It has been held the prosecution must announce its peremptory challenges before the defendant can be compelled to announce his. State *v.* Steely, 65 Mo. 218. As to practice in this respect see infra, § 672.

[1] In several States when defendants elect to be tried jointly, they are restricted to a single set of challenges. State *v.* Sutton, 10 R. I. 159; People *v.* McCalla, 8 Cal. 301. See Mahan *v.* State, 10 Ohio, 232; Brister *v.* State, 26 Ala. 107. That one defendant cannot, when separate challenges are

right unquestionably exists at common law;[1] though its difficulties may be obviated by the prosecution obtaining an order for severance in cases where the defendants persist in separate sets of challenges.[2]

On preliminary issues no challenge.

§ 615. On the preliminary trial of a prisoner's insanity, before the trial of the indictment against him, he has not the privilege of peremptory challenges; but he may challenge for cause.[3]

Not allowed on collateral issues.

§ 616. Peremptory challenges are not allowable on the trial of any collateral issue.[4]

Right ceases when panel is complete.

§ 617. Under ordinary circumstances the defendant's right to a peremptory challenge is waived when the juror is passed over to the court or the prosecution;[5] though this opinion cannot be maintained without qualification, as on due cause shown the court, at any moment before the case is opened, and the juror in question is sworn, will permit the challenge.[6] In any view the right ceases when the panel is complete and accepted.[7]

No challenges on misdemeanors.

§ 618. Peremptory challenges are not allowed at common law in trial for a misdemeanor.[8]

Matured challenge cannot ordinarily be recalled.

§ 619. A defendant who, in case of felony, has challenged twenty jurors peremptorily, cannot ordinarily withdraw one of those challenges to challenge another juror, instead of one whom he had previously challenged;[9] nor for the purpose of challenging for cause.[10] But in

permitted, object to his co-defendants' challenges, see infra, § 680.

[1] 2 Hale P. C. 263; 1 Ch. C. L. 536; U. S. *v.* Marchant, 4 Mason, 160; 12 Wheat. 480; State *v.* Stoughton, 51 Vt. 362; State *v.* Sutton, 10 R. I. 159; Cruce *v.* State, 59 Ga. 83, and cases cited infra, § 680.

[2] Fost. 106.

[3] Freeman *v.* People, 4 Denio, 9, 35.

[4] Fost. 42; Burn's Justice, Jurors, viii.

[5] U. S. *v.* Hanway, 2 Wall. Jr. 143; Com. *v.* Rogers, 7 Met. 500; though see Com. *v.* Knapp, 9 Pick. 496; State *v.* Potter, 18 Conn. 166; Stewart *v.* State, 50 Miss. 587. Infra, §§ 675–7.

[6] Infra, §§ 672–7; McFadden *v.* Com. 23 Penn. St. 12; Hendrick *v.* Com. 5 Leigh, 708; Drake *v.* State, 51 Ala. 30; People *v.* McCarthy, 49 Cal. 241; and cases infra, §§ 673–4.

[7] State *v.* Cameron, 2 Chandler, (Wis.) 172. See infra, §§ 672, 679.

[8] Reading's case, 7 Howell's State Trials, 265; Oates's case, 10 Howell's State Trials, 1079; 4 Bl. Com. 353, note by Mr. Christian. See U. S. *v.* Devlin, 6 Blatch. C. C. 71; Freeman *v.* People, 4 Den. 9, 35. Supra, § 614, note.

[9] R. *v.* Parry, 7 C. & P. 836. See infra, § 679.

[10] Infra, § 679.

case of a mistake, not negligent or capricious, made in challenging, permission should be given to rectify.[1]

§ 620. The right of peremptory challenge is a right not to select, but to reject.[2] Right is to reject, not select.

The practice as to peremptory challenges is discussed in a future head.[3]

(*b*.) *Principal.*

§ 621. Principal challenge to the polls is where a cause is shown, which, if found true, stands sufficient of itself, without leaving anything to be tried by the triers.[4] The theory is that in such case the presumption of partiality is too strong to be rebutted.[5] As in our American practice challenges for favor, and those for principal cause, are frequently blended,[6] the various incidents of the two will be here considered.[7] It may be noticed that in New York the distinction between the two classes is retained.[8] Principal challenge is where the case does not rest on disputed fact.

Causes of principal challenge to the polls are such as these: —

(*a*[1].) *Preadjudication of Case.*

§ 622. In England it is a good cause for challenge, on the part of the defendant, that the juror has declared his opinion beforehand that the party is guilty, or will be hanged;[9] but it is said that expressions used by a juryman previous to the trial are not a cause of challenge, unless they can be referred to something of personal ill-will towards the party challenging.[10] In this country, as will presently be seen, the great preponderance of authority is that the holding by a juror of any opinions which may prevent him from rendering a verdict in accordance with the laws of the land is a disqualification.[11] Preadjudication of case ground for challenge.

[1] Infra, § 679.

[2] U. S. *v.* Marchant, 4 Mason, 160; 12 Wheaton, 480; State *v.* Smith, 2 Ired. 402; State *v.* Wise, 7 Richards. 412; State *v.* McQuaige, 5 S. C. 429. See, however, People *v.* Bodine, 1 Denio, 281. See infra, § 680.

[3] Infra, §§ 676 *et seq.*

[4] Burn's Justice, Jurors, viii. Infra, § 670.

[5] State *v.* Howard, 17 N. H. 171.

[6] Infra, § 670.

[7] Infra, § 670.

[8] Greenfield *v.* People, 6 Abb. New Cas. 1.

[9] 2 Hawk. c. 43, s. 28.

[10] R. *v.* Edmonds, 4 B. & Ald. 472; 2 Hawk. c. 43, s. 28.

[11] See cases cited infra. See also Pierce *v.* State, 13 N. H. 536; People *v.* Reyes, 5 Cal. 347.

Vague and loose talk does not disqualify.

§ 623. Mere opinions thrown out as a jest, however, or as vague and loose talk, or to avoid being empanelled, will not so operate.[1]

Nor does a general bias against crime.

§ 624. A juror, also, will not be incapable because of a general bias and prejudice against crime.[2]

Analysis of Rulings as to Preadjudication.

In U. S. courts a deliberate opinion as to defendant's guilt incapacitates, but otherwise as to mere impression.

§ 625. *United States Courts.* — "The court has considered," declared Marshall, C. J., in Burr's trial, "those who have deliberately formed and delivered an opinion on the guilt of the prisoner as not being in a state of mind to weigh the testimony, and therefore as being disqualified to sit as jurors in the case."[3] The question was accordingly sanctioned by the court, "Have you formed and expressed an opinion about the guilt of Colonel Burr?"[4]

When there were separate trials on a joint indictment, it was held by Baldwin, J., and Hopkinson, J., good cause of challenge on the second trial that the juror said, that if the same evidence was to be adduced as on the former trial, the prisoner is guilty.[5]

On the trial of Hanway, in 1852, for treason,[6] Judge Grier and Judge Kane held that a juror, who had formed an opinion that the "riots" in question either did or did not amount to treason, was incompetent; and in the last mentioned case it was held that a juror was incompetent who stated, on being challenged, "that he had read the newspaper accounts of the facts at the time, and come to his own conclusion, — *had made up his mind* that the offence was treason, though he had not expressed that opinion, nor apparently formed nor expressed an opinion

[1] Infra, §§ 629, 630; Com. v. Thrasher, 11 Gray, 57; State v. Potter, 18 Conn. 166; State v. Wilson, 38 Conn. 140; Com. v. Lenox, 3 Brewst. 247; Com. v. Flanagan, 7 W. & S. 68, 415; Com. v. Gross, 1 Ashm. 261; Ortwein v. Com. 76 Penn. St. 414; Hailstock's case, 2 Grat. 564; Clore's case, 8 Grat. 606; Montague v. Com. 10 Grat. 767; State v. Ellington, 7 Ired. 61; State v. Bone, 7 Jones, 121; State v. Williams, 3 Stew. 454; Johns v. State, 16 Ga. 200; and see cases cited infra, §§ 640, 652.

[2] Williams v. State, 3 Kelly, 453. See infra, § 668.

[3] Marshall, C. J., 1 Burr's Trial, 416. See also U. S. v. Woods, 4 Cranch C. C. 484.

[4] Marshall, C. J., 1 Burr's Trial, 367.

[5] U. S. v. Wilson, 1 Bald. 78.

[6] 2 Wall. Jr. 143.

that the defendant was or was not engaged in the offence." It was held at the same time that it did not constitute incompetency for a juror to say that he has formed a conditional, but not an absolute, opinion on the law of treason: *e. g.* who says he cannot understand how treason can be committed against the United States if such and such facts do not constitute it: if he says that, on being instructed by the court that the opinion is erroneous, such opinion will cease to influence him as a juror. It was held, also, that one who, without forming or expressing any opinion as to the matter to be tried, had "formed an opinion that the laws had been outraged," is competent; and so of one who had "certainly expressed an unfavorable opinion towards the course of these gentlemen," — that is a party of persons with whom the prisoner agreed in opinion; the person summoned being sensible of no such bias as would affect his action as a juror; having neither formed nor expressed any opinion as to the guilt or innocence of the prisoner, or of the other persons charged to have participated with him in the offence; not presuming to be a judge whether the offence was treason; "knowing none of these gentlemen individually," and meaning to express nothing more than an opinion against the transaction, and that the persons engaged in it ought to be punished.[1]

Subsequently (in 1854), Taney, C. J., laid down the following test in a criminal trial in Baltimore: —

"If the juror had formed an opinion that the prisoners are guilty and entertains that opinion now, without waiting to hear the testimony, then he is incompetent.[2] But if, from reading the newspapers or hearing reports, he has impressions on his mind unfavorable to the prisoners, but has no opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, then he is competent."

The same view has been expressed in the United States Circuit Court in New York.[3]

In 1879, it was held by the Supreme Court that a juror who states he has formed an opinion, which he has not expressed, and does not think will influence his verdict, is not incompetent.[4]

[1] 2 Wall. Jr. 143.

[2] See infra, § 844.

[3] U. S. *v.* McHenry, 6 Blatch. C. C. 503.

[4] Reynolds *v.* U. S. 98 U. S. 145.

§ 626. In *Maine*, to be a sufficient ground for disqualifying a juror from sitting in the trial of a criminal prosecution, the opinion formed by him must be fixed and unconditional.[1]

So in Maine.

§ 627. In *New Hampshire*, where jurors heard the prisoner tried upon another indictment, before another jury, and found guilty, and answered upon inquiry that they had formed an opinion of his guilt upon the second indictment, which was pending at the same time, from the evidence which they had heard on the other trial, they were held to be incompetent.[2] But "hearing" without "opinion" does not incapacitate.[3]

So in New Hampshire.

§ 628. In *Vermont*, the prior expression of an opinion disqualifies, notwithstanding the juror declares, when challenged, that he has no opinion, and could try the case impartially.[4] It has been said, however, though not very logically, that an opinion formed but not expressed does not disqualify.[5]

In Vermont prior expression of opinion disqualifies.

[1] State *v.* Kingsbury, 58 Me. 239 (Appleton, C. J., 1871). See State *v.* Jewell, 33 Me. 583.

[2] State *v.* Webster, 13 N. H. 491.

[3] State *v.* Howard, 17 N. H. 171. "In New Hampshire, the question of indifference is a fact to be decided by the court at the trial. See Rollins *v.* Ames, 2 N. H. 350; State *v.* Howard, 17 N. H. 171, 191–2; March *v.* R. R. 19 N. H. 372. The court are 'the triers' of this question; and their decision stands like the verdict of a jury, to be reversed only when it is manifestly against law and evidence. Such ground for reversal does not exist in this case. The decision seems correct. Without attempting to review or reconcile the numerous cases on this topic (see 1 Bishop Crim. Procedure, § 771, note; 2 Wharton Am. Crim. Law, §§ 2976–3016), it is sufficient to say that we adopt the views expressed by Shaw, C. J., in Com. *v.* Webster, 5 Cush. 295, pp. 297–8. The statute intended to exclude any person who had made up his mind, or formed a judgment in advance, in favor of either side. Yet, the opinion or judgment must be something more than a vague impression, formed from casual conversation with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or prevent a candid judgment, upon a full hearing of the evidence. If one had formed what in some sense might have been called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror." Smith, J., State *v.* Pike, 49 N. H. 399.

[4] State *v.* Clark, 42 Vt. 629.

[5] State *v.* Phair, 48 Vt. 366.

§ 629. In *Massachusetts*, a juror having said upon the *voir dire* that he had formed an opinion from what he had heard, but that he did not know how much he might be influenced by it, was allowed to be challenged for cause.[1] A juror, however, it is said, cannot be asked whether he considers that the facts set forth in the indictment constitute a proper subject for punishment.[2] And a person indicted is not entitled to have the jury asked, before they are empanelled, whether they have formed or expressed an opinion as to the credibility of a witness, whose testimony is to be relied on in support of the prosecution, and who testified, and whose credibility was in question, in another case before them.[3]

In Massachusetts prejudice must go to particular issue.

A fixed opinion of the unconstitutionality of the statute on which the prosecution is founded, which if persisted in would preclude concurrence in a conviction, disqualifies.[4]

A juror having convicted the defendant of a similar offence at the same term is not thereby incapacitated.[5]

"Hearing" as to a case does not incapacitate, when there is no opinion formed.[6]

§ 630. In *Connecticut*, while the jury were being empanelled for the trial of an indictment for murder, A. was called as a talesman, and, being inquired of whether he had formed any opinion as to the prisoner's guilt, said that soon after the prisoner's arrest he read certain newspaper accounts of what purported to be his confessions, and upon reading them he was of opinion that, if those accounts were true, a horrid murder had been committed, but he had formed no opinion as to the truth or falsity of them; and remarked to his family, while reading the accounts, that the case in the trial would probably turn out to be a very different affair. He added that he had not any settled opinion on the subject, and felt that he could render an

So in Connecticut.

[1] Com. *v.* Knapp, 9 Pick. 496. See, for practice in detail, Mr. Bemis's Report of the Webster case, p. 8.

[2] Com. *v.* Buzzell, 16 Pick. 153. The shaping and propounding of the interrogatories are within the discretion of the court. Com. *v.* Gee, 6 Cushing, 177. See infra, § 683.

[3] Com. *v.* Porter, 1 Gray, 476.

[4] Com. *v.* Austin, 7 Gray, 51. Infra, § 666.

[5] Com. *v.* Hill, 4 Allen, 591.

[6] Com. *v.* Thrasher, 11 Gray, 57.

impartial verdict. It was held that he was not disqualified by bias to sit as a juror in the cause.[1]

In New York at common law opinion though not impression disqualifies.

§ 631. In *New York*, it has been laid down generally that the law attaches the disqualification to the fact of forming and expressing an opinion, and does not look beyond to examine the occasion or weigh the evidence on which that opinion was founded.[2] "There is no distinction," it was said, "as to the grounds of the opinion formed by the juror of the guilt of the accused; whether it be founded on being an eye-witness, or on hearing the testimony of those who were present at the transaction, or whether it is based on rumors, reports, and newspaper publications; in either case it is a good cause of challenge."[3] "If a juror," it was declared in another case, "have expressed an opinion against the party, though from his knowledge of the cause and not from any favor or ill-will, yet this is a principal cause for challenge."[4] So a challenge to a juror for a principal cause was sustained, where the juror had said that he believed the defendant was guilty, although he testified that he had no fixed opinion upon the subject of the defendant's guilt; that he only entertained impressions derived from history and common reports, meaning thereby printed statements in papers, and reports in conversation; that he had never heard witnesses to the transaction testify nor say anything on the subject in question; if the evidence supported the circumstances he had heard, he had a fixed belief respecting the guilt of the defendant; if these circumstances should be done away by evidence, he should not consider him guilty.[5] The

[1] State *v.* Potter, 18 Conn. 166. "The opinion," said Butler, C. J., in 1871, "must be formed in such a way, or be of such a character, that hostility or prejudice toward the prisoner may be inferred from its existence or expression. But hostility or prejudice cannot, as a rule, be inferred from an opinion formed and expressed simply from reading, or hearing stated, as current news of the day, the fact of a homicide and the circumstances attending it. There should be found some other circumstances of relationship, partiality, prejudice, hostility, or ill-will, acting at the same time upon the mind and giving it a bias, or the juror should be accepted." Butler, C. J., State *v.* Wilson, 38 Conn. 140.

[2] People *v.* Mather, 4 Wend. 229; People *v.* Bodine, 1 Denio, 281; Blake *v.* Millspaugh, 1 Johnson, 316; Pringle *v.* Huse, 1 Cowen, 432.

[3] People *v.* Mather, 4 Wend. 229.

[4] Ex parte Vermilyea, 6 Cowen, 555.

[5] People *v.* Mather, 4 Wend. 229; People *v.* Bodine, 1 Denio, 281; Freeman *v.* People, 4 Denio, 9, 35.

mere forming of an opinion, also, without its expression, was considered a sufficient ground of exclusion.[1] An *impression*, however, does not disqualify.[2] Nor does a hypothetical[3] or indecisive opinion.[4] But it is otherwise as to an opinion formed by reading a report, no matter how incomplete, of a former trial.[5]

§ 632. By an act passed by the Legislature of New York in 1872,[6] the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action of law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror who may have formed or expressed, or has such an opinion or

But by statute no disqualification if witness be not under bias.

[1] People *v.* Rathbun, 21 Wend. 509. See Armstead *v.* Com. 11 Leigh, 657; Heath *v.* Com. 1 Robinson, 735.

[2] People *v.* Honeyman, 3 Denio, 121; People *v.* Hayes, 1 Edm. Sel. Ca. 582; O'Brien *v.* People, 36 N. Y. 276; S. C., 48 Barb. 274.

[3] People *v.* Fuller, 2 Park. C. R. 16; Stout *v.* People, 4 Park. C. R. 71.

A juror having stated before the triers that he had formed no opinion, and had no impressions as to the guilt of the prisoner, but that it had been and still was his impression that the general character of the prisoner was bad; the question was then put to the juror whether he would disregard what he had heard and read, and render his verdict according to evidence. It was held that the question, though inartificially put, substantially called for the consciousness of the juror as to his ability to try the case impartially, and that it was therefore properly allowed. Lohman *v.* People, 1 Comst. 379.

A proposed juror in a capital case stated, upon principal challenge, that he had read accounts, and formed an opinion as to the prisoner's guilt or innocence, which was unaltered, and which it would require evidence to remove, and that he could not exactly sit indifferent from the facts which he had heard; and afterward, when cross-examined, stated that if sworn he would try to be governed by the evidence, but would have a little prejudice; and again, that he meant by his answer, that he had read the evidence given in the newspapers, and assuming the statements to be true, he had formed an opinion, but that it would not affect his mind in determining the case on evidence. It was ruled that it was inferable that the juror had formed an opinion, of which he had not been able to divest himself; that the prisoner was entitled to the benefit of a doubt; and that the acceptance of the juror was error, for which, upon writ of error, a new trial would be granted. People *v.* Mallon, 3 Lansing, 225 (Mullin, P. J.), 1870.

[4] Thomas *v.* People, 67 N. Y. 218.

[5] Greenfield *v.* People, 6 Abb. New Cas. 1; reversing S. C., 1 Hun, 242.

[6] Ch. 477, vol. 2, p. 1135.

impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. This act was held constitutional by the Court of Appeals in 1873.[1]

The act, however, does not prevent such opinion from being ground of a challenge for favor.[2]

By an act passed May 7, 1853, all challenges are to be determined by the court, without the interposition of triers.[3]

In New Jersey juror must be proved to be prejudiced.

§ 633. In *New Jersey*, Chief Justice Hornblower, in 1846, on the trial of a party charged with a capital offence, said: "It has been supposed that an opinion of guilt, founded upon newspaper reports, or other information, or personal knowledge, disqualifies a man from being a juror. But this is not so. It has been solemnly declared by our own Supreme Court, in Mann *v.* Glover,[4] that a hypothetical

[1] Stokes *v.* People, 53 N. Y. 164.

In Greenfield *v.* People, infra, one juror was challenged for principal cause and for favor, and another for favor; each said that he had formed an impression as to the guilt of the prisoner, from reading the published testimony for the People on a former trial of the prisoner for the same offence. One of the jurors stated that it would require evidence to remove the impression, but each stated that he would give his verdict upon the evidence to be presented. It was ruled that either juror was not an impartial one so as to authorize his empanelling under the provisions of Laws 1872, c. 475, and the challenge for the favor should have been sustained. Thomas *v.* People, 67 N. Y. 218, was distinguished, for the reason that the impression of the juror there was derived from the talk of the people, and in this case from sworn testimony given at a trial. See the topic more fully discussed in Pender *v.* People, 18 Hun, 560.

"In Thomas *v.* People, the opinion of the juror was hypothetical and contingent. . . . . The impressions in the case before us are not hypothetical and contingent. Whether slight or deep, they were fixed and absolute. They were based, too, upon testimony actually given upon oath, and with the care and attention produced by the solemnity and importance of a trial for murder." *Per Curiam*, Greenfield *v.* People, 6 Abbott New Cas. N. S. 1.

In Phelps *v.* People, 72 N. Y. 334 (S. C., 13 N. Y. Sup. Ct. 6 Hun, 44), it was held that a juror who says he has formed and expressed an opinion, but that he believes he can render an impartial verdict, according to the evidence, unbiased and uninfluenced by the previously formed opinion, is competent.

[2] Thomas *v.* People, 67 N. Y. 218.

[3] See infra, § 684, note.

[4] 2 Green, 195.

opinion founded on the supposition that the facts detailed are true is no cause of challenge. And I have no hesitation in saying that a bystander who sees the commission of a homicide, or any other breach of the peace, is a perfectly competent juror, as much so as a witness to a bond or other contract between private parties would be on a trial concerning such bond or contract. It is a common occurrence, both in civil and criminal causes, to see jurors on the panel called as witnesses to prove some material facts in their knowledge relating to the matter in question. A declaration of opinion to disqualify a juror, therefore, must be such as implies malice or ill-will against the prisoner; thereby showing that the person challenged does not stand indifferent between the State and him. This is the uniform language of the books and cases which are of authority under our Constitution, as well as of the English courts up to the present time." [1]

§ 634. In *Pennsylvania*, if a juror forms an opinion without waiting to hear the testimony, he is incompetent. But an impression from reading a newspaper or hearing reports, without any opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, will not disqualify.[2] And the opinion must be founded on the evidence to be given, or must be a fixed belief.[3]

In Pennsylvania opinion (though not impression) disqualifies.

§ 635. In *Delaware*, the test adopted by Marshall, C. J., in Burr's case, appears to have been received.[4] In *Maryland*, the

[1] State *v.* Spencer, 1 Zabr. 196. See State *v.* Fox, 1 Dutch. 566.

[2] Irvine *v.* Kean, 14 Serg. & R. 292; Com. *v.* Lenox, 3 Brewster, 249. See Com. *v.* Flanagan, 7 W. & S. 415; Com. *v.* Gross, 1 Ashm. 281; Com. *v.* Work, 4 Crumrine, 493.

[3] Curley *v.* Com. 84 Penn. St. 151; 4 Weekly Notes, 141.

In this case a juror testified on his *voir dire* that he had a fixed opinion from what he had read, but that it was not such an opinion as would influence him in any degree as a juror to give undue weight to evidence against the prisoner, and that he felt certain he could divest his mind of all prejudice, and be controlled only by the evidence. It was held by the Supreme Court that he was competent, inasmuch as he had no fixed belief of the guilt of the prisoner, and had no opinion founded upon the evidence to be given. S. P., Ortwein *v.* Com. 76 Penn. St. 414; O'Mara *v.* Com. 75 Penn. St. 424. Otherwise where the witness said he had an opinion from reading a former trial, which opinion "it would take some evidence to remove." Staup *v.* Com. 74 Penn. St. 458.

[4] State *v.* Bonwell, 2 Harring. 529. See State *v.* Anderson, 5 Harring. 493.

view of Chief Justice Taney, as given above, is adopted, impressions derived from newspapers being held no disqualification. "The newspaper is now read by every one, and the press is ever ready and eager to furnish the details of crime, and although persons may, upon such statements, form an opinion, yet it is one in most cases liable to qualification or remodification, according to the real facts of the case. . . . . The opinion which should exclude a juror must be a fixed and deliberate one, partaking, in fact, of the nature of a pre-judgment."[1]

So in Delaware and Maryland.

§ 636. In *Virginia*, it is said, that upon a question, whether one called as a juror in a case of felony, and challenged for cause, stands indifferent or not, the general rule is, that one who has formed a decided opinion that the prisoner is guilty or innocent, whether that opinion be formed on the evidence of witnesses whose testimony he has heard on a former trial, or conversation with witnesses, or common report, is not an indifferent juror; and that it is immaterial whether such opinion has been expressed or not.[2] Thus, where a person called as a juror stated that "he had a conversation with the prosecutor shortly after the alleged offence committed, and heard from him a general statement of the facts, though he did not know whether that statement mentioned all the facts; on that statement he had *formed and expressed a decided opinion* that the prisoner was guilty; he knew the prosecutor, and had entire confidence in his veracity; he had forgotten some of the circumstances by him related; and the opinion he had formed was not such but that it would yield to evidence; he would try the prisoner's cause by the evidence alone, and had no doubt he could give him a fair trial; he had no prejudice against him;" upon a challenge for cause, it was held that the challenge should have been sustained.[3] But where a person being called as a juror in a case of felony said, on *voir dire*, "that he had expressed an opinion on the circumstances as he had heard them narrated in the country; but he had not heard any of the evidence given on the examination

So in Virginia.

[1] Waters *v.* State (Ct. of App. 1879), 7 Wash. L. R. 341 — Robinson, J.

[2] Lithgow *v.* Com. 2 Va. Cas. 297; Clore's case, 8 Grat. 606; Jackson *v.* Com. 23 Grat. 919.

[3] Armistead *v.* Com. 11 Leigh, 357. See Heath *v.* Com. 1 Robinson, 735.

of the prisoner, or conversed with any of the witnesses or parties, and he did not think the opinion so formed would have any influence on his mind in trying the case; it was held, he was qualified to act, and the challenge for the cause rightly disallowed.[1] Where a juror, examined as to his indifferency, on his *voir dire* declared "he had heard reports concerning the case in the country, and a statement of the circumstances from one of the witnesses, and had formed a hypothetical opinion, but he believed it would not influence his mind as a juror; he believed the acount he had heard of the case at the time he heard it (and he did not now express any doubt of its truth); if the evidence at the trial should correspond with the account he had heard, his former opinion would remain; but if it should be different, he felt satisfied he should be able to decide the cause without being influenced by what he had before heard, and without prejudice;" and it did not appear that the witness had ever before expressed the opinion he had so formed; it was held, that such preconceived hypothetical opinion did not constitute good cause of challenge to the juror. To constitute good cause of challenge to a juror, on the ground of preconceived opinion of the cause formed by him, it was said, it must appear that such preconceived one was a decided one, and not hypothetical.[2] And where a juror was examined on his *voir dire*, and said he had heard part of the evidence on a former investigation, and formed some opinion thereon, yet the opinion so formed would nowise incline his mind as a juror for or against the prisoner, but that he could pass upon the case, on the whole evidence, as impartially as if he had never heard of it; it was held, that such person was a good and impartial juror.[3] A person is not rendered incompetent as a juror in a criminal case, it was repeated by the same court on a later occasion, by the formation of a logical conclusion from facts previously presented to his mind, as he would be by the formation of a settled conviction in respect to the existence of facts themselves.[4]

[1] Brown *v.* Com. 2 Leigh, 769; S. P., Hailstock's case, 2 Grat. 564; Page *v.* Com. 27 Grat. 954.

[2] Osiander *v.* Com. 3 Leigh, 780. See also Sprouce *v.* Com. 2 Va. Cas. 375; Heath *v.* Com. 1 Robinson, 735; Pollard *v.* Com. 5 Randolph, 659.

[3] Hendrick *v.* Com. 5 Leigh, 708.

[4] Heath *v.* Com. 1 Robinson, 735. See Com. *v.* Buzzell, 16 Pick. 158. It is not enough to disqualify a ju-

§ 637. In *North Carolina*, the rule is that an opinion fully made up and expressed against either party, on the subject matter of the issue to be tried, is good cause of principal challenge; but an opinion imperfectly formed, or one merely hypothetical, that is, founded on the supposition that facts are as they have been represented or assumed to be, does not constitute a cause of principal challenge, but may be urged by way of challenge to the favor, which is to be allowed or disallowed, as the triers may find the fact of favor or indifferency.[1] In the same State, on a challenge for cause, the juror stated "that he had formed and expressed an opinion adverse to the prisoner, upon rumors which he had heard; but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the prisoner." The court found the juror indifferent, and the Supreme Court refused to reverse the decision.[2]

So in North Carolina.

§ 638. In *Ohio*, by the Code of Criminal Procedure, "the fol-

ror, according to the view of Leigh, J., "that if the facts and circumstances proved on the trial should be the same with those which the jurors had heard, then they had a decided opinion." Epes's case, 5 Grat. 676. An opinion founded on mere rumor, ought *primâ facie* to be regarded as a mere hypothetical opinion, forming no ground for challenge, unless it appear that the opinion formed is a decided one, likely to influence the juror in his decision. Armistead's case, 11 Leigh, 657; Epes's case, 5 Grat. 681. See Wormeley *v.* Com. 10 Grat. 658.

A talesman, when examined on his *voir dire*, said that he had heard a great deal said about the case, but that he had not heard or read the evidence given at the examinations before the mayor or hustings court; and that he had formed no opinion on the subject. He then stated that since the prisoner had been in jail, his wife and family had moved to the lot adjoining his residence, and had lived there; that they were often at his house, and that there was great intimacy between the families, and on that account he would rather not sit in the case; that his mind might be influenced; and in answer to a question from the court, he said he was unwilling to trust himself under the circumstances. He thought he could give the prisoner a fair trial on the evidence, that he had no prejudice for or against the prisoner, there was no connection by blood or marriage between them, and that he had never spoken to the prisoner's wife or family on the subject of the trial. It was held that he was a competent juror, and that it was error to set him aside. Montague *v.* Com. 10 Grat. 767, 768; and see Page *v.* Com. 27 Grat. 954; Bristow *v.* Com. 15 Grat. 634; Dilworth *v.* Com. 12 Grat. 689.

[1] State *v.* Benton, 2 Dev. & Bat. 196; State *v.* Bone, 7 Jones, 121. See State *v.* Cockman, 2 Wins. (N. C.) No. 2, 95.

[2] State *v.* Ellington, 7 Ired. 61.

lowing shall be good cause for challenge to any person called as a juror on any indictment: 1. That he was a member of the grand jury which found the indictment. 2. That he has formed or expressed an opinion as to the guilt or innocence of the accused.[1] This provision is a codification of the rule previously declared by the court.[2] So in Ohio.

In 1866, the statute was held constitutional, and applied in practice.[3] Under an amendment to the statute, a juror is incompetent who forms his opinion by reading a report of the testimony of alleged witnesses of the transaction.[4]

§ 639. In *Alabama*, in a capital case, it is held not to be ground of challenge of a juror that upon common report he has formed and expressed an opinion of the guilt of the prisoner, if the juror believes that such opinion would have no influence in the formation of his verdict, should the evidence on the trial be different from the report of the facts.[5] Under the statute of Alabama of 1831, which provides that if a juror, in a capital case, has formed and expressed an opinion founded upon rumor, he shall be sworn in chief, it must appear that such opinion was founded upon mere rumor. Where it appears that the opinion was formed upon facts well authenticated by persons in whom the juror had confidence, it is good ground for challenge for cause.[6] So in Alabama.

§ 640. In *Mississippi* the rule is, that while it is not necessary to exclude a juror, that he should have formed and expressed his opinion against the accused with malice or So in Mississippi.

[1] Code Crim. Procedure, § 134. See fully Warren's Crim. Law (1870), p. 131, for this code in full.

[2] Fouts *v.* State, 7 Oh. St. 471; Frazier *v.* State, 23 Oh. St. 551.

[3] Cooper *v.* State, 16 Oh. St. 328.

[4] Frazier *v.* State, 23 Oh. St. 551. In the same case it was held that if such opinion "shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony or hearing them testify," the person so challenged may, in accordance with the proviso of said section, be admitted to serve as a juror if he shall state, "on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence," and the court is satisfied that the juror is impartial and will render an impartial verdict in the case.

[5] State *v.* Williams, 3 Stewart, 454; State *v.* Morea, 2 Ala. 275; Carson *v.* State, 50 Ala. 134; Hall *v.* State, 51 Ala. 9.

[6] Quesenbury *v.* State, 3 Stew. & P. 308. See Ned *v.* State, 7 Port. 187.

ill-will, a mere hypothetical opinion, from rumor only, and subject to be changed by the testimony, does not disqualify.[1] If a juror, however, has formed a fixed judgment, as distinguished from a mere conception based on rumor, he ought to be excluded,[2] though he may never have expressed that opinion.[3] When the juror says that he has formed and expressed an opinion from rumor only, but that his mind is free to act upon the testimony, he is competent.[4] It is otherwise, however, as to a juror who has formed an opinion from what he has heard had been said by some of the witnesses in the case, though he himself had not heard any of the witnesses say anything on the subject, and though he states that his opinions are not such as would influence his verdict, but that he would be governed by the evidence.[5] *A fortiori* the formation of an opinion by one who had heard all the testimony is a disqualification. And while absolute freedom from preconceived opinion should be required where it can be had, yet where, from the notoriety of the transaction or other cause, that cannot be obtained, as near an approximation to it as possible should be had.[6]

So in Missouri.

§ 641. In *Missouri*, by statute, opinion formed only on rumors and producing no bias does not disqualify.[7]

So in Tennessee.

§ 642. In *Tennessee*, it has been declared that loose impressions and conversations of a juror, as to the prisoner's guilt or innocence, founded upon rumor, would not have the effect to set him aside as incompetent; nor, if disclosed

[1] Ogle *v.* State, 33 Miss. 383; Noe *v.* State, 4 How. (Miss.) 330; Lee *v.* State, 45 Miss. 114.

[2] Logan *v.* State, 50 Miss. 269.

[3] State *v.* Johnson, 1 Walk. 392; State *v.* Flower, Ibid. 318.

[4] King *v.* State, 5 Howard's Miss. R. 730; and so White *v.* State, 52 Miss. 216. See State *v.* Johnson, 1 Walk. 392.

[5] Nelms *v.* State, 13 Sm. & Marsh. 500; Alfred *v.* State, 37 Miss. 296; Ogle *v.* State, 33 Miss. 383.

[6] Sam *v.* State, 13 Sm. & Marsh. 189.

Where a juror, being asked if he had formed an opinion as to the guilt or innocence of the prisoner, answered that he had; and, after being challenged for cause by the prisoner, said, in answer to questions by the court, that his opinion was formed from rumor, and that his mind was as free to act upon the testimony as if he had heard nothing about the case, it was held, that it was error for the court to require the prisoner either to accept the juror or to challenge peremptorily. Cotton *v.* State, 31 Miss. 504.

[7] State *v.* Rose, 32 Mo. 560; State *v.* Burnside, 37 Mo. 343; State *v.* Davis, 29 Mo. 391.

after verdict, be a cause of new trial.[1] But an emphatic opinion of guilt excludes. And it has been held, where a juror said, on the morning of the trial: "I have formed my opinion as to that case; I believe he ought to be hung;" again: "Damn him, he ought to be hung;" that he should have been rejected as incompetent.[2]

§ 643. In *Indiana*, it is ruled that when the juror answers that he has formed or expressed an opinion of the defendant's guilt, the nature and cause of the opinion must be inquired into; and that if it appear that the juror has formed or expressed an opinion of the defendant's guilt out of ill-will to the prisoner, or that he has such a fixed opinion of the defendant's guilt as would probably prevent him from giving an impartial verdict, the challenge ought to be sustained.[3] If, however, it was said, the opinion be hypothetical, or of that transient character formed when we hear any reports of the commission of an offence, — such an opinion merely as would probably be changed by the relation of the next person met with, — it is not a sufficient cause of challenge.[4]

So in Indiana.

[1] Howerton *v.* State, Meigs, 262; Alfred *v.* State, 2 Swan, 581; Major *v.* State, 4 Sneed, 597; Moses *v.* State, 11 Humph. 232; but see M'Gowan *v.* State, 9 Yerg. 154.

[2] Brakefield *v.* State, 1 Sneed, 215.

A juror, on his examination by the court, stated, that "shortly after the killing, and while he was looking at the body of the deceased, he inquired of the by-standers how the killing occurred; being told that it was done without provocation, he said that the prisoner ought to be hung." But he also stated, that he had no opinion now. The court held him competent. The prisoner excepted. It was held, that without some explanation of his change of mind, the juror was incompetent, and a new trial was ordered. Norfleet *v.* State, 4 Sneed, 340.

[3] M'Gregg *v.* State, 4 Blackford, 101; but see Heacock *v.* State, 42 Ind. 393.

[4] Ibid.; Rice *v.* State, 7 Ind. 332. See Fleming *v.* State, 11 Ind. 234; Bradford *v.* State, 15 Ind. 347; Morgan *v.* State, 31 Ind. 193; Fahnestock *v.* State, 23 Ind. 231; Clem *v.* State, 33 Ind. 419; Cluck *v.* State, 40 Ind. 263; Hart *v.* State, 57 Ind. 102; Gillooley *v.* State, 58 Ind. 182.

Certain jurors, included in the *venire* at a trial for murder, on examination by the court, stated that they had heard considerable talk about the case, and had read the newspaper accounts of it; that they were rather inclined to think, if what they had read was correct, the prisoner was guilty; that they had never talked with any of the witnesses, nor formed nor expressed an opinion; that they had no ill-will against the prisoner, and could give him a fair trial according to the law and evidence. They were held competent to try the issue. Rice *v.* State, 7 Ind. 332.

§ 644. In *Illinois*, the rule is said to be that a juror is disqualified if he has formed or expressed a decided opinion upon the merits of the case.[1] If, on the contrary, he says he has no prejudice or bias of any kind for or against either party; that he has heard rumors in relation to the case, but has no personal knowledge of the facts, and from the rumors has formed and expressed an opinion in a particular way, if they are true, without expressing any belief in their truth; he would not be disqualified.[2]

So in Illinois.

It is held, also, in conformity with the view taken in other States,[3] that if an opinion is formed, but not expressed, it is not good cause for a challenge.[4] A juror was held incompetent who declared that no amount of circumstantial evidence would induce him to convict a defendant.[5] And the same ruling was had with another who declared that he would not convict, even if convinced of the prisoner's guilt.[6]

§ 645. In *Arkansas*, if a juror in a criminal case state upon his *voir dire* that he has formed an opinion as to the guilt or innocence of the prisoner from rumor, he should be required to state, also, that the opinion was not such as to bias or prejudice his mind, in order to render him competent; and if he state that he has conversed with persons about the case, and formed his opinions from such conversations, he should be required to state further, that such persons did not profess

So in Arkansas.

[1] Gates *v.* People, 14 Ill. 433; Neely *v.* People, 13 Ill. 685; Gray *v.* People, 26 Ill. 344. By a statute passed in 1873, it is provided that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence; and provided, further, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression based upon rumor, or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such cause, if he shall upon oath state that he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of the statement.

[2] Smith *v.* Eames, 3 Scam. 78; Gardner *v.* People, 3 Scam. 83; Thomson *v.* People, 24 Ill. 60; and to the same effect, Baxter *v.* People, 3 Gilm. 386; Leach *v.* People, 53 Ill. 311.

[3] Supra, §§ 628 *et seq.*

[4] Noble *v.* People, Breese, 54.

[5] Gates *v.* People, 14 Ill. 433. Infra, § 665.

[6] Ibid.

to have a personal knowledge of the matters stated by them; but it is not necessary that he should know or be able to state whether such persons were witnesses in the case.[1]

§ 646. In *Georgia*, it is said, that while a juror who states that he has formed and expressed an opinion in a particular case, upon the guilt or innocence of the prisoner, is not competent to sit in such case;[2] and that while the opinion which disqualifies depends upon the nature and strength of the opinion, and not upon its source or origin,[3] yet the mere formation of an opinion by a juror, from rumor, without having expressed that opinion, or expressed it otherwise than jocularly,[4] is not good cause of challenge.[5] The opinion must be settled and abiding.[6] And an opinion on one fact in the prosecution's case does not disqualify.[7]

So in Georgia.

§ 647. In *Iowa*, an unqualified opinion as to the guilt or innocence of the prisoner, formed from rumor, is sufficient to exclude a juror.[8] But the opinion must be absolute, and not such as, in the judgment of the juror, would leave him without bias in the case.[9] Nor does it exclude that such a qualified opinion is formed on reading partial reports of the case.[10]

So in Iowa.

[1] Meyer *v.* State, 19 Ark. 156.

[2] Reynolds *v.* State, 1 Kelly, 222; Anderson *v.* State, 14 Ga. 709.

[3] Boon *v.* State, 1 Kelly, 631.

[4] John *v.* State, 16 Ga. 200; Baker *v.* State, 15 Ga. 498.

[5] Hudgins *v.* State, 2 Kelly, 173; Baker *v.* State, 15 Ga. 498; Griffin *v.* State, Ibid. 476. See Anderson *v.* State, 14 Ga. 709.

[6] Wright *v.* State, 18 Ga. 383.

[7] Lloyd *v.* State, 45 Ga. 57. Infra, § 653.

One formed from mere report will not exclude. Thompson *v.* State, 24 Ga. 297; Maddox *v.* State, 32 Ga. 581; Westmoreland *v.* State, 45 Ga. 228; qualifying Boon *v.* State, 1 Kelly, 618; Ray *v.* State, 15 Ga. 223; Jim *v.* State, 15 Ga. 535. The words, "If that is so, the prisoner deserves to be hung," used before a trial by a juror, in reply to a statement by a third person, does not show a fixed opinion of guilt that would be sufficient ground for a new trial. Mercer *v.* State, 17 Ga. 146. On the other hand, it has been held a sufficient disqualification of a juror, on a trial for murder, that he was heard to say before the trial, "that from what he knew, he would stretch the prisoner." Monroe *v.* State, 5 Ga. 85. See, as to practice in this State in reference to triers, Willis *v.* State, 12 Ga. 444; Copenhaven *v.* State, 14 Ga. 22.

[8] Wau-kon-chau-neek-kaw *v.* U. S. 1 Morris, 332; State *v.* Shelledy, 8 Iowa, 477.

[9] State *v.* Sater, 8 Iowa, 420.

[10] State *v.* Bruce, 48 Iowa, 530.

When the opinion is as to the *killing*, and not as to the defendant's *guilt*, it does not exclude.[1]

In Wisconsin mere opinion is ground for challenge for favor. Rule in Nebraska.

§ 648. In *Wisconsin*, a juror on his examination stated that he had an opinion on the question of the defendant's guilt or innocence if what he had heard was true; that he had heard the story talked about, but had not read the report of the examination before the coroner, or heard the story from witnesses, or those who had heard the testimony, and that his opinion would not prevent his hearing testimony impartially. It was held that this was cause for challenge to the favor, but not for principal cause.[2]

In *Nebraska* mere impression does not exclude.[3]

In Michigan opinion must be unqualified.

§ 649. In *Michigan*, an opinion "partial" but not "positive" does not disqualify.[4] Hence it is no cause for challenge that the juror believed that the crime with which the defendant was charged was committed by *some one*.[5] But it is otherwise when evidence would be required to overcome the prepossession.[6]

And so in California.

§ 650. In *California*, having formed and expressed an opinion from report does not disqualify a person to sit as a juror if he declares he can sit on the jury without bias, that evidence can change his opinion, and that he will be governed by the evidence.[7] It is otherwise when the opinion is unqualified.[8] Under the Criminal Code of that State, a challenge for implied bias can be taken only where the juror has formed and expressed an unqualified opinion or belief that the prisoner is guilty of the offence charged.[9] The challenge must specify

[1] State *v.* Thompson, 9 Iowa, 188; State *v.* Ostrander, 18 Iowa, 434. But see State *v.* Bryan, 40 Iowa, 379. Infra, § 652.

[2] Schœffler *v.* State, 3 Wis. 823.

[3] Curry *v.* State, 4 Neb. 545; S. C., 5 Neb. 412; Carroll *v.* State, 5 Neb. 3; Smith *v.* State, 5 Neb. 183; though see Carroll *v.* State, 5 Neb. 31. As to construction of Nebraska statute (similar to that of New York) see Palmer *v.* State, 4 Neb. 68.

[4] Holt *v.* People, 13 Mich. 224. See Burden *v.* People, 26 Mich. 162.

[5] Holt *v.* People, 13 Mich. 224; Stewart *v.* People, 23 Mich. 63; S. P., supra, § 647.

[6] Stephens *v.* People, 38 Mich. 156.

[7] People *v.* Mahony, 48 Cal. 180; People *v.* Murphy, 45 Cal. 137; People *v.* Johnston, 46 Cal. 78.

[8] People *v.* Edwards, 41 Cal. 640; People *v.* Brotherton, 43 Cal. 530; People *v.* Johnston, 46 Cal. 80; People *v.* Brown, 48 Cal. 253.

[9] People *v.* Macauley, 1 Cal. 379.

the particular cause.[1] It is not material that the juror did not state whether his opinion was for or against the prisoner. The courts would not permit the juror to be questioned on that point.[2]

§ 651. In *Louisiana*, opinion based on common rumor, such opinion being without any prejudice or bias against the accused, does not disqualify.[3] If the juror believes he could render an impartial verdict, he is not on this ground open to challenge.[4]

And so in Louisiana.

§ 652. In *Kansas* a mere hypothetical opinion does not exclude,[5] nor an impression received from newspaper reports,[6] though it is otherwise as to a settled belief.[7] In *Florida* the same rule obtains.[8]

And so in Kansas and Florida.

(*b*[1].) *General Propositions as to Prejudice.*

§ 653. The opinion, to disqualify, must go to the whole case. If it touches merely portions, it is inoperative as a ground for challenge.[9] Thus a juror will not be set aside because he believes that there was an offence committed;[10] because he believes that if certain facts be true the defendant is guilty;[11] because he has drawn an inference from a single inculpatory fact;[12] because he even holds that the *fact* of homicide, though not its *malice*, is to be traced to defendant, the issue being on *malice*.[13]

Opinion must go to whole case.

§ 654. The prevailing opinion, in this country, is that a juror must answer, under oath, any question asked him with regard to his competency as a juror, providing such question does not tend to degrade him, or make him infamous.[14] It seems he will not be excused from stat-

Juror must answer questions, but not to inculpate himself.

[1] People *v.* Walsh, 43 Cal. 447.
[2] People *v.* Williams, 6 Cal. 206.
[3] State *v.* Ward, 14 La. An. 673; State *v.* Caulfield, 23 La. An. 148.
[4] State *v.* Hugel, 27 La. An. 375; State *v.* Coleman, 27 La. An. 691. See State *v.* Guidry, 28 La. An. 630.
[5] Roy *v.* State, 2 Kans. 405.
[6] State *v.* Medlicott, 9 Kans. 257; State *v.* Crawford, 11 Kans. 32.
[7] State *v.* Brown, 15 Kans. 400.
[8] O'Connor *v.* State, 9 Fla. 215.
[9] State *v.* Thompson, 9 Iowa, 18; State *v.* Ostrander, 18 Iowa, 434; Holt *v.* People, 13 Mich. 224.
[10] Holt *v.* People, 13 Mich. 224; Stewart *v.* People, 23 Mich. 63; State *v.* Ostrander, 18 Iowa, 434.
[11] Lee *v.* State, 45 Miss. 114.
[12] Lloyd *v.* State, 45 Ga. 57.
[13] Lowenberg *v.* People, 27 N. Y. 336; S. C., 5 Park. C. R. 414; Wright *v.* State, 18 Ga. 383; State *v.* Thompson, 9 Iowa, 188; State *v.* Ostrander, 18 Iowa, 434.
[14] Infra, §§ 674, 682; 7 Dane's

ing whether he has any prejudice against a religious sect, on the ground that the answer would tend to disgrace him.[1] Questions that would disgrace or criminate him he will not be compelled to answer.[2]

Must first be sworn on *voir dire*.

§ 655. He must, of course, be sworn on his *voir dire* before he can be interrogated.[3] And this is the usual practice.[4]

Court may ask questions not statutory.

§ 656. As it is the duty of the court to empanel, for the trial of each case, a competent and impartial jury, the courts may propound to the jurors returned other interrogatories than those which they are required to put by statute.[5]

Only party prejudiced may challenge.

§ 657. A challenge of a juror, because of his having formed and expressed an opinion on the question to be tried, can be made, at common law, only by that party against whom it was so formed and expressed. In such case the other party cannot interpose.[6]

Juror may be examined as to details.

§ 658. If the juror answers that he has not formed or expressed an opinion on the merits, the examination is not closed, but either party[7] may proceed to ask him such questions as may further test his competency, and in case of sufficient reason appearing on the *voir dire* to form

Abridgment, 334; Edwards's Juryman's Guide, 85; Com. *v.* Knapp, 9 Pick. 496; People *v.* Bodine, 1 Denio, 281; State *v.* Zellers, 2 Halst. 220; Howser *v.* Com. 51 Penn. St. 333; Staup *v.* Com. 74 Penn. St. 458; State *v.* Bonwell, 2 Harring. 529; Lithgow *v.* Com. 2 Va. Cas. 297; Heath *v.* Com. 1 Robinson, 735; Epps *v.* State, 19 Ga. 102; State *v.* Crank, 2 Bailey, 66; State *v.* Benton, 2 Dev. & B. 196; Fletcher *v.* State, 6 Humph, 249. In England the practice is not accepted. R. *v.* Edmonds, 4 B. & A. 471; and see State *v.* Baldwin, 3 Brevard, 309; Const. R. 289. See, *contra*, State *v.* Spencer, 1 Zabr. 196; and, as doubting, see Dilworth *v.* Com. 12 Grat. 689. Numerous cases where the right is exercised will be cited hereafter.

[1] People *v.* Christie, 2 Parker C. R. 579.

[2] Ibid.; Burt *v.* Panjand 99 U. S. 180; Hudson *v.* State, 1 Blackf. 317.

[3] King *v.* State, 5 How. Miss. 730; State *v.* Flower, 1 Walk. 518; Com. *v.* Jones, 1 Leigh, 598. See infra, § 682. The right extends to cross-examination. Infra, § 682.

[4] O'Mara *v.* Com. 75 Penn. St. 424; Staup *v.* Com. 74 Penn. St. 458.

[5] Infra, §§ 683, 684, note; Pierce *v.* State, 3 N. H. 536; Com. *v.* Gee, 6 Cush. 177; Montague *v.* Com. 10 Grat. 767. See infra, §§ 672, 683, 684, as to manner of putting questions.

[6] State *v.* Benton, 2 Dev. & Bat. 196.

[7] Howser *v.* Com. 50 Penn. St. 333.

cause for challenge, he may be challenged for favor, and at common law the question of his bias, as will be seen more fully hereafter, submitted to triers.[1]

[1] People *v.* Bodine, 1 Denio, 281; Heath *v.* Com. 1 Robinson, 735. Infra, §§ 670, 684.

Questions which have been allowed by the courts. — The following questions, in the several cases in which they occur, were adopted, as determining the competency of the juror: —

"Have you formed and expressed an opinion about the guilt of Colonel Burr?" Marshall, C. J., Burr's Trial. 1 Burr's Trial, 367.

"Have you formed and delivered an opinion on the subject matter of this indictment?" Chase, J., in U. S. *v.* Callender, Callender's Trial, Pamphlet, 19-21.

"Have you heard anything of this case, so as to make up your mind?" "Do you feel any bias or prejudice for or against the prisoner at the bar?" Parker, J., Selfridge's Trial. Pamphlet, p. 9.

"Have you formed and expressed an opinion of the guilt or innocence of the prisoner?" Marshall, C. J., in U. S. *v.* Hare, &c., U. S. Circuit Court for Baltimore, May T. 1818, Pamphlet.

"Have you formed and expressed an opinion as to the general guilt or innocence of all concerned in the commission of the offence?" (namely, the burning of the convent in Charlestown, Mass.) Supreme Court of Mass., on trial of the Charlestown rioters. Com. *v.* Buzzell, 16 Pick. 153.

"Have you made up your minds as to which of the two parties was in the wrong in the Kensington riots?" Rogers, J., Supreme Court of Pennsylvania, April 29, 1845, in Com. *v.* Sherry, one of the Kensington rioters, MSS.

1. "Have you at any time, formed or expressed an opinion, or even entertained an impression, which may influence your conduct as a juror?"

2. "Have you any bias or prejudice on your mind for or against the prisoner?" Ogden, J., on a homicide trial. People *v.* Johnson, 2 Wheel. C. C. 367.

1. "Have you expressed or formed any opinion relative to the matter now to be tried?"

2. "Are you sensible of any prejudice or bias therein?"

3. "Had you formed an opinion that the law of the United States, known as the Fugitive Slave Law of 1850, is unconstitutional — so that you cannot convict a person indicted under it for that reason, if the facts alleged in the indictment are proved and the court held the statute to be constitutional?"

4. "Do you hold any opinion upon the subject of the Fugitive Slave Law, so called, which would induce you to refuse to convict a person indicted under it, if the facts set forth in the indictment and constituting the offence are proved against him, and the court direct you that the law is constitutional?" Curtis, J., in U. S. *v.* Morris, charged with attempting to rescue a fugitive slave, Boston, 1851, and approved by Grier, J., and Kane, J., in Phila., 1852, U. S. *v.* Hanway, 2 Wall. Jr. 139.

On the trial of Dorr, the following questions asked by the attorney general were rejected by the court: —

"Did you vote for the Dorr constitution?"

"Do you believe the defendant to have been governor of Rhode Island?" 7 Bost. Law Rep. 347.

§ 659. The bias, however, must go to the particular issue; and on *autrefois acquit* the question is not, opinion as to guilt, but general bias for or against the prisoner.[1] That a bias against crime does not disqualify we have already seen.[2]

Bias must go to immediate issue.

§ 660. There are other causes of challenge, which, though less common in this country than that which has been just noticed, have been frequently acted on. Thus, a principal challenge will be allowed if the juror be within the age of twenty-one;[3] if a female;[4] if he be of blood or kindred to either party,[5] within the ninth degree;[6] if he be connected by affinity or alliance with either party,[7] though if the relationship be remote, as where the juror's sister was the wife of the nephew of one of the parties, the rule is otherwise.[8] By the old English common law it was held a disqualification that the juror was godfather to the child of the defendant, or the defendant to his child.[9]

Relationship a cause for challenge.

§ 661. It is no ground of challenge that the juror on a prior case had found a verdict against the defendant on a prosecution for a distinct offence.[10] This has been pushed so far that in Massachusetts[11] jurors who had just convicted the defendant for keeping a liquor nuisance at

And so of prior connection with case.

[1] Supra, § 623; Josephine *v.* State, 39 Miss. 613.

[2] Supra, § 624.

[3] 1 Inst. 157. See infra, § 846.

[4] Burn's Justice, tit. Jurors, viii. p. 965.

In State *v.* Ketchey, 70 N. C. 621, it was ruled that because of a juror's being first cousin to the prisoner is no good cause of challenge by the prisoner, unless it be shown that ill feeling or bad blood exists between the juror and the prisoner.

[5] 1 Inst. 157; State *v.* Baldwin, 80 N. C. 390.

[6] Jaques *v.* Com. 10 Grat. 690; State *v.* Perry, 1 Busbee, 330; O'Connor *v.* State, 9 Florida, 215.

[7] Bank *v.* Hart, 3 Day, 491; Hinchman *v.* Clark, Coxe, 446; Stevenson *v.* Stiles, 2 Pen. (N. J.) 543. But if the affinity is ruptured by the death of the intermediate link (*e. g.* where the prisoner's wife, who was cousin to the juror, is dead without issue), then the rule does not apply. State *v.* Shaw, 3 Ired. 532. See infra, § 846.

[8] Rank *v.* Shewey, 4 Watts, 218. If, during the trial of a case of felony, it is discovered that the prisoner has a relation on the jury, this is no ground for discharging the jury, and the case must proceed. R. *v.* Wardle, 1 C. & M. 647. See also Moses *v.* State, 11 Humph. 232; and see infra, §§ 845, 846.

[9] 1 Inst. 157.

[10] Sawdon's case, 2 Lewin C. C. 117; U. S. *v.* Shackelford, 3 Cranch C. C. 178.

[11] Com. *v.* Hill, 4 Allen, 591.

one date, were held competent to sit on a prosecution against him for keeping the same kind of nuisance at a subsequent date. But this is a hard decision. The quality of proof in the two cases was the same, the question of date being merely technical; and the jurors in the first case must be viewed as having in the most solemn way formed and expressed an opinion on the second. But it is good ground for challenge that the juror has given a prior verdict on the same subject matter though against another defendant;[1] that he was one of the grand jury who found the particular bill;[2] that he was counsel, servant of, or under close obligations to either party;[3] though it is no cause of challenge that he is brother of one of the counsel of the opposite party;[4] that he is client of the prisoner, who is a member of the bar;[5] that, being a clergyman, he had preached the funeral sermon of the deceased, the prosecution being for murder;[6] or that he lodges as a pay boarder with the defendant.[7] But he is incompetent if he has been *bonâ fide* summoned as a witness for either

[1] 1 Inst. 157. Merely having been sworn as a juror in a prior trial, however, on which there was a *nolle prosequi* before testimony received, is not a disqualification. Reed *v.* State, 50 Ga. 556.

[2] R. *v.* Percival, 1 Sid. 243; R. *v.* Cook, 13 St. Tr. 334; 2 Rev. Stat. N. Y. 734, § 8; Rev. Stat. Mass. c. 137, § 2; Stewart *v.* State, 15 Ohio St. 155; Rice *v.* State, 16 Ind. 298; Barlow *v.* State, 2 Blackford, 115; Rogers *v.* Lamb, 3 Blackford, 155; Birdsong *v.* State, 47 Ala. 68; State *v.* McDonald, 9 W. Va. 456. But being on the *list* of a grand jury without sitting on the case does not disqualify. Rafe *v.* State, 20 Ga. 60. And it has been ruled too late to take the objection after the juror has been accepted. Davis *v.* State, 54 Ala. 93. In Florida, serving on a coroner's inquest, without forming an opinion, is said not to disqualify, when the question of the guilt of the defendant did not come up. O'Connor *v.* State, 9 Fla. 215; State *v.* Madoil, 12 Fla. 151.

[3] 1 Inst. 157; Springer *v.* State, 34 Ga. 379.

[4] Pipher *v.* Lodge, 16 Serg. & R. 214.

[5] R. *v.* Geach, 9 C. & P. 499.

[6] State *v.* Stokely, 16 Minn. 282 (1871). "Searching questions were put by the defendant's counsel as to his state of mind in reference to the case, and the guilt or innocence of the defendant; and he emphatically declared himself entirely impartial in the case. The presumption is that he told the truth. That he officiated at the funeral in his capacity as a clergyman had, of itself, no more tendency to prove a mental bias against defendant, than a performance by the undertaker of the duties of *his* calling on the same occasion would tend to prove such a bias on *his* part." Ripley, C. J. Ibid.

[7] Cummings *v.* Gann, 52 Penn. St. 484.

Mere business relationship, or even social intimacy, does not *per se* disqualify. — Ibid.

of the parties;[1] if he be bail for the defendant;[2] and if, on an indictment for riot, he be an inhabitant of the town where the riot occurred, and had taken an active part in the matter which led to it.[3]

And so of participation in cognate offence.

§ 661 *a*. A juror is incompetent who is indicted for an offence of the same character as that charged against the defendant, the offences being grouped under the same general law, *e. g.* in cases of liquor selling.[4] And in 1879 it was held, by the Supreme Court of the United States, that living in polygamy disqualifies a juror from sitting on a prosecution for polygamy.[5]

And so of pecuniary interest in the result.

§ 662. A pecuniary interest merely as a member of the town or county to whose treasury a fine is to be paid does not incapacitate.[6] It is otherwise, however, when the juror has an individual claim to a fine or forfeiture which a conviction would produce.

And so of irreligion and infamy.

§ 663. Where a juror said, when on a jury in another cause in the same term, "that he was a Tom Paine man, and would as lief swear on a spelling-book as on a Bible," this was held a good ground for challenge;[7] and so is a conviction of an infamous crime.[8]

And so of conscientious scruples as to capital punishment.

§ 664. Where a juror, on being called in a capital case, declared, "that he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict;" it was held by the Supreme Court of Pennsylvania a principal cause of challenging by the prosecution; Gibson, C. J., dissenting.[9] The same opinion is adopted in New York,[10] even

[1] Com. *v.* Joliffe, 7 Watts, 585.

[2] 1 Wheeler's C. C. 391.

[3] R. *v.* Swain, 2 M. & Rob. 112. See infra, § 668.

[4] McGuire *v.* State, 37 Miss. 369.

[5] Reynolds *v.* U. S. 98 U. S. 145; aff. S. C., 1 Utah, 226.

[6] Middletown *v.* Ames, 7 Vt. 166. This is the uniform practice in Pennsylvania. But see State *v.* Williams, 30 Me. 484.

[7] Com. *v.* McFadden, 23 Penn. St. 12.

[8] 1 Inst. 158; Brown *v.* Crashaw, 2 Bulstr. 154; 2 Hale, 277.

[9] Com. *v.* Lesher, 17 S. & R. 155.

[10] People *v.* Damon, 13 Wend. 351; Lowenberg *v.* People, 5 Park. C. R. 414; 27 N. Y. 336; O'Brien *v.* People, 36 N. Y. 276.

though the juror does not belong to a religious denomination scrupulous on the subject, which seems to have been the qualification of the revised statute ;[1] in Maine ;[2] in New Hampshire ;[3] in Vermont ;[4] in Indiana ;[5] in Ohio ;[6] in Massachusetts ;[7] in Virginia ;[8] in North Carolina ;[9] in Georgia ;[10] in Alabama ;[11] in Louisiana ;[12] in Mississippi ;[13] in Texas ;[14] in California ;[15] and in the United States Circuit Court for the Eastern District of Pennsylvania, by Baldwin, J.[16] But when, notwithstanding objections to capital punishment, the juror thinks he could do justice in the case, he may be competent.[17]

In Arkansas, jurors are not rejected because they are opposed to capital punishment, unless they go further, and bring themselves under the disqualifications prescribed by the statute.[18]

In Alabama, the exemption is extended to scruples as to penitentiary punishment.[19] The *defendant* has no ground of complaint if a juror having such conscientious scruples should not be set aside.[20]

So of other conscientious scruples.

§ 665. Any other conscientious scruples which will prevent a just verdict may be ground for challenge. Thus a juror is incompetent who declares that no amount of circumstantial evidence would induce him to find a verdict of guilty.[21] And on the trial of a nuisance for erecting a

[1] Walter *v.* People, 32 N. Y. 147; People *v.* Damon, 13 Wend. 351; People *v.* Wilson, 3 Parker C. R. 199.

[2] State *v.* Jewell, 33 Me. 583.

[3] State *v.* Howard, 17 N. H. 171.

[4] State *v.* Ward, 39 Vt. 226.

[5] Jones *v.* State, 2 Blackf. 475; Gross *v.* State, 2 Carter (Ind.), 329; Driskill *v.* State, 7 Ind. 338; Fahnestock *v.* State, 23 Ind. 231; Greenley *v.* State, 60 Ind. 141.

[6] State *v.* Town, Wright's R. 75; Martin *v.* State, 16 Ohio, 364. By the Ohio Code of Cr. Proc. this is made a statutory cause of challenge, § 134. Warren's Ohio Cr. Law, 1870, p. 131.

[7] Rev. Stat. c. 137, § 6; Gen. Stat. c. 172, § 5.

[8] Clore's case, 8 Grat. 606.

[9] State *v.* Bowman, 80 N. C. 432.

[10] Williams *v.* State, 3 Kelly, 453.

[11] Stalls *v.* State, 28 Ala. 25.

[12] State *v.* Nolan, 13 La. An. 376; State *v.* Baker, 30 La. An. 1134.

[13] Lewis *v.* State, 9 S. & M. 115; Williams *v.* State, 32 Miss. 389; Fortenberry *v.* State, 55 Miss. 403.

[14] Burrell *v.* State, 18 Tex. 713.

[15] People *v.* Tanner, 2 Cal. 257.

[16] U. S. *v.* Wilson, 1 Baldwin, 78.

[17] Com. *v.* Webster, 5 Cush. 295; Williams *v.* State, 32 Miss. 389; People *v.* Stewart, 7 Cal. 140.

[18] Dig. § 158, c. 2; Atkins *v.* State, 16 Ark. 568.

[19] Stalls *v.* State, 28 Ala. 25.

[20] Murphy *v.* State, 37 Ala. 25.

[21] Gates *v.* People, 14 Ill. 433; Smith *v.* State, 55 Ala. 1.

mill-dam, a juror is incompetent who conscientiously believes all mill-dams to be nuisances, though he swears that as to such particular mill-dam he knows nothing, and has formed no opinion.[1]

It has been also ruled that it is a good ground of challenge that the juror held that the offence for which the accused was to be tried (burning a convent) is no crime,[2] and so in Pennsylvania, as to a juror who declared in a prior case that he would acquit any one the judge wanted him to convict.[3]

The prosecuting officer may inquire of a person presented as a juror in the trial of a case of counterfeiting, whether he has taken an oath to acquit all persons of counterfeiting, but the person may refuse to answer.[4]

So of belief that statute is unconstitutional.

§ 666. Belief that a statute is unconstitutional, so as to preclude assent to a conviction under it, disqualifies;[5] but the converse is not true, for a statute is presumed to be constitutional until otherwise determined by the court.[6]

But not in case where a mason is concerned that juror was a freemason.

§ 667. In New York it has been held to be no cause of challenging a juror that he is a freemason, where one of the parties to a suit is a freemason and the other is not.[7] In the obligation, it was observed, assumed by a royal arch mason, and said to be in these words: "I promise and swear that I will aid and assist a companion royal arch mason when engaged in any difficulty, and espouse his cause as far as to extricate him from the same, if in my power, whether he be right or wrong," there is a discrepancy in the relation given of it by masons; while some say that such is the form of the oath, others deny it; but all concur in stating that the obligation is always accompanied with an explanation as to its meaning, which is, that if a royal arch mason sees a brother mason engaged in a quarrel with another person, it is his duty to take his brother mason by the arm and extricate him, without inquiring into the merits of the controversy. On such an interpreta-

[1] Crippen *v.* State, 8 Mich. 117.
[2] Com. *v.* Buzzell, 16 Pick. 153.
[3] Com. McFadden, 23 Penn. St. 12.
[4] Fletcher *v.* State, 6 Humph. 249. See Com. *v.* Eagan, 4 Gray, 18. Supra, § 653.
[5] Com. *v.* Austin, 7 Gray, 51.
[6] Com. *v.* Abbott, 13 Met. 120.
[7] People *v.* Horton, 13 Wend. 9. See Burdine *v.* Grand, 37 Ala. (N. S.) 478.

tion, the oath taken by a master mason, or a royal arch mason, on his admission, it was ruled, does not disqualify him from serving as a juror in an action between a mason and a person not a mason.[1]

Membership of specific vigilance associations or proscriptive organizations may disqualify, but not of general associations to put down crime.

§ 668. The members of any association of men, combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for that purpose, may be incompetent to sit as jurors on the trial of an indictment for violating that law.[2] And it has been held error in Illinois to refuse, on a prosecution for selling spirituous liquor, to permit the following questions to be put: "Are you a member of a temperance society?" "Are you connected with any society or league organized for the purpose of prosecuting a certain class of people under what is called the new temperance law of the State, or have you ever contributed any funds for such a purpose?"[3] But members of an association to prosecute offences against certain laws, who have each, by subscribing a certain sum to the funds of the associa-

[1] People *v.* Horton, *ut supra.*

[2] Com. *v.* Eagan, 4 Gray, 18. See supra, § 624.

A juror, being challenged for bias, was examined before triers, and the following questions were propounded: 1st. Are you a member of a secret and mysterious order known as, and called, Know-nothings, which has imposed on you an oath or obligation, beside which an oath administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded? 2d. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which any prejudice exists in your mind against Catholic foreigners? 3d. Do you belong to any secret political society, known as, and called by the people at large in the United States, Know-nothings; and if so, are you bound by an oath, or other obligation, not to give a prisoner of foreign birth, in a court of justice, a fair and impartial trial? 4th. Have you at any time taken an oath or other obligation, of such a character that it has caused a prejudice in your mind against foreigners? 5th. Are you under any obligation not to extend the same rights, privileges, protection, and support to men of foreign birth as to native-born American citizens? 6th. Have you any prejudice whatever against foreigners? It was held, in California, that the court erred in refusing to allow the questions to be asked. People *v.* Reyes, 5 Cal. 347.

[3] Lavin *v.* People, 69 Ill. 303. These rulings may be harmonized with the following by the distinction suggested by the Illinois court, that such questions are proper at least to enable the defendant to exercise his right of peremptory challenge.

tion, rendered themselves liable to pay, to the extent of their subscriptions, their proportion of expenses incurred in such prosecutions, are not incompetent to sit as jurors on the trial of such a prosecution, commenced by the agent of the association, and carried on at its expense, if it appear that they paid their subscriptions before the prosecution was commenced.[1] And in several States a juror is not rendered incompetent by the fact that he belongs to an association for prosecution of crimes of the same class as that under trial.[2]

Connection with the police is by itself no disqualification.[3]

To a grand juror it is no cause for challenge that he belongs to an association for the prosecution of crime.[4]

A bias or prejudice against crime generally, or against the crime on trial, is no disqualification.[5]

(*c*[1].) *Alienage.*

Alienage may be a disqualification. And so may ignorance of language.

§ 669. In those jurisdictions where alienage is a disqualification (which is the case at common law), the objection is good if made by way of challenge. After verdict it is too late, since the disqualification is one which due diligence would have discovered, and which is not moral but technical.[6] Ignorance of the English language is a ground for challenge when the jury can be made up of persons familiar with the language.[7]

[1] Com. *v.* O'Neil, 6 Gray, 343. See Com. *v.* Thrasher, 11 Gray, 55; Williams *v.* State, 3 Kelly, 453.

[2] State *v.* Wilson, 8 Clarke (Iowa), 407; Boyle *v.* People, 4 Col. 176.

[3] People *v.* Reynolds, 16 Cal. 128.

[4] Musick *v.* People, 40 Ill. 268. See R. *v.* Swain, 2 M. & R. 112.

[5] Williams *v.* State, 3 Kelly, 453. Supra, § 624. To conscientious objections to polygamy, see U. S. *v.* Reynolds, 1 Utah, 226; 98 U. S. 145.

[6] R. *v.* Sutton, 8 B. & C. 417; R. *v.* Despard, 2 Man. & R. 406; Presbury *v.* Com. 9 Dana, 203; State *v.* Nolan, 13 La. An. 276; Seal *v.* State, 13 Sm. & M. 286; Schumaker *v.* State, 5 Wis. 324.

[7] Fisher *v.* Phil. 4 Brewst. 375; State *v.* Marshall, 8 Ala. (N. S.) 302; Lyles *v.* State 41 Tex. 172. That the court may take notice of such disqualification see infra, § 683.

In Trinidad *v.* Simpson, Sup. Ct. Cal. 1879, 10 Cent. L. J. 149, we have the following from Elbert, J.: —

"We are not unmindful that there are many serious objections to the interposition of interpreters in judicial proceedings, and while we hold it within the power of the court to appoint an interpreter under the circumstances of this case, it was also within its discretion to exclude the jurors named for the cause assigned. People *v.* Arceo, 32 Cal. 49; Atlas M. Co. *v.*

(c.) *Challenges to Polls for Favor.*

§ 670. Challenges to the polls for favor take place when, though the juror is not so evidently partial as to amount to a principal challenge, there are reasonable grounds to suspect that he will act under some undue influence or prejudice, and when these grounds involve disputed questions of fact.[1] The distinction, however, between

Challenges for favor are those involving disputed questions of fact.

Johnson, 23 Mich. 37; State *v.* Marshall, 8 Ala. (N. S.) 302. Such persons are not disqualified, but whenever it is practicable to secure a full panel of English-speaking jurors, a wise discretion would excuse from jury duty persons ignorant of that language. The cases of Fisher *v.* Philadelphia, 4 Brewst. 375, and Lyles *v.* State, 41 Tex. 172, are cited against the conclusion arrived at in this opinion. The first authority we have been unable to obtain. With the reasoning of the last we are not satisfied. If our conclusion as to the power of the court to appoint an interpreter be correct, the foundation upon which the conclusions in that case appear to rest disappears."

This, however, can only hold good in cases where the panel can in no other way be constituted; and even in such case it is hard to see how the deliberations can be conducted of a jury who have no common language. To put an interpreter in with them would be to make the interpreter the arbiter.

[1] Supra, § 621; Co. Lit. 157 *b;* Bac. Abr. Juries, E. 5; Williams's J., Juries, v.; Dick. Sess. 188; Freeman *v.* People, 4 Denio, 39. "Challenges to the favor," as was observed by the late Judge Gaston, of North Carolina, "are where the matters shown do not *per se* demonstrate unindifference, and therefore warrant it as a judgment of the law, but only excite a suspicion thereof, and leave it as a matter of *fact*, to be found or not found, by the triers, upon the evidence. And," he adds, "it seemeth to us that an opinion fully made up and expressed, against either of the parties, on the subject matter of the cause to be tried, whether in civil or criminal cases, is a good cause of principal challenge; but that an opinion imperfectly formed, or an opinion merely hypothetical, that is to say, founded on the supposition that facts are as they have been represented or assumed to be, do not constitute a cause of principal challenge, although they may be urged by way of challenge *to the favor*, which is to be allowed or disallowed as the triers may find the fact of favor or indifferency." State *v.* Benton, 2 Dev. & B. 212, 213. So, in pursuance of the same distinction, it was said by Beardsley, J.: "A fixed and absolute opinion may be necessary to sustain a challenge for *principal* cause, but not so where the challenge is *for favor*. In the first species of challenge, the result is a conclusion of law upon ascertained facts; but in the latter, the conclusion is a matter of fact to be found by the triers. No certain rule can be laid down for their guidance. They are sworn to try whether the juror challenged stands indifferent (Gra. Pr. 307; 1 Trials, per Pais, 205; 1 Salk. 152, pl. 1; Bac. Abr. Juries, E. 12, notes); and this must be determined

challenges for favor and those for principal cause is in many jurisdictions disregarded. Thus, in the federal courts, it is settled law that when a challenge for favor would be sustained, a court of error will not reverse because the challenge was in form for cause.[1] Consequently, what has been already said under the head of challenges for principal cause is to be examined as connected with challenges for favor.[2]

The fact, however, that in some jurisdictions *all* challenges are decided by the court, without the intervention of triers, does not do away with the distinction between the two classes.[3] The question, in challenges for favor, is, whether the juryman is altogether indifferent as he stands unsworn,[4] because he may be, even unconsciously to himself, swayed to one side, and indulge his own feelings when he considers himself influenced entirely by the weight of evidence;[5] or may be under such influences, indirect or direct, as to create in him a bias to one or the other side.[6]

upon their conscience and discretion, in view of the facts and circumstances in evidence before them. It is competent to prove that the juror challenged and the opposite party are in habits of great intimacy; that they are members of the same society, partners in business, or the like. The feelings of the juror may also be shown, and that whether they amount to positive partiality or ill-will, or not, as his views and opinions also may be, whether mature, absolute, or hypothetical. Indeed any and every fact or circumstance from which bias, partiality, or prejudice may justly be inferred, although very weak in degree, is admissible, on this issue; and the inquiry should by no means be restricted to the isolated question of a fixed and absolute opinion as to the guilt or innocence of the prisoner." People *v.* Bodine, 1 Denio, 9, 35, 281. See, to same effect, Schœffler *v.* State, 3 Wis. 823.

[1] Reynolds *v.* U. S. 98 U. S. 145.

[2] See supra, § 621.

[3] State *v.* Howard, 17 N. H. 171; Greenfield *v.* People, 6 Abb. New Cas. 1, reversing S. C., 1 Hun, 212.

[4] People *v.* Horton, 13 Wend. 8.

[5] Ibid.

[6] See fully supra, § 621; and see Co. Lit. 157; Bac. Abr. Juries, E. 5; Burn's J., Juror, iv. 1; Williams's J., Juries, v.

Properly speaking, challenges for "bias," in the English practice, fall under the present head, though they have necessarily been considered, from circumstances connected with our distinctive American practice, under the title of Principal Challenges. The reason of this confusion of nomenclature is to be traced to the circumstance that the question of preconceived opinion or prejudice on the juror's part, as a mere matter of opinion, is examined into in England as a conclusion of law, to be drawn from certain conditions (*e. g.* that the juror and the defendant are intimate friends), while with us it is treated as an independent objective fact, cap-

§ 671. As will hereafter be more fully seen,[1] persons to be affected by the finding of jurors may object to their fitness, but have nothing to do with the question whether the juror is privileged from acting as such. Whether a person is privileged on account of his age comes under the latter class of questions.[2]

Challenges cannot moot questions of mere personal privilege to juror.

The court may excuse a juror for deafness, without the prisoner's consent.[3]

III. MODE AND TIME OF TAKING CHALLENGES.

§ 672. Local statutes usually determine the question which party has priority in peremptory challenging; though on principle it would seem right that the prosecution should begin, and that the defendant should not be called upon to answer until the prosecution's challenges are made.[4] When the prosecution has no peremptory challenges to make, the practice is for the defendant first to challenge; and if he makes no challenge, the prosecution may then address the juror such questions for testing his impartiality as the court may approve. The challenge, either by the prosecution or the defence, must be before the oath is commenced, down to which period the right exists.[5] The moment the oath is begun it is, in ordinary cases, too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so; but if he take the book without authority, neither party wishing to challenge is prejudiced thereby.[6] The rule, however, rests on the supposition that the defendant, when the objection

Challenge must be prior to oath.

able of determination by a personal examination of the juror under oath. See supra, § 621.

[1] Infra, § 692.

[2] Breeding *v.* State, 11 Tex. 257.

[3] Jesse *v.* State, 20 Geo. 156.

[4] State *v.* Steely, 65 Mo. 218.

[5] Supra, § 617; Munly *v.* State, 7 Blackf. 593; Morris *v.* State, Ibid. 607; Williams *v.* State, 3 Kelly, 453; State *v.* Patrick, 3 Jones N. C. (L.) 443; Powell *v.* State, 48 Ala. 154; Murray *v.* State, 48 Ala. 675; Drake *v.* State, 51 Ala. 30; Battle *v.* State, 54 Ala. 93; People *v.* Kohle, 4 Cal. 198; People *v.* Jenks, 24 Cal. 11; People *v.* Coffman, 24 Cal. 230; People *v.* Sanford, 43 Cal. 29; State *v.* Larkin, 11 Nev. 314; Clarke *v.* Terr. 1 Wash. T. 82. Even if the juror has been accepted this does not preclude his challenge. People *v.* Montgomery, 53 Cal. 576.

[6] R. *v.* Giorgetti, 4 F. & F. 546; R. *v.* Frost, 9 C. & P. 129; Com. *v.* Knapp, 10 Pick. 477; McClure *v.* State, 1 Yerg. 206; Rash *v.* State, 61 Ala. 89.

is raised by him, had the opportunity of discovering the juror's bias before the oath was administered. If he has no such opportunity, the objection may be taken after the oath;[1] and when such bias is discovered after verdict, it is, as will presently be seen, ground for new trial.[2] Such being the case, when the party discovers such disqualification subsequent to oath but before opening the case, the objection should be allowed by the court. Hence it has been ruled that after a juror has been sworn in chief, and taken his seat, if it be discovered that he is incompetent to serve, he may, in the exercise of a sound discretion, be set aside by the court at any time before evidence is given, and this may be done even in a capital case, and as well for cause existing before as after the juror was sworn;[3] though as a general rule it is too late, after the jury is empanelled, to inquire into the impartiality of a juror.[4]

When for favor must specify reasons.

§ 673. A challenge for favor or bias must specify the specific reasons of objection. It is not enough to challenge for "bias." The kind of bias must be stated.[5]

Juror must be sworn on *voir dire*.

§ 674. The correct practice is, immediately after the juror is challenged, to swear him on his *voir dire*, as a condition precedent to his examination.[6] The form of oath to the juror on the *voir dire* is as follows: "You shall true answer make to all such questions as the court shall demand of you. So help you God."

Passing over to court no waiver.

§ 675. It is no waiver of the right to challenge for cause for the defendant to pass the juror over to the court, or to the opposite side for examination.[7]

[1] Supra, § 617; Com. *v.* Twombly, 10 Pick. 480; Hendrick *v.* Com. 5 Leigh, 708; McFadden *v.* Com. 23 Penn. St. 12; Evans *v.* State, 6 Tex. Ap. 513.

[2] Infra, § 844.

[3] U. S. *v.* Morris, 1 Curtis C. C. 23; People *v.* Damon, 13 Wend. 351; People *v.* Bodine, 1 Edm. (N. Y.) Sel. Cas. 36; Tooel *v.* Com. 11 Leigh, 714; Com. *v.* McFadden, 23 Penn. St. 12; Bristow *v.* Com. 15 Grat. 634; Dilworth *v.* Com. 12 Grat. 689; McGuire *v.* State, 37 Miss. 369. See §§ 820, 844, &c., as to the withdrawal of jurors.

[4] Com. *v.* Knapp, 10 Pick. 477; Gillooley *v.* State, 58 Ind. 182; Ward *v.* State, 1 Humph. 253. See State *v.* Harris, 30 La. An. 90.

[5] People *v.* Renfrow, 41 Cal. 37; People *v.* McGungill, 41 Cal. 429; People *v.* Buckly, 49 Cal. 241.

[6] Supra, §§ 654–5; infra, § 682.

[7] McFadden *v.* Com. 23 Penn. St. 12; Hendrick *v.* Com. 5 Leigh, 708; and see supra, §§ 617–18.

§ 676. The mere fact of a juror purging himself from disqualification on his *voir dire* does not preclude the party questioning him from challenging him for favor, and producing evidence before the court or the triers, as the practice may be, to disprove his testimony. Otherwise, an incompetent juror could qualify himself by adding perjury to his other disqualifications.[1]

After principal challenge is disallowed, there may be challenge for favor.

§ 677. We have already seen,[2] that it is doubted whether a defendant can make a peremptory challenge after he has passed the juror over to the court or to the prosecution; though the better opinion is that on due cause shown the right may be exercised at any period down to the completion of the panel. But it is agreed that the defendant has the right of peremptory challenge to a juror after he has made such answers on the *voir dire* as do not authorize a challenge for cause,[3] though by high authority this has been questioned.[4]

Peremptory challenge may be made after challenge for cause.

§ 678. It has been said that the defendant must personally, and not through counsel, make such challenges as are peremptory.[5] This, however, is a mere arbitrary and forced extension of the fiction of the jurymen and prisoner looking on each other, to see if there is any personal reminiscence which would touch the question of indifference. The usual practice is for this kind of challenge, as is the case with all others, to be made by counsel.

Challenges may be made by counsel.

§ 679. It is said that the court, in its discretion, will not permit a peremptory challenge to be recalled, after the juryman is set aside, in order merely to admit a chal-

In cases of surprise peremptory

[1] Carnal *v.* People, 1 Parker C. R. 273; Freeman *v.* People, 4 Denio, 9; People *v.* Bodine, 1 Denio, 281; Com. *v.* Heath, 1 Robinson, 735; though see Com. *v.* Wade. 17 Pick. 395.

A juror s answers on a challenge for favor are not admissible on a challenge for principal cause; but when a challenge for principal cause and that for favor are tried successively by the court, the answers on the trial for principal cause may be referred to on the trial of the challenge for favor. Greenfield *v.* People, 6 Abbott's New Cas. (N. S.) 1.

[2] Supra, § 617.

[3] See cases cited supra, § 673, and see 6 T. R. 531; Co. Lit. 158 *a*; 4 Black. Com. 363; 2 Hawk. c. 43, s. 10; Bac. Abr. Juries, E. 11; State *v.* Potter, 18 Conn. 166; Hooker *v.* State, 4 Ohio, 350. See People *v.* Bodine, 1 Denio, 281; Hoobach *v.* State, 43 Tex. 242.

[4] Com. *v.* Rogers, 7 Met. (Mass.) 500.

[5] State *v.* Price, 10 Rich. L. 351.

challenge may be recalled.

lenge for cause.[1] But in case of surprise such discretion may be properly invoked.

§ 680. While in some jurisdictions joint defendants are limited to a single set of challenges,[2] yet, where this limitation does not obtain, the right to challenge a juror, as has been observed, is a right to reject, not to select; and therefore neither of two defendants in an indictment on a joint trial has cause to complain of a challenge by the other.[3]

One defendant cannot object to challenge of co-defendant.

Juror indifferent on one side may be challenged by other.

§ 681. If a juror be challenged on one side and be found indifferent, he may still be challenged on the other side.[4]

§ 682. The juror, as has been seen, may be examined under oath as to his qualifications; though he is not to be so examined when the question involves disgrace.[5] He is of course subject to cross-examination by the party opposing the challenge.[6]

Juror may be cross-examined.

§ 683. As has been already seen, the court, of its own motion, without the suggestion of either party, may examine upon oath all who have been summoned to serve upon the jury, touching any disability created by statute,

Court may of its own motion examine.

[1] State *v.* Price, 10 Rich. L. 351; State *v.* Coleman, 8 S. C. 237. See R. *v.* Parry, 7 C. & P. 836; State *v.* Lautenschlager, 22 Minn. 514. Supra, § 619.

In Connecticut, B., having been called as a talesman, and examined as to his bias, and no reason to except to him appearing, the counsel for the prisoner were informed by the court that they could then challenge B. peremptorily if they desired to do so. They declined to exercise the right at that time, as the panel was not then full; and B. was directed to take his seat as one of the jurors. After the panel was full, and but six peremptory challenges had been made, the prisoner's counsel claimed the right to challenge B. peremptorily. It was held that in the absence of any reason for a peremptory challenge then, which did not exist before, when the exercise of the right was declined, it was too late to challenge B. peremptorily. State *v.* Potter, 18 Conn. 166. See supra, § 617; State *v.* Cameron, 2 Chandler (Wis.), 172; but see Hendrick *v.* Com. 5 Leigh, 708.

[2] Supra, § 614 *a*.

[3] U. S. *v.* Marchant, 4 Mason, 160; 12 Wheaton, 480; State *v.* Doolittle, 58 N. H. 92; Bixbe *v.* State, 6 Oh. 86; Matow *v.* State, 15 Ill. 536; Brister *v.* State, 26 Ala. 107; State *v.* Smith, 2 Ired. 402. See supra, § 620.

[4] Co. Lit. 158 *a*; Bac. Abr. Juries, E. 16; 1 Ch. C. L. 545.

[5] Supra, § 654.

[6] Cook's case, 13 How. St. Tr. 312; People *v.* Bodine, 1 Denio, 281; People *v.* Knickerbocker, 1 Parker C. R. 302; Howser *v.* Com. 51 Penn. St. 333; Heath *v.* Com. 1 Robinson, 735.

such as infancy, want of freehold or property qualifications, or, in a capital case, conscientious scruples on the subject of capital punishment, and upon any such disability being thus made to appear, or if it be shown that any one summoned has been convicted of perjury, the court may and should set aside any such juror of its own action, without objection made by either party.[1] And the court, of its own motion, without the suggestion or consent of either party, may excuse or set aside a juror who, though in all other respects competent, is disabled physically or mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing, or other like cause, from properly performing the duties of a juror.[2] But the erroneous exercise of this power is a matter of exception by the prisoner, for which, in an extreme case of abuse, the judgment of the court may be reversed.[3] In Massachusetts, the right of propounding questions is for the court exclusively, and not for parties.[4]

IV. HOW CHALLENGES ARE TO BE TRIED.

§ 684. If the array be challenged, the mode of trial is at common law at the discretion of the court. The trial sometimes is by two coroners, and sometimes by two of the jury; with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge be for favor or partiality, then by any other two assigned thereunto by the court.[5] Upon a challenge to the array, the persons making the challenge must be prepared strictly to prove the cause.[6]

At common law at discretion of court.

[1] State *v.* Howard, 17 N. H. 171; People *v.* Christie, 2 Park. C. R. 579; U. S. *v.* Blodgett, 35 Ga. 336; McCarty *v.* State, 26 Miss. 299. See State *v.* Boon, 80 N. C. 461.

[2] Montague *v.* Com. 10 Grat. 767. See Com. *v.* Hayden, 4 Gray, 18; Stewart *v.* State, 1 Ohio St. 66; Stephen *v.* People, 38 Mich. 739; Jesse *v.* State, 20 Ga. 156; Breeding *v.* State, 11 Tex. 257; State *v.* Marshall, 8 Ala. 302. Supra, §§ 669, 671; infra, 692–3.

[3] Montague *v.* Com. *ut supra.* But the case, to reverse, must be one of oppression to the defendant. State *v.* Ostrander, 18 Iowa, 435; People *v.* Lee, 17 Cal. 76. Infra, §§ 692–3.

[4] Com. *v.* Gee, 6 Cush. 177.

[5] 2 Hale, 275. Supra, § 609.

[6] R. *v.* Savage, 1 Mood. C. C. 51. Supra, § 611.

The trial in Pennsylvania is by statute assigned to the court. Rev. Act, Bill II. § 39. In New York, by the Act of May 7th, 1873, "all challenges of jurors, both in civil and criminal cases, shall be tried and deter-

§ 685. When the array is thus challenged, the opposite party may either plead to it, or demur to its sufficiency in law.[1] If he plead, then the triers are sworn and charged to inquire "whether it be an impartial array or a favorable one;" if they affirm it, the clerk enters under it "*affirmatur;*" but if they find it to be partial, the words "*calumnia vera*" are entered on record.[2] The court may either decide the demurrer at once, or adjourn its consideration to a future period.[3] Where the judges, upon hearing the arguments, overrule the challenge, the decision is entered on the original record, and at *nisi prius* appears on the *postea;* but if it is overruled without demurrer on being debated, the objections may afterwards be made the subject of a bill of exceptions.[4] Should the challenge be admitted, and the array be quashed, a new *venire* is awarded the coroners or elisors, in the same manner as if it had been prayed by one of the parties to be so directed, to prevent the delay at an earlier stage of the proceedings.[5]

As to array triers are appointed on issues of fact; otherwise when there is demurrer.

§ 686. In many States, as has been seen, challenges to the polls are tried by the court. In others statutory provisions exist allowing triers. In others, the court, at common law, chooses the triers; if two are sworn, they then

At common law, on challenges to the poll,

mined by the court only," but to the action of the court exceptions may be taken by writ of error or certiorari. See supra, § 632.

In Ohio, by the Code of Criminal Procedure, "all challenges for cause shall be tried by the court on the oath of the person challenged, or on other evidence, and such challenge shall be made before the jury is sworn and not afterward."

A challenge to the array should be in writing, so that it may be put upon the record, and the other party may plead or demur to it; and the cause of challenge must be stated specifically. R. *v.* Hughes, 1 C. & K. 235, 519; 47 E. C. L. R.

"When the opposite party pleads to the challenge, two triers are appointed by the court; either two coroners, two attorneys, or two of the jury, or indeed any two indifferent persons. If the array be quashed against the sheriff, a *venire facias* is then directed *instanter* to the coroner; if it be further quashed against the coroner, it is then awarded to two persons, called *elisors*, chosen at the discretion of the court, and it cannot be afterwards quashed. Co. Lit. 158 *a*." Roscoe's Cr. Ev. p. 208.

In the United States courts, triers are dispensed with. Act of March 3, 1865, § 2. See Rev. Stat. U. S.

[1] See forms, 10 Wentw. 474.

[2] 4 Black. Com. 353, n. 8; Bac. Abr. Juries, E. 12; 1 Ch. C. L. 549.

[3] Ibid.

[4] 1 Ch. C. L. 549; Bac. Abr. Juries, E. 12.

[5] Co. Lit. 158 *a*.

try ;[1] and if they try one indifferent, and he be sworn, then he and the two triers try another ; and if another be tried indifferent, and he be sworn, then the two triers cease, and the two that be sworn on the jury try the rest.[2]

triers are appointed by court.

[1] McGuffie *v.* State, 17 Ga. 497.

[2] Finch. 112 ; 1 Inst. 158 ; Co. Lit. 158 *a ;* 2 Hale, 275 ; Bac. Abr. Juries, E. 12; Burn's J., Jurors, iv. 3; Williams's J., Juries, v. ; Dick. Sess. 190. "If the party pleads to the challenge" (Archbold's C. P. 17th ed. (1871) p. 154), "two *triers* are (in the case, at least, of a challenge for favor, and also, it would seem, in the case of a principal challenge, unless the fact be admitted or apparent) appointed by the court, who are sworn, and charged to try whether the array be an impartial or favorable one. See O'Brien *v.* R. 2 Ho. Lords Cas. 465. These triers are generally two of the jurymen returned. The court may, however, in its discretion, refer the trial to the two coroners, or to two attorneys, or to any other two indifferent persons. 2 Hale, 275; 4 Bla. Com. 353 ; 2 Roll. Rep. 363. If they find in favor of the challenge, a new *venire* is awarded to the coroners, or, if they be interested, to the elisors. See 1 Inst. 158; R. *v.* Dolby, 2 B. & C. 104. There the defendant, being indicted for a seditious libel, challenged the array on the ground that the prosecution was instituted by an association called the Constitutional Association, and that one of the sheriffs who returned the jury was one of the association. The counsel for the prosecution thereupon took issue ; the chief justice then appointed two triers to try the issue, who were accordingly sworn; the counsel for the defendant first addressed these triers, and called a witness, who proved that the sheriff named was one of the subscribers to the association. The counsel for the prosecution then addressed the triers, and called a witness to prove that the sheriff had ceased to be a subscriber to or member of the association before the return of the jury process, but failed in proving it for want of the letter by which the sheriff had withdrawn himself from it. The triers were then addressed by the counsel for the defendant in reply. The chief justice summed up. The triers found in favor of the challenge, and the cause was adjourned. If the triers find against the challenge, the trial proceeds as if no such challenge had been made. The improper disallowance of a challenge is ground, not for a new trial, but for a *venire de novo.* R. *v.* Edmonds, 4 B. & Ald. 471."

"If the challenge is to the first juror called, the court may select any two indifferent persons as triers ; if they find against the challenge, the juror will be sworn, and be joined with the triers in determining the next challenge ; but as soon as two jurors have been found indifferent, and have been sworn, every subsequent challenge will be referred to their decision. 2 Hale, 275; Co. Lit. 158 *a ;* Bac. Abr. Juries, E., 12."

Where, on a trial for murder, a juror was challenged for favor, and the first two jurors sworn having been appointed triers, sworn as such, and on hearing the evidence, arguments, and charge, could not agree, it was held that the next two (the third and fourth) should be selected to rehear the matter as triers ; and they were so sworn. People, *v.* Dewick, 2 Park. C. R. (N. Y.) 230.

Triers' Oath. — The oath of the tri-

No challenge to triers.

§ 687. From the necessities of the case, no challenge of triers is admissible.[1]

When triers are not asked for, parties are bound by decision of court.

§ 688. When the facts on which a challenge rest are disputed, the proper course is to submit the question to triers; but if neither of the parties ask for triers to settle the issue of the fact, and submit their evidence, whether consisting of the jurors' *voir dire* or of extraneous evidence, to the judge, and take his determination thereon, they cannot afterwards object to his competence to decide that issue.[2] The production of evidence to the judge without asking for triers will be considered as the substitution of him in the place of triers; and his decision will be treated in like manner as would the decision of triers; and, therefore, although the determination of the judge should be against the weight of evidence, a new trial will not be granted for that cause when the defendant is acquitted, in analogy to the principle, that if on a main question in a criminal case the defendant was found not guilty, there cannot be a new trial.[3] The same distinction has been applied by the Supreme Court of the United States on a writ of error to the decision of the trial court upon a challenge for principal cause.[4]

ers, as given in the 17th edition of Archbold's Criminal Pleading, published in 1871, pp. 154, 155, is: "*You shall well and truly try whether A. B., one of the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God.*" It has been ruled in New York to be error to swear the triers simply to find whether the juror is indifferent "upon the issue joined." Freeman *v.* People, 4 Denio, 9.

[1] Archbold's C. P. 17th ed. 154, 155.

Oath of Witness before Triers. — The form of oath to be administered to a witness sworn to give evidence before the triers is as follows: "*The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth. So help you God.*" The topic of examination of the challenged juror has been already noticed. Supra, § 682.

[2] People *v.* Rathbun, 21 Wend. 509; People *v.* Mather, 4 Wend. 229; People *v.* Doe, 1 Mann. (Mich.) 451; Stewart *v.* State, 8 Eng. (13 Ark.) 720.

[3] People *v.* Mather, 4 Wend. 229.

[4] U. S. *v.* Reynolds, 98 U. S. 145. It was further held that the finding of the trial court upon the question of fact ought not to be set aside in a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trials because the verdict is against the evidence. If a juror is challenged for principal cause, and the challenge sustained, the judgment, it

§ 689. Upon the trial of a challenge for favor, it is erroneous to reject all evidence except such as goes to establish a fixed and absolute opinion touching the guilt or innocence of the prisoner. A fixed opinion of the guilt or innocence of the prisoner, though it may be necessary to sustain a challenge for principal cause, need not be proved where the challenge is for favor. A less decided opinion may be shown and exhibited to the triers, who must determine upon its effect. Thus, when the question is submitted to the triers, a juror challenged for favor, if examined, may be asked whether he ever thought the prisoner guilty; or what impressions statements which he had heard or read respecting the evidence had made upon his mind; and, on the same reasoning, an opinion imperfectly formed, or one based upon the supposition that facts are as they have been represented, may be proved before the triers upon such a challenge.[1] The question is to be submitted as a question of fact, upon all the evidence, to the conscience and discretion of the triers, whether the juror is indifferent or not, and any fact or circumstance from which bias or prejudice may justly be inferred, although weak in degree, is admissible evidence.[2]

Evidence tending to show bias admissible on trial.

was ruled, will not be reversed upon error if it appears that, although the challenge was not good for cause, it was for favor. Ibid.

[1] People *v.* Fuller, 2 Parker C. R. 16; Barber *v.* State, 13 Fla. 675.

[2] People *v.* Bodine, 1 Denio, 281. In New York, under the old practice, it is said that the court should not instruct the triers how to find. People *v.* McMahon, 2 Parker C. R. (N. Y.) 663.

Upon a challenge for favor, if the court err in admitting or rejecting the evidence, or instructing the triers upon matters of law, a bill of exceptions lies. The remedy would be the same if the court should overrule such a challenge when properly made, or refuse to appoint triers. Per Beardsley, J. The fact that a prisoner did not avail himself, as he might, of a peremptory challenge to exclude a juror, who was found indifferent upon a challenge for cause, may not, as we will soon see more fully, prevent him from taking advantage of an error committed on the trial of the challenge for cause, though it appears that his peremptory challenges were not exhausted when the empanelling of the jury was completed. See infra, § 693.

In Georgia, where a juror is put upon the triers to ascertain his competency, the trial should be conducted in the presence of the court; but it is not error if the triers are allowed to retire with the juror, and question him in private. Epps *v.* State, 19 Ga. 102.

§ 690. Though it is not a good ground of challenge to a juror for principal cause that he has an impression as to the defendant's guilt or innocence,[1] yet, upon a challenge for favor, evidence as to such impression is admissible, and is to be judged of by the triers; but the juror should not be set aside unless the triers find that he has formed a settled opinion. It is not sufficient to justify triers in setting aside a juror, in a criminal case, as not being indifferent, that he has formed an unfavorable opinion of the accused.[2]

But bias must be shown to set aside juror.

V. PERSONAL PRIVILEGE OF JUROR TO BE EXCUSED, WHICH, HOWEVER, A PARTY CANNOT ADVANCE AS GROUND OF CHALLENGE.

§ 692. Independently of the reasons heretofore specified, there are cases in which a juryman may be privileged from serving, but in which, as we have already seen, the privilege must be set up by himself or by the court, and cannot be technically regarded as a ground of challenge. Thus a juror may be excused from serving on ground of old age;[3] of deafness or other infirmity incapacitating him from proper discharge of duty;[4] and of holding excusatory offices.[5] And the excusing of the juror for reasons of this class is always within the discretion of the court, irrespective of the statutes relating to challenges.[6]

VI. REVISION BY APPELLATE COURT.

§ 693. Can a defendant, who has not exhausted his peremptory challenges, object in error to the action of the court below in deciding against him a challenge for favor? There is good authority for holding that in ordinary cases he cannot. He is bound, it is argued, if he objects to the juror, and his objection is overruled by the court, to challenge such juror peremptorily, sup-

Defendant not exhausting his peremptory challenges cannot except in error to court over-

[1] People v. Honeyman, 3 Denio, 121.

[2] People v. Lohman, 2 Barb. 216.

Where a challenge for principal cause is overruled by the court, and the juror is then challenged for favor, it is erroneous to instruct the triers that the latter challenge is in the nature of an appeal from the judgment of the court upon the facts ruled on by the court. Freeman v. People, 4 Denio, 9, 35.

[3] Davis v. People, 19 Ill. 74; Breeding v. State, 11 Tex. 257.

[4] Jesse v. State, 20 Ga. 156. See Mulcahy v. R. L. R. 3 H. L. Cas. 306. Supra, § 671.

[5] State v. Quimby, 51 Me. 395.

[6] State v. Marshall, 8 Ala. 302. Supra, § 671.

posing the case ultimately shows that he has challenges to spare.[1] But if it appear that the defendant was misled by the action of the court, or that he was in any way excluded from making a peremptory challenge of the juror in question, then he should be allowed to review the decision in error.[2] And we may also hold that where the defendant peremptorily challenges the juror after his admission by the court, without exhausting his peremptory challenges, no error lies.[3]

ruling challenge for favor.

§ 694. Where the defendant exhausts his peremptory challenges on trial, if in such case the statute gives a writ of error to rulings of courts on challenges, there can be no question that an erroneous action of the court below, on admitting a juror after challenge for favor, is ground for reversal. In some jurisdictions, however, the action of the court on challenges for favor is exclusively a matter of judicial discretion, and not ground for error.[4]

Otherwise when he exhausted his peremptory challenges.

§ 695. When the action of the court, as in cases of challenges to the array and peremptory challenges, is placed on record, and there is a regular issue and joinder, and judgment on this issue, then error lies to this at common law.[5]

Error lies when challenge is on record.

[1] People *v.* Knickerbocker, 1 Park. C. R. 302; State *v.* Benton, 2 Dev. & B. 196; State *v.* McQuaige, 5 S. C. 429; McGowan *v.* State, 9 Yerg. 154; Norfleet *v.* State, 4 Sneed, 340; People *v.* Stonecifer, 6 Cal. 405; People *v.* McGungill, 41 Cal. 429. See Iverson *v.* State, 52 Ala. 170.

[2] See Lithgow *v.* Com. 2 Va. Cas. 297; Baxter *v.* People, 3 Gilm. 386; People *v.* Bodine, 1 Denio, 282; People *v.* Freeman, 1 Denio, 9, 35; Birdsong *v.* State, 47 Ala. 68.

[3] Ogle *v.* State, 33 Miss. 383; Stewart *v.* State, 8 Eng. (Ark.) 720; Burrell *v.* State, 18 Tex. 713; Sharp *v.* State, 6 Tex. Ap. 650. See cases cited supra, § 617.

[4] See R. *v.* Edmonds, 4 B. & Ald. 471; Heath *v.* Com. 1 Robinson, 735; Costly *v.* State, 19 Ga. 614; Buchanan *v.* State, 24 Ga. 282. Infra, §§ 777 *et seq.*

[5] Infra, § 777; and see Thomas *v.* People, 67 N. Y. 218; People *v.* Vasquez, 49 Cal. 860; People *v.* Colson, 49 Cal. 679.

CHAPTER XIII.

CERTAIN SPECIAL INCIDENTS OF TRIAL.

I. Concurrent Trial of Separate Indictments, § 697.
II. Severance of Defendants on Trial, § 698.
III. Arraignment.
Defendant usually required to hold up the hand, § 699.
Failure to arraign may be fatal, § 700.
Defendant may waive right, § 701.
IV. Bill of Particulars.
May be required when indictment is general, § 702.
Affidavit should be made, § 703.
Particulars may be ordered on general pleas, § 704.
Action on particulars not usually subject of error, § 705.
V. Demurrer to Evidence.
Demurrer to evidence brings up whole case, § 706.
VI. View of Premises.
Such view may be directed when conducive to justice, § 707.
VII. Charge of Court.
Questions of law are for court, § 708.
Defendant has a right to full statement of law, § 709.
Misdirection a cause for new trial, § 710.
Judge may give his opinion on evidence, § 711.
Must, if required, give distinct answer as to law, § 712.
Error to exclude point from jury unless there be no evidence, § 713.
Charge must be in open court and before parties, § 714.

I. CONCURRENT TRIAL OF SEPARATE INDICTMENTS.

When separate indictments can be concurrently tried.

§ 697. As we have elsewhere seen, it is no objection to the joinder of several counts in an indictment, and their concurrent trial, that they contain distinct offences if such offences fall under the same general category.[1] For the same reason it has been held that two indictments against the same defendant, embracing different phases of a conspiracy, can be tried together, against the defendant's objection.[2] But unless the offences are such as could properly be joined in one indictment, they ought not to be thus concurrently tried.[3]

When cross-prosecutions of assault and battery are simul-

[1] Supra, § 285.

[2] Withers *v.* Com. 5 S. & R. 59; Brightly's Dig. Penn. Rep. 498.

[3] State *v.* Devlin, 25 Mo. 175.

taneously pending, the practice is for them to be tried together, as by this process the ends of justice are subserved.[1]

II. SEVERANCE OF DEFENDANTS ON TRIAL.

§ 698. We have already seen that joint defendants are entitled to a severance on trial.[2] Whether, as has been seen, there can be severance in indictments for conspiracy and riot, has been doubted, though the preponderance of authority is in favor of the right even in these cases.[3]

Joint defendants may sever on trial.

III. ARRAIGNMENT.

§ 699. The defendant being brought into court for trial, the first step is to call upon him by name to answer the matter charged on him in the indictment.[4] By the old law, he was required to stand up and hold up his hand, the object being to compel the full extension of his per-

Defendant usually required to hold up the hand.

[1] See R. *v.* Wanklyn, 8 C. & P. 290.

[2] Supra, §§ 310, 311, where the authorities are given.

[3] In Casper *v.* State, Sup. Ct. Wis. 1879 (9 Reporter, 223), we have the following on this point: —

"Although the practice may work inconvenience, and even difficulty, separate trials may be had upon indictment or information for conspiracy. R. *v.* Kinnersley, 1 Str. 193; R. *v.* Scott, 3 Burr. 1262; R. *v.* Cooke, 5 B. & C. 538; R. *v.* Kendrick, 5 Ad. & E. 49; R. *v.* Ahearne, 6 Cox C. C. 6; People *v.* Olcott, 2 Johns. 301; State *v.* Buchanan, 5 H. & J. 317, 500. The case of Commonwealth *v.* Manson, 2 Ashm. 31, holds otherwise, but cites no authorities. Informations for conspiracy are therefore within §§ 4680, 4685, Rev. Stat. When the venue is changed for some only of the defendants in indictment or information for conspiracy, separate trials must be had. The plaintiff in error was therefore properly tried alone in the municipal court. When several are prosecuted together for crime, which one, or other limited number only, cannot commit, like conspiracy or riot, and are taken and may be brought to trial, and on separate trials verdicts go against a number incapable in law of committing the crime, judgment against those found guilty should be suspended until the number necessary to the crime are convicted. Failing that, those against whom verdicts have been found should be discharged. When verdicts are found against the number necessary to the crime, then judgment should go against them."

[4] See supra, §§ 408 *et seq.*; 1 Chitty C. L. 351; 4 Blac. Com. ch. xxv. "The *arraignment* of prisoners, against whom true bills for indictable offences have been found by the grand jury, consists of three parts: first, calling the prisoner to the bar by name; secondly, reading the indictment to him; thirdly, asking him whether he be guilty or not of the offence charged.

"It was formerly the practice to require the prisoner to hold up his

son, and in this way to determine identity. One or two cases, in fact are recorded in which, on the prisoner thus rising and extending his hand, peculiarities were brought out (*e. g.* as in left-handedness) by which identity was settled. But in England the form is no longer obligatory,[1] though it is still maintained in some parts of the United States, with the qualification that if the defendant refuses to hold up his hand, but confesses that he is the person named, this is enough.

hand, the more completely to identify him as the person named in the indictment, but the ceremony, which was never essentially necessary, is now disused; and the ancient form of asking him how he will be tried is also obsolete. The prisoner is to be brought to the bar without irons, shackles, or other restraint, unless there be danger of escape; and ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no terror or uneasiness other than what proceeds from a sense of his guilt or the misfortune of his present circumstances. 2 Hawk. c. 28, s. 1. In Layer's case, 6 St. Tr. 230, a distinction was taken between the time of arraignment and the time of trial, and the prisoner was obliged to stand at the bar in irons during his arraignment; but the ruling in that case is at variance with the authority of all the expositors of the common law. The Mirror, c. 5, s. 1 (54), says: 'It is an abuse that a prisoner is laden with irons, or put to pain before attainted of felony.' Britton, c. 5, fo. 14, says: 'If felons come in judgment to answer, &c., they shall be out of irons and all manner of bonds, so that their pain shall not take away any manner of reason, nor constrain them to answer but at their free will.' See also 3 Inst. 34, where Lord Coke cites Bracton, b. 3, f. 137; Staundf. P. C. 78; and a decision of the judges, 8 Edw. 2; also Hale's Sum. 212. See supra, § 540 *a*.

"Formerly, if a defendant wished to plead *autrefois acquit*, he was entitled to have the indictment so slowly read that he might take it down, and so state it correctly in his plea — the prisoner, in cases of treason or felony, by the common law, not being entitled to a copy of the indictment; but now the Stat. 14 & 15 Vict. c. 100, s. 28, renders it unnecessary to say anything more in a plea of *autrefois acquit* than that the prisoner was heretofore lawfully acquitted of the offence charged; and it is a constant practice for the courts, in all cases where the prisoner's counsel deems it material to the defence of the prisoner, as a favor to allow a copy of the indictment, or of such parts of it as may be necessary for him to examine. If the prisoner be charged upon an indictment and also upon an inquisition for the same offence, he may be arraigned and tried at the same time upon both; 1 East P. C. 371; and where several defendants are charged in the same indictment, they ought all to be arraigned at the same time. Kel. 9." Archbold's Pl. & Ev. 17th ed. 1871, p. 110. See supra, § 408.

When a case in which the defendant is arraigned is removed to another court, there is to be no fresh arraignment. Supra, § 602; Davis *v.* State, 39 Md. 355.

[1] 4 Black. Com. 323.

§ 700. Wherever the duty to arraign is imperative, failure in the performance of this duty is fatal, when the record shows the failure, in an appellate court.[1] The arraignment need not be repeated after a mistrial.[2]

Failure to arraign may be fatal.

§ 701. Where there is evidence on record of the defendant's presence, the reading to him of the demand of guilty or not guilty may in some jurisdictions be waived by plea.[3]

Defendant may waive right.

The plea of guilty should be given by the defendant personally.[4]

IV. BILL OF PARTICULARS.

§ 702. Wherever the indictment is so general as to give the defendant inadequate notice of the charge he is expected to meet, the court, on his application, will require the prosecution to furnish him with a bill of particulars of the evidence intended to be relied on. That indictments may be thus general, and yet in entire conformity with precedent, has been heretofore abundantly shown. It is allowable to indict a man as a common barrator, or as a common seller of intoxicating liquors, or as assaulting a person unknown, or as conspiring with persons unknown to cheat and defraud the prosecutor by "divers false tokens and pretences;" and in none of these cases is the allegation of time material, so that the defendant is obliged to meet a charge of an offence apparently undesignated, committed at a time which is not designated at all. Hence has arisen the practice of requiring, in such cases, bills of particulars; and the adoption of such bills, instead of the exacting of increased particularity in indictments, is pro-

When indictment is general, bill of particulars may be required.

[1] R. *v.* Fox, 10 Cox C. C. 502; Graeter *v.* State, 54 Ind. 159; Griggs *v.* People, 31 Mich. 471; Anderson *v.* State, 3 Pinn. (Wis.) 367; Smith *v.* State, 1 Tex. Ap. 408; People *v.* Gaines, 52 Cal. 480. In Missouri, see State *v.* Saunders, 53 Mo. 234. See *contra*, in Kansas, State *v.* Cassaday, 12 Kans. 550.

[2] Hayes *v.* State, 58 Ga. 35.

Whether arraignment is necessary has become almost exclusively a subject of statutory enactment. In Pennsylvania, by the Act of January 8, 1867, arraignment is only required in cases triable exclusively in oyer and terminer. In such cases it is obligatory. Dougherty *v.* Com. 69 Penn. St. 286. It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. State *v.* Ketchey, 70 N. C. 621.

[3] See fully supra, § 541.

[4] People *v.* McCrory, 41 Cal. 459. Supra, §§ 408 *et seq.*

ductive of several advantages. It prevents much cumbrous special pleading, and consequent failures of justice, as no demurrer lies to bills of particulars.[1] And it gives the defendant, in plain, unartificial language, notice of the charge he is to meet.

Affidavit should be made.

§ 703. As has been already seen, bills of particulars may be ordered under the usual general count in conspiracy,[2] under indictments for being a common seller of liquor,[3] and under indictments for embezzlement,[4] and for being a common barrator or common scold.[5] But it is proper, in order to justify the ordering by the court of such a bill, that the defendant should make affidavit that he is, from the generality of the indictment, unable to duly prepare himself for his defence.

Particulars may be ordered on general pleas.

§ 704. Of course the same reasoning applies when the defendant sets up, by way of confession and avoidance, a defence which is substantially a new case. In such instances (*e. g.* where the defence, to an indictment for libel charging general official misconduct, is the truth of the charge), the defendant may be, on due cause shown, compelled to state the particulars of his defence.[6]

§ 705. It is said that the allowance of bills of particulars is

[1] See Com. *v.* Davis, 11 Pick. 432; Williams *v.* Com. Sup. Ct. Penn. 1880.

"It seems that the proper course is for the defendant to apply to the prosecutor, in the first instance, for particulars of the offence; and, if they are refused, to apply to the court or a judge, upon an affidavit of that fact, and that the accused is unable to understand the precise charge intended. R. *v.* Bootyman, 5 C. & P. 300; R. *v.* Hodgson, 3 C. & P. 422; R. *v.* Downshire, 4 A. & E. 699. The application may be made to the judge at the assizes. R. *v.* Hodgson, supra, where Vaughan, B., said he would, if necessary, put off the trial in order that particulars might be delivered. In barratry, however, it seems to be necessary to give particulars without any demand. 1 Curw. Hawk. 476, s. 13.

"If particulars have been delivered, the prosecutor will not be allowed to go into other charges than those contained therein. If particulars have been ordered, but not delivered, it seems that the prosecutor cannot be precluded from giving evidence on that account. R. *v.* Esdaile, 1 F. & F. 213–227. The proper course is to apply to put off the trial." Rosc. Cr. Ev. p. 192.

[2] Supra, § 157; Whart. Crim. Law, 8th ed. § 1386.

[3] State *v.* Bacon, 41 Vt. 526; Com. *v.* Giles, 1 Gray, 466; Com. *v.* Wood, 4 Gray, 11.

[4] R. *v.* Bootyman, 5 C. & P. 301; R. *v.* Hodgson, 3 C. & P. 422; State *v.* Cushing, 11 R. I. 314; Whart. Crim. Law, 8th ed. § 1048.

[5] R. *v.* Urlyn, 2 Saunders R. (Williams's ed.) 308.

[6] Com. *v.* Snelling, 15 Pick. 322.

within the discretion of the presiding judge, and is not subject of error.[1] Yet whenever a bill of particulars is a substitute for special averments in an indictment, error should be entertained. The same right of exception allowed to the defendant in the one case should be allowed, unless there be a statutory impediment, in the other. The appellate court should have the power of determining whether there is enough filed against the defendant to put him on his trial.

Not usually subject of error.

V. DEMURRER TO EVIDENCE.

§ 706. In several of the United States it has been held, as has been seen, that the defendant may demur to the evidence; though when this is done, the prosecution is not compelled to join in the demurrer, but may, at its election, go to the jury.[2] In Massachusetts, the court, when there is no evidence to convict, will take the case from the jury;[3] and in New York, under similar circumstances, the court advises and virtually directs an acquittal.[4] Unless there be statutes prohibiting this course, this is a necessary prerogative of the judge trying the case.[5]

Demurrer to evidence brings up whole case.

VI. VIEW OF PREMISES.

§ 707. The practice which obtains in civil suits, of permitting the jury to visit the scene of the *res gestae*, is adopted in criminal issues whenever such a visit appears to the court important for the elucidation of the evidence.[6] The visit, however, should be jealously guarded, so as to exclude interference by third parties, and should be made under sworn officers.[7] Such view may be granted after the judge

View may be directed to premises when necessary to case.

[1] Com. *v.* Giles, 1 Gray, 466; Com. *v.* Wood, 4 Gray, 11; Gardner *v.* Gardner, 2 Gray, 434; Harrington *v.* Harrington, 107 Mass. 329.

[2] Supra, § 407.

[3] Com. *v.* Fitchburg R. R. 10 Allen, 189.

[4] People *v.* Bennet, 49 N. Y. 137; People *v.* Harris, 1 Edm. Sel. Ca. 453. See fully infra, § 812.

[5] Infra, § 812.

[6] See Massachusetts Gen. Stat. c. 172, § 9; and 5 Cush. 298; and see Chute *v.* State, 19 Minn. 271.

[7] See, as to value of such testimony, Whart. Crim. Ev. § 312; and see R. *v.* Martin, L. R. 1 C. C. 378; R. *v.* McNamara, 14 Cox C. C. 229; State *v.* Knapp, 45 N. H. 148; Ruloff *v.* People, 18 N. Y. 179; Eastwood *v.* People, 3 Parker C. R. 25; Fleming *v.* State, 11 Ind. 234 — a case of arson.

In Chute *v.* State, 19 Minn. 271, the court below charged the jury as

has summed up the case.[1] But where only a part of the jury visited the premises, and this, after the case was committed to the jury for their final deliberation, this was held ground for new trial.[2] The visit, also, must be made under the supervision of officers appointed by the court,[3] and in the presence of the accused, who is entitled to have all evidence received by the jury taken in his presence,[4] though a refusal to attend by the defendant, he being duly requested and empowered to do so, may not vitiate the proceedings.[5] But during the view no stranger is permitted to talk with the jury.[6]

VII. CHARGE OF COURT.

Questions of law for the court.

§ 708. Several branches of this subject are elsewhere distinctively considered. It has been shown that the admissibility of evidence is exclusively for the court;[7] that it is for the court alone to determine when there shall be a severance of defendants on trial;[8] that the court is to judge of the validity of challenges;[9] that it is the duty of the court, in case any material charge of the indictment is not supported in law, so to tell the jury, directing an acquittal, and, in case of a conviction, to give a new trial;[10] and, in fine, that all matters of law belong exclusively to the court, and that unless there are

follows: "You must weigh the evidence given in court, coupled with your own examination, and if you are satisfied therefrom, beyond a reasonable doubt, that the building is a nuisance, and dangerous to the public, you should so find." The Supreme Court said: "Defendant's exception to this instruction was, we think, well taken. We think the court below misconceived the proper purpose of a view by a jury. The view is not allowed for the purpose of furnishing evidence upon which a verdict is to be found, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court. Com. v. Knapp, 9 Pick. 515." As to irregular views see infra, § 836.

[1] R. v. Martin, Law Rep. 1 C. C. 378.

[2] Ruloff v. People, 18 N. Y. (4 E. P. Smith) 179; Eastwood v. People, 3 Park. C. R. 25.

[3] See infra, § 836.

[4] State v. Bertin, 24 La. An. 46; State v. Sanders, 68 Mo. 202; State v. Graham, 74 N. C. 646; Smith v. State, 42 Tex. 444; Benton v. State, 30 Ark. 328; Carroll v. State, 5 Neb. 31; though see State v. Adams, 20 Kans. 311.

[5] State v. Buzzell, Sup. Ct. N. H. 1879.

[6] People v. Green, 53 Cal. 60.

[7] Whart. Crim. Ev. §§ 23 *et seq.*

[8] Supra, § 309.

[9] Supra, §§ 583 *et seq.*

[10] Infra, §§ 805, 812, 813.

local statutory or constitutional provisions to the contrary, the jury is bound to take the law from the court.

Defendant has a right to full statement of law.

§ 709. But here comes up the question, in what way the views of the court as to the law are to be made known. At common law, and by the practice, until a recent period, of England and of the United States, no bill of exceptions could be taken in criminal cases, and there could be no writ of error, except to so much of the case as was on record. No provisions existed for filing the charge of the court, or for requiring the court to charge on particular points, or for eliciting the opinion of the court either in the affirmative or negative of a particular proposition. The only way in which the law expressed on a trial could be overhauled was by a motion for a new trial; and on such a motion the parties had to depend, as to what had taken place, upon the recollection and notes of the judge trying the case. This is still the usage in England, as well as in several of the United States; and this will account for the meagreness of the judicial literature of this branch of the law. This much, however, is clear. The law is to come from the court, and the court is bound to give the law. And it has been repeatedly declared that the defendant has a right to a full statement of the law from the court; and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal.[1] And so to leave a matter of

[1] Infra, § 796; State v. McDonnell, 32 Vt. 491; Longnecker v. State, 22 Ind. 247; State v. Braintree, 25 Iowa, 572; People v. Dunn, 1 Idaho, 75; Lancaster v. State, 3 Cold. 339; Phipps v. State, 3 Cold. 344; Strady v. State, 5 Cold. 300; Hinch v. State, 25 Ga. 699; Cox v. State, 32 Ga. 515; Farris v. State, 35 Ga. 241; Aaron v. State, 39 Ala. 684; Armstead v. State, 43 Ala. 340; Clements v. State, 50 Ala. 117; State v. Daubert, 42 Mo. 242; State v. Mitchell, 64 Mo. 191.

In Pennsylvania, it is not usual for the Commonwealth to give points to the court. Murray v. Com. 79 Penn. St. 311. See also, generally, State v. Carlton, 48 Vt. 636; Com. v. Pemberton, 118 Mass. 36; Meyers v. Com. 83 Penn. St. 131; Roach v. People, 77 Ill. 25; Roman v. State, 41 Wis. 312; State v. Lautenschlager, 22 Minn. 514; Edwards v. State, 53 Ga. 428; Cicero v. State, 54 Ga. 156; Moody v. State, 54 Ga. 660; Habersham v. State, 56 Ga. 61; McBeth v. State, 50 Miss. 81; State v. Foster, 61 Mo. 549; Hudson v. State, 40 Tex. 12; Pefferling v. State, 40 Tex. 487; Taliaferro v. State, 40 Tex. 523; Cole v. State, 40 Tex. 147; Ferrell v. State, 43 Tex. 523.

In State v. Mahly, 68 Mo. 315, it is held to be the duty of the court, in cases of cruel homicide, to charge that the offence is murder in the first degree.

law to the jury, as a matter of *fact*, is error,[1] and so is it to leave to the jury a question as to which there is no evidence.[2]

Misdirection cause for new trial.

§ 710. Of the fidelity thus exacted in the discharge of this particular duty repeated illustrations are given in a succeeding chapter. As is there shown, any misdirection by the court, in point of law, on matters material to the issue, is a ground for a new trial; nor is such misdirection cured by prior or subsequent contradictory instructions,[3] nor by the fact that the jury founded their verdict on a distinct point.[4]

Judge may give his opinion on the evidence.

§ 711. Unless there are conflicting statutory provisions,[5] the judge is entitled to give his opinion on the evidence, commenting as much thereon as he deems conducive to the interests of justice;[6] and he may also state the presumptions of law to which the evidence gives rise.[7] He is not, however, required to give his opinion as to whether certain facts are proved,[8] and when there is a conflict of fact, he has no right to adjudicate on such conflict, and thus take it from

[1] Infra, § 798.

[2] Smith *v.* State, 41 N. J. L. 370; State *v.* Carter, 76 N. C. 20.

[3] Murray *v.* People, 79 Penn. St. 311; People *v.* Valencia, 43 Cal. 553.

[4] Infra, § 793.

[5] Infra, § 798.

[6] Infra, § 798. *Contra*, in North Carolina, by statute. State *v.* Locke, 77 N. C. 480; State *v.* Daney, 78 N. C. 437; though see State *v.* Boon, 80 N. C. 461.

In U. S. *v.* Reynolds, 98 U. S. 145, exception was taken to the following clause of the charge of the trial judge: "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on they multiply, and there are pure-minded women and there are innocent children — innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land."

It was held by the Supreme Court, Waite, C. J., giving the opinion, that this was no error. While every appeal of the court, so it was ruled, "to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of every reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862, 12 Stat. 501, saw fit to make bigamy a crime in the territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform."

[7] Infra, § 794.

[8] People *v.* Jones, 24 Mich. 216.

the jury.[1] Whether he can absolutely direct an acquittal or conviction is elsewhere considered.[2]

§ 712. When statutory provisions exist requiring the judge at *nisi prius* to give his opinion affirming or negativing particular propositions, these provisions must be strictly followed, nor is it permissible for him to evade this duty by merely general statements of the law.[3] He is not bound, it is true, to expatiate on abstract and irrelevant themes, though these were correctly propounded to him by counsel;[4] nor is he forced to adopt the language in which counsel may couch instructions prayed for, but may recast the propositions, and submit them in his own terms;[5] nor is he, when an instruction asked for is partly correct and partly erroneous, bound either to affirm or repudiate it as a whole; but, as has been seen, he may restate, unless precluded by statute, the law in his own terms.[6] Nor is he bound to leave to the jury a point incidentally made on the trial, if his attention be not specifically called to it by a prayer for instructions, and if he substantially covers the whole case in his charge.[7]

Must, if required, give distinct answers to law.

§ 713. It is error for the judge, unless there be an entire absence of evidence to prove a particular grade of murder, to exclude such grade from the consideration of

Error for judge to exclude

[1] Watson *v.* People, 64 Barb. 130. Infra, § 798.

[2] Infra, § 812; supra, § 706.

[3] State *v.* Christmas, 6 Jones N. C. 471; Terry *v.* State, 17 Ga. 204. See Cook *v.* Brown, 39 Me. 443; Foster *v.* People, 50 N. Y. 598; People *v.* Sanford, 43 Cal. 29; Dixon *v.* State, 13 Fla. 631, 636; Palmore *v.* State, 29 Ark. 248.

[4] Infra, § 797; State *v.* Pike, 65 Me. 111; State *v.* McDonald, 65 Me. 465; People *v.* Cunningham, 1 Denio, 524; People *v.* Jones, 24 Mich. 216; Lewis *v.* State, 4 Ham. 389; McCoy *v.* State, 15 Ga. 205; Bird *v.* State, 55 Ga. 317; State *v.* Ware, 62 Mo. 597; State *v.* Glass, 5 Oregon, 73; People *v.* Walsh, 43 Cal. 447; Wilson *v.* State, 3 Heisk. 278.

[5] Pistorius *v.* Com. 84 Penn. St. 158; Long *v.* State, 12 Ga. 293; Dougherty *v.* People, 1 Col. 514; Boles *v.* State, 9 S. & Mar. 284; Mask *v.* State, 36 Miss. 77; Wilson *v.* State, 2 Scam. 226; State *v.* Wilson, 8 Iowa, 407; State *v.* Shaw, 4 Jones N. C. Law, 440; State *v.* Wissmark, 36 Mo. 592; State *v.* Schlagel, 19 Iowa, 169; People *v.* Cleveland, 49 Cal. 578.

[6] See State *v.* Benner, 51 Me. 267; Com. *v.* Costley, 118 Mass. 1; Keithler *v.* State, 10 S. & Mar. 192; State *v.* Stonum, 62 Mo. 596; Kennedy *v.* People, 40 Ill. 488; State *v.* Downer, 21 Wis. 275; State *v.* Wilson, 8 Iowa, 407; Stanton *v.* State, 13 Ark. 318; Dixon *v.* State, 13 Fla. 636.

[7] Infra, § 794; Com. *v.* Costley, 118 Mass. 1; State *v.* O'Neal, 7 Ired. 251; Dave *v.* State, 22 Ala. 23.

point from jury unless there is no evidence.

the jury.[1] But it is not error for him to express his opinion as to the grade of the offence reached by the case, provided it is not done in the way of *direction*;[2] and the omission or refusal of the court to charge the jury upon a grade of homicide not authorized by the pleadings and proof is not error.[3] But it is error to refuse to define the degrees when required, and the case invokes such definition.[4]

Charge must be in open court and before parties.

§ 714. It must, however, be kept in mind that all communications from judge to jury must be made in open court, and in presence of the parties. If any statements, material to the issue, be made by the judge to the jury, in the absence of the defendant and his counsel, they will be ground for a new trial.[5] And it is error for the judge to alter his charge after the jury has retired, unless in open court, in presence of the parties, in explanation of mistake.[6]

Other points relating to this topic will be hereafter discussed.[7]

[1] McNevins *v.* People, 61 Barb. 307; Burdick *v.* People, 58 Barb. 51; Adams *v.* State, 29 Oh. St. 412; Harris *v.* State, 47 Miss. 318. See Lane *v.* Com. 59 Penn. St. 371. As to taking a case absolutely from jury see infra, § 812.

[2] Johnston *v.* Com. 85 Penn. St. 54; but see State *v.* Dixon, 75 N. C. 275. That such is his duty, unless forbidden by statute, see Mahly *v.* State, 68 Mo. 315.

[3] Choice *v.* State, 31 Ga. 424; Williams *v.* State, 3 Heisk. 376.

[4] Ibid; Wynne *v.* State, 56 Ga. 113; State *v.* Burnside, 37 Mo. 343; State *v.* Wyatt, 50 Mo. 309.

[5] Infra, § 830.

[6] Goss *v.* State, 40 Tex. 520.

[7] Infra, §§ 795 *et seq.*

CHAPTER XIV.

CONDUCT OF JURY.

I. Swearing.
Jury must appear to have been sworn, § 716.
II. Conduct during Trial: Adjournment and Discharge.
Misconduct of jury is a contempt, § 717.
In England juries may be discharged at discretion of court, § 718.
In this country separations allowed in cases less than capital, § 719.
Otherwise as to capital cases, § 720.
Tampering with jury to be punished, § 721.
Court can discharge jury in cases of surprise when gross injustice would otherwise be done, § 722.
Adjournment of court is ground for discharge, § 723.
And so is sickness or eminent disqualification of juror, § 724.
In non-capital cases jury may be discharged at discretion of court, § 725.
Conflict of opinion in capital cases, § 726.
III. Deliberations of Jury.
Jury must be secluded during deliberations, § 727.
1. *Swearing Officer.*
Officer must be duly sworn, § 728.
2. *Communications by Third Parties.*
Illegal communication with jury is indictable, § 729.
Such communications ground for new trial, § 730.
3. *Food and Drink.*
Food and drink may be supplied to jury, § 731.
4. *Casting Lots.*
May be ground for new trial, § 732.
IV. Curing Irregularities by Consent.
Consent may cure minor irregularities, § 733.

I. SWEARING.

Jury must be shown to have been sworn.

§ 716. It must appear from the record that the jury was duly sworn, such swearing being essential to empanelling.[1]

[1] In an Alabama case we have the following: —

"That oath requires the jurors to be sworn, not only to well and truly try the issue joined between the State of Alabama and the defendant, but also *a true verdict to render according to the evidence.* The record in this case states, the jury 'were duly sworn to well and truly try the issue joined between the State of Alabama and the defendant, Joe Johnson.' If it were stated that the jury were duly sworn according to law, it might, perhaps, be presumed they were sworn in the form required by the statute, but as the oath administered is stated, we cannot presume that they were otherwise sworn. The oath stated leaves out an essential and substantive part

§ 717. The jury, after being empanelled, is under the control of the court; and it is usual for the judge to caution its members to hold no conversation and receive no information with regard to the case on trial. Any misconduct in this or other respects will be immediately corrected, and if necessary punished, by the court, which possesses plenary powers for such a purpose.[1]

Misconduct of jury is a contempt.

II. CONDUCT DURING TRIAL: ADJOURNMENT AND DISCHARGE.

§ 718. "If the trial is not concluded on the same day on which it began," it is stated in the edition of Archbold's Pleading, published in 1871, "the judge has authority to adjourn it from day to day, without the defendant's consent.[2] In such case the jury, on a trial for treason or felony, are (and in all criminal cases may be) kept together during the night, under the charge of officers of the court; but in misdemeanors they are generally allowed to return to their homes for the night, being charged not to converse with any person on the subject of the trial.[3] Where the witnesses for the prosecution have all been examined, the court may order the case to be adjourned, and direct another trial to be proceeded with, in order to give time for the production of a thing essential to the proof deposited at a distance.[4] And on a trial for murder before Maule, J., at York, December, 1848, where, after the opening address of the counsel, it was discovered that in consequence of the detention of the railway train, the witnesses for

In England juries may be discharged at discretion of court.

of the oath required to be administered, to wit: 'and a true verdict render according to the evidence, so help you God.' Thus we see not only an essential, but the most impressive part of the oath, was omitted; that part that directs the jurors to look to God for help in the discharge of their important and solemn duty, — a duty in which the life of a human being was involved. This omission must necessarily render the verdict illegal, and insufficient to justify the fearful and terrible punishment to which the defendant is consigned by the sentence and judgment of the court. Harriman *v.* State, 2 Greene (Iowa), 270–283; Bivens *v.* State, 6 Eng. 455, 465; Jones *v.* State, 5 Ala. 666, 673." Peck, C. J., in Johnson *v.* State, 47 Ala. 62.

As to form of oath, see State *v.* Owen, 72 N. C. 605. It is not necessary that the form of oath should appear on the record. Lawrence *v.* Com. 30 Grat. 845.

[1] See infra, §§ 840 *et seq.*, as to misconduct as ground for new trial.

[2] R. *v.* Stone, 6 T. R. 530; R. *v.* Hardy, 24 St. Tr. 418.

[3] See R. *v.* Kinnear, 2 B. & Ald. 462.

[4] R. *v.* Wenborn, 6 Jur. 267.

the prosecution had not arrived in the city, the trial was adjourned, the jury were locked up, a fresh jury was called into the jury box, and another case was proceeded with.[1] Where a juror was sworn in a wrong name, and the objection was taken before the verdict, the same learned judge, at the same assizes, intimated that the proper course was to *discharge* the jury, and try the prisoners again; although there being in that case a second indictment against the prisoners, such a course was there not necessary.[2] It has been held that the trial must proceed, although in the course of the proceedings it is discovered that one of the jurors is related to the prisoner on trial, as that fact was a ground of challenge.[3] Where a prisoner, indicted for felony, with whom the jury were charged, was by sudden illness rendered incapable of remaining at the bar, the jury were discharged, and the prisoner, on recovering, was tried before another jury;[4] and in a case of misdemeanor, where the prisoner became ill and was carried out of court, the judge discharged the jury, being of the opinion that the consent of his counsel, that the case should proceed in the absence of the defendant, was not, under such circumstances, sufficient; and if a prisoner so taken ill recovers during the assizes, he may be put on his trial again, — the proceeding being, of course, begun *de novo*." [5]

§ 719. In this country, in misdemeanors, the unquestioned usage is for the jury, if the case cannot be concluded in one session, to be allowed to separate, repairing for the recess to their respective homes, cautioned, however, not to communicate with others as to the trial.[6] In felonies, while the English practice is to refuse to permit such separation during recesses,[7] in the United States the practice is to permit such separation in cases less than capital.[8]

In this country separation is allowed in cases less than capital.

§ 720. As to capital cases, there is great diversity of opinion; but while the weight of authority is that such separation should not be permitted, there is a growing tendency towards relaxation of this rule.[9]

Otherwise as to capital cases.

[1] R. *v.* Foster, 3 C. & K. 201.
[2] R. *v.* Metcalf, MS.
[3] R. *v.* Wardle, C. & Mar. 647.
[4] R. *v.* Stevenson, 2 Leach, 546.
[5] R. *v.* Streek, 2 C. & P. 413; Jervis's Archbold, 17th ed. (1871) p. 162.
[6] Infra, § 815–8.
[7] Ibid.
[8] Infra, § 818.
[9] Infra, § 819–21.

§ 721. Tampering with the jury is not only a misdemeanor but a contempt. It is, as will presently be more fully seen, a misdemeanor to submit, to jurymen sworn in a case, any information as to the case except with the sanction of the court, in the presence of both parties.[1] It is a misdemeanor in a juryman knowingly to permit such communications.[2] The offence may be punished by indictment; or, summarily, by attachment and imprisonment as for a contempt.[3] If a verdict has been attained by the party in whose interest the communication was made, then, as will hereafter be fully seen, a new trial will be granted.[4]

Tampering with jury to be summarily punished.

§ 722. *Can a jury be discharged or a juryman withdrawn, during the trial of a case, if from any unexpected incident the case be brought to a stand-still?* Here again we impinge on topics elsewhere abundantly discussed, and as to which opinions of courts are in irreconcilable conflict. First, it will be remembered, we meet the constitutional provision that no man shall be placed twice in jeopardy for the same offence; and on this the question arises whether there is any "jeopardy" until the verdict of the jury is given.[5] Next, as to cases not capital in all

Court can discharge jury in cases of surprise, when gross injustice would otherwise result.

[1] Infra, § 960.

[2] Infra, § 729.

[3] Infra, § 956.

[4] See fully infra, §§ 823, 831, 836–7; and see, as to plea of once in jeopardy, § 490.

[5] See this point discussed at large supra, §§ 490, 510.

"It would seem to be the better opinion that the discharge of the jury without giving a verdict is a matter of practice in the discretion of the judge at the trial, and that although the power with which he is thus invested ought not to be exercised without very strong reasons, yet that it may be exercised without any absolute 'necessity.' Thus, where a material and necessary witness for the prosecution refused to answer a question put to him, and although informed by the judge that he was bound to do so, persisted in such refusal, and was thereupon adjudged to be guilty of a contempt of court, and fined and imprisoned, the judge, on the application of the counsel for the prosecution, and against the will of the defendant, discharged the jury. R. *v.* Charlesworth, 2 F. & F. 326 — Hill, J. The course pursued in this case by Mr. Justice Hill was afterwards questioned in the Court of the Queen's Bench, and although it did not become necessary to give judgment upon its propriety, Blackburn, J., expressed an opinion that it was right, which opinion seems to have been shared by Cockburn, C. J., who denied that the rule laid down in 4 Bla. Com. 360, that 'the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict,' is a true or correct exposition of the law as

jurisdictions, and even as to capital cases in those jurisdictions where the "jeopardy" is not considered to take place until verdict, we are arrested by the question whether the court, upon either party being surprised by sickness, or sudden failure of evidence, or other material casualty, can withdraw a juror, or discharge the jury. That such is the usual practice is elsewhere seen;[1] but in all such cases it must appear, to justify a discharge, that the party applying for it was really *surprised*, — that no ordinary diligence and caution could have guarded against the surprise, — and that, unless the court so interfere, a grossly unjust verdict might ensue. But the grounds of the necessity should, for the sake of caution, be spread on the record.[2]

Adjournment of court good ground for discharge.

§ 723. Under any circumstances, the closing of a term of court before verdict is a good ground for discharge in States where no verdict can afterwards be taken.[3]

And so is sickness or eminent disqualification of juror.

§ 724. Even by those courts where the constitutional provision is construed most strictly, such sickness of a juror as incapacitates him for further attention to the case is ground for withdrawing a juror, or, to put the motion in the shape which it now generally takes, for the jury's

practised in our day. Wightman, J., and Crompton, J., on the other hand, 'thought the discharge of the jury by Mr. Justice Hill, under the circumstances mentioned above, was improper.' R. *v.* Charlesworth, 1 B. & S. 460; 31 L. T. (M. C.) 25." Jervis's Archbold, 17th ed. (1871) p. 169.

"A defence, founded on the improper discharge of the jury, cannot be taken by *plea*, for the only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the same offence; but if the former trial has been abortive without a verdict, there has been neither a conviction nor an acquittal. Winsor *v.* R. L. R. 1 Q. B. 395; 35 L. T. (M. C.) 161 (Exch. Chamb.). And the discretion exercised by the judge in this respect, at all events where he discharges the jury on the ground of *necessity*, of the existence of which necessity it is for him alone to determine, cannot be reviewed in any way. Winsor *v.* R. *ubi supra*. And *quaere*, whether the exercise, upon any ground, of his discretion by the judge to discharge the jury is subject to review. R. *v.* Charlesworth, 1 B. & S. 460; 31 L. T. (M. C.) 25." Ibid. See supra, §§ 470, 508 *et seq.*; infra, §§ 814, 821.

[1] Supra, §§ 508 *et seq.*; infra, § 820.

[2] See People *v.* Reagle, 60 Barb. 529; State *v.* Ephraim, 2 Dev. & B. 162; State *v.* Lytle, 5 Ired. 58; Vincent, ex parte, 43 Ala. 402; State *v.* Evans, 21 La. An. 321; State *v.* Redman, 17 Iowa, 329; State *v.* Vaughan, 29 Iowa, 286; O'Brian *v.* Com. 9 Bush, 333; McKenzie *v.* State, 26 Ark. 334; Moseley *v.* State, 33 Tex. 671.

[3] Supra, § 513.

discharge.[1] The same course is taken when a juror becomes deranged;[2] and when the court and parties are surprised by the transpiring of some gross and eminent disqualification of a juror, *e. g.* that he is an alien, in those States in which this is an absolute statutory disqualification;[3] or that he is unequivocally interested in the case, having improperly concealed this interest at the time of empanelling.[4]

§ 725. *Can a jury be discharged on failure to agree?* It will be sufficient, in answer to this question, to state the points already established in other relations.

In non-capital cases jury may be discharged at discretion of court.

(*a.*) *In misdemeanors, and in all felonies less than capital, it is in the discretion of the court to discharge the jury, when there is no reasonable prospect of their agreement, if they have been together a sufficient time to enable a just conclusion in this respect to be reached. And the action of the court below in this respect is not generally the subject of revision in error.*[5]

§ 726. (*b.*) *In capital cases the same view is adopted in the federal courts and in the courts of most of States; while in others such discharge is a bar to a second trial, unless it appear from the record that such discharge was necessary, e. g. caused by dangerous sickness of juror.*[6] Whether the prisoner can by consent cure the irregularity in such cases is elsewhere discussed.[7]

Conflict of opinion in capital cases.

[1] See supra, §§ 508 *et seq.*; and see also Kinloch's case, Fost. 28; U. S. *v.* Haskell, 4 Wash. C. C. 402; Com. *v.* Fells, 9 Leigh, 613; Mahala *v.* State, 10 Yerger, 532; State *v.* Curtis, 5 Humph. 601; Hector *v.* State, 2 Mo. 166. Infra, §§ 821–1.

[2] U. S. *v.* Haskell, 4 Wash. C. C. 402.

[3] Stone *v.* People, 2 Scam. 326. Infra, §§ 845 *et seq.*

[4] See U. S. *v.* Coolidge, 2 Gall. 364; Com. *v.* McFadden, 23 Penn. St. 12. Infra, § 844.

[5] Winsor *v.* R. 6 B. & S. 143; L. R. 1 Q. B. 289, 390; Com. *v.* Bowden, 9 Mass. 494; State *v.* Woodruff, 2 Day, 504; People *v.* Goodwin, 18 Johns. R. 187; People *v.* Green, 13 Wend. 55; Sutcliffe *v.* State, 18 Ohio, 469; Dobbins *v.* State, 14 Ohio St. 493; Williams *v.* State, 45 Ala. 57; Mosely *v.* State, 33 Tex. 671; and see cases cited supra, §§ 436, 490.

[6] Supra, §§ 490–519.

[7] Supra, § 518, 541; infra, §§ 733, 786, 787.

III. DELIBERATIONS OF JURY.

§ 727. As soon as the case is submitted to the jury, they are to be kept together, under the charge of an officer, in such a way as to be secluded from all communication with other parties, until they have agreed on a verdict, or it appear that it is impossible for them to agree.[1]

Jury must be secluded in deliberation.

What books or other instruments of proof the jury may take with them is hereafter discussed.[2]

It is the duty of the court to see that the jury are provided with medicine and other conveniences or necessities.[3]

[1] Supra, §§ 725–6; infra, § 814; State *v.* Leunig, 42 Ind. 541.

Sir J. F. Stephens in his Treatise on Criminal Law (p. 223), remarks: —

"That part of Bentham's phrase which condemns the means used to produce unanimity, which it describes as 'torture,' requires more attention than the part which condemns unanimity itself as perjury. The employment of the word 'torture' is a curious instance of the use of a dyslogistic epithet by a man whose life was passed in protesting against the employment of dyslogistic or eulogistic language on any occasion. If torture means only the infliction of bodily inconvenience in any shape whatever, it may no doubt be applied properly enough to the plan of depriving the jury of fire and food till they agree on their verdict; but it might also be applied to the restraint of being obliged to sit for hours in a hot court on a hard board, listening to tiresome speeches and dull evidence. The word 'torture' proves nothing. The process to which it is applied does not deserve to be viewed so seriously. It is quaint and antiquated rather than cruel. To put a dozen farmers into a bare room, and say, 'You shall not have your dinners till you have made up your minds,' is a rough and half humorous way of mentally jogging them. It assumes the possibility of a kind of sluggish obstinacy, which requires some slight external stimulus to overpower it; and to view the thing tragically is to misunderstand it. It must, however, be confessed, that the expedient is coarse and rough, and that it belongs to an age of less considerate and polished manners than our own. The mere confinement is quite compulsion enough, and the power of ordering reasonable accommodations, in the shape of either food or fire, might well be intrusted to the judge.

"The difficulty has been practically solved by the power which the judges have assumed of discharging a jury if they are unable to agree after a reasonable time, and if they declare that there is no chance of their agreeing. In such cases the prisoner can be tried again, and this is obviously the course of proceeding most consistent with the general character of the institution." See R. *v.* Newton, 13 Q. B. 716, for a case in which the prisoner was tried for the same murder three times. She was at last acquitted.

[2] Infra, § 829.

[3] O'Shields *v.* State, 55 Ga. 696. Infra, § 731.

1. *Swearing of Officer.*

Officer must be duly sworn.

§ 728. The officer should be a sworn officer of the court, or if not, must be sworn specially to faithfully discharge the office imposed on him in the particular case. When the jury have been out with an unsworn officer, this is ground for a new trial, unless it appear affirmatively that no prejudice to the defendant resulted thereby.[1] And the better practice in all cases is to swear the officer "well and truly to keep the jury in some convenient and private place (or in certain rooms prescribed by the court), and not to suffer any person to speak to them, nor to speak to them yourself on the subject of the case, without leave of court."[2]

2. *Communications by Third Parties.*

Illegal communication with jury is indictable.

§ 729. For third parties to communicate with a jury, when engaged in its deliberations, is an indictable offence, when such communication touches the subject matter of the trial,[3] or it may be treated as a contempt of court.[4]

[1] See infra, § 827.

[2] See Philips *v.* Com. 19 Grat. 485; McCann *v.* State, 9 S. & M. 465.

[3] See supra, § 338, 721; infra, § 966.

"At its last session," said Judge Field, of the Supreme Court of the United States, in charging a grand jury in California, in August, 1872 (Pamph. Rep. p. 12), "Congress passed a stringent act to prevent the continuance of this pernicious practice, as well as to prevent any attempt to influence the administration of justice corruptly, or by the intimidation of jurors. It is entitled, 'An act to prevent and punish the obstruction of the administration of justice in the courts of the United States.' It enacts 'that if any person or persons shall corruptly, or by threats or force, or by threatening letters, or any threatening communications, endeavor to influence, intimidate, or impede any grand or petit jury or juror of any court of the United States in the discharge of his or their duty, or shall corruptly, or by threats or force, or by threatening letters, or any threatening communications, influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice therein, such person or persons so offending shall be liable to prosecution therefor by indictment, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the aggravation of the offence.' And it also enacts that 'if any person or persons shall attempt to influence the action or decision of any grand or petit juror upon any issue or matter pending before such juror, or

[4] Infra, § 956.

Even irregular communications from the judge may vitiate the verdict.[1]

§ 730. The only question of doubt is whether the reception of extraneous communications by itself avoids the verdict, in case of conviction, or whether it is necessary to prove prejudice to the defendant. The former is the better opinion,[2] as it cannot be presumed that such communication was without influence in securing the result.

Such communications ground for new trial.

It is otherwise, however, when the communications do not touch the subject matter of the trial. In such case the verdict will not be disturbed.[3] But if the jury are allowed to disperse, when deliberating, or are left without guard in the society of other persons, this is *per se* ground for a new trial.[4]

3. *Food and Drink.*

§ 731. The old rule used to be that the jury, when the charge is committed to them, should be kept together without food.[5] This, however, no longer obtains, and the only point as to which doubt is expressed is as to whether the use of spirituous liquors at this period vitiates the verdict. It may indeed be a contempt to permit juries to take liquor without consent of court; but the preponderance of opinion is that unless intoxication result, this is not ground for new trial.[6] As has been seen, the jury is to be provided with proper necessaries and comforts.[7]

Food and drink may be supplied to jury.

before the jury of which he is a member, or pertaining to his or their duties, *by writing or sending to him any letter or letters, or any communication in print or in writing, in relation to such issue or matter, without the order previously obtained of the court before which the said juror is summoned*, such person or persons so offending shall be deemed guilty of a misdemeanor, and shall be liable to prosecution therefor by indictment or information, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment, according to the aggravation of the offence.' You thus perceive that Congress intends that in the investigation of public offences you shall be secure from intimidation or personal influence of every kind."

[1] Supra, § 714; infra, § 830.

[2] See infra, §§ 831–838, 952.

[3] Infra, §§ 836, 837.

[4] Infra, § 821.

[5] Infra, § 814.

[6] Infra, § 821.

[7] Supra, § 727; O'Shields *v.* State, 55 Ga. 696.

4. *Casting Lots.*

Casting lots may be ground for new trial.

§ 732. Misconduct of this character is usually the subject of examination on motion for a new trial, under which head it is discussed.[1]

IV. CURING IRREGULARITIES BY CONSENT.

Consent may cure minor irregularities.

§ 733. In England,[2] and in several American courts,[3] there has been a tendency to hold the defendant incapable of assenting to irregularities on part of the jury, sometimes because of the peculiar attitude of the defendant, which makes it improper to compel him to decide so delicate a question, and sometimes because the separation of a a jury is so gross a violation of fundamental law that no consent can legitimate it. It is difficult, however, to sustain either of these propositions to their full extent. No hesitation has been expressed as to requiring defendants to decide as to questions of consent, some of which are at least as delicate as that under consideration.[4] Thus a prisoner is permitted to waive a preliminary examination before a magistrate, no matter how much this may subsequently prejudice him;[5] to waive technical objections to jurors, though here, too, by a refusal his case may be prejudiced;[6] and to waive objections to evidence, under circumstances in which it might be in like manner forcibly urged that the election to which he is put is unfair, as to decline would exhibit him in an ungracious light before the jurors.[7] It has also been seen that the defendant, even in the view of those courts which attach the most stringent construction to the constitutional limitation as to jeopardy, is permitted to waive this right by a motion for a new trial, if not by a motion in arrest of

[1] Infra, § 842.

[2] R. *v.* Woolf, 1 Chit. 402. See supra, § 518.

[3] Peiffer *v.* Com. 15 Penn. St. 468; Wesley *v.* State, 1 Humph. 502; Berry *v.* State, 10 Ga. 511; Woods *v.* State, 43 Miss. 364; State *v.* Populus, 12 La. An. 710; all, however, capital cases, except the first. See, as to jeopardy, supra, § 518; as to separation of jury, infra, § 821.

[4] See Perteet *v.* People, 70 Ill. 171; State *v.* Waters, 1 Mo. Ap. 7. On the general question of consent see Whart. Crim. Law, 8th ed. §§ 44 *et seq.* As to question of jeopardy see supra, § 518; and see State *v.* Potter, 16 Kans. 80; People *v.* Granice, 50 Cal. 447.

[5] See supra, §§ 70 *et seq.*

[6] See supra, § 351; infra, §§ 886-9; State *v.* Waters, 62 Mo. 196.

[7] Infra, § 804.

judgment.[1] If we confine the question of separation to the period between the charge of the judge and the rendering of the verdict, and if we treat "separation" as convertible with "dispersion," then, no doubt "separation" cannot be legalized by consent, so as to permit a jury thus dispersed to reunite and return a verdict. But it is otherwise when we come to the question of separation during trial, but before the judge's charge, and are asked to decide that while such separation is allowable in misdemeanors, and even in non-capital felonies, it cannot be cured even by consent in felonies that are capital. If, in a high felony this privilege is not likely to be abused, it certainly will not be in capital cases, in which the jury are under peculiarly solemn sanctions. If the defendant is anxious to conciliate in a capital case, so is he also in a high felony. To refuse to defendants this privilege of consenting to separation during trial will, in the long run, be oppressive rather than protective, for it will tend to force trials on with undue speed, and introduce into the jury box an inferior grade of jurymen.[2] Hence it is that the weight of authority is that the defendant, even in capital cases, can legalize the separation of the jury during the recesses of the court, down to the period when the case is given to them for deliberation by the charge of the court.[3] But such consent does not, it has been held, operate to legalize a trial by *eleven* instead of *twelve* jurors,[4] nor can a defendant, without an express statutory authority, waive his right to a trial by jury on a plea of not guilty.[5]

[1] See supra, § 518; infra, §§ 759, 767; and see as to scope of maxim, *Volenti non fit injuria*, Whart. Crim. Law, 8th ed. §§ 144–5.

[2] See infra, § 819. As to effect of consent see supra, § 518.

[3] See supra, § 518; infra, § 819; and see Smith *v.* Com. 14 S. & R. 70.

[4] Cancemi *v.* People, 18 N. Y. 128; Allen *v.* State, 54 Ind. 461; People *v.* O'Neil, 48 Cal. 257; Bell *v.* State, 44 Ala. 393; State *v.* Davis, 66 Mo. 684; though see, *aliter*, as to misdemeanors, Com. *v.* Dailey, 12 Cush. 80; State *v.* Van Matre, 49 Mo. 268; State *v.* Barowsky, 11 Nev. 119; Murphy *v.* Com. 1 Metc. (Ky.) 365; Tyra *v.* Com. 2 Metc. (Ky.) 1.

[5] State *v.* Maine, 27 Conn. 281; Dillingham *v.* State, 5 Oh. St. 283; Williams *v.* State, 12 Oh. St. 622; Hill *v.* People, 16 Mich. 351; State *v.* Lockwood, 43 Wis. 403; Neales *v.* State, 10 Mo. 498; Wilson *v.* State, 6 Ark. 601. See State *v.* Mansfield, 41 Mo. 470; Cooper *v.* State, 21 Ark. 228.

In State *v.* Kauffman, S. C. Iowa, 1879, 20 Alb. L. J. 299, the power of waiver was extended to felonies.

In this case we have the following from Seevers, J.: —

"In Bullard *v.* State, 38 Tex. 504,

And supposing it to be a fundamental principle of the common law that a jury, when its deliberations once commence, must be kept together in seclusion until they terminate, it must on like reasoning be held that consent would not validate a separation of the jury between the charge of the court and the verdict.[1]

the verdict was rendered by thirteen jurors. It was set aside; but it does not appear whether or not the defendant had any knowledge, until after verdict, there was that number of jurors. In Williams *v.* State, 12 Oh. St. 622, a jury trial was waived, and the defendant found guilty by the court. On appeal the attorney general submitted to a reversal, on the ground that a jury trial could not be waived. The case was disposed of by the court in a single line, by saying such was the opinion of the court. It is evident the case was not very elaborately considered. The following cases hold that a trial by jury cannot be waived, and the same take place before the court: Bond *v.* State, 17 Ark. 290; People *v.* Smith, 9 Mich. 193; League *v.* State, 36 Md. 259. The Constitution of this State provides that 'in all criminal prosecutions . . . . the accused shall have the right . . . . to be confronted with the witnesses against him.' Art. 1, § 10, Code, 770. In State *v.* Polson, 29 Iowa, 133, 'it was agreed in open court, between the district attorney and counsel of defendant, in the presence of the defendant and of the jury, that, in order to save time and facilitate the trial of the cause, the testimony taken upon the former trial should be read to the jury, as a substitute for the oral testimony of the witnesses in court.'

"A conviction followed, which was held to be right, and that the constitutional provision was a personal right, and in no manner affected the jurisdiction of the court, and that it might be waived. This decision, in principle, is identical with the case at bar. If one constitutional provision may be waived, why not another? The one is not more binding or obligatory than the other. Both are equally important."

In State *v.* Worden, 46 Conn. (1 Am. Crim. Law Mag. 178) it was held that a statute was constitutional which provided that in all prosecutions the defendant could elect to be tried by the court instead of by the jury. To the same effect see Daily *v.* State, 4 Oh. St. 57; Dillingham *v.* State, 5 Oh. St. 280; Ward *v.* People, 30 Mich. 116. In State *v.* Conlin, 27 Vt. 318, it was intimated that the constitutional restriction applies only to high crimes. For an examination of the cases see note in 1 Am. Crim. Law Mag. 193.

In Dacres's case, Kel. 59, where Lord Dacres was tried for treason, one question was whether the prisoner might waive a trial by his peers and be tried by the country, but the judges of the Court of King's Bench agreed that he could not, for the statute of Magna Charta was in the negative, and the prosecution was at the king's suit. See also 1 Wooddesson's Lect. 346; 3 Inst. 30; 8 Alb. L. J. 262; and see supra, § 518.

Failure to take technical objections at an earlier period does not waive right to writ of error. Infra, § 775.

[1] Supra, § 351. As to general doctrine of consent see Whart. Crim. Law, 8th ed. §§ 144–6.

CHAPTER XV.

VERDICT.

I. WHERE THERE ARE SEVERAL COUNTS.
Prosecution may withdraw superfluous or bad counts, § 737.
General verdict when there is one bad count, § 738.
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Verdict of guilty on one count equivalent to not guilty on others, § 740.
(Informalities cured by verdict § 760.)

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III. DOUBLE OR DIVISIBLE COUNT.
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V. SPECIAL VERDICT.
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XIV. DEFECTIVE VERDICT.
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XV. RECOMMENDATION TO MERCY.
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I. WHERE THERE ARE SEVERAL COUNTS.

§ 736. THE accurate practice in such case is for the jury to find specially on each count.[1] But as this, from carelessness or other causes is often neglected, it becomes frequently incumbent on the courts to determine what course to take when a general verdict of guilty is rendered on the whole indictment. This sub-

[1] Day *v.* People, 76 Ill. 380. Supra, § 292.

ject has been heretofore generally discussed. It may be sufficient here to recapitulate the following rules: —

Prosecution may withdraw bad or superfluous counts.

§ 737. When counts are joined for offences which are different but not positively repugnant, and there is a general verdict of guilty, the practice is to sentence on the count of the highest grade, the prosecution either expressly or tacitly withdrawing the other counts; [1] and where there has been a general verdict of guilty on a whole indictment containing several counts for offences of different grades, a sentence on the count for the highest grade is proper.[2] But it is not irregular in most jurisdictions, when the offences are distinct and there are separate verdicts, to sentence specifically on each count.[3]

General verdict when one count is bad.

§ 738. When there is a good count and a bad count, and a general verdict of guilty, it has been held that a valid judgment can be entered on the verdict, which will be presumed in error to have been entered on the good count.[4] In some jurisdictions, however, a judgment entered on such a verdict will be reversed, as logically erroneous.[5]

[1] Supra, §§ 291–2, 383; infra, §§ 760, 771, 908–10; Cook *v.* State, 4 Zab. 843; Manly *v.* State, 7 Md. 135; State *v.* Speight, 69 N. C. 72; Estes *v.* State, 55 Ga. 131.

[2] Hawker *v.* People, 75 N. Y. 487.

[3] Infra, § 910.

[4] Infra, §§ 771, 907; supra, §§ 291.

[5] Ibid.

In Massachusetts, it was ruled in 1869 that if on the trial of an indictment charging distinct offences in separate counts the jury return a general verdict of guilty, and, in answer to an inquiry of the court, reply that they did not pass upon the counts separately, and the verdict is thereupon ordered to be affirmed and recorded, the defendant has good ground for exception, even if the case was submitted to the jury with suitable instructions as to the several counts. Com. *v.* Carey, 103 Mass. 214; People *v.* Lilly, 38 Mich. 270. In 1876 it was ruled in the same State that where the same offence is charged in several counts in inconsistent ways, a general verdict should be entered on the whole case, or a special verdict on the count proved, but that a special verdict of guilty on each count was bad. Com. *v.* Fitchburg R. R. 120 Mass. 372. In Connecticut, in 1867, it was ruled (supra, § 292), that while it is in the discretion of a judge, in order to insure a fair trial, where there are several counts in an information, to direct the attorney for the State to elect upon which counts he will claim a conviction, and to withdraw the others; or to direct the jury, when they return their verdict, to say upon which count or counts they find the prisoner guilty, yet this is a matter of discretion; and if the court do not take this course, the omission cannot be revised, as matter of right, on motion in arrest or for a new trial; nor

§ 739. When there is a new trial on one count alone, this leaves the other in full force. When there has been an acquittal on one count and a conviction on another, and the counts are for distinct offences, a new trial can only be granted on the count on which there has been a conviction.[1]

New trial may be on a single count.

§ 740. A verdict of guilty on one count, saying nothing as to other counts, is equivalent to a verdict of not guilty as to such other counts;[2] and when the jury fail to agree on a second count, but convict on the first, the defendant may be sentenced on the first.[3]

Verdict of guilty on one count equivalent to not guilty on others.

II. DEFENDANT MUST BE PRESENT.

§ 741. At the time of the rendition of the verdict, as a general rule, the defendant must be present in court,[4] and in capital cases to take the verdict in his absence is a fatal error.[5]

III. DOUBLE OR DIVISIBLE COUNT.

§ 742. When two offences are joined in one count (*e. g.* burglary with larceny, and assault and battery with assault), the verdict may be not guilty of the greater offence, and guilty of the less.[6] It should be remembered, however, that at common law it has been held in some States that there can be no conviction of a misdemeanor on an

Verdict may go to part of divisible count.

will the court interfere to grant a new trial, unless they see that injustice has been done. State *v.* Tuller, 34 Conn. 281.

[1] Infra, § 895.

[2] U. S. *v.* Davenport, Deady, 264; State *v.* Phinney, 42 Me. 384; State *v.* Watson, 63 Me. 128; Edgerton *v.* Com. 5 Allen, 514; Guenther *v.* People, 24 N. Y. 100; Girtz *v.* Com. 22 Penn. St. 351; Henwood *v.* State, 52 Penn. St. 424; Com. *v.* Bennett, 2 Va. Cas. 235; Kirk *v.* Com. 9 Leigh, 627; Weinzorpflin *v.* State, 7 Blackf. 186; Bittings *v.* State, 56 Ind. 101; Bonnell *v.* State, 64 Ind. 498; Dawson *v.* State, 65 Ind. 445; Stoltz *v.* People, 4 Scam. 168; Nabors *v.* State, 6 Ala. 200; Morris *v.* State, 8 Sm. & M. 762; State *v.* Coffee, 68 Mo. 120; though see Latham *v.* R. 5 B. & S. 635; 9 Cox C. C. 516; R. *v.* Craddock, 2 Den. C. C. 31. And a verdict of guilty on all the counts, and a sentence on one count, though erroneous, disposes of the case as to the other counts. Com. *v.* Foster, 122 Mass. 317. But *contra* as to special verdict. Infra, § 745.

[3] State *v.* Hill, 30 Wis. 416; State *v.* Martin, 30 Wis. 216. See infra, § 910.

[4] Supra, § 549.

[5] Nolan *v.* State, 55 Ga. 521; Cook *v.* State, 60 Ala. 39. Supra, § 518.

[6] Supra, § 244. As to murder see Whart. Crim. Law, 8th ed. §§ 541 *et seq.*

indictment for a felony.[1] Nor can there be ordinarily a conviction of a minor offence on an indictment in which it is not contained.[2]

When an offence is divisible, the jury may convict the defendant of part of the charge, and acquit as to the rest;[3] or, after a general verdict of conviction, the attorney general may enter a *nolle prosequi* as to one branch of the case, and the court may sentence on the other.[4]

The proper course, on such a trial, is for the jury, if they convict of the minor offence alone, to find a verdict of guilty of the minor, and not guilty of the major, but a verdict of guilty of the minor is treated as involving an acquittal of the major.[5]

In what case, on a count for a felony or other consummated offence, the jury can convict of an assault or attempt, is elsewhere considered.[6]

When several articles are joined in the same count for lar-

[1] Supra, §§ 249, 261. See R. *v.* Woodhall, 12 Cox C. C. 240. A verdict may, under the present Virginia practice, be taken for an assault, on an indictment for feloniously and maliciously cutting, &c., though the latter is a felony and the former a misdemeanor. Canada's case, 22 Grat. 899. See Hunter *v.* Com. 79 Penn. St. 503.

[2] Supra, §§ 249, 261; Reynolds *v.* People, 83 Ill. 479.

[3] See supra, §§ 247, 251, 261; Com. *v.* Morgan, 107 Mass. 199; Com. *v.* Keenan, 67 Penn. St. 203; Richie *v.* State, 58 Ind. 355; Hanna *v.* People, 19 Mich. 316; State *v.* McCort, 23 La. An. 326. Under statutes verdicts may be taken for attempts in all cases of substantive crime. R. *v.* Bird, 2 Den. C. C. 94; R. *v.* Reid, 2 Den. C. C. 89; R. *v.* Hapgood, L. R. 1 C. C. 221; State *v.* Wilson, 30 Conn. 500; Hill *v.* State, 53 Ga. 125; Wolf *v.* State, 41 Ala. 412. But at common law this cannot be, unless the attempt be averred in the indictment. See supra, §§ 245–250, 465. In the United States courts the defendant may be found guilty of an attempt, "when itself a separate offence," contained in a greater offence charged. Rev. Stat. § 1035. As to verdicts in homicide see Whart. Crim. Law, 8th ed. § 541.

Where an indictment alleged the production of an abortion, and the consequent death of the victim, the jury found a verdict of guilty of the abortion, but did not agree as to the death proceeding therefrom, the prosecution offered to enter a *nolle prosequi* to that part of the indictment, upon which the jury afterwards acquitted on that averment. It was held that no exception could be taken to the receiving and recording the verdict. Com. *v.* Adams, 127 Mass. 15.

See, further, supra, §§ 465, 472; infra, § 896.

[4] Supra, § 383; Jennings *v.* Com. 105 Mass. 586. In California, a verdict, "guilty as charged in the indictment," when an indictment is for an offence containing two or more grades, is held to be void for uncertainty. People *v.* Baza, 53 Cal. 690.

[5] See supra, § 465.

[6] Supra, §§ 249, 261, and cases cited in prior notes to this section.

ceny, the verdict may go to either.[1] In libel, on a count charging composing and publishing, the defendant may be found guilty of publishing.[2]

IV. ADJOURNMENT OF COURT PRIOR TO.

§ 743. In addition to the points thus recapitulated, the following may now be noticed: —

Court may adjourn during deliberation of jury.

§ 744. Even where the jury are to be kept together, without intercourse with third parties, until they agree, this is not the case with the judges, who may adjourn, and return to receive the verdict in open court.[3] Such is the necessary practice in cases where the trial continues over a day.[4] It would seem, also, that the court, in minor offences, may order the clerk to discharge the jury if they do not agree by a specific hour; and that a verdict subsequent to such hour will be set aside.[5]

In some States a verdict may be received after the close of the term.[6]

V. SPECIAL VERDICT.

Jury may find special verdict.

§ 745. The jury are not confined to finding a verdict of "guilty" or "not guilty" on the general issue. They may find a special verdict setting forth the facts, and leaving it to the judgment of the court to decide. "This," says Blackstone, "is where they *doubt* the matter of the law, and therefore *choose* to leave it to the determination of the court, though they have an unquestioned right of determining upon all the circumstances and finding a general verdict, if they think proper so to hazard a breach of their oaths." But this admonition fell without much effect on English practice; and now special verdicts are very rare.[7] The right to find such a verdict, however, continues to be recognized.[8]

[1] Supra, §§ 252, 470; Bell *v.* State, 48 Ala. 684.

[2] Whart. Crim. Ev. § 134.

[3] See infra, §§ 818–20.

[4] 4 Black. Com. 361.

[5] Com. *v.* Townsend, 5 Allen, 216; Mass. Law Reg. October, 1863, cited Hilliard on New Tr. (1873), 238.

[6] Supra, § 513.

[7] See R. *v.* Suffolk, 5 N. & M. 139; R. *v.* Hughes, 1 H. & W. 313; compare R. *v.* Francis, 2 Stra. 1015; Peterson

[8] Com. *v.* Call, 21 Pick. 509; Lewer *v.* Com. 15 S. & R. 93; Com. *v.* Chathams, 50 Penn. St. 181.

§ 746. In stating a special verdict the facts must be summed up fully and exactly as on a special plea, and the omission of any fact (*e. g.* venue) necessary to constitute the offence is fatal,[1] since the court cannot supply from its

Verdict must be full and exact.

v. U. S. 2 Wash. C. C. 36; Com. *v.* Squires, 97 Mass. 59; McGuffie *v.* State, 17 Ga. 497. "The jury have a right in all criminal cases, to find a special verdict. Such verdict must state positively the facts themselves, and not merely the *evidence* adduced to prove them, and all the facts necessary to enable the court to give judgment must be found; for the court cannot supply by intendment or implication any defect in the statement. 2 Hawk. c. 47, s. 9; 2 East P. C. 708, 784. See R. *v.* Francis, 2 Stra. 1015; R. *v.* Royce, 4 Burr. 2073; 1 Chit. Crim. L. 643.

"Thus, where the indictment alleged that the defendant discharged a gun against the deceased, and thereby gave him a mortal wound, and the special verdict stated only that the defendant discharged a gun and thereby killed the deceased, not stating in terms that it was discharged *against* him; it was held that the court could not give any judgment *against* the defendant. R. *v.* Plummer, Kel. 111.

"So, where the indictment charged a robbery from the person, and the proof was of a taking up of the prosecutor's money from the ground in his presence; and the special verdict, though it stated that the defendant struck the money out of his hand, and immediately took it up, was held insufficient, because it did not expressly find that he was present at the taking up. R. *v.* Francis, 2 Stra. 1015. But if the jury find all the substantial requisites of the charge, they are not bound to follow in terms the technical language of the indictment.

"Thus, where the defendant was charged with forgery of a bank note, and the special verdict stated that he erased and altered it by changing the word 'two' into 'five,' this was held sufficient. R. *v.* Dawson, 1 Stra. 19.

"So, where an indictment for murder enumerated three wounds, and the special verdict mentioned one only, this was held not to be a fatal variance. R. *v.* Morgan, 1 Bulstr. 87. So, where the evidence need not correspond precisely with the statement in the indictment, the special verdict will be good, although in the same respects it vary from the statement in the indictment; as where the fact is found to have occurred, in a case of a transitory nature, at a different place within the jurisdiction of the court, or, where time is immaterial, on a day different from that stated in the indictment. 6 Co. 47; 2 Roll. Abr. 689. If the verdict do not state the time when the facts occurred, it seems the court will intend them to have happened in the order in which the jury have stated them. R. *v.* Keite, 1 Ld. Raym. 142. The jury need not, and indeed ought not, after stating the facts, to draw any legal conclusion, for that is the province of the court, and if they do so, and the inference drawn by them is an erroneous one, the court will reject it as superfluous, and pronounce, nevertheless, the judgment

[1] Com. *v.* Call, 21 Pick. 509; Clay *v.* State, 43 Ala. 350. See R. *v.* Dawson, 1 Stra. 19. As to form see 1 Chit. C. L. 645.

own knowledge any material fact which the jury should find;[1] and the practice is, when the verdict is insufficient, insensible, or in violent antagonism to the evidence, to set it aside and grant a new trial.[2] Where a special verdict substantially avers facts constituting guilt, the court can declare the guilt or innocence of the defendant as a question of law; but if the facts found are equivocal, and are consistent with innocence, then the court

warranted by the facts stated. See 1 Chit. Crim. L. 645, and the cases there cited.

"A special verdict is not amendable as to matters of fact; but a mere error of form may be amended, even, as it seems, in capital cases, in order to fulfil the evident intention of the jury, where there is any note or minute to amend by. 2 Hawk. c. 47, s. 9; R. *v.* Hayes, 2 Stra. 844; R. *v.* Hazel, 1 Leach, 382; R. *v.* Woodfall, 5 Burr. 2661. If three offences are charged in the indictment, and the special verdict state evidence which applies to two of them only, the court may adjudge the defendant guilty of those two, and enter an acquittal as to the residue. R. *v.* Hayes, supra. The court cannot, however, on an indictment for felony, adjudge the defendant guilty of a misdemeanor. R. *v.* Westbeer, 2 Stra. 1133. But where it appears clearly from the facts stated in the special verdict, that the defendant has been guilty of a crime, though not of the degree charged upon him in the indictment, the court will not discharge him, but direct a fresh indictment to be preferred. R. *v.* Francis, 2 Stra. 1015. Where the verdict is so imperfect that no judgment can be given upon it, a *venire de novo* may, in misdemeanor, be awarded. R. *v.* Woodfall, 5 Burr. 2661; and also, notwithstanding previous doubts upon the subject, in felonies. Campbell *v.* R. 11 Q. B. 799; 17 L. J. (M. C.) 89; in which case, says Blackburn, J., delivering judgment in Winsor *v.* R. 35 L. J. (M. C.) 133, 'there is a solemn decision of the Queen's Bench, not reversed or questioned, that a *venire de novo* will lie in a felony on an imperfect verdict.'

"In cases of felony, the court may enter a judgment of acquittal, where the facts found by the special verdict do not warrant a judgment *against* the defendant. See R. *v.* Huggins, 2 Ld. Raym. 1585; but this will be no bar to another prosecution for the same felony. R. *v.* Burridge, 3 P. Wms. 480; Com. Dig. Indictment (N.)" Jervis's Archbold, 17th ed. (1871) 164.

Upon an indictment for stealing a watch, the jury returned the following verdict: "We find the prisoner not guilty of stealing the watch, but guilty of keeping it, in the hope of reward, from the time he first had the watch." It was ruled by the Court of Criminal Appeal that this finding amounted to a verdict of "not guilty." R. *v.* York, 1 Den. C. C. R. 335; S. C., 18 L. J. M. C. 38.

[1] This applies even to averment of negatives. Com. *v.* Dooly, 6 Gray, 360.

[2] R. *v.* Maloney, 9 Cox C. C. 6; R. *v.* Meany, L. & C. 213; 9 Cox C. C. 231; Com. *v.* Call, 21 Pick. 509; Com. *v.* Lewer, 15 S. & R. 93; Arthur *v.* State, 21 Iowa, 322; State *v.* Izard, 14 Richards. 209. See infra, §§ 754–6.

cannot determine as a question of law the guilt or innocence of the defendant.[1] Thus in an information under the ninth section of the Internal Revenue Act, which enacts that any person who shall issue any instrument, &c., for the payment of money, without the same being duly stamped, with intent to evade the provisions of this act, shall forfeit and pay, &c., an intent to evade is of the essence of the offence, and no judgment can be entered on a special verdict which does not find such intent.[2]

Surplusage in a special verdict may be disregarded.[3]

In Louisiana, the only verdicts can be "guilty" or "not guilty."[4]

VI. HOW VERDICT IS RENDERED.

General verdict is by word of mouth.

§ 747. The usual mode of rendering a general verdict is by word of mouth. A *written* general verdict is irregular, and the court may reject it, and require it to be made orally.[5] In cases of felony, at least, an oral rendering by the foreman is essential.[6] The jury, when they have agreed, signify the fact by the foreman, and the clerk, directing the defendant to stand up, or to lift up his hand, addresses the jury and the defendant as follows: "Prisoner, look on the jury; jury, look on the prisoner: How say ye; is the prisoner guilty of the felony (or offence) whereof he stands indicted, or not guilty?" The foreman, if there be a special verdict, reads it, or if the verdict be general, states it, "guilty," or "not guilty," as the case may be.[7] The clerk then records the verdict, and again addresses the jury: "Hearken to your verdict as the court hath recorded it: You say that A. B. is guilty (or not guilty) of the felony (or offence) whereof he stands indicted, and so you say all." This last declaration of the clerk is important, as fixing the character of the verdict, and preventing misconception.[8]

The verdict "guilty" is assumed to refer to the indictment to which it is a response.[9]

[1] R. *v.* Francis, 2 Stra. 1015; State *v.* Curtis, 71 N. C. 56.

[2] U. S. *v.* Buzzo, 18 Wall. 125.

[3] Wallace *v.* State, 2 Lea, 29.

[4] State *v.* Jurche, 17 La. An. 71.

[5] Lord *v.* State, 16 N. H. 325. Traube *v.* State 56 Miss. 154; Timmons *v.* State, 56 Miss. 786. As to Ohio statute requiring written verdicts see Hardy *v.* State, 19 Ohio St. 579.

[6] Com. *v.* Tobin, 125 Mass. 203.

[7] Rollins *v.* State, 62 Ind. 46.

[8] Com. *v.* Gibson, 2 Va. Cas. 70.

[9] Bond *v.* People, 39 Ill. 26.

The procedure must be in open court, and in defendant's presence.[1]

§ 748. That the verdict should be recorded is essential; but this may be done *nunc pro tunc* at a subsequent term.[2] If the record shows that less than twelve jurors assented, this is fatal.[3]

Must be recorded.

VII. SEALED VERDICT.

§ 749. In misdemeanors, and in some States in felonies not capital, the court may, with the defendant's consent, permit the jury to separate, and bring in a sealed verdict.[4] But though the defendant may agree to a sealed verdict, it is error to permit the jury to leave such verdict with the clerk.[5] The defendant is entitled to have them present at its rendition.[6]

In misdemeanors sealed verdict may be rendered.

That a verdict is not signed, its genuineness being undisputed, is no ground for new trial.[7]

[1] Supra, § 549; Com. *v.* Tobin, 125 Mass. 203; State *v.* Epps, 76 N. C. 55; Stubbs *v.* State, 49 Miss. 716; Finch *v.* State, 53 Miss. 363; State *v.* Mills, 19 Ark. 476.

[2] Hall *v.* State, 3 Kelly, 18. See State *v.* Levy, 24 Minn. 362.

[3] State *v.* Meyers, 68 Mo. 266. Supra, § 733.

[4] Anonymous, 63 Me. 590; Com. *v.* Carrington, 116 Mass. 37; Com. *v.* Boyle, 9 Phila. 592; Barlow *v.* State, 2 Blackf. 114; Bradley *v.* State, 31 Ind. 492; Reins *v.* People, 30 Ill. 256; U. S. *v.* Potter, 6 McLean, 186. That defendant's consent is necessary see People *v.* Kelly, 46 Cal. 357.

As to form of sealed verdict see Com. *v.* Carrington, 116 Mass. 37.

[5] In Com. *v.* Tobin, 125 Mass. 203, the jury upon a trial for manslaughter, being still out when the court adjourned for the day, were told by the court that they seal up their verdict and separate when they should agree, and bring it into court the next morning. This they did, and the sealed verdict was handed by the foreman of the jury to the clerk of the court, the prisoner being present. The clerk stated to them in the usual form that they found the prisoner guilty, and that this was their verdict. No response was made to this by the jury or their foreman, and nothing more was said. The proceedings were held by the Supreme Court to be erroneous. See R. *v.* Parkinson, 1 Moody, 45; R. *v.* Vodden, 6 Cox C. C. 226; Com. *v.* Durfee, 100 Mass. 146; Com. *v.* Carrington, 116 Mass. 37.

[6] U. S. *v.* Potter, 6 McLean, 186; Wright *v.* State, 11 Ind. 569. See Martin *v.* Morelock, 32 Ill. 485; Stewart *v.* People, 32 Mich. 63. Supra, § 549.

[7] Roberts *v.* State, 14 Ga. 8.

VIII. POLLING THE JURY.

Jury may be polled by either party.

§ 750. Either party may require that the jury shall be polled, *i. e.* that the name of each juryman shall be specially called, and the question as to the defendant's guilt or innocence propounded to him individually; though in some jurisdictions the question proposed simply is, "Is this your verdict?"[1] The same power resides in the court of its own motion.[2] If any juryman dissent from the verdict previously expressed, then it is a nullity, and the jury must again retire for deliberation,[3] though it is otherwise if the dissent be withdrawn.[4]

In Massachusetts, under the practice by which the jury are asked orally whether each assents to the verdict, polling is held not to be a matter of right;[5] and such is the view now taken in South Carolina.[6]

The better view is that when a sealed verdict is rendered the jury may be polled.[7]

IX. AMENDING VERDICT.

Verdict may be amended before discharge of jury.

§ 751. Until the jury are discharged, the verdict may be amended. After they are discharged and separate, however, it is too late.[8] And if there is any informality, uncertainty, or impropriety about a verdict, the court may require the jury to amend it before they

[1] U. S. *v.* Potter, 6 McLean, 182; People *v.* Perkins, 1 Wend. 91; Sargent *v.* State, 11 Ohio, 472; Wright *v.* State, 11 Ind. 569; John *v.* State, 8 Ired. 330; State *v.* Young, 77 N. C. 498; Tilton *v.* State, 52 Ga. 478; State *v.* Austin, 6 Wis. 205.

[2] Harris *v.* State, 31 Ark. 196.

[3] 2 Hale P. C. 299; R. *v.* Vodden, Dears. C. C. 229; 6 Cox C. C. 226; R. *v.* Parkin, 1 Moody C. C. 45; Nomaque *v.* People, Breese, 109; State *v.* Hardin, 1 Bailey, 3; State *v.* Brister, 26 Ala. 107; Burk *v.* Com. 5 J. J. Marshall, 676; Hilliard on New Trials (1873), 242.

[4] Gose *v.* State, 6 Tex. Ap. 121. See supra, § 749.

[5] Com. *v.* Roby, 12 Pick. 496; Com. *v.* Costley, 118 Mass. 1.

[6] State *v.* Wise, 7 Richards. 412.

[7] U. S. *v.* Potter, 6 McLean, 86; Wright *v.* State, 11 Ind. 569; Stewart *v.* People, 23 Mich. 63.

In U. S. *v.* Bridges, U. S. Cir. Ct. Ala. 1879; 1 South. Law Jour. (N. S.) 8, the right was denied by Judge Bruce. For criticisms see 1 Crim. Law Mag. 7; 1 South. Law Jour. (N. S.) 9, and 10 Cent. L. J. 1.

[8] R. *v.* Vodden, 6 Cox C. C. 226; Dears. C. C. 229; Sargent *v.* State, 11 Ohio, 473. See Com. *v.* Lang, 10 Gray, 11; Nemo *v.* Com. 2 Grat. 558; Mitchell *v.* State, 22 Ga. 211; Burk *v.* Com. 5 J. J. Marsh. 675; People *v.* Ah Ye, 31 Cal. 451.

separate.[1] Even where a verdict of "not guilty" was pronounced by one of the jurors, which was entered by the clerk in the minute book, and the prisoner discharged, it was held that upon it appearing that the verdict the jury intended was "guilty," the record could be immediately amended, the verdict "guilty" recorded, and the prisoner committed.[2] We will presently see that a defective verdict is no bar to further proceedings.[3]

X. DESIGNATION OF DEGREE OR OF PUNISHMENT.

§ 752. Where a statute requires in the verdict a designation of a degree, or the specific assessment of a punishment, a general verdict, without such designation or assessment, will be a nullity, and if the jury are discharged, a second trial may be constituted, except in those jurisdictions where constitutional limitations are held to stand in the way;[4] and so as to a verdict which is preposterously impracticable.[5] A verdict imposing a greater punishment than that authorized by law is void;[6] nor can the court ordinarily reduce a punishment so assessed,[7] unless the assessment be divisible, in which case the illegal branch of the assessment may be stricken off.[8] A punishment less than the statutory can be sustained on error.[9]

Where degree or punishment is to be designated by jury this must be done specifically.

[1] R. v. Meany, L. & C. 213; 9 Cox, 231; Com. v. Chauncy, 2 Ashm. 91; Nemo v. Com. 2 Grat. 558; Cook v. State, 26 Ga. 593; State v. Waterman, 1 Nev. 543; People v. Bonney, 19 Cal. 426; Gibson v. State, 38 Miss. 295.

[2] R. v. Vodden, Dears. C. C. 229; 6 Cox C. C. 226.

To recall a jury immediately after rendering a verdict, to amend it, is not causing such a separation as avoids the verdict, though the jury were told they were discharged, and though the defendant objected to the recalling. Lovells v. State, 32 Ark. 585; Mitchell v. State, 22 Ga. 211. To same effect, R. v. Parkins, 1 Mood. C. C. 46. The verdict, as amended, is that which is to be recorded. R. v. Parkin, 1 Moody C. C. 45; Com. v. Dowling, 114 Mass. 259.

[3] Infra, §§ 756, 763.

[4] Cropper v. U. S. Morris, 259; Com. v. McGrath, 115 Mass. 150; Dick v. State, 3 Oh. St. 89; Parks v. State, 3 Oh. St. 101; Com. v. Hatton, 3 Grat. 623; Com. v. Scott, 5 Grat. 697; Robertson v. State, 42 Ala. 509; State v. McCue, 39 Mo. 112; People v. Littlefield, 5 Cal. 356; People v. Welsh, 49 Cal. 174; People v. Brickley, 49 Cal. 241. See Eastman v. State, 54 Ind. 441; State v. Bean, 21 Mo. 269; and cases cited infra, § 756.

[5] David v. State, 40 Ala. 69. Infra, § 754.

[6] Cropper v. U. S. Morris, 259; Allen v. Com. 2 Leigh, 737; Ah Cha, ex parte, 40 Cal. 426.

[7] Cole v. People, 84 Ill. 216.

[8] Infra, §§ 780, 918, 927. So in Michigan. Wilson v. People, 24 Mich. 410. Infra, § 927.

[9] Infra, § 918.

Where two defendants are jointly convicted and a fine imposed for the offence, this is a finding for the whole amount against each defendant.[1]

The designation of degrees in homicide is elsewhere noticed.[2]

Joint defendants may be convicted of different degrees.[3]

XI. VALUATION OF PROPERTY.

Jury may find a special valuation.

§ 753. It has elsewhere been seen[4] that wherever the sentence is affected by the value of property stolen, it is in the power of the jury, if they find the valuation in the indictment erroneous, to find a special valuation, which will bind the court. But it is not necessary, at common law, for the jury in any case to value the chattels in larceny; and though they have undoubtedly the power to do so if they choose, yet a general verdict of guilty is an affirmation of the value stated in the indictment, and is therefore, for this purpose, sufficient. In some States, it is true, the practice prevails for the jury, in larceny and the kindred offences, to value the chattels;[5] but unless this is required by statute valuation is superfluous.

XII. WHEN COURT MAY REFUSE TO RECEIVE VERDICT.

Palpably wrong verdict may be rejected by court.

§ 754. In England the practice has been for the court, when a verdict plainly contradicts the evidence, or is founded on mistake of law, to refuse to receive it, and to direct the jury to take it back and reconsider it with renewed instructions. This course, for instance, has been followed in cases where the evidence required a verdict of either murder or of not guilty, but where the jury found manslaughter.[6] The course of refusing to receive a verdict, under such circumstances, may be traced to the fact that in England it is not the practice to revise verdicts by motions for new trial. In this

[1] Infra, § 940; Bennett *v.* State, 30 Tex. 521.

[2] Infra, § 914; Whart. Crim. Law, 8th ed. § 543.

[3] Klein *v.* People, 31 N. Y. 229; Mickey *v.* Com. 9 Bush, 593. Supra, § 304; Whart. Crim. Law, 8th ed. §§ 236, 541.

[4] Whart. Crim. Law, 8th ed. § 953.

[5] Locke *v.* State, 32 N. H. 106; Highland *v.* People, 1 Scam. 392; Case *v.* State, 26 Ala. 17; State *v.* Redman, 17 Iowa, 329. As to Mississippi see Shines *v.* State, 42 Miss. 331.

[6] R. *v.* Meany, 1 Leigh & C. 213; 9 Cox C. C. 231. See for other cases supra, § 746.

country, however, where new trials are granted in all cases where a defendant is wronged by a verdict, it is unusual for a judge thus peremptorily to interfere.[1] But where a statute requires the jury to find the degree, then a general verdict will be refused by the court, and a verdict finding the degree directed.[2] And so where the verdict is insensible, and an amendment is required,[3] or where the verdict is not as to the offence charged.[4] In such case the jury is to be sent back, and directed to return a responsive verdict.[5]

XIII. WHEN THERE ARE SEVERAL DEFENDANTS.

§ 755. The law in this respect, as has been already stated,[6] may be thus recapitulated. When the charge is for a *single* offence, one defendant cannot be found guilty of one part of the charge, and the other defendant of another part. It is otherwise, however, when the offence is capable of being divided into stages, as where the charge is burglary and larceny, in which case one defendant may be convicted of the larceny and the other of the burglary.[7]

Defendants may be severed in finding.

In riot and conspiracy, as has been seen, there cannot be a conviction of a single defendant, coupled with an acquittal of co-defendants, unless there is an allegation and proof of the coöperation of parties not indicted.[8]

A conviction of a joint offence, it must also be kept in mind, can only be on evidence of joint guilt.[9]

Convictions of co-defendants are several.[10]

[1] Supra, §§ 751, 752; State *v.* Shule, 10 Ired. 153; but compare State *v.* Underwood, 2 Ala. 745; State *v.* McGregg, 4 Blackf. 101; Heacock *v.* State, 42 Ind. 393; Arnold *v.* State, 51 Ga. 144; Alston *v.* State, 41 Tex. 39.

[2] People *v.* Bonney, 19 Cal. 426. Supra, §§ 751, 752.

[3] Supra, §§ 751, 752.

[4] State *v.* Bishop, 73 N. C. 44.

[5] Ibid.

[6] Supra, §§ 313, 314.

[7] Supra, §§ 312–15; infra, § 874; Whart. Crim. Ev. § 136.

[8] Supra, §§ 305, 312; Whart. on Ev. § 131; Whart. Crim. Law, 8th ed. §§ 82, 1388 *et seq.*

[9] Supra, § 315.

[10] Supra, § 314; Mask *v.* State, 32 Miss. 406.

XIV. DEFECTIVE VERDICT.

§ 756. A verdict fatally defective is a nullity,[1] and is no bar, as we have already seen, to a second trial on the same indictment, if there be no constitutional prohibition.[2] It was in the power of the defendant to have it corrected at the time it was rendered; and if he fail to do this, he cannot afterwards take advantage of his own laches.[3] An insensible verdict, also, can be arrested on application of the defendant.[4]

Defective verdict no bar.

XV. RECOMMENDATION TO MERCY.

§ 757. The recommendation for mercy, when added to a verdict of guilty of an offence whose punishment is at the discretion of the court, is an appeal, in the first place, to the court,[5] and afterwards to the pardoning authorities. But the recommendation is no part of the verdict, either

Such recommendation not obligatory.

[1] Supra, §§ 746, 752; State *v.* Newson, 13 W. Va. 859.

[2] R. *v.* Woodfall, 5 Burr. 2661; Campbell *v.* R. 11 Q. B. 799; State *v.* Scannel, 39 Me. 68; Com. *v.* Call, 21 Pick. 509; Wilson *v.* State, 20 Oh. 26; Marshall *v.* Com. 5 Grat. 663; Webber *v.* State, 10 Mo. 5; Gipson *v.* State, 38 Miss. 295; and cases cited to § 752. Mere clerical errors will not make a verdict insensible. People *v.* Boggs, 20 Cal. 432.

[3] Supra, § 751.

[4] Supra, § 752; infra, § 763. See Westbrook *v.* State, 52 Miss. 777.

A special verdict, finding the defendant guilty of the same facts as those charged in the indictment, but not finding him guilty in the county where the offence was laid, cannot be supported, and the defendant must again be put on his trial. Com. *v.* Call, 21 Pick. 509. Supra, § 745. On the other hand, on an indictment for receiving goods, knowing them to be burglariously stolen, &c., a verdict of guilty of receiving the goods, knowing them to have been stolen, but not burglariously stolen, was held sufficient to sustain a sentence. Dyer *v.* Com. 23 Pick. 402. Supra, §§ 255, 746.

It is no ground for arrest of judgment that the defendants were convicted of different degrees of homicide. Supra, § 755.

If, on an indictment for an assault with intent to kill and murder, the jury find the accused guilty of being accessary before the fact of an assault with intent to kill, that offence not being necessarily included in the indictment, judgment will be arrested. State *v.* Scannel, 39 Me. 68.

Judgment will not be arrested under the Massachusetts act on an indictment for larceny of "sundry bank bills, of the aggregate value of $367," merely because the verdict was "guilty of stealing sundry bank bills of the value of $317," and not guilty as to the residue. Com. *v.* Duffy, 11 Cush. 145.

[5] Infra, § 942.

in capital or non-capital offences.[1] When, however, the court, as in capital cases, has no discretion as to the degree of punishment, the recommendation, as a mere collateral petition from the jury, is sent to the pardoning authorities direct.[2]

[1] Stephens *v.* State, 51 Ga. 328.

[2] In Com. *v.* Pomeroy, 117 Mass. 143, the jury returned with their verdict of guilty, this paper, signed by all the jurors: "The jury recommend that the sentence be commuted to imprisonment for life on account of his youth." A general verdict of guilty was entered, and the defendant alleged exceptions to other rulings at the trial, but not to this, which on argument to the full court were subsequently overruled (117 Mass. 143), and the defendant sentenced to death. Application was then made to the governor and council for a pardon. A certified copy of the record of the conviction and sentence was transmitted to the governor, and the *original* return of the jury, given above, with another paper also, returned at the same time, giving the grounds of the verdict. The justices of the court were then inquired of by the governor and council whether "the papers so transmitted were a part of the judicial proceedings in said case, or of the record thereof, and what is their legal relation thereto." To which they unanimously answered: "A memorandum of the ground of the verdict, or of a recommendation to mercy, presented by the jury to the judges, cannot affect the manner of returning, recording, or affirming the verdict, or the form of the sentence; and, in law, forms no part of the judicial proceedings in the case, or of the record thereof, and has no legal relation to the judicial proceedings or record." "See Opinion of the Justices, 120 Mass. 600 (1876). In the Park Lane Murder case, Ann. Reg. 1872, p. 209, the defendant was convicted of murder, but 'strongly recommended to mercy on the ground that there was no premeditation in the act.' But Baron Channell said, 'it would be his duty to send the recommendation to mercy to the proper quarter, but at present all he had to do was to pass upon her the sentence of the law,' and she was sentenced to death in the usual form. A similar course was taken in People *v.* Lee, 17 Cal. 76 (1860). The defendant was convicted of murder in the first degree, with a recommendation to mercy. The court directed the verdict to be entered without the recommendation, which, on appeal, was sustained, the court saying: 'The recommendation was addressed solely to the court, and constituted no part of the verdict.' See also State *v.* O'Brien, 22 La. An. 27 (1870); State *v.* Bradley, 6 Ibid. 560 (1851). So in State *v.* Potter, 15 Kans. 303 (1875), the verdict as returned was 'guilty of murder in the second degree,' and with it these words, 'and we recommend his punishment to be the least amount allowed by law.' The court declined to receive the verdict in that form, and handed the jury another blank, which was duly signed and returned by them without those words. This was held no error." See note to Eason *v.* State, 17 Am. Law Reg. 313; S. C., 6 Baxt. 466; from which the above is taken.

In Eason *v.* State, the Supreme

Court of Tennessee ruled that the finding by one jury in a murder case of "guilty, with mitigating circumstances," where the court disregards the finding, and sentences the prisoner to the extreme penalty, does not bind a different jury in a subsequent trial, which may, on the contrary, find a verdict of "guilty" without mitigation.

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CHAPTER XVI.

MOTION IN ARREST OF JUDGMENT.

At common law, most exceptions may be taken on motion in arrest, § 759.
Informalities are cured by verdict, § 760.
Misnomer no ground, § 761.
Under statute rule is extended, § 762.
Insensible verdict will be arrested, § 763.
Pendency of prior indictment no ground for arrest, § 764.
Otherwise as to statute of limitations, § 765.
But not irregularities of grand jury, § 766.
Time for motion is limited, § 767.
Sentencing defendant is equivalent to discharge of motion, § 768.

§ 759. At common law, and until 7th Geo. 4, c. 64, ss. 20, 21, and the corresponding statutes in this country,[1] any objection which would have been fatal in demurrer was (with exceptions to be presently noticed) equally fatal on motion in arrest of judgment.[2] Judgment, however, can only be arrested for matter appearing on the record;[3] though the motion is not confined to the indictment alone, as it obtains if any part of the record is imperfect, repugnant, or vicious.[4] Thus judgment will be arrested

At common law, most demurrable exceptions can be taken on motion in arrest.

[1] See supra, §§ 90 *et seq.*

[2] 4 Bla. Com. 324; Burn's J., Indict. xi.; 1 Ch. C. L. 442, 663; State *v.* Putnam, 38 Me. 296; State *v.* Bangor, 38 Me. 592; Com. *v.* Morse, 2 Mass. 128, 130; Brown *v.* Com. 8 Mass. 59, 65; Com. *v.* Child, 13 Pick. 198; State *v.* Doyle, 11 R. I. 574; Francois *v.* State, 20 Ala. 83; Martin *v.* State, 28 Ala. 71; Tipper *v.* Com. 1 Metc. (Ky.) 6. A defective indictment is not cured by a plea of *nolo contendere*. Com. *v.* Northampton, 2 Mass. 116. Supra, § 418. Defective description of the offence is not one of the points in which an indictment is cured by a verdict, but the same is equally fatal upon a motion in arrest of judgment as upon demurrer, or a motion to quash. State *v.* Gove, 34 N. H. 510; Rice *v.* State, 3 Kans. 141.

[3] 1 Ld. Raym. 281; 1 Salk. 77, 315; Com. Dig. Indict. v.; State *v.* Carver, 49 Me. 588; Com. *v.* Donahue, 126 Mass. 51; Horsey *v.* State, 3 Har. & J. 2; Com. *v.* Linton, 2 Va. Cas. 476; Com. *v.* Watts, 4 Leigh, 672; State *v.* Allen, Charlt. 518; Sparks *v.* State, 59 Ala. 82; State *v.* Connell, 49 Mo. 282; Shepherd *v.* State, 64 Ind. 43; State *v.* Conway, 23 Minn. 291.

[4] 1 Ch. C. L. 662; 2 Stra. 901; 2 Taylor, 93; State *v.* Fort, 1 Car. Law Rep. 510; Whitehurst *v.* Davis, 2 Hay. 113. See State *v.* O'Connor, 11 Nev. 416.

where no indictable offence is set forth;[1] where the statute creating the offence has been intermediately repealed;[2] where the case has been tried by more or less than twelve jurors;[3] where no issue was averred to have been joined;[4] and where the verdict is insensible;[5] though, as the court possesses the power of amending its own records at any time during the term in which they are entered,[6] it seems that clerical errors, such as the false entering of a plea on an impossible day, may be corrected.[7]

Informalities are cured by verdict.

§ 760. Errors as to form, not going to the description of the offence, which might have been taken advantage of at a previous stage, are not sufficient cause to arrest judgment. Thus, while duplicity is fatal on motion to quash, or demurrer, the better opinion is, that it will not be ground for arrest;[8] and the same position is undoubtedly good when there has been a misjoinder of counts, but where the defendant has gone to trial without a motion to quash, or on application for election.[9] So the verdict will cure the omission to connect necessary and dependent members of the same sentence by their appropriate copulatives,[10] and also merely formal or clerical errors.[11] So is it with essential averments, of which the verdict implies the truth, but which are imperfectly stated. "There is a general rule as to pleading at common law, and I think it is right to say that there is no distinction, where questions of this kind arise, between the pleadings in civil and criminal proceedings," said Blackburn, J., in 1873; "that where an averment which is necessary to support a particular part of the pleading has been imperfectly stated, and a verdict on an issue involving that averment is found, and it appears to the court after verdict that unless this averment were true the verdict could not be sus-

[1] Com. v. Hinds, 101 Mass. 209.

[2] R. v. McKenzie, R. & R. 429; R. v. Denton, Dears. 3; 18 Q. B. 761; Com. v. Kimball, 21 Pick. 373; Com. v. McDonough, 13 Allen, 581.

[3] Supra, § 733. See State v. Meyers, 68 Mo. 266.

[4] State v. Fort, 1 Car. Law Rep. 510.

[5] Com. v. Call, 21 Pick. 509. Supra, § 756.

[6] Supra, § 751.

[7] Com. v. Chauncy, 2 Ashm. 91.

[8] Com. v. Tuck, 20 Pick. 356; State v. Johnson, 3 Hill S. C. 1. See supra, § 255.

[9] See supra, §§ 245, 299; Com. v. Gillespie, 7 S. & R. 476; Guykowski v. People, 1 Scam. 476. But where two counts set forth the same offence judgment will be arrested. Supra, § 299.

[10] Lutz v. Com. 29 Penn. St. 441; People v. Swenson, 49 Cal. 388.

[11] Supra, §§ 90, 273; West v. State, 6 Tex. Ap. 485.

tained, in such case the verdict cures the defective averment, which might have been bad on demurrer. The authorities upon this subject are all stated in 1 Williams' Saund. 260, n. I. (last ed.)" [1]

[1] Blackburn, J., Queen's Bench, Jan. 1873, in R. *v.* Heymann, 28 Law T. 163; S. C., 12 Cox C. C. 383; L. R. 8 Q. B. D. 102.

In R. *v.* Bradlaugh (Ct. of Appeal), 38 L. T. (N. S.) 118; L. R. 3 Q. B. D. 607; 14 Cox C. C. 68, it was held that an indictment for publishing an obscene book, which does not set out the passage of such book alleged to constitute the offence, but only refers to the book by its title, is bad, and the defect is not cured by verdict. Supra, § 177.

"Then as to the last question," said Brett, J., "how far the omission must go to be incurable by verdict. The rule as to this point also is stated in my judgment in R. *v.* Aspinall. After stating the test for determining what is a mere imperfect averment — which the verdict will cure — to be to see if, "assuming the facts which are accurately alleged in the indictment to have been proved as alleged, and the facts which are imperfectly alleged to have been proved in a sense adverse to the accused, the charge is supported," the judgment goes on to give the test of an omission which verdict will not cure: "But if, assuming both the above-mentioned allegations of facts, the perfect and imperfect allegations, to be proved respectively as before stated, the charge would not be supported for want of the existence of some other allegation, affirmative or negative, which has been totally omitted, then the indictment is bad notwithstanding the verdict. The verdict is only to be taken as conclusive evidence that the facts alleged in the indictment, accurately and inaccurately, were proved in a sense adverse to the accused. If those facts, so proved, would not support the charge, the indictment is bad on a writ of error;" and the passage from Williams' Saunders (vol. 1, p. 261, ed. 1871) is to the same effect. The indictment must contain all that is put in issue; what is totally omitted is not in issue, whereas an inaccurate or defective averment is, and verdict accordingly cures the defect.. Now is there such a total omission here? The introductory words, 'a certain indecent, lewd, filthy, bawdy, and obscene libel,' merely point out the class of offence under which the words which are to follow come. But all that follows is, 'to wit, a certain indecent book called Fruits of Philosophy.' There is no description even of the contents of the book, and a total omission of all quotation, and, according to the authorities I have examined, such an omission is fatal. Some American cases have been cited; but they do not help the prosecution, for they either are not the law of England, or, if they are, they are in the defendants' favor. They seem to say that where there is an averment that the libel is so bad as to pollute the records of the court if set out upon it, the libel need not be set out. But here there is no such averment. Even if there had been such an averment, I know no authority for saying that that is the law of England. It seems a more robust doctrine to say there is nothing in such an objection, when every one that is in court during the trial hears the obscenity over and over again. Therefore, in my opin-

§ 761. It is clear that if misnomer of the defendant be not met by plea in abatement, it is too late for objection after trial.[1]

Misnomer no ground.

§ 762. The rigor of the common law in this respect has been so greatly and so variously modified by statutes, that, so far as the pleading is concerned, few errors remain which motions in arrest of judgment can reach.[2]

Under statute rule is extended.

ion, this indictment is incurably defective, and the defendants are on that short ground, one entirely of law and quite apart from the merits of their case, entitled to our judgment."

To this Cotton, L. J., adds: —

"Is this omission, then, cured by verdict? The rule is simple: verdict will cure only defective statements. This is not a mere defective statement, there is an absolute and total omission. Such an omission has not been cured, and cannot be cured, by verdict; therefore, according to settled and well established rules of law, the defendants are entitled to our judgment." Supra, § 177.

In Massachusetts, however, it has been held that as a rule the verdict does not cure defects that would be fatal in demurrer. Com. *v.* Child, 13 Pick. 200 (see Com. *v.* Bean, 14 Gray, 54; State *v.* Barrett, 42 N. H. 466); though this is inconsistent with the ruling in Com. *v.* Tuck, 20 Pick. 356.

[1] Com. *v.* Beckley, 3 Met. 330. See supra, §§ 120 *et seq.*; Com. *v.* Chauncy, 2 Ashm. 90.

[2] Of these statutes the following may be taken as illustrations.

Under 7 & 8 Geo. 4, which enacts that "where the offence charged has been created by any statute, the indictment shall, after verdict, be held sufficient if it describe the offence in the words of the statute," it was held that after verdict there could be no objection to an indictment which charged that defendant "unlawfully did receive goods which had been unlawfully and knowingly and fraudulently obtained by false pretences with intent to defraud, well knowing that the goods had been obtained by false pretences with intent to defraud, as in this count before mentioned," but omitting to set out what the particular false pretences were. R. *v.* Goldsmith, 12 Cox C. C. 594; L. R. 2 C. C. 760; R. *v.* Knight, 14 Cox C. C. 31; and see Com. *v.* Pettes, 126 Mass. 242; People *v.* Cox, 9 Cal. 32.

In Ohio, the motion is only allowable where the grand jury had no jurisdiction, and where the facts stated by the indictment constitute no offence. Code Crim. Prac. § 195; Warren's C. L. (1870) § 195.

In Massachusetts, matters concerning the jurisdiction of the court can be overhauled by this motion. Gen. Stat. 1864, c. 250, § 3.

With these statutes are blended in practice the various statutes of jeofails and amendment, which have heretofore been examined. Supra, §§ 90 *et seq.*

It may be now generally stated, that under these statutes technical irregularities in pleading can no longer be considered ground for motions in arrest. Cowman *v.* State, 12 Md. 250; Maguire *v.* State, 47 Md. 485; State *v.* Pemberton, 30 Mo. 376; State *v.* Boudreaux, 14 La. An. 88; State *v.* Millican, 15 La. An. 557; Wise *v.* State, 24 Ga. 31; Camp *v.* State, 25 Ga. 689; Walston *v.* State, 16 B.

Insensible verdict will be arrested.

§ 763. As has been already seen in cases where the verdict itself is on its face insensible, judgment will not be entered.[1]

Prior indictment no ground for arrest.

§ 764. After a verdict of guilty on an indictment for murder, judgment will not be arrested because it appears on record that there was, at the time of the trial, another indictment against the defendant for the same offence, pending in the same court.[2]

Statute of limitations ground for arrest.

§ 765. Whether where it appears on the face of an indictment that the offence charged is barred by the statute of limitations, and none of the exceptions in the statute to prevent its operation are alleged therein, judgment will be arrested, is elsewhere considered.[3]

But not irregularities of grand jury.

§ 766. Irregularities in respect to grand juries, unless matter of record, are not ground for arrest.[4] And where it appears from the statement on the face of the indictment that the grand jury were sworn, it is not competent, on a motion in arrest of judgment, to disprove the recital by testimony *aliunde*.[5]

Time for motion is limited.

§ 767. At common law the motion may be made at any time before sentence;[6] but rules of court are adopted in most jurisdictions, requiring the motion to be made within four days after verdict. These rules, however, it is within the discretion of the court, in strong cases, to extend or vacate.

Monr. 15; Com. *v.* Hadcraft, 6 Bush, 91; Dillon *v.* State, 9 Ind. 408; State *v.* Raymond, 20 Iowa, 582.

In Pennsylvania, by the Revised Acts of 1860:—

Cure of Defects in Jury Process by Verdict. — No verdict in any criminal court shall be set aside, nor shall any judgment be arrested or reversed, nor sentence delayed, for any defect or error in the precept issued from any court, or in the *venire* issued for the summoning and returning of jurors, or for any defect or error in drawing, summoning, or returning any juror or panel of jurors; but a trial, or an agreement to try on the merits, or pleading guilty, or the general issue, in any case, shall be a waiver of all errors and defects in or relative or appertaining to the said precept, *venire*, drawing, summoning, or returning of jurors. Rev. Acts, 1860, p. 443. See, as applying this act, Com. *v.* Frey, 14 Wright, 245.

[1] The authorities and illustrations are given supra, § 756.

[2] Com. *v.* Murphy, 11 Cush. 472. Supra, § 452.

[3] Supra, §§ 316 *et seq.*

[4] Supra, §§ 345, 350, 353.

[5] Terrell *v.* State, 9 Ga. 58.

[6] 1 Chitty Cr. L. 662–3, citing 5 T. R. 445; 2 Burr. 801; 2 Stra. 845.

§ 768. The correct course is to enter on the record the judgment of the court in declaring that the rule is either discharged or made absolute. But this is not imperatively necessary, as the sentencing of a prisoner, on the face of a motion in arrest, will be regarded by a court in error as a discharge of the rule.[1]

Sentencing defendant equivalent to discharge of rule.

[1] Weaver *v.* Com. 29 Penn. St. 445.

CHAPTER XVII.

WRIT OF ERROR.

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X. Supersedeas.
At common law, a writ of error is a supersedeas in capital cases, § 783.
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Such removal provided for by statute, § 783 *a*.

I. TO WHAT COURTS.

§ 770. A WRIT OF ERROR is a writ issuing from an appellate court commanding a subordinate court of record to send up to such appellate court the entire record of a contested procedure. A court not of record cannot be reached by writ of error. The mode of revising the procedure of such courts is by *certiorari*.[1]

Must be to a court of record.

[1] 1 Wms. Saunders, 101, note; R. *v.* Paty, 2 Salk. 503; Wilde *v.* Com. 2 Met. 408; Com. *v.* Morey, 30 Leg. Int. 141; Tarleton, ex parte, 2 Ala. 35. For history of writ of error in Pennsylvania see remarks of Paxson, J., in Sayres *v.* Com. 88 Penn. St. 291; compare Brightly's Troubat & Haly's Practice, § 885. No writ of error lies in criminal cases from the United States Court to the Circuit Courts; the only mode of appeal being on a certificate of division, writ of *habeas corpus*, or *certiorari*. See discussion in Lange, ex parte, 18 Wall. 163. Infra, § 773.

II. HOW FAR ONE BAD COUNT AFFECTS A GENERAL CONVICTION ON ERROR.

One bad count may vitiate judgment.

§ 771. For years it was the prevailing practice in England and this country, where there was a general verdict of guilty on an indictment containing several counts, some bad and some good, to pass judgment on the counts that were good, on the presumption that it was to them that the verdict of the jury attached, and upon the withdrawal by the prosecution of the bad counts.[1] On the same reasoning, where one of two counts was bad, and the defendant was found guilty, and sentenced generally, courts of error presumed that the trial court awarded sentence on the good count; and the sentence would be held not erroneous, if it was warranted by the law applicable to the offence charged in that count.[2] This prac-

[1] See cases cited supra, § 292; and, as ruling point in text, see U. S. v. Potter, 6 McLean, 186; U. S. v. Furlong, 5 Wheat. 184; State v. Burke, 38 Me. 374; Arlen v. State, 18 N. H. 563; State v. Davidson, 12 Vt. 300; State v. Bean, 19 Vt. 530; Com. v. Holmes, 17 Mass. 339; Edgerton v. Com. 5 Allen, 514; Com. v. Nickerson, 5 Allen, 519; Com. v. Hawkins, 3 Gray, 463; Com. v. Howe, 14 Gray, 26; State v. Stebbins, 29 Conn. 463; People v. Curling, 1 Johns. 320; Guenther v. People, 24 N. Y. 100; Baron v. People, 1 Parker C. R. 246; Kane v. People, 3 Wend. 363; West v. State, 2 Zab. 212; Hunter v. State, 40 N. J. L. 495; Com. v. McKisson, 8 S. & R. 430; Hazen v. Com. 23 Penn. St. 355; Hutchison v. Com. 82 Penn. St. 472; Buck v. State, 1 Oh. St. 61; State v. Kube, 20 Wis. 217; Murphy v. Com. 23 Grat. 960; State v. Speight, 69 N. C. 72; State v. Pace, 9 Richs. 355; State v. Shelledy, 8 Iowa, 477; Parker v. Com. 8 B. Mon. 30; Brice v. State, 2 Tenn. 254; Isham v. State, 1 Sneed, 111; Bulloch v. State, 10 Ga. 47; Shaw v. State, 18 Ala. 547; Baker v. State, 30 Ala. 521; Montgomery v. State, 40 Ala. 684; Chappell v. State, 52 Ala. 359; Toney v. State, 60 Ala. 97; State v. Jennings, 18 Mo. 435; State v. Testerman, 68 Mo. 408; Brown v. State, 5 Eng. (Ark.) 607.

It has, however, been ruled that when the counts cover offences as to which there are several punishments, a general verdict of guilty is bad. State v. Montague, 2 McCord, 257. In Virginia it has been said that the rule is not applicable in cases of penitentiary crimes, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict. Mowbray v. Com. 11 Leigh, 643. Compare Clere v. Com. 3 Grat. 615; Murphey v. Com. 23 Grat. 960. The English practice, down to O'Connell's case, was to consider one count as sufficient after verdict for all necessary purposes. Grant v. Astley, Dougl. 730; Peake v. Oldham, Cowp. 275; 2 Burr. 986. See fully supra, §§ 707, 736.

[2] U. S. v. Burroughs, 3 McLean, 405; U. S. v. Plumer, 3 Cliff. 28; Josselyn v. Com. 6 Met. 236; Jen-

tice has been shaken in England in a case of great professional interest, as well as of high political importance, where a judgment of the Court of Queen's Bench of Ireland, on an indictment containing some good counts and some bad, as to each of which there was a verdict of guilty, was reversed, because the judgment was entered generally on the verdict, instead of severally on the good counts.[1] It will be noticed, however, that, in the opinion of the great majority of the judges, the judgment of the court below was sustained, and that in the House of Lords the reversal was carried by a bare majority, — Lord Denman, C. J., Lord Cottenham, and Lord Campbell voting for reversal; Lord Lyndhurst and Lord Brougham for affirmance. Of course a judgment on a bad count must be reversed on error; and when on error one count in several is held to be bad, it is illogical, when there is a lumping judgment, to say that the judgment in the count below went only on the counts that were good. But the logical difficulty is overcome by counter presumptions which it is the duty of a court of error to supply. Suppose a count for a felony is joined to a count for an attempt to commit the same felony, which latter count is defectively pleaded; and suppose there be a general judgment on the indictment and sentence for the felony; would not a court of error be bound to presume that the court below treated the count for the attempt as a nullity? Or suppose that the pleader, as is usually the case in complicated trials, states the same offence in several different ways; and suppose that after a verdict of guilty, either generally or on each count severally, the court below should say, "These counts are alternative; one of the bunch is good; the offence they describe is the same; we sentence the defendant generally on the offence as proved and which one of these counts fits:" — ought not a court of error to hold that the

nings *v.* Com. 17 Pick. 80 (though see Com. *v.* Carey, 103 Mass. 214); People *v.* Davis, 45 Barb. 494; Hartmann *v.* Com. 5 Barr, 60; State *v.* Miller, 7 Ired. 275; State *v.* Conolly, 3 Richards. 337; Rowland *v.* State, 55 Ala. 210; Wash *v.* State, 14 Sm. & M. 126; Hiner *v.* People, 34 Ill. 297; Parker *v.* Com. 8 B. Monr. 30; Bennett *v.* State, 8 Humph. 118; Rice *v.* State, 3 Heisk. 215. But there must be a reversal if the punishment is greater than the law awards to the good count. State *v.* Bean, 21 Mo. 269. Infra, §§ 780, 918.

[1] R. *v.* O'Connell, 11 Cl. & F. 15; Pamphlet Report, Arm. & T. See Lord Denman's Life, ii. 172.

judgment attaches to the good count, and, if the sentence is no more than the law prescribes for such a count, to sustain the judgment? Strictly logical such a conclusion may not be, yet not only would the greatest practical inconveniences follow if it be not accepted, but presumptions such as those we state are within the notice of a court of error, and if applied would, in all proper cases, remove the logical difficulty. At all events, to apply such presumptions was the uniform English practice, until O'Connell's case; and in the United States, with but few exceptions, the courts have united in sustaining general judgments on an indictment in which there are several counts stating cognate offences, irrespective of the question whether one of these counts is bad.[1] On the other hand, there are cases in which no such presumption can be made. Suppose that the bad count is

[1] In England O'Connell's case was in some measure followed in Campbell *v.* R. 11 Q. B. 799, and Gregory *v.* R. 15 Q. B. 957. It was held in Latham *v.* R., infra, that where the record omits to set forth the finding or judgment on the first count of an indictment, but gives the finding and judgment on the second count, each count, for the purpose of the verdict, is a distinct indictment, and that, as there was a good finding upon a good count, the defendant might be convicted upon it. Latham *v.* R. 9 Cox C. C. 516; 5 B. & S. 635; 33 L. J. M. C. 197.

The difficulty, it is said in Roscoe's Cr. Ev. p. 222, may now be frequently got over by the power conferred by the 11 & 12 Vict. c. 78, s. 5, which provides that "whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition." Under this statute, where the prisoner is convicted on good and bad counts, and judgment is entered generally on all or on a bad count, the court of error may arrest the judgment on the bad counts, and enter judgment, or direct it to be entered, on the good ones. Holloway *v.* R. 2 Den. C. C. 287; 17 Q. B. 319. It is added that the form in which sentence was passed in Gregory *v.* R., supra, was said by Lord Denman to be that which the judges had adopted in order to avoid the objection raised in O'Connell *v.* R. And the best plan in making up the record will be to state a separate judgment for each count. See Gregory *v.* R. p. 973 of the report.

In U. S. *v.* Plumer, 3 Cliff. 68, Clifford, J., said: "Special attention is called to the case of O'Connell *v.* Queen, 11 Cl. & Fin. 155, but it is impossible to adopt that rule, as a different rule prevailed in the courts of that country, prior to the decision, for nearly two centuries; and when our ancestors immigrated here, they brought that rule with them as part of the common law, which cannot now be changed by the federal courts."

for an offence substantially different from the good count. Suppose that evidence, calculated to influence the jury on the good count, but inadmissible under that count, was admitted under the bad count. In such case, after a general verdict of guilty, there should be a new trial, or after a judgment on such verdict, there should be a reversal; the reason for such action being that the result was reached by the introduction of a wrongful element.[1]

[1] The distinction in the text is illustrated in Phelps *v.* People, 72 N. Y. 372. In this case, to adopt a summary of the opinion of Rapallo, J., exception was taken on the trial to the form of the first forty-eight counts of the indictment, on the ground that the false entry was not set out in words and figures in those counts. . . . . The allegation in the first count is "a false entry in a book of accounts called a ledger, kept in the office of the treasurer of the State of New York, by which a demand in favor of the People of the State of New York against the Mechanics' and Farmers' Bank of Albany was created for the sum of $200,000." In the succeeding forty-seven counts the language is varied so as to include the several terms used in the statute, namely: demand, obligation, claim, right, interest, increased, affected, &c., and to vary the party intended to be defrauded, &c. These other counts set forth a copy of the false entry. "The counsel for the People claims that the counts objected to are good, being in the words of the statute upon which the indictment is founded; but whether this position be sound or not he contends that the conviction being general on all the counts, which are based on the same offence, if there is any one good count it is sufficient to sustain the conviction. This proposition was regarded as settled law. There being evidence in support of the good counts, and the jury having convicted upon them, as well as upon those claimed to be defective, it is clear that it was quite immaterial that the court held these latter to be good, and admitted evidence to sustain them, and refused to direct an acquittal under them, as those rulings could not have varied the result, and even if erroneous are not ground of reversal. People *v.* Gonzales, 35 N. Y. 100; Real *v.* People, 42 Ibid. 270." The case of Wood *v.* People, 59 Ibid. 117, it was argued, does not conflict with this rule, inasmuch as in that case the several assignments of perjury charged distinct offences, and the jury might have based their verdict of guilty on assignments insufficiently alleged, or unsustained by proof of the materiality of the matter falsely sworn to.

It has been held in Ohio that the rule that a judgment on a verdict of guilty, on an indictment containing several counts, some of which are good and some bad, will be sustained, is not varied by the circumstance that a demurrer of the defendant to the bad counts was overruled, after which the defendant pleaded not guilty to the whole indictment, it not appearing from the record that the defendant was prejudiced by the introduction of evidence under the bad counts, which was not competent under the good counts. Robbins *v.* State, 8 Oh. St. R. 131.

Whether the defendant can object to an imprisonment for less than the legal minimum is hereafter noticed.[1]

III. BILL OF EXCEPTIONS.

At common law bill of exceptions cannot be tendered.

§ 772. The practice concerning bills of exception, so far as it is settled by statute, does not fall within the compass of this work. So far as concerns criminal cases at common law, it has always been held in this country that bills of exception do not lie. In England, the same view was generally taken by the older authorities;[2] but now it seems to be the better opinion that they may be tendered in cases of *misdemeanor*.[3] Where, in a case of obtaining money by false pretences, and for a conspiracy to defraud, a bill of exceptions was tendered to the admissibility of certain documents in evidence, Lord Campbell, C. J., said that it was the first time he had ever known a bill of exceptions in a criminal case; but after hearing arguments at chambers, he sealed the bill of exceptions, leaving the question whether it would lie to be argued in the Court of Error.[4] It is, however, agreed, that if a challenge, whether to the array or to the polls, be overruled without demurrer, the ruling of the judge may be made the subject of a bill of exceptions.[5] On the other hand, in treason and felony a bill of exceptions has never been allowed at common law.[6]

Where a *special* verdict only applies to a portion of the counts, leaving others undisposed of, and sentence is awarded on the whole indictment, it seems the judgment will be reversed. Baron *v.* People, 1 Park. C. R. 246. But see supra, § 740.

To subsequent chapters the reader is referred for a discussion of the question of errors in sentences on indictments containing two or more counts. Infra, §§ 907, 918.

[1] Infra, § 918.

[2] Sir Harry Vane's case, 1 Sid. 85; 1 Keble, 384; 1 Lev. 68; Kelynge, 15.

[3] R. *v.* Paget, 1 Leon. 5; R. *v.* Higgins, 1 Vent. 366; R. *v.* Nutt, 1 Barnard, 307; R. *v.* Preston (Inhab.), 2 Str. 1040; R. *v.* Alleyne, infra.

[4] R. *v.* Alleyne, cited Archbold's C. P. 17th ed. 160. For the form of a bill of exceptions, on an information in *quo warranto*, see 2 Gude's Crim. Prac. 2117.

[5] Bac. Abr. Juries (E.), 12; Skin. 101; 2 Inst. 427.

[6] St. Tr. f. 938; 2 Hawkins, c. 46, s. 1; Bac. Abr. Bill of Exceptions.

In a case of felony (In re Hayes and Rice, 3 Jones & La Touche, 568), Sir E. Sugden, Lord Chancellor of Ireland, 1846, refused a writ for a bill of exceptions; saying that, "having regard to the terms of the 13 Edw. 1, and of the Irish Act 28 Geo. 3, c. 31, and the authorities, that a bill of exceptions cannot be taken in a case like this, particularly (Vane's case, 2 Harg. St. Tr. 450; and R. *v.*

IV. IN WHOSE BEHALF A WRIT OF ERROR LIES.

At common law error does not lie for prosecution: otherwise by statute.

§ 773. At common law a writ of error cannot be taken by the prosecution to review an adverse judgment on demurrer or other procedure before the trial court.[1] In most States this is now permitted by statute.[2]

M'Donnell, 1 Hud. & Br. 439); and having regard to the circumstance that there is no authority in favor of the statute of Westminster applying to a criminal case like this, he was of opinion, on a review of all the circumstances, that the application should not be granted. Archbold's Crim. Pl. 17th ed. 160.

In Pennsylvania, the extent to which the Supreme Court may review errors in certain criminal cases was limited, by the Act of November 6, 1856, to the decisions of the court below on the trial, on points of evidence or law, excepted to by the defendant, and noted and filed of record by the court. Fife *v.* Commonwealth, 29 Penn. St. 429.

By the Revised Acts of 1860, bills of exceptions are under specified conditions allowed.

A bill of exceptions cannot be attacked on affidavit. Beavers *v.* State, 58 Ind. 530.

The Virginia practice is detailed in Reed *v.* Com. 22 Grat. 924.

[1] U. S. *v.* More, 3 Cranch, 159; Com. *v.* Cummings, 3 Cush. 212; People *v.* Corning, 2 N. Y. 9, overruling several prior cases; Com. *v.* Harrison, 2 Va. Cas. 202; People *v.* Dill, 1 Scam. 257; Martin *v.* People, 13 Ill. 341; State *v.* Kemp, 17 Wis. 669; Com. *v.* Sanford, 5 Litt. 289; Com. *v.* Cain, 14 Bush, 525; State *v.* Solomon, 6 Yerg. 360; State *v.* Phillips, 66 N. C. 647; State *v.* West, 71 N. C. 263; State *v.* Jones, 7 Ga. 422; State *v.* Copeland, 65 Mo. 497 (reversing State *v.* Peck, 51 Mo. 111); State *v.* Daugherty, 5 Tex. 1.

[2] People *v.* Nestle, 19 N. Y. 583; State *v.* Buchanan, 5 H. & Johns. 317; State *v.* Graham, 1 Pike, 428. For exceptional cases see Com. *v.* Scott, 10 Grat. 750; Com. *v.* Anthony, 2 Metc. (Ky.), 400; State *v.* Douglass, 1 Greene (Iowa), 550; State *v.* Ross, 14 La. An. 364. Other cases are noticed infra, § 785. The English practice is given in R. *v.* Chadwick, 11 Q. B. 205; R. *v.* Houston, 2 Cr. & Dix, 310.

In New York, by statute, the prosecution was held not entitled to a writ of error to review the order of the Supreme Court, granting a new trial in a criminal case, where there had been a conviction and *certiorari* with stay of judgment in the court below. People *v.* Nestle, 19 N. Y. 583. It was at one time held that the writ only lies where there has been final judgment for the prisoner upon the indictment. Ibid. See infra, §§ 927–8; supra, § 404. For errors in charge see supra, § 712.

In People *v.* Bork (Ct. App. 1879), it appeared that after conviction of defendant for embezzlement at the Oyer and Terminer, a case with exceptions was settled, a motion for a new trial thereon denied, and a motion to quash the indictment made, entertained by the court, and denied. Sentence was suspended, and there was no judgment in the Oyer and Terminer. Thereafter a writ of *cer-*

§ 774. In England, no writ of error issues at common law for the defendant as a matter of right. To this the allowance of the attorney general is necessary; though in this respect he has been accustomed to take the opinion of the appellate court as to the propriety of issuing the writ.[1]

At common law special *allocatur* usually necessary.

The same practice exists at common law in most of the United States;[2] with the exception that generally a writ may be allowed on the special *allocatur* of a single judge.[3] Such was the rule in Pennsylvania at common law, and under the old practice the court refused to allow a writ to correct merely technical errors.[4]

In Maryland and Missouri, it would seem that a writ can issue without a special *allocatur*.[5]

One of several defendants convicted may bring a writ of error alone.[6]

In the federal courts a revision by the Supreme Court of the

tiorari was issued and allowed, and the proceedings removed to the Supreme Court. After hearing both parties the General Term made an order that "the conviction be reversed," and subsequently at another general term, upon motion of the district attorney, the first order was modified by striking out the words therein, "proceedings remitted to the Erie Oyer and Terminer," and inserting, "the defendant discharged." It was ruled that the district attorney could not have the proceedings reviewed by the Court of Appeals upon writ of error. At common law such writ lies only to review a final judgment (Hartung *v.* People, 26 N. Y. 154), nor then in behalf of the People (People *v.* Corning, 2 N. Y. 9; People *v.* Merrill, 14 N. Y. 74); and a writ by the People in such a case as this is not allowed by any statute. Writ of error dismissed. See People *v.* Clark, 3 Seld. 385.

In Pennsylvania, a writ of error was sustained when taken by the Commonwealth to a judgment for the defendant, on a demurrer to the evidence, and the Supreme Court directed the record to be remitted to the court below, so that the latter might give judgment in accordance with the former's decree. This case, however, it should be observed, was one of fornication and bastardy, which may be treated as *quasi* civil. Com. *v.* Parr, 5 Watts & Serg. 345.

[1] Ch. Cr. Law, 749.

[2] Lavett *v.* People, 7 Cow. 339; Com. *v.* Profit, 4 Binn. 424; Baker *v.* Com. 2 Va. Cas. 353; Loftin *v.* State, 11 Sm. & M. 358.

[3] Compare Webster *v.* Com. 5 Cush. 386, 394; Farris *v.* State, 1 Oh. St. 188.

[4] Com. *v.* Martin, 2 Barr, 244. For statutory practice in Pennsylvania, see Brightly's Troubat & Haly's Pr. §§ 886, 887-8.

[5] State *v.* Buchanan, 5 Har. & J. 317; Mitchell *v.* State, 3 Mo. 283.

[6] Wright *v.* R. 14 Q. B. 148.

United States can be only had where the judges of the court below are divided in opinion.[1]

Fugitive cannot be heard on such writ.

§ 774 *a*. A writ of error will not be heard when the party suing it out has escaped from the jurisdiction of the court.[2]

V. AT WHAT TIME.

Error does not lie till after judgment.

§ 775. Error can only be taken after final judgment has been entered in the court trying the case.[3] On the importance of adhering positively to this rule it is scarcely necessary to enlarge. It is essential to the just administration of penal law.

Failure to demur, &c., does not waive right.

§ 776. After final judgment, the right is one which it is equally necessary to maintain intact. And in accordance with this view, failure to demur, or move in arrest of judgment, cannot be held to waive the right to make objections to the indictment in the appellate court; the right being constitutional and not personal.[4]

VI. FOR WHAT ERRORS.

1. *At Common Law.*

At common law error only lies to matter of record.

§ 777. At common law, as has been already noticed, error lies only to matters of record.[5] Of the errors of record which may thus be reviewed at common law, the following are given as illustrations in the 17th edition (1871) of Archbold's Criminal Pleading: "If in an

[1] Gordon, ex parte, 1 Black, 503. Supra, § 770.

[2] Smith *v.* U. S. 94 U. S. 97; Com. *v.* Andrews, 97 Mass. 544; People *v.* Genet, 59 N. Y. 80; Leftwich's case, 20 Grat. 723.

[3] See R. *v.* Kenworthy, 3 D. & R. 173; 1 B. & C. 711; U. S. *v.* Norton, 91 U. S. 566; People *v.* Merrill, 14 N. Y. 75; People *v.* Nestle, 19 N. Y. 583; Miles *v.* Rem. 4 Yeates, 319; Grant *v.* Com. 71 Penn. St. 495; Staup *v.* Com. 74 Penn. St. 458; Kinsley *v.* State, 3 Oh. St. 508; Cochrane *v.* State, 30 Oh. St. 61.

[4] Lemons *v.* State, 4 West Va. 755. See supra, § 733, as to consent in curing irregularities; and on the general question see Whart. Crim. Law, 8th ed. §§ 144–6.

[5] Nash *v.* R. 9 Cox C. C. 424; Turns *v.* Com. 6 Met. 224; Gaffney *v.* People, 50 N. Y. 416; Casey *v.* People, 72 N. Y. 393; Sampson *v.* Com. 5 W. & S. 385; McCue *v.* Com. 78 Penn. St. 185; Davis *v.* State, 39 Md. 355; Campbell *v.* Com. 2 Va. Cas. 314; State *v.* Lawrence, 81 N. C. 522; State *v.* Branch, 25 La. An. 115; Smith *v.* People, 1 Colo. 121. Hence evidence can only come up on bill of exceptions. Allen *v.* State, 46 Wis. 383.

indictment for perjury on which judgment has been given, it does not appear that the oath upon which the perjury has been assigned has been taken in a judicial proceeding;[1] or that the court had competent authority to administer the oath;[2] or that the defendant swore 'falsely;'[3] a writ of error may be brought. So if an indictment be preferred for libellous words and they are not indictable,[4] and judgment be given thereon. And an indictment charging the defendant with obtaining money by false pretences, without showing what the pretences were, is insufficient, and such a defect would be ground for reversing the judgment;[5] so before it was unnecessary for indictments for false pretences to allege any ownership of the money or goods obtained, if such an indictment did not show whose were the money or goods obtained by means of the false pretences.[6] If in an indictment for burglary it appeared that the prisoner broke and entered the dwelling-house with intent to commit a trespass or misdemeanor, and not a felony, error would lie.[7] So, where value is of the *essence* of the offence, as in embezzlement, to the value of £10 or upwards by bankrupts (24 & 25 Vict. c. 134, s. 221), the omission of a statement of the value would render the indictment bad on error. In the same way, where local description is necessary, its omission would be fatal.[8] So, also, where time is of the essence of the offence, as in burglary. An indictment charging a conspiracy to cheat and defraud certain tradesmen of divers quantities of their goods and chattels was held insufficient, on error, for not setting out the names or designating the class of persons intended to be defrauded.[9] Where

[1] R. *v.* Overton, 4 Q. B. 90; 12 L. J. (M. C.) 61.

[2] R. *v.* Hallett, 2 Den. 237; 20 L. J. (M. C.) 197; R. *v.* Chapman, 1 Den. 432; 18 L. J. (M. C.) 152; Lavey *v.* R. 2 Den. 504; 17 Q. B. 496; 21 L. J. (M. C.) 10.

[3] R. *v.* Oxley, 3 C. & K. 317.

[4] As in R. *v.* Penny, 1 Ld. Raym. 153.

[5] R. *v.* Mason, 2 T. R. 581; and per Lord Campbell, C. J., Holloway *v.* R. 2 Den. 296.

[6] Sill *v.* R. Dears. 132; 1 E. & B. 553; 22 L. J. (M. C.) 41.

[7] R. *v.* Powell, 2 Den. 403.

[8] See 14 & 15 Vict. c. 100, s. 23; as in nuisance to highways (4 Chitty's Crim. L. 423), keeping disorderly houses, arson, burglary, housebreaking, stealing in a dwelling-house, being armed at night on land for the purpose of killing game, &c.

[9] King *v.* R. 7 Q. B. 798; 14 L. J. (M. C.) 172; cited at large in Whart. Crim. Law, 8th ed. § 1348; and see Lord Hale's Com. F. N. B. tit. Error.

the defendant challenges a juror peremptorily, and the crown demurs, and judgment is wrongly given by the court in which the trial is proceeding against the defendant's right to a peremptory challenge, a court of error will reverse the whole proceedings.[1] But *semble*, there must be a regular *judgment* on an issue joined in law or in fact to found the writ of error on, and the mere order by the court that the juror challenged by the crown shall stand by, though irregular, is not ground of error.[2] So, also, where a challenge to the array is improperly overruled, it is error.[3] If the verdict of the jury were returned during the absence of one of the jurors, it would be error. So, also, where it does not appear upon the record that the jurors were *boni et legales homines*. But where the record set out an award of *venire* to the sheriff which required him to empanel and return a jury of good and lawful men of the county, and then proceeded to state that the sheriff, for the purpose aforesaid, empanelled and returned certain persons named, and arrayed them in one panel; it was held that by reasonable intendment the record showed that the persons named in the panel were good and lawful men of the county.[4] Error may also be assigned on a special verdict, where judgment has been passed on the defendant;[5] and on the omission of the *allocatur*, or demand of the defendant what he has to say why judgment should not proceed against him. So, also, if sentence of death be passed against a prisoner not present in court.[6] If an indictment be preferred at the quarter sessions for an offence not cognizable by justices of the peace, and the defendant be convicted and judgment passed upon him, the proceedings will be reversed on error: such as an indictment on a penal statute, where jurisdiction is not given to sessions;[7] or an indictment for perjury, which would be wholly void;[8] or for forgery;[9] or an indictment for conspiracy, not within the exceptions of 5 & 6 Vict. c. 38, s. 1.

[1] Gray *v.* R. 11 Cla. & Fin. 427.

[2] Ibid.; Mansell *v.* R. 8 E. & B. 54; Dears. & B. 375; 27 L. J. (M. C.) 4.

[3] O'Connell *v.* R. 11 Cla. & Fin. 155. See supra, §§ 693–5.

[4] Mansell *v.* R. 8 E. & B. 54; Dears. & B. 375; 27 L. J. (M. C.) 4.

[5] 2 Ld. Raym. 1514; R. *v.* Chadwick, 11 Q. B. 205; 17 L. J. (M. C.) 33.

[6] 1 Ld. Raym. 48, 267. See infra, § 906. That defendant must be present at all the proceedings see supra, § 540.

[7] 4 Mod. 379; 3 Salk. 188.

[8] R. *v.* Haynes, Ry. & M. 298.

[9] R. *v.* Rigby, 8 C. & P. 770.

A writ of error also lies to reverse an outlawry.[1] Duplicity in pleading is not ground of error,"[2] but it is otherwise with the omission of any essential averment.[3] "If the judge, in the exercise of his discretion, discharge the jury on the ground of necessity, such exercise of his discretion cannot be reviewed in a court of error.[4] No writ of error lies on a summary conviction;[5] it only lies on judgments in courts of record acting according to the course of common law."[6] Refusing a motion to quash is no ground for error.[7]

2. *By Statute.*

By statute exceptions may be taken for which error lies.

§ 778. By statutes of comparatively recent adoption, exceptions may be taken to the rulings of the court at trial, and these exceptions removed by writ of error to the appellate court.[8] Where such a practice is established to the extent of putting criminal cases on the same basis with civil, all matters which are thus excepted to below may be the subject of revision in the court above. To this law, therefore, as subsequently expounded under the head of "New Trials," the reader is referred for a discussion of points likely to arise on bills of exception in error.

Error does not usually lie to matters of discretion.

§ 779. There is, however, this distinction to be kept in mind. There are some questions, such as those relating to continuance, to severance on trial, to election,[9] to the order of procedure in examination of witnesses, and the speeches of counsel, which eminently belong to the discretion of the judge trying the case, and which in many jurisdictions can only, except in extreme cases of injustice, be revised by the judge himself, or by a court of which he is a member. The same rule applies to the action of the court below in refusing a new trial.[10] The law in this respect is specifically noticed in the

[1] R. *v.* Wilkes, 4 Burr. 2537; 2 Hawk. c. 50, s. 11; Hand's Cr. Prac. 487, n.

[2] Nash *v.* R. 9 Cox C. C. 444; 4 B. & S. 935. Supra, § 256.

[3] R. *v.* Cook, 1 R. & R. 176; Robinson *v.* Com. 101 Mass. 27; Lemons *v.* State, 4 W. Va. 755.

[4] Winsor *v.* R. L. R. 1 Q. B. 289; Ibid. 390 (Exch. Cham.).

[5] Per Holt, C. J., Ld. Raym. 469.

[6] Com. Dig. Pleader, 3 B. 7; Jerv. Archbold, 17th ed. (1871), p. 187.

[7] Supra, § 387.

[8] See Wiggins *v.* People, 93 U. S. 465; Stokes *v.* People, 53 N. Y. 164. As to exceptions to charge of court see supra, §§ 793 *et seq.*

[9] Supra, § 295.

[10] Donohue *v.* People, 56 N. Y. 208;

chapters in which these particular topics are discussed.[1] And error does not lie for rudeness of manner to a defendant by a trial judge, unless it is capable of being put on record and results in injury to the defendant.[2]

VII. ERROR IN SENTENCE.

Appellate court reversing sentence at common law must discharge.

§ 780. In England,[3] and in some portions of the United States,[4] it has been held that at common law a court in error, when it reverses on account of error in the sentence, must discharge the defendant, for it cannot remit the case, or impose a new sentence itself. But, as will hereafter be more fully explained,[5] this proposition has been by no means universally received; and even at common

King *v.* People, 5 Hun, 297; Bull's case, 14 Grat. 613; Read *v.* Com. 22 Grat. 924.

[1] Discretion is thus defined in an able opinion delivered in Ohio: "In the conduct of a trial, very many matters must rest in the discretion of the court of original jurisdiction. If the matter complained of infringes upon no rule of law, and merely affects the mode and manner of arriving at a determination, and not the right or merits to be decided, it is generally considered a matter of practice within the discretion of the court, with which it would not be proper for a court in error to interfere. Upon a motion for a new trial, and upon a review of the action upon that motion of the court in which the case was tried, which we permit by bill of exceptions and on proceeding in error, the range of action in reference to such matters is undoubtedly enlarged. But in such a case we suppose that it must appear that there has been an abuse of discretion, resulting in injustice. A difference of opinion as to the proper course of proceeding would not be sufficient; the appellate court must be able to say that the course pursued was not only improper, but that it operated unjustly and injuriously to the parties." Gandolfo *v.* State, 11 Ohio St. 114; cited and adopted in Powell on App. Jur. 321. To the same effect, see People *v.* Cole, cited supra, § 566.

See, for discretion as to order of addresses by counsel and examining witness, supra, §§ 551 *et seq.*; as to continuances, §§ 584 *et seq.*; as to charge of court, § 708; as to bail, § 76; as to joinder of defendants, §§ 305, 755; as to new trial, § 902; as to challenges, § 693.

Hence the commitment for perjury during trial of a witness for the defendant is not ground for a reversal on error, however operative it might be in obtaining a new trial. Lindsay *v.* People, 63 N. Y. 145.

[2] Arnold *v.* State, 75 N. Y. 603.

[3] 1 Ch. Cr. L. 755; Silversides *v.* R. 2 G. & D. 617; 3 Q. B. 406; R. *v.* Ellis, 5 B. & C. 395; R. *v.* Bourne, 7 A. & E. 58; Holt *v.* R. 2 D. & L. 774; Holland *v.* R. 2 Jebb & S. 358.

[4] Lange, ex parte, 18 Wall. 163; Christian *v.* Com. 5 Met. 530; Ratzky *v.* People, 29 N. Y. 124; McDonald *v.* State, 45 Md. 90; Howell *v.* State, 1 Oregon, 241. See *contra*, Kelly *v.* State, 3 Sm. & M. 518.

[5] Infra, § 927.

law it has been argued, with strong reason, that where an appellate court is authorized to review, it is authorized to correct. In many States it is expressly provided by statute that when there is an error in the sentence requiring reversal, the appellate court is to render such judgment as the court below should have rendered,[1] or to remand the record to the court below for an amended sentence.[2] The whole of a sentence may be reversed for an error in part,[3] or a sentence, if divisible, may be affirmed in part and reversed in part.[4]

[1] See Powell on Appellate Juris. 341; Graham *v.* People, 63 Barb. 468; Messner *v.* People, 45 N. Y. 1. "Formerly, if the court below had pronounced an erroneous judgment, the court of error had no power to pronounce the proper judgment, or remit the record to the court below, but were bound to reverse the judgment and discharge the defendant. R. *v.* Bourne, 7 A. & E. 58; R. *v.* Drury, 3 C. & K. 192. But now it is enacted, by 11 & 12 Vict. c. 78, s. 5, that whenever any writ of error shall be brought upon any judgment, on any indictment, information, presentment, or inquisition, in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition. And see the observations of Lord Campbell, C. J., on this section of the statute, in Holloway *v.* R. 2 Den. 287; 17 Q. B. 317. Upon the reversal of a judgment against any person convicted of any offence, the judgment, execution, and all former proceedings become thereby absolutely null and void. If living, he (or if dead his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him. But a judgment reversed is no bar to a second indictment. R. *v.* Drury, 3 C. & K. 193." Jervis's Archbold, 17th ed. (1871) p. 197. See, for statutes correcting common law in this respect, Massachusetts, Jacquins *v.* Com. 9 Cush. 279; New York, Ratzky *v.* People, supra; Pennsylvania, Beale *v.* Com. 25 Penn. St. 11, and Missouri, Laws of 1877, p. 261. As to sentence for imprisonment see infra, § 918. For a reversal on ground of excessive sentence see State *v.* Driver, 78 N. C. 423. In Pennsylvania, a defective sentence may be remoulded, and the defendant sentenced *de novo*. Drew *v.* Com. 1 Whart. 279; Daniels *v.* Com. 7 Penn. St. 371. But the more recent practice is to remand to the court below. Beale *v.* Com. 25 Penn. St. 11.

[2] Infra, § 928; Harris *v.* People, 59 N. Y. 599; Dodge *v.* People, 4 Neb. 220; De Bardelaben *v.* State, 50 Ala. 179. See McCue *v.* Com. 78 Penn. St. 185.

[3] Picket *v.* State, 22 Oh. St. 405.

[4] Christian *v.* Com. 5 Met. 530; People *v.* Phillips, 42 N. Y. 200;

Whether a sentence will be reversed because one count is bad has been already discussed.[1]

VIII. ASSIGNMENT OF ERRORS.

§ 781. "The writ having been duly returned, the next proceeding is the assignment of errors. On a charge of felony, the party suing out the writ must appear in person to assign errors;[2] and it is said[3] that if the party be in custody, in the prison of the county or city in which the trial has taken place, he must be brought up by *habeas corpus* for the purpose of this formality, which writ must be moved for on affidavit.[4] So, where a person convicted of felony brings error from the Queen's Bench into the Exchequer Chamber, the general rules for governing the proceedings in error in civil cases under the Reg. Gen. Hil. T. 2 W. 4, and under the Common Law Procedure Act, do not apply; but the prisoner must be brought to the Court of Exchequer Chamber, and must there pray oyer of the record, and assign errors by delivering them in writing to the officer of that court, and must be present during the argument and the delivery of the judgment." Error must be assigned.

IX. JOINDER IN ERROR.

§ 782. According to the English practice, the attorney general, on the delivery of the assignment of errors, may join in error, *ore tenus*.[5] If there be no joinder in error in some form by the prosecution, the plaintiff in error is entitled to judgment.[6] Must be joinder in error.

Montgomery *v.* State, 7 Oh. St. 107. Infra, § 927; supra, § 752.

The record itself is not sent up to the Superior Court in proceedings in error, but only a transcript; and for the purposes of amendment, the record remains in the court below. Graham *v.* People, 63 Barb. 468. See Cancemi *v.* People, 18 N. Y. 128.

As to making up the record see Bolen *v.* State, 26 Oh. St. 371; Bartlett *v.* State, 28 Oh. St. 669; Earll *v.* People, 73 Ill. 329; Filian *v.* State, 5 Neb. 351; State *v.* Coleman, 27 La. An. 691.

[1] Supra, § 771.

[2] 8 Rep. Crim. L. 173.

[3] Corner's Cr. Prac. 102. As to where error may be returnable see Hazen *v.* Com. 23 Penn. St. 355.

[4] See Holloway *v.* R. 2 Den. 287; 17 Q. B. 317; Mansell *v.* R. 8 E. & B. 54; Dears. & B. 375; 27 L. J. (M. C.) 4.

[5] Jervis's Archbold, 17th ed. 192; 19th ed. 211.

[6] In R. *v.* Howes, 7 A. & E. 60, n.; 3 N. & M. 462, "the crown not having joined in error, the court granted a peremptory rule (a previous rule having been made to the like effect) that

X. SUPERSEDEAS.

§ 783. At common law, a writ of error, though duly allowed by the appellate court, is not a supersedeas so as to discharge from custody;[1] but in capital cases it operates to stay execution.[2]

XI. REMOVAL TO FEDERAL COURTS.

§ 783 *a*. By the Revised Statutes of the United States provision is made for the removal to the Circuit Court of the United States of criminal prosecutions in which a party indicted is denied by local law his "equal civil rights," or in which the party indicted is a federal officer, and the act charged is alleged to have been done in obedience to federal authority.[3]

judgment should be entered for the defendants, unless the coroner and attorney of the King's Bench should join in error within four days after notice of that rule, to be given to the prosecutor and the solicitor for the treasury; and the coroner not having joined in error, judgment was given for the defendants, and they were discharged." Jervis's Archbold, 17th ed. (1871) p. 193.

[1] R. *v.* Wilkes, 4 Burr. 2527; Tichborne case, 1879.

[2] Brightly's Troub. & Haly's Pr. 885; Gen. Stat. Mass. 1864.

[3] "Under section 641 of the Revised Statutes of the United States, whenever a civil suit or *criminal prosecution* is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State any right secured to him by any law providing for the equal civil rights of all citizens and of all persons, or whenever a civil suit or criminal prosecution is commenced against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from the civil rights laws, or for refusing to do any act on the ground that it would be inconsistent with those laws, such suit or prosecution may, upon the petition of the defendant, filed in the state court at any time before the trial or final hearing of the cause, be removed for trial into the Circuit Court of the United States for that district.

"Again, under section 643, whenever a civil suit or criminal prosecution is commenced in any state court against any officer appointed under or by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the Circuit Court of the United States in the district where the same is pending, upon the petition of the defendant to such Circuit Court. So also may any

The right, however, when based on the fourteenth amendment to the Constitution, cannot extend to individual infringements of the sanctions of that amendment. A removal to the federal courts can only be claimed when the alleged impediment to justice arises from some state statute, regulation, or custom. Mere local prejudice against a person of color is not ground for removal.[1] It is otherwise when a state statute works the deprivation of rights.[2] And the right to remove is ruled to be absolute in all cases in which the defendant is charged in a state court for a crime consisting in the performance of his duty as a federal officer.[3]

civil suit or criminal prosecution commenced in any state court against any federal officer or other person on account of any act done under the provisions of the Revised Statutes of the United States relating to the elective franchise, or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions." 1 Crim. Law Mag. 139.

[1] Wells, in re, 17 Alb. L. J. 111; State *v.* Gaines, 2 Woods, 342; State *v.* Rives, Sup. Ct. U. S. 1880.

[2] Strander *v.* State, Sup. Ct. U. S. 1880, reversing S. C., 11 W. Va. 745.

[3] State *v.* Davis, Sup. Ct. U. S. 1880. This case is thus reported in 1 Crim. Law Mag. 250:—

"Davis, a deputy collector of internal revenue, was indicted in a Tennessee state court for the murder of one Haynes, a citizen of Tennessee. A petition was filed by Davis to remove the case from the state to the federal court, under section 643 of the Revised Statutes, on the ground that the killing was done in self-defence, and while he was engaged in the discharge of his duties under the internal revenue laws of the United States. One of the questions upon which the judges of the court below certified a division of opinion was, whether, in a case of this kind, such removal could be made. The court held that the petition of removal was in conformity to the statute, and, upon being filed, the prosecution was removed to the federal court. 'The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. It can act only through its officers and agents, and they must act within the States. If, when thus acting and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the state court, — the operations of the general government may at any time be arrested at the will of one of its members. No such element of weakness is to be found in the Constitution. If the case, whether civil or criminal, be one to which the judicial power of the United States extends, its removal to the federal court is no invasion of state domain." Strong, J., giving the opinion of the court; Clifford and Field, JJ., dissenting.

CHAPTER XVIII.

NEW TRIAL.

I. In what New Trials consist.
A new trial is a reëxamination after verdict of facts and law not of record, § 784.

II. In what Cases Courts have Authority to grant.

1. *After Acquittal.*
No new trial after acquittal, § 785.
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So in *quasi* civil cases, § 787.
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Conviction of minor offence is acquittal of major, § 789.

2. *After Conviction.*
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1. *Misdirection of Court.*
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Courts holding such separation absolutely fatal, § 822.
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I. IN WHAT NEW TRIALS CONSIST.

A new trial is a reëxamination after verdict of facts and law not of record.

§ 784. A NEW TRIAL is a reëxamination by jury, according to the forms of the common law, of the facts and legal rights of the parties upon disputed facts, which it is in the discretion of the court to grant or refuse, but which is claimable as a right when evidence has been improperly received or rejected, or incorrect directions in law have been given.[1] No error, however, which is apparent on the record, and which can be noticed in arrest of judgment, will ordinarily be ground for a new trial.[2] Thus a new trial will not

[1] 4 Chitty's Gen. Practice, 31; 1 Stark. Ev. 468; Bernasconi *v.* Farebrother, 3 B. & Ad. 372; New Castle *v.* Broxtowe, 4 Bar. & Adol. 273; Roberts *v.* State, 3 Kelly, 310.

[2] Minor *v.* Mead, 3 Conn. 289.

be granted because a letter was omitted in the prisoner's name, in the title on the back of the bill found by the grand jury.[1]

II. IN WHAT CASES COURTS HAVE AUTHORITY TO GRANT NEW TRIALS.

1. *After Acquittal.*

§ 785. After an acquittal of the defendant, on an indictment for either felony or misdemeanor, there can in general be no new trial, though the result be produced by error of law or misconception of fact.[2]

No new trial after acquittal.

§ 786. In cases, however, where the verdict has been obtained by fraud of the defendant, such, for instance, as the collusive or forcible keeping back witnesses for the prosecution, or the submitting the case by trick without evidence, the verdict may be treated as a nullity.[3]

Otherwise when verdict was fraudulent.

[1] State *v.* Duestoe, 1 Bay, 377.

[2] 4 Black. Com. 361; Bac. Ab. Trial, L. 9; 2 Hawk. c. 47, s. 12; R. *v.* Sutton, 2 N. & M. 57; 5 B. & Ad. 52; U. S. *v.* Gibert, 2 Sumn. 20; Com. *v.* Cunningham, 13 Mass. 245; State *v.* Lee, 10 R. I. 494; State *v.* Kanouse, 1 Spencer, 115; Guffy *v.* Com. 6 Grant, 66; State *v.* McCory, 2 Blackf. 5; State *v.* Reiley, 2 Brev. 126; State *v.* West, 71 N. C. 263; State *v.* Anderson, 3 S. & M. 751; State *v.* Baker, 19 Mo. 683; State *v.* Norvelle, 2 Yerg. 24; Campbell *v.* State, 9 Yerg. 333; People *v.* Webb, 38 Cal. 467; People *v.* Bangenenaur, 40 Cal. 613. In a prominent case in New York, where the defendants had been acquitted on an indictment for conspiracy, a motion for a new trial on behalf of the public prosecutor was entertained by the Supreme Court. "The right of a court to grant a new trial in case the defendant has been acquitted," said Marcy, J., after refusing a new trial on the merits, "is called in question by the defendant. That such right does not exist, where the ground of the application is that the finding is against evidence, is conceded; but whether a new trial can be granted where the acquittal has resulted from the error of the judge in stating the law to the jury, seems to be involved in much doubt. It is a very important question, and not necessary to be now settled; the court have, therefore, deemed it discreet to forbear expressing an opinion on it till a case shall arise requiring them to do so." People *v.* Mather, 4 Wendell, 266. In a subsequent case, however, the point seems to have been decided substantially in accordance with the settled practice. People *v.* Comstock, 8 Wendell, 549. As ruling that no error of law by the judge will sustain a revision see Hines *v.* State, 24 Oh. St. 134; Black *v.* State, 36 Ga. 447. Compare supra, § 773.

[3] Supra, § 451.

Where the complaint was made to a justice by a person employed to do so by the defendant, and the warrant was served, and witnesses summoned by the defendant's direction, and an attorney retained and paid by him to appear on the part of the State, and the circumstances of the case were so represented to the justice that he im-

§ 787. Another exception is to be found in cases where the object of the proceeding is substantially to try a right, and the verdict would bind the right, as in cases of indictment for non-repair of a highway or a bridge. In such case a new trial may be had after verdict for the defendant, if evidence have been improperly received, or there have been misdirection, or a verdict contrary to the evidence.[1] But an indictment for obstructing a navigation has been regarded as not within this second exception, inasmuch as in such a case the defendant is liable on conviction to fine and imprisonment, and the verdict of acquittal does not bind any right.[2] The test seems to be this: where the issue goes to civil rights, and where only a fine can be imposed, there can be a new trial after an acquittal. Where the punishment involves imprisonment, or other personal discipline, the acquittal is final, unless fraudulently obtained.[3]

So in *quasi* civil cases.

§ 788. It has been held in some jurisdictions, that where a defendant is acquitted upon one count and convicted on another, a new trial goes to the whole case;[4] but by the general practice, where a defendant has been acquitted on some counts and convicted upon others, and the counts are for distinct offences, a motion for a new trial made by him generally is only applicable to the counts upon which he was convicted.[5] It may well, indeed, be argued, that when the counts are simply several formal variations in stating the same offence, then a new trial opens the whole case;[6] though it is otherwise when the counts are for separate

Motion for new trial only applicable to counts where there has been a conviction.

posed a lighter fine than he otherwise would have done, the case was held open to another trial. State *v.* Little, 1 N. H. 257. See Com. *v.* Jackson, 2 Va. Cas. 501. Supra, § 451.

[1] R. *v.* Inhabitants of West Riding, 2 East, 362, n.; R. *v.* Chorley, 12 Q. B. 515; R. *v.* Crickdale, 3 E. & B. 947, n.; R. *v.* Russell, 3 E. & B. 942.

[2] R. *v.* Russell, supra. As to cases in the courts where new trials have been granted on ground of fraud or by acquittal see supra, § 451.

[3] Jones *v.* State, 15 Ark. 261.

[4] State *v.* Stanton, 1 Ired. 424; State *v.* Commissioners, 3 Hill S. C. 239; Leslie *v.* State, 18 Ohio St. 390. See infra, § 895.

[5] Infra, § 896; U. S. *v.* Davenport, Deady, 264; State *v.* Kittle, 2 Tyler, 471; Com. *v.* Stuart, 28 Grat. 950; State *v.* Malling, 11 Iowa, 239; Campbell *v.* State, 9 Yerger, 333; Esmon *v.* State, 1 Swan, 14; State *v.* Kettleman, 35 Mo. 105; State *v.* Fritz, 27 La. An. 360.

[6] Leslie *v.* State, 18 Ohio St. 390.

offences.[1] But an acquittal on a particular count, unless in cases of fraud or mistake, must ordinarily be regarded as final.

§ 789. Where a defendant, being indicted for burglary and larceny, is acquitted of burglary, but convicted of larceny, it has been held that the revision of the case pervades the whole indictment, and that on the second trial he is to be arraigned on the burglary as well as the larceny portion of the count.[2] But the sounder conclusion is, that when the jury has the whole case before them, a conviction on the minor offence alone is virtually an acquittal of the major.[3] And for this reason a conviction of manslaughter, on an indictment for murder, is an acquittal of murder.[4]

Conviction of minor offence is acquittal of major.

2. *After Conviction.*[5]

§ 790. In England, as well as in this country, a defendant may have a new trial at the discretion of the court, after a verdict of conviction of a misdemeanor.[6] In cases of felony or treason, the former understanding in England was that no new trial in any case could be granted where the proceedings have been regular;[7] but if the conviction appeared to the judge to be improper, he might respite the execution to enable the defendant to apply for a pardon. But now the Court of Queen's Bench, when the record is before that court, may in its discretion order a new trial in cases of *felony*, where evidence has been improperly admitted, or where the jury have been misdirected.[8] In England an inferior court cannot grant a new trial in a criminal case, on the merits, though it can do so where there has been some irregularity in the proceedings.[9]

Generally new trial may be granted at discretion of court.

[1] See infra, § 895.

[2] State *v.* Morris, 1 Blackf. 37.

[3] Supra, §§ 455, 465; infra, § 896.

[4] Supra, § 465.

[5] For Ohio statute see Code of Criminal Procedure, § 192; Warren's Ohio Criminal Law, 1870, p. 135.

[6] 1 Ch. C. L. 653; U. S. *v.* Gibert, 2 Sumn. 19; State *v.* Prescott, 7 N. H. 287; Com. *v.* Green, 17 Mass. 513; People *v.* Comstock, 8 Wend. 549; People *v.* Vermilyea, 7 Cow. 369; State *v.* Slack, 1 Bailey, 330.

[7] 1 Ch. C. L. 653, referring to 6 Term R. 525, 638; East, 416, n. *b;* 4 B. & A. 275.

[8] R. *v.* Scaife, 2 Den. C. C. 281; 17 Q. B. 238; 2 D. P. C. 553; but see R. *v.* Bertrand, L. R. 1 P. C. 520.

[9] 2 Tidd's Prac. 905; 13 East, 418, n. *b;* Burn's J., New Trial; R. *v.* Day, Sayer Rep. 203; R. *v.* Peters, 1 Burr. 568; Bac. Abr. Trial (L.); R. *v.* Mayor of Oxford, 3 Nev. & M. 2.

And where a court of quarter sessions had ordered a new trial after a verdict of guilty against two prisoners, on the ground that, after the jury had retired, one of them had separated from his fellows and had conversed with a stranger respecting his verdict, and that therefore the verdict was bad, on a writ of error brought, it was held that the new trial had been properly ordered.[1]

In this country this applies to all classes of crime.

§ 791. In this country the uniform and unquestioned practice, down to a comparatively late period, has been to extend to criminal cases, so far as the revision of verdicts is concerned, the same principles which have been established in civil actions; and though, except in cases of fraud, no instance exists where an acquittal has been disturbed, new trials in cases of conviction have frequently been granted, as will be presently shown more fully, on account of irregularity in the jury, of misdirection by the judge, and of informality in the verdict. In 1832, however, the supposed English rule was pronounced by the Supreme Court of New York in force as part of the common law of the land;[2] and in 1833, in a case of great interest, it was declared by Judge Story,[3] that not only was there no case in this country where a new trial, in a capital case, had been granted on the merits, where the authority of the court on the subject matter had been agitated, but that after a verdict of a jury regularly rendered on the facts in such case, it was out of the power of a common law court to interpose, except by the recommendation of pardon. The common law doctrine, it was held, so far from being of imperfect application to this country, was invested with additional strength, not only by the federal Constitution, but by the constitutions of most of the individual States. "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb;" and, "No fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law."[4] But plausibly as the position was sustained by

[1] R. *v.* Fowler, 4 B. & Ald. 273.

[2] People *v.* Comstock, 8 Wend. 549.

[3] U. S. *v.* Gibert, 2 Sumn. 51.

[4] Whether these prohibitions bear on the state courts has been doubted (People *v.* Goodwin, 18 Johnson, 187; U. S. *v.* Gibert, 2 Sumner, 51), though the inclination of practice seems to be to regard them as limited to the federal tribunals (State *v.* Keyes, 8 Vermont, 57); and it is clear, that in

Judge Story, it was afterwards abandoned in the court in which it was uttered, and is now so universally rejected that its extended discussion is no longer necessary. It is sufficient to say that neither in federal nor state courts are there now any doubts expressed as to the right of the proper court to grant a new trial in any case in which it considers the verdict to be unjust.[1]

the two leading cases in Massachusetts and New York, where the subject was disposed of, the result was placed on common law reasoning exclusively. Com. *v.* Green, 17 Mass. 515; People *v.* Comstock, 8 Wendell, 549. There are, however, in most of the States, similar limitations; and even where no such constitutional restriction exists, it is doubtful whether equal force is not applied by the doctrines of the common law. U. *v.* S. Gibert, 2 Sumner, 41, 42; People *v.* Comstock, 8 Wend. 549. See supra, § 490.

[1] See 7th edition of this work, where the above conclusion is argued at length. To the same effect may be cited the following cases: U. S. *v.* Williams, 1 Cliff. 5; U. S. *v.* Fries, 3 Dall. 515; Whart. St. Tr. 598; U. S. *v.* Harding, 1 Wall. Jr. 127; U. S. *v.* Conner, 3 McLean, 386; Com. *v.* Hardy, 2 Mass. 303; People *v.* Comstock, 8 Wend. 549; People *v.* Williams, 4 Hill N. Y. 10; People *v.* Bush, Ibid. 134; People *v.* Newman, 5 Hill (N. Y.), 295; People *v.* Bodine, 1 Denio, 281; People *v.* Morrison, 1 Parker C. R. 624; People *v.* Judges of Dutchess County, 2 Barb. 282; Com. *v.* Brown, 3 Rawle, 207; Com. *v.* Clue, 3 Rawle, 500; Com. *v.* Flanigan, 7 W. & S. 415; Com. *v.* Jones, 1 Leigh, 598; Grayson *v.* Com. 6 Grat. 712; Ball's case, 8 Leigh, 726; M'Cune *v.* Com. 2 Robinson, 790; State *v.* Miller, 1 Dev. & B. 500; State *v.* Benton, 2 Dev. & B. 196; State *v.* Sparrow, 3 Murph. 487; State *v.* Lipsey, 3 Dev. 485; State *v.* Douglass, 63 N. C. 500; State *v.* Fisher, 2 Nott & McC. 261; State *v.* Sims, 2 Bailey, 29; State *v.* Anderson, 2 Bailey, 565; State *v.* Hooper, 2 Bailey, 37; Cassels *v.* State, 4 Yerg. 152; State *v.* Crawford, 2 Yerg. 66; and see State *v.* Jim, 4 Humph. 289, and cases hereafter cited.

So far as concerns the English practice, it is not out of place to notice the language of Chief Justice Tindal (Melin *v.* Taylor, 2 Hodges, 126, 127), not the less applicable here, because what in England is reserved to the mercy of the crown is in this country determined by the discretion of the court: "I cannot conceive how the benefit of trial by jury can be, in any way, impaired by a cautious and prudent application of the corrective which is now applied for; on the contrary, I think that, without some power of this nature residing in the breast of the court, the trial by jury would, in particular cases, be productive of injustice, and the institution itself would suffer in the opinion of the public." Best, C. J., in speaking of new trials, observed: "It is one of the most beautiful parts of our Constitution, that, when anything occurs in one tribunal which appears to be wrong, it may afterwards be corrected by another, so that the interest of a party cannot be prejudiced by a hasty decision; otherwise the trial by jury, instead of being a blessing, would become a source of evil. If the jury were to be made judges of law as well as of fact, parties would be always liable to suffer from an arbitrary decision." Levi *v.* Milne, 4 Bing. 198.

III. FOR WHAT REASONS NEW TRIALS WILL BE GRANTED.

§ 792. Assuming it to be law that in all cases where the application comes from the defendant, it is discretionary in the courts to grant new trials, the cases in which that discretion may be exercised will be considered under the following heads: —

1. *Misdirection by the Court trying the Case.*

Any material misruling ground for new trial.

§ 793. Any misdirection by the court trying the case, in point of law, on matters material to the issue, is a good ground for a new trial;[1] and such misdirection, even upon one point, is sufficient, although the jury might have properly found their verdict upon another point, as to which there was no misdirection;[2] though if the error was immaterial, irrelevant, or trivial, and justice has been done, the court will not set aside the verdict, nor enter into a discussion of the question of law.[3] Material error in one instruction calculated to mislead, however, is not cured by a subsequent contra-

Nor are these opinions weakened by the painful developments contained in the Eighth Report of the British Commissioners. It is there stated by Sir Frederick Pollock, that in a particular period of nine months, six persons convicted of capital crimes at the Old Bailey were, upon investigation of their cases, after they had been ordered to execution, found to be innocent. "As the examination of these cases was induced by unusual circumstances, and as the attention ordinarily given to applications for reprieves was of only a superficial character, the inference was that the frightful number of ten executions a year of innocent men, in the city of London alone, might have been prevented, had the court before whom the conviction was obtained had the power and the willingness to go into a careful examination of the grounds for new trials." See 8 Rep. Brit. Com. 18, &c.; 2 Lond. Jur. part ii. 449; New York Com. Rep. 242.

[1] People *v.* Cogdell, 1 Hill (N. Y.), 95; People *v.* Thomas, 3 Hill (N. Y.), 169; People *v.* Townsend, Ibid. 479; People *v.* Bodine, 1 Denio, 282; Com. *v.* Parr, 5 Watts & S. 345.

[2] State *v.* McCluer, 5 Nev. 132; People *v.* Bodine, 1 Denio, 280. See Harris *v.* State, 47 Miss. 318; Ballew *v.* State, 36 Tex. 98.

In Parnell *v.* Com. 86 Penn. St. 260, it was said that in a capital case the Supreme Court will reverse when the charge is doubtful and liable to be misunderstood.

[3] U. S. *v.* Smith, 3 Blatch. 255; State *v.* Tudor, 5 Day, 329; Stewart *v.* State, 1 Ohio St. 66; Kennedy *v.* People, 40 Ill. 488; State *v.* Downer, 21 Wis. 275; Lewis *v.* State, 33 Ga. 131; Tate *v.* State, 46 Ga. 148; State *v.* Johnson, 31 La. An. 368. Supra, § 708.

For a new trial granted in a case where the judge unduly pressed an argument see State *v.* Bybee, 17 Kans. 462.

dictory instruction.[1] Error committed by the court in the allowance or refusal of challenges,[2] or the allowance or refusal of a motion, either for continuance [3] or for compelling the prosecutor to elect,[4] or of any other peremptory motion,[5] is ground for a new trial. Other questions as to the structure of the charge have been already discussed.[6] It should be here observed, that a mistaken exercise of discretion, which cannot be reached in error,[7] may be reached by a motion for a new trial.

§ 794. The due degree of weight to be given to presumptions of law which legitimately arise in the case, it is for the court to determine,[8] though if the court instruct a jury that they may indulge a presumption of fact not warranted by the evidence, a new trial will be awarded.[9] Thus where the judge charged that the non-production, by the defendant, of evidence of good character should weigh against the defence, it was held error;[10] and where there was evidence that a murder had been committed, and that the house in which the dead body was had been subsequently set on fire under such circumstances as to raise a suspicion that the same was done by the perpetrator of the murder to conceal that offence, and the evidence left it doubtful whether the prisoner was in the vicinity of the house when the fire was set, and the court charged the jury, that if the prisoner might have been at the scene of the

And so as to error as to presumption of fact.

[1] Clem *v.* State, 31 Ind. 480; Howard *v.* State, 50 Ind. 190. Supra, § 708.

[2] Supra, §§ 693–5, 777; People *v.* Mather, 4 Wend. 229; People *v.* Rathbun, 21 Wend. 509; People *v.* Bodine, 1 Denio, 281; Com. *v.* Lesher, 17 S. & R. 155; Com. *v.* Heath, 1 Robinson, 735; Armstead *v.* Com. 11 Leigh, 657; Vaughan *v.* State, 21 Tex. 452; though see Henry *v.* State, 4 Humph. 270.

[3] People *v.* Vermilyea, 7 Cowen, 369; Vance *v.* Com. 2 Va. Cas. 162; Com. *v.* Gwatkin, 10 Leigh, 687; Bledsoe *v.* Com. 6 Rand. 674; State *v.* Files, 3 Brevard, 304. Supra, §§ 583 *et seq.*

[4] People *v.* Costello, 1 Denio, 83. Supra, §§ 301 *et seq.*

[5] Com. *v.* Church, 1 Barr, 105.

[6] Supra, § 708.

[7] See supra, § 779.

[8] Attorney General *v.* Good, McClel. & Y. 286; 4 Ch. Gen. Practice, 42; People *v.* Genung, 11 Wend. 18; Watson *v.* People, 64 Barb. 130; Whart. Crim. Ev. §§ 707 *et seq.* See infra, § 798.

[9] Hendricks *v.* State, 26 Ind. 493; State *v.* Bailey, 1 Wins. N. C. (No. 1) 137. On this point the reader is particularly referred to Whart. Crim. Ev. §§ 707 *et seq.*; and see supra, §§ 712, 713.

[10] People *v.* Bodine, 1 Denio, 283; but see People *v.* White, 22 Wend. 167. As to burden of proof see Whart. Crim. Ev. § 319. As to presumptions, Ibid. § 707.

fire, "the *onus* was cast upon her to get rid of the suspicion which thus attached to her," and that she was bound to show where she was at the time of the fire, it was held that the ruling was erroneous, and ground for a new trial.[1] The same conclusion is reached where a judge takes it upon himself to declare a witness to be untrustworthy.[2] And it has been held error in a judge to say, without qualification, that an *alibi* is a defence which should be offered at the preliminary hearing.[3]

Omission to charge cumulatively no error.

§ 795. The omission by the judge, in summing up specifically, to leave to the jury a point made in the course of the trial (his attention not being expressly called to it) is no ground for a motion for a new trial, if the whole of the case was substantially left to them.[4]

Judge not required to charge as to undisputed law.

§ 796. Where there is no dispute as to the law, the judge cannot be required, where no points are tendered under the statute, to charge generally on the law.[5]

Otherwise when jury fall into error from want of instructions.

§ 796 *a*. Where, however, from the absence of proper instructions, the jury fall into error, a new trial will be granted.[6] Thus the court is bound, if required, to instruct the jury that unless they are satisfied beyond reasonable doubt, the defendant must be acquitted.[7] And any other failure on the part of the court to state the law, which failure results in an erroneous verdict, will exact a new trial.[8]

Yet abstract dissertations by judge are not required.

§ 797. It is not the duty of a court, in conducting a trial, to determine abstract propositions submitted by counsel (*e. g.* whether certain testimony, which had been given, bore upon the issue, or only on the credit of witnesses); it is enough if the court respond to all objections to

[1] People *v.* Bodine, 1 Denio, 282. See Whart. Crim. Ev. §§ 707 *et seq.*

[2] Bishop *v.* State, 43 Tex. 390.

[3] Sullivan *v.* People, 31 Mich. 1; Spencer *v.* State, 50 Ala. 124.

[4] Supra, § 710; Robinson *v.* Gleadow, 2 Scott, 250; 2 Bing. N. C. 156.

[5] Thus a new trial was refused when the complaint was that the judge, although requested, declined to charge the jury, there being no dispute as to the law of the case; the trial closing so late on Saturday night that, had the jury been charged, they must either have been dismissed or kept over during Sunday; and the verdict being fully supported by the evidence. People *v.* Gray, 5 Wend. 289. Supra, § 709.

[6] Supra, § 709; Armistead *v.* State, 43 Ala. 340; Hilliard on New Trials (1873), 258. See supra, §§ 708 *et seq.*

[7] Ibid. See supra, §§ 710 *et seq.*

[8] Supra, §§ 712, 713.

testimony taken by either party, and give the proper instructions to the jury.[1] "Courts," said the Supreme Court of New York, "are under no obligation to listen to abstract propositions from counsel, and are not bound to explain them on the trial of causes."[2] If, however, incorrect abstract propositions are laid down, and the jury are misled by them, the verdict will be avoided.[3]

§ 798. A judge has a right to express his opinion to the jury on the weight of evidence, and to comment thereon as much as he deems necessary for the course of justice;[4] and an erroneous opinion on matter of fact, it is said, expressed by the judge in his charge, is no ground for new trial, unless the jury are thereby led to believe that such fact was withdrawn from their consideration.[5] But it is ground for a new trial that a judge expresses himself as to inferences of fact, so that the jury understand him to be stating principles of law.[6] And this is eminently the case when a question of fact is taken from the consideration of the jury.[7]

Judge may give opinion as to weight of evidence.

[1] People *v.* Cunningham, 1 Denio, 524; People *v.* Walsh, 43 Cal. 447; Hilliard on New Trials (1873), pp. 45, 261. Supra, §§ 710–715.

[2] People *v.* Cunningham, *ut supra;* Etting *v.* U. S. Bank, 11 Wheaton, 59; Com. *v.* Tarr, 4 Allen, 315; People *v.* Robinson, 2 Park. C. R. 285; McCoy *v.* State, 15 Ga. 205.

[3] Supra, § 793.

[4] Supra, § 710. See Am. Law Reg. Jan. 1853; Com. *v.* Child, 10 Pick. 252; State *v.* Smith, 10 Rich. 341; though see *contra*, State *v.* Dick, 2 Wins. N. C. 798; Perkins *v.* State, 50 Ala. 154. "I cannot, for my part, see how the jury can hesitate a moment to convict the prisoner on the third count," was held in Pennsylvania not to be, on the facts, too strong an instruction. Johnston *v.* Com. 85 Penn. St. 54. "A judge," says Strong, J. (Kilpatrick *v.* Com. 31 Penn. St. 198), "may rightfully express his opinion respecting the evidence, yet not so as to withdraw it from the consideration and decision of the jury." Adopted 85 Penn. St. 65. As to Indiana see Barker *v.* State, 48 Ind. 163; State *v.* Banks, 48 Ind. 197. As to Missouri see State *v.* Jones, 61 Mo. 232.

[5] People *v.* Rathbun, 21 Wend. 509; Com. *v.* Gallagher, 4 Penn. Law Jour. 517; 2 Clark, 798; State *v.* Smith, 12 Rich. 430. *Contra*, Smith *v.* State, 43 Tex. 103.

[6] Supra, § 794; State *v.* Williamson, 42 Conn. 261; State *v.* Lynott, 2 Ames (R. I.), 295; Woodin *v.* People, 1 Parker C. R. 164; Watson *v.* People, 64 Barb. 130; Noland *v.* State, 19 Ohio, 131; Bill *v.* People, 14 Ill. 432; Cicero *v.* State, 54 Ga. 156; Spencer *v.* State, 50 Ala. 124; State *v.* Ross, 29 Mo. 32; State *v.* Rigg, 10 Nev. 284; Skidmore *v.* State, 43 Tex. 93; and see fully, as to error in charging presumptions of fact as presumptions of law, supra, § 794; Whart. Crim. Ev. §§ 707 *et seq.* Supra, § 710.

[7] Com. *v.* Davis, 11 Gray, 4; State

There are States, however, in which by statute the court is prohibited from expressing an opinion as to whether the facts prove a particular crime.[1]

That in extreme cases there may be an absolute direction to acquit or convict will be hereafter seen.[2]

Judge may give supplementary charge, but not in absence of defendant.

§ 799. Where the jury returned into court without having agreed, and the judge instructed them a second time on the evidence as to matters about which they had made no inquiries, and had stated no difficulties or doubts as to the law, this was not a sufficient ground for a new trial,[3] though the case is different when the judge communicates his views of the law and facts in writing, without having the jury brought into open court for the purpose, and without procuring the attendance of the parties.[4]

Erroneous instructions on one count vitiate when there is general verdict.

§ 800. When there are two good counts in an indictment, and the court gives erroneous instructions to the jury as to one of the counts, and there is a general verdict against the defendants, and judgment thereon, a *venire de novo* will be awarded.[5]

2. *Mistake in the Admission or Rejection of Evidence.*

Such error ground for new trial.

§ 801. In any case where illegal testimony has been admitted, or legal testimony rejected, a new trial may be had,[6] if objection was duly taken at the trial.[7] In civil cases the practice is, that though there be exceptionable testimony, yet if there be sufficient legal evidence to support the

v. Williamson, 42 Conn. 401; Roach *v.* State, 77 Ill. 25.

[1] See Edgar *v.* State, 48 Ala. 312; State *v.* Dick, 2 Wins. N. C. 45; State *v.* Dancy, 78 N. C. 437. In Massachusetts see Com. *v.* Foran, 110 Mass. 179. The California Constitution of 1879 precludes all opinions on facts.

[2] Infra, § 812.

[3] Com. *v.* Snelling, 15 Pick. 321. Infra, 830.

[4] Infra, § 830; supra, § 547.

[5] State *v.* McCanless, 9 Ired. 375.

[6] Com. *v.* Green, 17 Mass. 515; Com. *v.* Edgerly, 10 Allen, 184; People *v.* White, 14 Wend. 111; Carter *v.* People, 2 Hill (N. Y.), 317; People *v.* Restell, 3 Hill (N. Y.), 289; People *v.* Spooner, 1 Denio, 343; People *v.* McGee, 1 Denio, 21; Stokes *v.* People, 53 N. Y. 164; Com. *v.* Parr, 5 Watts & S. 345.

When material illegal evidence has been admitted, this can only be cured by the judge distinctly withdrawing the matter from the jury. Marx *v.* People, 63 Barb. 618. Infra, § 803.

[7] Ibid.; Evans *v.* State, 33 Ga. 4; Haiman *v.* State, 39 Ga. 708; State *v.* Williams, 3 Heisk. 76; People *v.* Ah Who, 49 Cal. 32. Infra, §§ 804, 877.

verdict, and justice appear to have been done, the verdict will not be set aside,[1] and the same rule applies where legal evidence has been excluded, but where, had it been admitted, it would have produced no variation in the result.[2] In the former case, however, the court must see that the evidence did not weigh with the jury in forming their opinion, or that an opposite verdict, given upon the remainder of the evidence, must have been set aside as against evidence.[3] And Denman, C. J., once observed to the counsel who had put in such inadmissible evidence: "It is not enough for you to say that the reception of this evidence could have made no difference; you should have taken care not to put in bad evidence. The alleged unimportance of a piece of evidence improperly rejected or admitted is no ground for refusing to send a case down for a new trial."[4]

Usually court will not presume that illegal evidence had no effect.

§ 802. In criminal cases, however, courts will rarely presume that the particular evidence which was wrongfully admitted could have had no influence on the deliberations of the jury; and there have been but few exceptions, therefore, to the general rule, that in such cases of misruling the defendant has a right to have his case given to another jury in a legal shape. But where, on a trial for conspiracy, a witness for the prosecution swore she had formerly sworn falsely at the instigation of the defendant, charging her bastard child to the prosecutor, and to discredit her, she was cross-examined to her own profligacy, and answered as to her criminal connection with other men; whereupon the defendant, further to discredit her, offered to prove her guilty with others, but the proof was rejected; on a motion to set aside the verdict, Lord Ellenborough, C. J., observed: "The other objection amounted to no more than this, that *Hannah Stringer*, the witness, having admitted that she had been connected with two or three persons, the learned judge thought it immaterial to examine witnesses tendered on the part of the defendant, to show that she had also been connected, at other times, with several other

[1] Horford *v.* Wilson, 1 Taunt. 12; Doe *v.* Tyler, 6 Bingham, 561; Prince *v.* Shepherd, 9 Pick. 176; Stiles *v.* Tilford, 10 Wend. 338.

[2] Edwards *v.* Evans, 3 East, 451; Fitch *v.* Chapman, 10 Conn. 8.

[3] Rützen *v.* Farr, 5 Nev. & Man. 617; S. P., Somerville *v.* State, 6 Tex. Ap. 433.

[4] Ibid. 618.

persons; considering that, by her own showing, she was a common woman. But it was not urged that the extent of her prostitution might have shaken her credit in a greater degree. If, however, the evidence had been admitted, it could have made no difference, at least it ought not to have made any difference, in the verdict."[1] In several American courts of high authority, we have several cases to the same effect.[2]

When erroneous ruling is rescinded, no ground for new trial.

§ 803. The illegal reception of evidence is no ground for revision when the evidence was subsequently ruled out, and the jury directed to disregard it.[3] So the converse is true, that a new trial will not be granted on account of the exclusion of particular evidence, when the objection to such evidence is withdrawn after its exclusion, and the defendant has had an opportunity to offer it.[4]

§ 804. Except under extraordinary circumstances of surprise,[5]

[1] R. v. Teal, 11 East, 307. See Com. v. Bosworth, 22 Pick. 397.

[2] Com. v. Sumner, 124 Mass. 321; Stephens v. People, 4 Park. C. R. 396; S. C., 19 N. Y. 549; People v. Gonzales, 35 N. Y. 49; Hunter v. State, 40 N. J. L. 495; Com. v. Eberle, 3 Serg. & R. 14; Com. v. Gallagher, 4 Penn. Law Jour. 516; 2 Clark, 297; Bird v. State, 14 Ga. 43; Mathis v. State, 33 Ga. 24; Wise v. State, 2 Kans. 419; Clark v. People, 31 Ill. 479; Jackson v. Sharff, 1 Oreg. 246; Lynes v. State, 36 Miss. 617; Evans v. State, 44 Miss. 762; Ganard v. State, 50 Miss. 147; Boon v. State, 42 Tex. 237; though see Com. v. McGowan, 2 Pars. 347, where it is said that after a court has rejected competent and material testimony offered by a defendant charged with an infamous crime, the court will not refuse relief on the assumption that the rejected evidence would not have availed the accused, if it had been received. Per King, P. J. To the same effect may be cited De Phue v. State, 44 Ala. 32; Peek v. State, 2 Humph. 78.

Where a witness, called for the defence, was so much intoxicated at the time as to be incapable of comprehending the obligation of an oath, and the court refused to permit him to testify, but told the prisoner that he might recall him afterwards, but he was not so recalled; it was held that this was not ground in law for granting a new trial, the granting or refusing a new trial in such case being in the discretion of the judge. State v. Underwood, 6 Ired. 96. Supra, § 566; Whart. Crim. Ev. § 384 *a*.

A new trial was granted where proof of the violent temper of the prisoner, who was charged with homicide, was introduced by the government, where it had not been put in issue by him. State v. Merill, 2 Dev. 269.

[3] State v. Lawrence, 57 Me. 574; Mimms v. State, 16 Oh. St. 221. See Marx v. People, 63 Barb. 618. Supra, § 564.

[4] State v. McCurry, 63 N. C. 33. See Stephens v. People, 19 N. Y. 549; People v. Henderson, 28 Cal. 468; Hilliard on New Trials (1873), 48.

[5] See §§ 796, 810.

a verdict will not be set aside because improper evidence was admitted, if no objection to its admission was made on trial.[1] And where a party neglects, at the proper time, to state for what purpose particular evidence is offered, and it is rejected for irrelevancy, he cannot afterwards obtain a new trial by showing that it might have been applied to a point material to the issue.[2] So when there is a special objection to the admission of testimony, which objection could be obviated if mentioned at the trial, a party cannot keep such objection back at the trial, and then, when the mistake becomes one which it will be too late to remedy, use it in error under a general exception to the admissibility of such evidence.[3]

Objection, to avail, must have been made at time.

3. *Verdict against Law.*

§ 805. Wherever and as often as the finding of a jury is in point of law against the charge of the court, a due regard to public justice requires that the verdict should be set aside. On this principle, it is true, the doctrine of *autrefois acquit* grafts an important exception, but this exception arises, not from the doctrine sometimes broached that the jury are the judges of law in criminal cases, but from the fundamental policy of the common law, which forbids a man when once acquitted to be put on a second trial for the same offence. When a case is on trial, the great weight of authority now is that the jury are to receive as binding the law laid down by the court; and after a conviction it is hardly doubted in any quarter that if the verdict be against the law it will be set aside.[4]

Jury bound to receive law from court.

[1] Evans *v.* State, 33 Ga. 4; Haiman *v.* Moses, 39 Ga. 708; State *v.* Williams, 3 Heisk. 376; People *v.* Collins, 48 Cal. 277. Infra, § 878. As to surprise see § 884.

[2] State *v.* Wadsworth, 30 Conn. 56; State *v.* Neville, 6 Jones (N. C.), 423; Barksdale *v.* Toomer, 2 Bailey, 180. Supra, §§ 564 *et seq.*

[3] Height *v.* People, 50 N. Y. 392; Bishop *v.* State, 9 Ga. 121. Supra, §§ 564 *et seq.*

[4] U. S. *v.* Shive, 1 Bald. 512; U. S. *v.* Battiste, 2 Sumner, 243; Com. *v.* Knapp, 10 Pick. 477; Com. *v.* Porter, 10 Met. 286; Carpenter *v.* People, 8 Barb. 610; People *v.* Pine, 2 Barb. 571; Duffy *v.* People, 26 N. Y. 589; Guffy *v.* Com. 2 Grant, 66; Davenport *v.* Com. 1 Leigh, 588; Hardy *v.* State, 7 Mo. 607; Montee *v.* Com. 3 J. J. Marsh. 150; Carter *v.* State, 48 Ga. 43. As to right of counsel to argue law to jury see supra, §§ 578.

§ 806. For some time after the adoption of the federal Constitution, a contrary doctrine, it is true, was generally received. In many of the States, the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much popular importance. Thus, John Adams, in his Diary for February 12, 1771,[1] in a passage which is probably either an extract from or memorandum of a speech before the colonial legislature, urges that in the then state of things public policy demanded that not only in criminal but in civil cases juries should be at liberty to take the law in their own hands. It was natural, therefore, that the early judges both of the federal and state courts should have continued for some time to assert a doctrine which, before the Revolution, they had found so necessary for protection against oppression and persecution. To this may be added, that the federal Supreme Court in particular, for reasons elsewhere more fully given, was unwilling to assert any prerogative which might draw odium on itself, or expose the new Constitution to any additional shock.[2] Hence it was that Judge Chase not only

Earlier doctrine in this respect to the contrary.

[1] John Adams's Life and Works, 252.

[2] It was not the least of the vices with which the early construction of the Constitution was infected that the judiciary, so far from being regarded as a separate estate of equal dignity with its sisters, did not hesitate to desert its own sovereign functions for the purpose of entering into their service. At the very outset, Mr. Jay held, at the same time, the office of chief justice and secretary of state for nearly six months; and afterwards, while retaining the chief justiceship, did not scruple to undertake the mission to England, which kept him from the bench from April 19, 1794, to June 29, 1795; when at last he resigned, not because he thought the two offices incompatible, but because he was elected to a third, that of governor of New York. On February 27, 1799, Mr. Ellsworth, then chief justice, was commissioned as minister plenipotentiary to France, holding on to the chief justiceship until October, 1800, and resigning then only on the ground of ill health. On January 20, 1800, Mr. Marshall, then secretary of state, was nominated as chief justice, presided during the whole of February term in the Supreme Court, and only left the secretaryship on March 4, 1801, on the incoming of Mr. Jefferson, discharging in the mean time the duties of two offices concurrently: on the same day, issuing reports in the one capacity, and delivering judgments in the other. To these cases the precedent of the English chancellor is scarcely in point, as he possesses no criminal jurisdiction; and in the only instances in England where a common law judge has blended judicial with ministerial duties (that of Lord Ellen-

broadly denied that the courts had any power to pronounce on the unconstitutionality of statutes, but over and over again de-

borough, during Mr. Fox's last administration), professional as well as public opinion has now determined that a great error was committed, and that few things could be so improper as for the executive who directs a prosecution to become the judge who enforces it. With us, objections still stronger exist. The judges, and eminently so those of the federal Supreme Court, are not only the construers of all laws, whether established by treaty or legislation, but the arbiters of their constitutionality; and to commit to them the office of interpreting the laws which they themselves make, or of making the laws they themselves interpret, is a consolidation of power inconsistent with the genius of a government whose great felicity it is that it is the government of reciprocal checks. But the mischief does not stop here. A judge who becomes a statesman is in some danger of becoming a partisan; and though neither of the three eminent men who first took the disease received it in its worst type, yet in those of their associates, to whom they communicated it, it raged with malign vivacity. At the beginning of August, 1800, Judge Chase left the bench to stump the State of Maryland on behalf of the existing administration, and the result was that the court, the chief justice being then on the French mission, was left for a whole term without a quorum. There was not a charge to a grand jury which was not, at the same time, a party harangue, differing in the several cases, it is true, in intensity, but with the same general design; and even the guilt of a criminal was sometimes tested as much by the dogmas of the politician as the rulings of the judge. The state courts, of course, did not hesitate to follow this august example. Of six presidential electors chosen that year in New Hampshire, three were members of the Supreme Judicial Court, and one of them thought proper to select the opening of a term as the occasion for the personal castigation of a political opponent. In Vermont, one of the county judges became so strongly impregnated with what Mr. Ames might have called the French effluvium, as to sit on the bench in a liberty cap. In Massachusetts, the chief justice, in a charge to the grand jury, denounced "the French system-mongers, from the quintumvirate of Paris to the Vice-President and minority of Congress, as apostles of atheism and anarchy, bloodshed and plunder." In New York, Judge Cooper broke up an election by threatening to commit anybody who challenged voters favorable to his own way of thinking; and even Chancellor Livingston sullied his brilliant name by a system of political agitation so daring as to gain the motto which afterwards clung to the capable and ambitious family of which he was the head: —

"Rem facias rem,
Si possis recte, si non, quoque modo, rem."

That the same vice ran through the New Jersey courts appears from a very able pamphlet, now extinct, published by a learned jurist of that State; and even the fine judicial parts of the first chief justice of Pennsylvania were marred by a partisanship as undisguised as it was efficient. [Chief Justice McKean, in fact, was at one and the same time governor of Delaware, president of Congress, chief justice of Pennsylvania, and a member of the convention to reform the Constitution of the latter State, to

clared that the Supreme Court was to be treated as possessed only of such powers as the legislature might from time to time

which body, on the question coming up, he announced that he considered such functions perfectly compatible. Of his political antagonisms, when on the bench, Cobbett, in his autobiography, gives a lively though over colored account.] It is not necessary to go further south to show that the courts of the States did not hesitate to adopt, in its fullest development, the system of politico-judicialism promulgated by the supreme bench of the Union.

Since these days fifty years have now passed, in the first twenty of which the federal judges had to struggle against an administration embittered by their personal onslaughts, and a majority irritated by their political encroachments. When Mr. Jefferson came in, the political consequence of the court seemed over. With its secular dignities destroyed, and its secular possessions confiscated, it was ordered, like a disgraced bishop of feudal days, to betake itself to its own diocese, and no longer to meddle in affairs of State. One part was lopped off by the repeal of the Judiciary Act of 1800, and there seemed no slight prospect that the whole would fall next. In the mean time, the court, devoting itself solely to the discharge of its constitutional duties, began to exhibit a power which in the palmiest days of executive favor it had never shown. Confining itself, under the guidance of the pure and intrepid jurists who then controlled its course, within its constitutional limits, it soon began to develop those sovereign prerogatives which to it, as a coequal branch of the government, had been intrusted. The judicial veto, the existence of which, in its political prosperity, it had scarcely hinted, was now applied with equal firmness and vigor to both the executive and legislative departments.

The high function of declaring an act void, because it disagrees with the Constitution, which lay dormant down to 1800, was now boldly exercised as a part of the ordinary jurisdiction of the court. In 1793, the collected bench, aided by the whole strength of Washington and his then undivided cabinet, could not procure the conviction of a flagrant state culprit, though it was notorious that his discharge would expose to defeat the whole foreign policy of the government. In 1807, a jury, under the direction of the chief justice, acquitted, on purely technical ground, a criminal about whose guilt they entertained no manner of doubt, and to effect whose conviction popular and executive influences were strained to their highest tension. In 1797, a brigade of militia was necessary to enable the marshal to execute process in Pennsylvania; in 1809, the same officer, in the face of the militia of the same State called out to resist him, went quietly through his functions, armed only by the precept of that most fearless and spotless of judges, Judge Washington; and in a few months after, the officer by whom that militia was commanded was brought into the federal court, and there convicted by a jury of the vicinage "of obstructing, resisting, and opposing" the execution of the process of the United States. This great change is not without its lesson. It has taught us that to the judiciary, as to the church, political consequence is moral peril; and that though, while occupying its own territory, its authority is sovereign and its edicts supreme, the moment it over-

impart to it. At the very time that this eminent but arbitrary judge was keeping the bar in an uproar by his assaults on counsel and witnesses, he was prompt in conceding to the jury as good a right to judge of the law as he had himself. Thus in Fries's case he said, "The jury are to decide on the present and in all criminal cases both the law and the facts, on their consideration of the whole case." "If, on consideration of the whole matter, *law as well as fact*, you are convinced that the prisoner is guilty, &c., you will find him guilty." No better illustration of Judge Chase's character can be found than in the fact that, in the very case where he thus recognized the power of the jury over the law, he succeeded, by stopping counsel when they undertook to dispute the law he laid down, in raising a turmoil which ended in his own impeachment.[1]

Early cases no longer authoritative.

§ 807. But it was not long before it was found necessary, if not entirely to abandon the rule, at least practically to ignore it. If juries have any moral right to construe the law, it becomes essential to know what is the construction they adopt; and the most strenuous advocates for the abstract doctrine soon confessed that the notions of juries, even on fundamental questions, vary so much that it was difficult to report, much more to systematize them. And yet, if it be settled that a jury's view of the law of a case is conclusive, it is vital to the community to know what that view is. Take, for instance, the statutory cheats growing out of the laws abolishing imprisonment for debt. The tendency of legis-

steps the boundaries by which that territory is confined, — the moment it canvasses for popular honor or executive favors, — that moment the magic of its power is gone, and it loses for itself those princely attributes with which it is by the Constitution invested, and, for the community, those high conservative sanctions by which that Constitution is to be preserved. Wharton's State Trials, preliminary notes, 46–48.

[1] That Judge Chase was not peculiar in his view, appears from the testimony taken during his impeachment. Thus, Mr. Edward Tilghman, a lawyer not only of great eminence, but of political sympathies which would have kept him from any ultra democratic tendencies, testified: "The court generally hear the counsel at large on the law, and they are permitted to address the jury on the law and on the fact, after which the counsel for the State concludes; the court then states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and fact to the jury." Chase's Trial, 143. See supra, § 578. To the same effect, also, is Mr. Hay's evidence as to the state of practice at the time in Virginia. Ibid. 175.

lation in late years has been to relieve a debtor from imprisonment, except in cases where a wilful false pretence is the consideration for the debt, or where there has been a subsequent fraudulent disposal of the acquired property. The tendency of judicial decision is to construe these exceptions strictly, and to hold that, to entitle a creditor to avail himself of them, he must show that he had not the opportunity of detecting the false pretence at the time, that it related to an alleged existing fact, or that the property secreted was actually and fraudulently detached from an honest and vigilant execution. These views are well known to the community; they enter into every contract, and are binding upon the courts. But what would a jury say? At one time a broken promise would be held indictable, and thus the old days of imprisonment for debt would be recalled. At another time not even frauds clearly within the statute would be held indictable, and hence imprisonment for fraud would cease *in toto*. Or take, for instance, malicious mischief at common law, about which even among the courts there is already sufficient diversity of opinion. Certainly from juries, no settled rule could be had as to what the offence is, and if there could be, no one could undertake to classify their decisions. Or again, when the question arises whether the uncorroborated evidence of an accomplice is enough to convict in a particular case, a question in which the judiciary of almost each State holds a distinct shade of opinion, where would be the chances of uniformity of adjudication, if juries, acting on the particular circumstances at hand, are to be the arbiters? Or, to recur to an illustration elsewhere noticed, a party is indicted for a political disturbance in one of those courts in which, according to statements generally accepted in the Senate of the United States in 1878, juries uniformly sympathize with the marshal by whom they are summoned. Was the offence a riot or was it treason? How could we get a comprehensive rule from trials in which juries were summoned one year by a marshal who held all riots to be treason, and the next year, on a change of administration, by a marshal who held such treason to be only riot?[1]

§ 808. But a practical illustration of much point is found in a case, to which may be attributed the change of sentiment on

[1] Whart. Crim. Law, 8th ed. § 395.

this question of the late Mr. Justice Baldwin, a judge who, it is well known, was not disposed on light grounds to surrender any long-cherished opinions. On several occasions, in his early judicial history, he was unequivocal in his commitment of the whole law to the jury; and in one instance, after counsel had directly appealed from the court to the jury on a legal point, he went so far as to say that, in so doing, they had but "acted in the strict line of their duty."[1] But when, some time afterwards, counsel, profiting by this encouragement, undertook to open to the jury, on an indictment for counterfeiting United States bank notes, the unconstitutionality of the bank's charter, this learned judge paused. He felt that however legitimate a result of his own reasoning this course was, if permitted, it would defeat all prosecutions for the particular offence on trial. "Should you assume and exercise this power," he said, in language which applies with equal force to all questions of law whatever, "your opinion does not become a supreme law, no one is bound by it, other juries will decide for themselves, and you could not expect that courts would look to your verdict for the construction of the Constitution, as to the acts of the legislative or judicial departments of the government; nor that you have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow-citizens or for the court. If one jury exercises this power, we are without a constitution or laws. One jury has the same power as another; you cannot bind those who may take your places; what you declare constitutional to-day, another jury may declare unconstitutional to-morrow. We shall cease to have a government of law, when what is the law depends on the arbitrary and fluctuating opinions of judges and jurors, instead of the standard of the Constitution, expounded by the tribunal to which has been referred all cases arising under the Constitution, laws, and treaties of the United States."[2]

§ 809. But in practice, however speciously the doctrine may be asserted, it is, except so far as it may sometimes lead a jury

[1] U. S. *v.* Wilson, 1 Bald. 99.

[2] Supra, § 573; U. S. *v.* Shive, 1 Baldwin, 512. To same effect may be cited U. S. *v.* Riley, 5 Blatch. C. C. 204; U. S. *v.* Greathouse, 4 Sawyer, 457. Compare 2 Curtis's Life and Works, 176.

to acquit in a case where the facts demand a conviction, practically repudiated, and since its only operation now is mischievous, it is time it should be rejected in theory as well as reality. For, independently of the reasons already mentioned, an attempt to carry it out in practice would involve a trial in endless absurdity. Thus, for instance, what questions of law are of more vital interest to a prisoner on trial than those of the admissibility of dying declarations, or of confessions? If the jury are to judge of the law, what grosser invasions of their rights, and those of the prisoner, could be, than to take from the jury the decision of questions thus distinctly within their province, and which, so far from being collateral to, as has been urged, are in most instances direct to, the matter of guilt? And yet there is no judge sitting with a jury on the trial of a criminal case, who does not take to himself alone the hearing of the preliminary evidence as to whether the declarations were uttered under a consciousness of approaching dissolution, or whether the confession was extorted by duress or solicitation. The line of authority here and in England is unbroken, that in such and in kindred cases the court alone is to determine.[1] But if such be the law, as a matter of principle the jury have no more moral right to convict or acquit a man against the charge of the court that such evidence was to be stricken out, if improvidently let in, than they would to convict or acquit him on the evidence if actually excluded. And this view is strengthened by the fact, that in England and this country the statutory or constitutional provisions giving juries the power of determining as to whether a written document is unlawful or not go no further than the particular instance of indictment for libel.

Jury are at common law not judges of law.

§ 810. The conclusion we must therefore accept is that the jury are no more the judges of law in criminal than in civil cases, with the qualification that, owing to the peculiar doctrine of *autrefois acquit*, a criminal *acquittal* cannot be overhauled by the court.[2] In the federal courts such is now the established rule.[3]

[1] See Whart. Crim. Ev. §§ 297, 523 *et seq.*

[2] As to law of *autrefois acquit* see supra, §§ 435 *et seq.*

[3] U. S. *v.* Fenwick, 4 Cranch C. C. 675; Stettinius *v.* U. S. 5 Cranch C. C. 573; U. S. *v.* Battiste, 2 Sumner, 243; U. S. *v.* Morris, 1 Curt. C. C.

Independently of the federal courts, which have been already

43. See, as to same case, 2 Curtis's Life & Works, 176; U. S. *v.* Riley, 5 Blatch. 204; U. S. *v.* Greathouse, 4 Sawyer, 457; 2 Abbott U. S. 364.

To the same effect is the reply of the late Judge Thompson, while presiding in the United States Circuit Court, in the city of New York, on the trial of a criminal case, when requested by one of the counsel to charge the jury that they were judges both of the law and the fact. His answer was: "I sha'n't; they ain't."

Equally emphatic was the direction of Mr. Justice Hunt, on the trial of Miss Anthony, in 1873. U. S. *v.* Anthony, 11 Blatch. 200. Infra, § 812.

On this principle can be sustained the action of Judge Curtis, and that of Judge Grier and Judge Kane, in Philadelphia, in prosecutions where they held that it was a good cause of challenge that a juryman differed from the court in his view of the constitutionality of the statute on which the prosecution rested. Certainly if the jury were the judges of the law, this would have been as arbitrary an act as was that of James II., who polled the Court of King's Bench as to the dispensing power, and dismissed the judges who refused beforehand to pledge themselves to hold the prerogative constitutional. On the assumption that the jury are judges of the law as well as the court, there is no more reason, *a priori*, that the court should set aside a juror, than that the jury should set aside the judge. See supra, § 666.

"It is the duty of the court," says Chief Justice Shaw, of Massachusetts, in 1845, "to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide, contrary to such opinion or direction of the court in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner, as they are conscientiously bound to decide on all questions of fact according to the evidence." See Com. *v.* Anthes, 5 Gray, 185. It seems, however, that the same court will not prevent counsel addressing the jury on the law. Com. *v.* Porter, 10 Met. (Mass.) 286. See Com. *v.* White, Ibid. 14.

In Massachusetts the following statute was subsequently passed:—

In all trials for criminal offences, it shall be the duty of the jury to try, according to established forms and principles of law, all causes which shall be committed to them, and after having received the instructions of the court, to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to find a special verdict at their election; but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon all collateral and incidental proceedings, and also to charge the jury, and to allow bills of exception; and the court may grant a new trial in cases of conviction. Supplement to Rev. Stats. 1855, c. 153.

noticed, it may now be considered that the courts of Maine,[1]

Under this act it was held that the jury have no rightful power to determine questions of law involved in the issue against the instructions of the court. Com. *v.* Anthes, 5 Gray, 185 — Dewey and Thomas, JJ., dissenting. See Com. *v.* Rock, 10 Gray, 4.

It was also held, that the legislature cannot, consistently with the Constitution of the Commonwealth, confer on the jury, in criminal trials, the rightful power to determine questions of law involved in the issue, against the instructions of the court, even by a statute which also provides that the jury shall try the cases according to established forms and principles of law, and that the court shall superintend the course of the trials, decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon collateral and incidental proceedings, and charge the jury, and allow bills of exception, and may grant a new trial in cases of conviction. By Shaw, C. J., Metcalf, Bigelow, and Merrick, JJ.; *contra*, Dewey and Thomas, JJ. Com. *v.* Anthes, 5 Gray, 185; S. P., Com. *v.* Rock, 10 Gray, 4.

It has also been ruled that a refusal of the presiding judge to allow the defendant's counsel in a criminal case to read to the jury the whole of the statute, upon one section of which the prosecution is founded, is no ground of exception, if he is allowed to read all those parts which he contends affect the construction of that section, and to comment to the jury upon the whole of the statute. Com. *v.* Austin, 7 Gray, 51.

In Connecticut, a statute making juries judges of the law does not relieve them, it is said, from the duty of obeying the law as it actually is. State *v.* Buckley, 40 Conn. 246.

In New York, though before the re-

[1] State *v.* Wright, 53 Me. 336.

In this case, Appleton, C. J., in the course of his opinion, said: —

"The question seems never to have been directly before the Supreme Court of the United States sitting in banc; but several of the judges of that court, namely, Baldwin, Thompson, Story, and Curtis, as we have already seen, have emphatically denied the right of the jury to decide the law in any case, civil or criminal; and we cannot doubt that such will be the decision of the full court if the question ever comes before them.

"The following States unite in the doctrine that it is the duty of the jury to be governed by the law as it is laid down by the court: N. Hampshire, in Pierce *v.* State, 13 N. H. 536; Massachusetts, in Com. *v.* Porter, 10 Met. 263; Com. *v.* Anthes, 5 Gray, 185; Rhode Island, in Dorr's Trial, 121; New York, in People *v.* Pine, 2 Barb. 566; Carpenter *v.* People, 8 Barb. 610; Safford *v.* People, 1 Parker, 474; Duffy *v.* People, 26 N. Y. (Smith), 588; Pennsylvania, in Penn. *v.* Bell, Addison, 160; 2 Whart. Crim. Law, § 3106; Virginia, in Davenport *v.* Com. 1 Leigh, 588; Com. *v.* Garth, 3 Leigh, 761; Howel *v.* Com. 5 Grat. 664; North Carolina, in State *v.* Peace, 1 Jones (Law), 251; Ohio, in Montgomery *v.* State, 11 Oh. 424; Robbins *v.* State, 8 Oh. St. R. (N. S.) 131; Kentucky, in Montee *v.* Com. 3 J. J. Marsh. 150; Com. *v.* Van Tuyl, 1 Metc. (Ky.) 1; Alabama, in Pierson *v.* State, 12 Ala. 153; Batre *v.* State, 18 Ala. 119; Missouri, in Hardy *v.* State, 7 Mo. 607; Mississippi, in Williams *v.* State, 32 Miss. (3 George), 389; Arkansas, in Pleas-

New Hampshire,[1] Massachusetts,[2] Rhode Island,[3] New York,[4]

cent Constitution the inclination was otherwise, the same view has been solemnly held in more than one case of recent date. Bennett *v.* People, 49 N. Y. 141; cited infra, § 812; People *v.* Pine, 2 Barb. 566 — Barculo, J. See Carpenter *v.* People, 8 Barb. 610; Duffy *v.* People, 26 N. Y. 588. Compare People *v.* Finnegan, 1 Park. C. R. 147; 1 Park. C. R. 453; S. C., 26 How. Pr. 195; *contra*, People *v.* Thayers, Ibid. 595; People *v.* Videto, Ibid. 603. See, to the same effect, a valuable article in 5 Bost. Law Rep. N. S. 2 (May, 1852).

In Pennsylvania, though till 1879 there was no reported decision on the express point from the Supreme Court in banc, it has not been usual to leave to the jury the law to decide. A very strong leaning to the contrary is shown by Gibson, C. J., in closing a charge in a capital case: "If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it." Com. *v.* Harman, 4 Barr, 269. So, in a homicide case, in which the popular sentiment, excited by the recent riots in Kensington, set so strongly against the prisoner as to make possible a conviction on insufficient evidence, Rogers, J., in charging the jury, said: "You are, it is true, judges in a criminal case, in one sense, of both law and fact, for your verdict, as in civil cases, must pass on law and fact together. If you

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ant *v.* State, 8 Eng. (13 Ark.) 360; Texas, in Nels *v.* State, 2 Texas, 280; Tennessee, in McGowan *v.* State, 9 Yerger, 184.

"In Indiana the decisions are influenced by local legislation, and are therefore unimportant. There are, however, two well considered decisions in that State in which the right of the jury to determine the law is denied. 2 Black. 156; 2 Carter, 617; *contra*, 4 Black. 150, 247; 10 Ind. 503. State *v.* Holder, 5 Geo. 441, and some other cases in that State (Georgia), have been supposed by some to be in favor of the doctrine. But this is an error. In that State the subject is regulated by express statutory law, and their decisions have no bearing upon the question as a common law right.

"In Vermont, in State *v.* Croteau, 23 Vt. 14, a majority of the court held that, in criminal cases, the jury are judges of the law as well as the facts, but the doctrine was resisted in a very able dissenting opinion by Judge Bennett; and in a later case (State *v.* McDonnell, 32 Vt. 523), the presiding judge declared to the jury that to him such a doctrine was "most absurd and nonsensical," and the full court held the remark unexceptionable.

"In Maine, in State *v.* Snow, 18 Me. 346, the court seems to have taken it for granted that the law was settled in favor of the right of the jury to determine the law in criminal cases, and gave the question apparently very little consideration. Two cases only are cited. One of them (Croswell's case, 3 Johns. Cases, 337) establishes no such doctrine; and the other (Com. *v.* Knapp, 10 Pick. 497) has been emphatically overruled by the same court which made the decision."

[1] Pierce *v.* State, 13 N. H. 536.

[2] Com. *v.* Porter, 10 Met. 286; Com. *v.* White, Ibid. 14; Com. *v.* Abbott, 13 Met. 120; though now modified by statute given in a prior note to this section.

[3] Dorr's Trial, 121; 7 Bost. L. R. 347.

[4] See cases given above.

Virginia,[1] North Carolina,[2] Ohio,[3] Kentucky,[4] Alabama,[5] Missis-

acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. The popular impression is, that this power to definitely close a prosecution by an acquittal arises from a right on the jury's part to decide the law as well as the facts according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law, that no man can twice be put in jeopardy for the same offence. No matter from what cause an acquittal results, the defendant cannot be retried. If, for instance, it should result from a usurpation by the court of the facts of the case, which undoubtedly belong to the jury, the acquittal would be final; and yet it would be very improper to draw from such a result the assumption that the disposition of the facts belongs to the court. It is important for you to keep this distinction in mind, remembering that while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. The sanctity of your conclusion, in case of an acquittal, arises not from any inherent dominion on your part over the law, but from the principle that no man shall be twice put in jeopardy for the same offence, a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk, or an error of the attorney general. You are bound, notwithstanding this, to conform your verdict to the law of the land, in the same way that the two latter functionaries are bound to conform their conduct to the same standard; for it would be productive of the wildest consequences to establish the principle, that any officer whatever, in a criminal case, should be relieved from the restraint of the law as settled in a uniform system by the supreme authority. For your part, your duty is to receive the law for the purposes of this trial from the court. If an error injurious to the prisoner occurs, it will be rectified by the revision of the court in banc. But an error resulting from either a conviction or acquittal against the law can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim, that the law belongs to the court and the facts to the jury. My duty is, therefore, at the outset, to charge you that while you will in this case form your own judgment of the facts, you will receive the law as it is given to you by the court." Com. *v.* Sherry, Whart. on Homicide, App. Not varying

[1] Howel *v.* Com. 5 Grat. 664; and cases cited infra.

[2] State *v.* Peace, 1 Jones (Law), 251.

[3] Montgomery *v.* State, 11 Oh. 424; Robbins *v.* State, 8 Oh. St. 131; Adams *v.* State, 29 Oh. St. 412.

[4] Montee *v.* Com. 3 J. J. Marsh. 150; Com. *v.* Van Tuyl, 1 Metc. (Ky.) 1.

[5] Pierson *v.* State, 12 Ala. 153; Batre *v.* State, 18 Ala. 119, reviewing State *v.* Jones, 5 Ala. 666.

sippi,[1] Missouri,[2] Arkansas,[3] California,[4] South Carolina,[5] and Texas,[6] unite in the doctrine that the jury must take the law from the court; while the contrary seems to be held in Vermont,[7] Tennessee,[8] Georgia,[9] Maryland,[10] Louisiana,[11] Illinois,[12]

much from this is the language of Sergeant, J., in a charge in a case of misdemeanor: "The point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the court. If you believe the evidence in the whole case, you must find the defendant guilty." Com. *v.* Vansickle, Brightly R. 73. Infra, § 812.

In 1879, however, in Kane *v.* Com. Leg. Int. May 23, 1879, Ch. Just. Sharswood, speaking for the court, declared it error for a judge to say to the jury, "The law is for the court, and you will be governed by it, or you will not, as you have sworn to do, try the case by the law and by the evidence." "The distinction," says Ch. Just. Sharswood, "between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No court should give a binding instruction to a jury, which they are powerless to enforce, by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instructions, but beyond this they have

[1] Cothran *v.* State, 39 Miss. 541.

[2] Hardy *v.* State, 7 Mo. 607. See State *v.* Jones, 64 Mo. 391.

[3] Pleasant *v.* State, 2 Eng. (13 Ark.) 360. By the Constitution, however, the jury are judges of the law. See Patterson *v.* State, 2 Eng. 59.

[4] People *v.* Stewart, 7 Cal. 140; People *v.* Anderson, 44 Cal. 65.

[5] State *v.* Drawdy, 14 Richards. 87.

[6] Nels *v.* State, 2 Tex. 280.

[7] State *v.* Croteau, 23 Vt. 14; but see State *v.* McDonnell, 32 Vt. 523.

[8] Nelson *v.* State, 2 Swan, 237.

[9] Holder *v.* State, 5 Ga. 441; Ricks *v.* State, 16 Ga. 600; McGuffie *v.* State, 17 Ga. 497; McPherson *v.* State, 22 Ga. 478; McDaniel *v.* State, 30 Ga. 853; Clarke *v.* State, 35 Ga. 75; McMath *v.* State, 55 Ga. 303. See O'Neil *v.* State, 48 Ga. 66. But in Habersham *v.* State, 56 Ga. 61, it was said that it was the duty of the jury to take the law from the court.

[10] Franklin *v.* State, 12 Md. 236. This was in obedience to a constitutional provision that the jury are to be judges of the law. But at the same time it was held that, on the question of the *constitutionality* of laws, the jury were to take the law from the court. See Wheeler *v.* State, 42 Md. 563.

[11] State *v.* Jurche, 17 La. An. 71; State *v.* Saliba, 18 La. An. 35. But a subsequent case qualifies this by declaring that though the jury have the *power*, they have not the moral right, to reject the law of the court. State *v.* Tally, 23 La. An. 677.

[12] Falk *v.* People, 42 Ill. 331. See, however, Mullinix *v.* People, 76 Ill. 211, in which the defendant asked the court below to charge the jury that they were "sole judges of the law." The court, however, told the jury that it was "their duty to accept and act upon the law, as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court." The Supreme Court held that this was eminently proper.

and Indiana.[1] In most of the latter States, however, the result is exacted by statute. So far as concerns the question immediately in discussion, it is not anywhere disputed that if a jury, whatever may be its supposed elementary rights, finds against the court's charge, the verdict should be set aside.[2]

Court bound to hear counsel as to law.

§ 811. It has been ruled in Virginia, that upon a question of law addressed to the court at *nisi prius*, the judge is not bound to hear an argument from the prisoner's counsel, if his opinion is already formed.[3] The same point was made in Fries's case, by Judge Chase. But in the latter case the ruling of the court in this respect was the subject of an impeachment in which a conviction was barely escaped. The proper view is that on all questions of law, the court, before decision, is bound to hear counsel, with proper limits as to time.

Court may direct acquittal or conviction.

§ 812. Can a judge direct a jury peremptorily to acquit or convict, if in his opinion this is required by the evidence? Unless there is a statutory provision to the contrary, this is within the province of the court, supposing that there is no disputed fact on which it is essential for the jury to pass.[4] A remarkable illustration of a conviction

no right to go. The argument in favor of their taking the law from the court is addressed, very properly, *ad verecundiam*. The court is appointed to instruct them, and their opinion is the best evidence of what the law is." For a discussion of this opinion, see South. Law Jour. for 1879, p. 352, *et seq.*; 1 Crim. Law Mag. 47. But this is greatly modified in a subsequent case (Com. *v.* Nicholson), November 10, 1879, where the Supreme Court say: "The court below had an undoubted right to instruct the jury as to the law, and to warn them, as they did, against finding contrary to it. This is very different from telling them that they must find the defendant guilty, *which is what is meant by a binding instruction in a criminal case.*" This may be considered as virtually recalling the points in which the opinion on Kane *v.* Com. differs from prior opinions in the same court. See 1 Crim. Law Mag. 242.

In Virginia, not only is it held that the jury has no right to take the law except from the court, but it has been ruled expressly, that counsel will not be permitted to address an argument on the law except to the court. Davenport *v.* Com. 1 Leigh, 588; Com. *v.* Garth, 3 Leigh, 761; Howel *v.* Com. 5 Grat. 664. See, on these decisions, a learned article in 6 Am. Jurist, 237; and see fully supra, §§ 573 *et seq.*

[1] Warren *v.* State, 4 Blackf. 150; Williams *v.* State, 10 Ind. 503. See, also, 5 Law Rep. (N. S.) 6; Clem *v.* State, 31 Ind. 480; McCarthey *v.* State, 56 Ind. 203.

[2] Daily *v.* State, 10 Ind. 536. See supra, § 548.

[3] Howel *v.* Com. 5 Grat. 664.

[4] See, however, *contra*, State *v.* Dixon, 75 N. C. 275; Tucker *v.* State, 57

thus directed has been already noticed.[1] Where the whole case, leaving out disputed facts, requires an acquittal, a direction to acquit is eminently proper;[2] and there are instances of unfounded prosecutions pressed by popular prejudice when such a course is the peremptory duty of the judge.[3] Where a demurrer to evidence is allowed, the opinion of the court to this effect may be compelled by the defendant by filing such a demurrer.[4]

4. *Verdict against Evidence.*

§ 813. A conviction contrary to the weight of evidence will be set aside, and such is more particularly the case when any of the material allegations of the indictment remain unproved.[5] Thus, where the defendant was charged with burning the shop of B. & C., and no evidence was offered as to ownership;[6] where the evidence, on a charge of passing an altered note, failed to show that the prisoner knew of the alteration at the time of the passing;[7] where, on a trial for marking hogs with intent to steal them, there was no reasonable evidence of a guilty intent;[8] where, on a charge

Verdict against evidence may be set aside.

Ga. 503; Perkins *v.* State, 50 Ala. 154.

[1] U. S. *v.* Anthony, 11 Blatch. 200, by Hunt, J., 1873. See Whart. Crim. Law, 8th ed. § 88.

[2] State *v.* Gustave, 27 La. An. 395. See State *v.* Bowen, 16 Kans. 475.

[3] See Com. *v.* Fitchburg R. R. 10 Allen, 189; State *v.* Jaeger, 66 Mo. 208. That a judge has not this right is intimated in Howell *v.* People, 5 Hun, 620; S. C., 69 N. Y. 607.

"It has been a disputed question whether the court has power to direct an acquittal, or whether its power is advisory merely, which might or might not be acquiesced in by the prosecuting attorney or by the jury. Practically the result is the same. It is very rare that the prosecuting officer will not accede to the opinion of the court, and still more rare to convict against the advice of the court that it would be improper." . . . . "I can see no reason, therefore, why the court may not, in a case presenting a question of law only, instruct the jury to acquit the prisoner, or to direct an acquittal and enforce the direction; nor why it is not the duty of the court to do so." People *v.* Bennett, 49 N. Y. 141 (1872) — Church, C. J. See also People *v.* Harris, 1 Edm. Sel. Cas. 453.

[4] Supra, §§ 407, 706.

[5] U. S. *v.* Duval, Gilpin, 356; Com. *v.* Briggs, 5 Pick. 429; State *v.* Lyon, 12 Conn. 487; Resp. *v.* Lacaze, 2 Dall. 118; Ball *v.* Com. 8 Leigh, 726; Falk *v.* People, 42 Ill. 331; State *v.* Anderson, 2 Bailey, 565; State *v.* Fisher, 2 N. & M. 261; Bedford *v.* State, 5 Humph. 553; State *v.* Bird, 1 Mo. 417.

[6] State *v.* Lyon, 12 Conn. 487.

[7] State *v.* Anderson, 2 Bailey, 565.

[8] State *v.* Bird, 1 Mo. 417.

of receiving stolen goods, no evidence existed as to the *scienter*;[1] where, on the same charge, the indictment averred a former conviction for the same offence, but no proof was offered on trial to prove the identity of the defendant with the former defendant;[2] where the *corpus delicti* was not proved;[3] in each of these cases a conviction was set aside on account of the insufficiency of the testimony to support the verdict. If, however, there be conflicting evidence on both sides, and the question be one of doubt, it seems the verdict will generally be permitted to stand;[4] and this, though the court may differ from the jury as to the preponderance of the evidence.[5]

5. *Irregularity in Conduct of Jury.*

Mere inadvertent and innocuous separation not generally ground for new trial.

§ 814. The general rule is that the verdict will not be set aside on account of inadvertent irregularity in a jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them for the proper exercise of their functions.[6] An exception, however, formerly existed in England, and is still recognized in

[1] Bedford *v.* State, 5 Humph. 553.

[2] Com. *v.* Briggs, 5 Pick. 429.

[3] Ball *v.* Com. 8 Leigh, 726; State *v.* Hogard, 12 Minn. 293.

[4] Com. *v.* Flanigan, 7 W. & S. 415, 422; Com. *v.* Gallagher, 4 Penn. L. J. 514; 2 Clark, 297; Jerry *v.* State, 1 Blackf. 395; Taylor *v.* State, 4 Ind. 540; Williams *v.* State, 45 Ind. 157; Winfield *v.* State, 3 Iowa, 339; State *v.* Elliott, 15 Iowa, 72; Kirby *v.* State, 3 Humph. 289; Leake *v.* State, 10 Humph. 144; Cassels *v.* State, 4 Yerger, 152; State *v.* Sims, 2 Bailey, 291; Matthis *v.* State, 33 Ga. 24; Davis *v.* State, 33 Ga. 98; Thompson *v.* State, 55 Ga. 47; Mitchell *v.* State, 55 Ga. 556; State *v.* Burnside, 37 Mo. 343; State *v.* Connell, 49 Mo. 282; Bennett *v.* State, 13 Ark. 694; Pleasants *v.* State, 15 Ark. 624; Craft *v.* State, 3 Kans. 450; People *v.* Simpson, 50 Cal. 304; Palmer *v.* People, 4 Neb. 68.

[5] Ibid. See McLane *v.* State, 4 Ga. 335; State *v.* Connell, 49 Mo. 282; People *v.* Ah-Loy, 10 Cal. 301; Monroe *v.* State, 23 Tex. 210; Pleasants *v.* State, 15 Ark. 624; State *v.* Crozier, 12 Nev. 300. See *contra*, Rafferty *v.* People, 72 Ill. 37.

The general court in Virginia will only set aside a verdict, because it is contrary to the evidence, in a case where the jury has plainly decided against the evidence, or without evidence. Hill's case, 2 Grattan, 594. Where the evidence is contradictory, and the verdict is against the weight of evidence, though a new trial may be granted by the court trying the case at their discretion, their decision is not examinable by an appellate court. See Grayson *v.* Com. 6 Grat. 712; State *v.* Cruise, 16 Mo. 391; Herber *v.* State, 7 Tex. 69.

[6] State *v.* Prescott, 7 N. H. 290; Com. *v.* Roby, 12 Pick. 496, 519;

several of the United States, in felonies, where the jury separate after the opening of the evidence. While on the one hand the present practice in England, and in a portion of the American courts, is to sustain the verdict when the separation has been inadvertent or necessary, and no abuse has resulted from it; on the other hand, it has been considered in several instances that the mere separation, after the case is committed to the jury, is in itself reason for a new trial.[1]

§ 815. The latter doctrine was pressed with great rigor by the early common law authorities in all cases, both civil and criminal; it being agreed that by "the law of England, a jury, after the evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed."[2] A more humane system has since been recognized; and in all cases, not capital, it appears that juries are permitted to separate whenever in the discretion of the court it seems proper.[3] In capital cases however, in some States, under no circumstances will separation be permitted until a verdict is agreed on;[4] and so far, as has been already seen,[5] has this doctrine been pushed in several instances in this country, that it has been held that if a jury when once charged and sworn be discharged, except in case of such necessity as may be considered as the act of God, such discharge is a bar to a second trial.[6]

In some courts this view is not accepted.

State *v.* Babcock, 1 Conn. 401; People *v.* Douglass, 4 Cowen, 26; Bebee *v.* People, 5 Hill, 32; Martin *v.* Com. 2 Leigh, 745; Tooel *v.* Com. 11 Leigh, 714; McCarter *v.* Com. 11 Leigh, 633; Stone *v.* State, 4 Humph. 27; State *v.* Fox, Geo. Decis. part i. 35; State *v.* Peter, Ibid. 46; Whitney *v.* State, 8 Mo. 165; State *v.* Barton, 19 Mo. 227; State *v.* Igo, 21 Mo. 459. For English practice see R. *v.* Woolf, 1 Chitty R. 401.

[1] See this examined, in reference to the plea of once in jeopardy, supra, §§ 490 *et seq.*; and, as to general conduct of jury, supra, §§ 720, 721.

[2] Co. Lit. 227. See Bac. Ab. Verdicts, pl. 19; Com. Dig. Inquest, F. Supra, §§ 720 *et seq.*, 814.

[3] R. *v.* Woolf, 1 Chitty R. 401; 1 Ch. C. L. 664.

[4] Cochran *v.* State, 7 Humph. 544. See supra, §§ 508–11, 720 *et seq;* Bac. Abr. Juries, G.

[5] See supra, §§ 490, 511.

[6] *Pennsylvania.* — In a capital case before the Supreme Court of Pennsylvania, in 1851, it appeared by the record that, "on the 15th of March,

§ 816. Separation before the case is opened and the jury charged does not seem, even in the strictest practice, to be considered cause for setting aside a verdict.[1] Thus, where the jury had been empanelled and sworn, and where, before any evidence was given, three of the

Separation before case is opened always permissible.

1851, after the jury were sworn, it was agreed by the counsel of the Commonwealth and the counsel of the defendant, and agreed by the court, that the jurors sworn in this case be permitted to separate and return to their respective homes, and return to the jury-box on Tuesday morning next, March 18th," when they all attended, and a verdict of murder in the first degree was rendered. The judgment was reversed, and the prisoner ordered back for another trial. Peiffer *v.* Com. 15 Penn. St. 471. See supra, § 733.

Subsequently, on the trial of a party charged with burglary, the jury, after being cautioned by the court to avoid all conversation with any person about the case, were allowed to separate at the usual times of adjournment. McCreary *v.* Com. 29 Penn. St. 323.

Virginia. — In Virginia, the weight of authority is, that in cases of felony it is not necessary, in order to set aside the verdict, to show actual tampering, or conversation on the subject of the trial, with a juryman, but that the mere fact of the separation from the custody of the officer is usually sufficient. See Philips *v.* Com. 19 Grat. 485. Judge Nelson, who delivered the opinion of the court in an early case (Com. *v.* M'Caul, 1 Va. Cases, 271), said: "From the mode in which collusion and tampering is generally carried on, such circumstance is generally known to no person except the one tampering and the person tampered with, or the persons between whom a conversation may be held, which might influence a verdict. If you question either of these persons on the subject, he must criminate or declare himself innocent; and you lay before him an inducement not to give correct testimony." A verdict of conviction in a later case of felony, was set set aside where, pending the trial, and before the testimony was closed, five of the jury received permission to retire from the court-room accompanied by the sheriff, and another juror thereupon left the jury-box without the knowledge of the court, passed out of the court-house through a crowd of persons collected about the door, and remained absent a few minutes, after which he returned into the court; having (as he deposed) held no communication whatever with any person during his absence, but not having been, during that period, in charge of the sheriff, or even seen by him. Overbee *v.* Com. 1 Robins. (Va.) 756. But the bare possibility of tampering, it is conceded, is not adequate reason for a new trial. Sprouce *v.* Com. 2 Va. Cas. 375. Thus, upon trial of an indictment for murder, the jury, not agreeing on a verdict, were, after dark, adjourned over till the next morning, and committed to two sheriffs to be enclosed in a room to be prepared for them; in conducting them from the court-house to the room, one

[1] State *v.* Cucuel, 2 Vroom, 249; McFadden *v.* Com. 23 Penn. St. 12; Martin *v.* Com. 2 Leigh, 745; Cohron *v.* State, 20 Ga. 752. Supra, §§ 517, 718.

jurors separated from their fellows for a brief space of time, it was ruled that such separation, before any evidence given, was

juror separated from his fellows, moved twenty-five yards from them and the sheriffs having them in charge, told a servant whom he met with to take care of his horse, and said nothing else to any one, and no one speaking to him, when he was immediately pursued by one of the sheriffs, and brought back to the rest of the jury, his separation from his fellows not exceeding a minute, and he being a yet shorter time out of sight of the sheriffs. The jury having found the prisoner guilty of murder in the first degree, it was held that such separation was no cause for setting aside the verdict. M'Carter *v.* Com. 11 Leigh, 633; Tooel *v.* Com. Ibid. 714. See Martin *v.* Com. 2 Leigh, 745. A similar result, in a later case, was reached, where one of the jurors, during the progress of a capital case, left his fellow-jurors for a few moments during the night, and then, without meeting any stranger, returned. Thompson's case, 8 Grat. 638; S. P., State *v.* Cucuel, 2 Vroom (N. J.), 249. See supra, §§ 718–9. And in the same State, where the jury, in another case, were placed at night upstairs, in a tavern, in five lodging-rooms, which were separated from each other by a passage, into which they all opened, the doors of the lodging-rooms being generally open, but the door of the passage being constantly closed, it was held that the disposition of the jury had been in compliance with law. Kennedy *v.* Com. 2 Va. Cas. 510.

In *Tennessee*, it has been determined that where there is an unauthorized separation of a jury for fifteen or twenty minutes, it is not necessary for the prisoner to prove that they were during their absence tampered with; it is sufficient if they might have been. M'Lain *v.* State, 10 Yerg. 241; Jarnagin *v.* State, 10 Yerg. 529; though see Stone *v.* State, 4 Humph. 27. Where, however, it was affirmatively shown that no communication with other persons was had, a new trial was refused. Hines *v.* State, 8 Humph. 597. In felonies, however, a separation from day to day, even with the prisoner's consent, vitiates the verdict. Wiley *v.* State, 1 Swan (Tenn.), 256.

In *Louisiana*, it is said that in all criminal cases the separation of the jury, though by leave of the court, and with the consent of the accused and his counsel, will vitiate the verdict, if such separation take place after the evidence had been closed, and the charge given. State *v.* Populus, 12 La. An. 710. See State *v.* Evans, 21 La. An. 321.

In *Minnesota*, when the court, after charging the jury, gave them a recess of five minutes, in which they were allowed to leave the court-room and go at large, without being in charge of an officer, and without objection from either side, this was held to be ground for a new trial. State *v.* Parrant, 16 Minn. 178.

New York. — Irregular Reception of Evidence, or Conversing with Strangers on the Case, fatal, but mere Separation not by itself sufficient Ground. — In New York, mere separation, without permission, appears formerly to have been considered *primâ facie* evidence of misbehavior. See Spencer, Ch. J., 18 Johnson, 218. But the better opinion now is, that, to vitiate the verdict, reasonable suspicion of abuse must exist. Horton *v.* Horton, 2 Cowen, 589; People *v.* Douglass, 4 Cowen, 26; Oliver *v.* Trustees, 5 Cowen, 284; People *v.* Ransom, 7

no cause for setting aside a verdict of conviction; especially in the case at bar, where the separation was so momentary, that

Wend. 423; People *v.* Bebee, 5 Hill (N. Y.), 32. "The conclusion from these cases," said Sutherland, J., "appears to me to be this: that any mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jury themselves, will not be a sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court are satisfied that the party complaining has not, and could not, have sustained any injury from it." People *v.* Ransom, 7 Wend. 423. But where a jury, empanelled to try a prisoner upon an indictment for murder, were allowed to leave the court-house during the trial, under the charge of two sworn constables, and, having left the court-house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some with them on their return, and drank spirituous liquor, though not enough to affect them in the least, and one of them conversed with strangers on the subject of the trial; it was held, that though the mere separation was not, in itself, fatal, the drinking of spirituous liquor, and the conversing on the case, were sufficient reasons for a new trial. People *v.* Douglass, 4 Cowen, 26. After the evidence in a trial for murder had all been submitted, six of the jury, leaving their fellows, went, under the charge of an officer, on a walk for exercise, in the course of which they visited and viewed the premises where the homicide was alleged to have been committed, and returned after an absence of an hour. No person had been permitted to speak to them, and no improper conduct had taken place. But after conviction and sentence this was ruled to be good ground for a new trial. Eastwood *v.* People, 3 Parker C. R. 25; S. C., 14 N. Y. 562. See supra, § 707.

In the same State it has been held that on the record alone it is not error in law, in a capital trial, for the judge, with the assent of the prisoner, to permit the jury to separate from time to time before the charge is given to them, and they retire to deliberate upon their verdict. Ibid.; Stephens *v.* People, 19 N. Y. 549. But the consent of a prisoner to his trial by less than a full jury of twelve is a nullity, and a conviction thereby produced is illegal. Ruloff *v.* People, 18 N. Y. 179. See supra, § 733.

In New Hampshire, Connecticut, North Carolina, Indiana, and Missouri, something beyond mere Separation must be shown. — In New Hampshire, after a review of the authorities, the more liberal rule was adopted; it being determined that it is necessary to show something more than mere separation to set aside the verdict (State *v.* Prescott, 7 N. H. 290); and the same course appears to be pursued in Connecticut (State *v.* Babcock, 1 Conn. 401), in North Carolina (State *v.* Miller, 1 Dev. & Bat. 500; see 1 Hayw. 238), and in Indiana. Wyatt *v.* State, 1 Blackf. 257; Porter *v.* State, 2 Carter, 435; Creek *v.* State, 24 Ind. 151. In this State a statute exists permitting separation during trial and before submission of the case. Evans *v.* State, 7 Ind. 271. The same view is taken in Missouri. State *v.* Brannon, 45 Mo. 329; State *v.* Dougherty, 55 Mo. 69.

In South Carolina, Separation is at Discretion of Court. — In South Carolina, the jury, it is said, are not required to remain together even after they are charged, though the case be

any tampering with the jurors was hardly possible.[1] In another case, in empanelling a jury for trial on an indictment for felony, capital (State *v.* McKee, 1 Bailey, 651); and it is ruled that it is within the sound discretion of the presiding judge to allow a juror to leave the jury-box for a brief time, even during the trial of a capital case. State *v.* McElmurray, 3 Strobh. 33.

In Mississippi, Burden on Prosecution to disprove Impropriety. — In Mississippi the tendency of authority is to set aside a verdict after separation, unless it affirmatively appear there was nothing communicated to the jury on the subject of the trial. McCann *v.* State, 9 Sm. & Mars. 465; Nelms *v.* State, 13 Ibid. 500; Boles *v.* State, 13 Ibid. 398; Hare *v.* State, 4 How. (Miss.) 194; Browning *v.* State, 33 Miss. 48.

Where one of the jury, pending the trial, being at the window of the court-room, called to a person in the street and asked him to request his (the juror's) wife to send him his supper, to which the person thus addressed replied that "he would," and the supper was sent, as requested, and the person who brought it came into the room where the jury were confined, but was not permitted to deliver it to the juror, the officer in charge of the jury receiving it from his hands, and delivering it to the juror; and it appeared that the officer also kept the person who brought the supper on the opposite side of the room, sixty feet from the jury, while the supper was being eaten, and the officer also testified that nothing passed between the juror and the person addressed by him in the street, except what is above stated; and that to his knowledge the jury conversed with no one; it was held, that there was no improper tampering with, or sinister influence brought to bear on, the jury, and there was no cause for setting aside the verdict. Ned *v.* State, 33 Miss. 364.

In *Ohio*, by the Code of Criminal Procedure, §§ 164, 165, "in the trial of felonies, the jury shall not be permitted to separate, after being sworn, until discharged by the court. In the trial of misdemeanors, they shall not be permitted to separate after receiving the charge of the court, until discharged." See Davis *v.* State, 15 Oh. 72; Hurley *v.* State, 6 Oh. 399; Poage *v.* State, 3 Oh. St. 229; Dobbins *v.* State, 14 Oh. St. 493. Supra, § 505.

In *Illinois* and *Arkansas*, in case of separation, the burden is said to be on the prosecution to show that the defendant was not prejudiced by the separation. Jumpertz *v.* State, 21 Ill. 375; Russell *v.* People, 44 Ill. 508; Adams *v.* People, 47 Ill. 376; Cornelius *v.* State, 7 Eng. (Ark.) 782.

In *California*, it was once said that if a juror, in a criminal trial, separate without leave of the court, though with the prisoner's consent, and if the separation was such that he might have been improperly influenced by others, the verdict will be set aside. People *v.* Backus, 5 Cal. 275. This decision, however, was declared in 1861 to go "to the verge of the true rule, if not beyond;" and where the jurors separated for the purposes of nature, and it was in evidence that no one communicated with them during this momentary separation, the Supreme Court refused to set aside the verdict. People *v.* Bonney, 19 Cal. 426. And subsequently it was decided that separation without permission

[1] McFadden *v.* Com. 23 Penn. St. 12.

eight were elected and sworn, and three elected but not sworn; one, who had been sworn, separated from the rest, went some miles off and stayed some hours; the other ten were put in charge of the sheriff, to be kept together and separate from other persons, till the ensuing morning; the absconding juryman was taken the same night, and placed in the same room with the other jurymen till next morning; but there appeared to have been no conversation on the subject of the prosecution; the next morning, by allowance of the court, this juryman was challenged by the prisoner for cause, and set aside, and the jury was then completed. On a motion for a new trial, after conviction, it was held that the separation of the absconding juryman from his

does not vitiate a verdict, if it be shown that no injury resulted thereby to the defendant. People *v.* Symonds, 22 Cal. 348.

In *Georgia*, in the progress of a trial which lasted several days, upon the adjournment of the court at night the jury were committed to the sheriff, to be kept until next day. The most convenient and suitable accommodation which could be provided for the jury was in the third story of a large hotel, where they were placed in five different rooms opening upon a common passage, which communicated with the street below by flights of stairs, — the doors of their chambers being unlocked during the night, the jurors being unwilling to have them locked, from apprehension of fire during the night, and there being no doors or other fastenings at either end of the passage. It was held that this was not separation of the jury for which the prisoner was entitled to a new trial. Roberts *v.* State, 14 Ga. 8. See also Burtine *v.* State, 18 Ga. 534; Epps *v.* State, 19 Ga. 102. And so, also, where in the morning, before the court met, the jury were walking out, accompanied by the sheriff, for relaxation and exercise, and passed the boundary line separating the county in which the trial is progressing from an adjoining county, and remained in the adjoining county a few minutes, but there was no separation, conversation, or communication with any one, by any of the jurors. Ibid. See State *v.* Perry, 1 Busbee, 330. And so where the jury, through inadvertence, separated and mingled with the crowd, it being proved that no improper communications were made to them. Roberts *v.* State, 14 Ga. 8.

So, in the same State, the jury having come in with a verdict in a capital case, the court inquired if the defendant's counsel would poll the jury, and then if he knew any reason why the verdict should not be received, to both which he replied in the negative. After the verdict was delivered, and the jury dismissed and dispersed, but within ten minutes, the court, remembering that the jury had not been called over each by name before the verdict was delivered, had them reassembled, an oath administered, and each juror sworn that he was in the box when the verdict was delivered, that he heard it read, that it found the defendant guilty of murder, and that he agreed to it. It was held that there was no ground for a new trial. Mitchell *v.* State, 22 Ga. 211. See supra, § 751.

fellows, and his subsequent association with them, though he was afterwards struck from the panel, did not vitiate the verdict, and was no good reason for a new trial.[1] Yet in all cases jurors, after being sworn, should be directed by the court to hear or read nothing on the subject of the case.

In misdemeanors jury may separate during trial.

§ 817. In misdemeanors there is no difficulty in practice in permitting the jury to separate during the trial. Thus, in a case which has been generally followed in this country, on a motion for a new trial, after conviction for conspiracy, it appeared that the trial had lasted two days; that on the first day the court sat from the morning till eleven o'clock at night; and that on the adjournment the jury separated, going to their several homes, and returned the next morning. The separation was without the knowledge of the defendant and his counsel, and without the consent of the court. It was held, however, not to constitute ground for disturbing the verdict of guilty which the jury rendered.[2]

[1] Tooel *v.* Com. 11 Leigh, 714. Supra, § 518.

[2] "I am of opinion," said Abbot, C. J., "that there is no sufficient foundation for the present application. The application is grounded upon the suggestion of these two facts: First, that the jury had dispersed during the night. Secondly, that the fact was not known to the defendants until after the trial was over. Now, the trial began between nine and ten in the morning; it had proceeded until eleven o'clock at night, or later, before the evidence on the part of the prosecution was closed. Learned counsel were employed separately, for several defendants. It must be assumed, that in that stage of the case evidence would be laid before the jury on the part of the defendants. It became matter, therefore, of necessity, that the trial should be adjourned, and an adjournment, accordingly, took place from the necessity of the case, the jury being fatigued both in mind and body; and it would have been most injurious to the case of the defendants, even if the judge and jury had had strength enough to go on till the trial came to a close; I say, most injurious to the case of the defendants, if their case was heard by persons whose minds were exhausted with fatigue, as it would have been if an adjournment had not taken place. An adjournment of this nature is not necessarily followed by the dispersion of the jury, for in many cases they are kept together till the final close of the trial. But I am of opinion that, in a case of misdemeanor, their dispersion does not vitiate the verdict; and I found my opinion upon the admitted fact that there are many instances, of late years, in which juries, upon trials for misdemeanors, have dispersed and gone to their abodes, during the night for which the adjournment took place, and I consider every instance in which that has been done to be proof that it may be lawfully done. It is said that in some of those instances the

§ 818. Even in felonies less than capital the jury are generally permitted to separate at the adjournments of the court until the period when, at the close of the trial, the case is finally committed to their charge. After this, they must remain together until they agree, or until they are discharged by the court.[1]

And so in felonies less than capital.

§ 819. Separation, after the jury are sworn and the case opened, has in capital cases been considered a ground for new trial, even without any evidence that the jury were communicated with concerning the case;[2] and if

But not generally in capital felonies.

adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion that that can make no difference. I think the consent of the defendant, in such case, ought not to be asked; and my reason for thinking so is, that if that question is put to him, he cannot be supposed to exercise a fair choice in the answer he gives, for it must be supposed that he will not oppose any obstacle to it; for if he refuses to accede to such an accommodation, it will excite that feeling against him which every person, standing in the situation of a defendant, would wish to avoid. I am also of opinion, that the consent of the judge would not make, in such case, that lawful which was unlawful in itself; for if the law requires that the jury shall, at all events, be kept together until the close of a trial for misdemeanor, it does not appear to me that the judge would have any power to dispense with it. The only difference that can exist between the fact of the jury separating, with or without the approbation of the judge, as it seems to me, is this: that if it be done without the consent or approbation of the judge, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation. But though it may be a misdemeanor in them to separate without his consent, it will not avoid the verdict, in a case of this kind, as it would if the law required the jury to be absolutely kept together. It seems to me, that the law has vested in the judge the discretion of saying whether or not, in any particular case, it may be allowed to the jury to go to their own homes, during a necessary adjournment throughout the night. For these reasons, it appears to me that there is no ground for the present application; and, I conceive, we ought not to give any reason to suppose that any doubt exists, when none really exists in our minds." R. *v.* Woolf, 1 Ch. R. 401. See Ex parte Hill, 3 Cowen, 355; Wyatt *v.* State, 1 Blackf. 25; State *v.* Miller, 1 Dev. & Bat. 500; State *v.* Carstaphen, 2 Hayw. 238. In Indiana such separation is allowed in all cases by statute. Evans *v.* State, 7 Ind. 271.

[1] Com. *v.* Tobin, 125 Mass. 203; McCreary *v.* Com. 29 Penn. St. 323. Otherwise in Ohio by statute. See supra, § 815, note.

[2] Peiffer *v.* Com. 15 Penn. St. 468; Wesley *v.* State, 11 Humph. 502; where it was said that the irregularity could not be cured by the prisoner's consent. Compare Quinn *v.* State, 14 Ind. 589; Jumpertz *v.* People, 21 Ill. 375; Woods *v.* State, 43 Miss.

the object is to exclude tampering, such a precaution is as necessary *before* as *after* the final committal of the case. Yet lately a laxer practice has arisen, based on the difficulty of keeping juries together, without sickness or great business inconvenience, during protracted trials; and cases are not unfrequent in which, even on capital issues, juries have been permitted to separate at the adjournments of the court, down to the period in which the case is finally committed to their deliberation.[1] Nor can it be denied that there is growing reason for the acceptance of this view. No juries composed of right materials can be kept together day and night during the trial of a case which lasts for days if not for weeks, without great discomfort and risk to themselves, and positive damage to the business community. We have, therefore, to decide between one of three courses. We must go on with a case, according to the old English fashion, day and night, until it terminates; or we must make up our juries from idlers, if not vagrants, whose seclusion will be no public loss, and perhaps not much inconvenience to themselves; or, if we summon business and family men charged with other duties, and thus competent to decide difficult issues, we must permit such adjournments and separations during trial as will preserve the health and protect the business relations of the jurors. Of course stringent charge should be made in the latter case to the jurors to listen to nothing out of court on the subject of the case; and these admonitions should be followed, not only by new trials, but by severe punishment of the offending jurors, if the injunction be not obeyed.[2]

Court in such cases may adjourn from day to day.

§ 820. In cases of such sicknesses or temporary incapacities as do not permanently touch the competency of the jury, the court may adjourn the jury from day to day, until the incapacity is removed; nor is there

364; McLean *v.* State, 8 Mo. 153; State *v.* Frank, 23 La. An. 213. Poage *v.* State, 3 Oh. St. 229, may be cited under Ohio statute.

[1] State *v.* Babcock, 1 Conn. 401; State *v.* Feller, 25 Iowa, 67; State *v.* Anderson, 2 Bailey, 565; State *v.* McKee, 1 Bailey, 651; State *v.* Ryan, 13 Minn. 370. See Eastwood *v.* People, 3 Park. C. R. 25; Stephens *v.* People, 19 N. Y. 549; State *v.* McElmurray, 3 Strobh. 33. The question of consent is discussed supra, § 733.

[2] Striking remarks on this point of Strong, J., are reported in Stephens *v.* People, 19 N. Y. 550.

any reason to doubt that, with the limitations hereinafter expressed, the jury, due caution being given them by the court, may be permitted to separate. On this point may be studied the remarks of Judge Story, in a case where the principal witness for the prosecution refusing to testify, the case was brought to a stand-still, whereupon the court, on motion of the district attorney, discharged the jury, and remanded the case for another trial. "In misdemeanors," said the learned judge, "there is certainly a larger discretion, and, until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose that, in the course of the trial, the accused should be reduced to such a situation as to be totally incapable of vindicating himself, shall the trial proceed, that he be condemned? Suppose a juryman taken suddenly ill, and incapable of attending to the cause, shall the prisoner be acquitted? Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared that on Lee's testimony depended a conviction or acquittal, would it be reasonable that the cause should proceed? Lee may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion that the government is not bound to proceed, but that the case be suspended until the close of the term, that we may see whether the witness will not consent to an examination." [1] From the printed report it does not appear that the order of court was that the jury should be *discharged*, but merely that the case should be *postponed*. And what has just been quoted applies to a mere motion to adjourn the trial.

In England short adjournments have been permitted to enable a witness to be instructed as to the nature of an oath; [2] but in felonies it is said that the judge has no power even to order an adjournment from day to day on account of absence of prosecutor or witnesses.[3] It is otherwise, however, when a juror or

[1] U. S. *v.* Coolidge, 2 Gallison, 364. See also U. S. *v.* Haskell, 4 Wash. C. C. 402; State *v.* Bullock, 63 N. C. 570; and see supra, §§ 508, 723 *et seq.*

[2] See Whart. Crim. Ev. §§ 371 *et seq.*

[3] R. *v.* Tempest, 1 F. & F. 381; R. *v.* Parr, 2 F. & F. 861; R. *v.* Robson, 4 F. & F. 360; R. *v.* Perkins, Ld. Raym. 64.

prisoner is taken so ill as to be unable to proceed with the trial.[1]

§ 821. *Summary of Law as to Separation of Jurors after the Final Commitment to them of the Case.* — 1. Separation of the jury, in a capital case, after they have been sworn and empanelled, in such a way as to expose them to tampering, may be ground for a new trial. The authorities, however, differ as to whether, (1.) This ground is absolute; or, (2.) *Primâ facie*, subject to be rebutted by proof from the prosecution that no improper influence reached the jury; or, (3.) Merely contingent, upon proof to be offered by the defence that a tampering really took place.

Conflict of opinion as to whether separation after committal of case is permissible.

§ 822. (1.) Among those holding the *first* view, the courts of Pennsylvania, Louisiana, Mississippi, and Tennessee take, at least in capital cases, the most extreme position, they maintaining that even consent of prisoner cannot, in such cases, cure a separation.[2]

Courts holding such separation fatal.

§ 823. (2.) That such separation, in a capital case, is *primâ facie* ground for a new trial, subject to be rebutted by proof from the prosecution that no improper influence reached the jury, is the position generally taken by the American courts.[3]

Courts holding such separation only *primâ facie* ground.

§ 824. (3.) There are, however, cases in which it has been held that separation of the jury is only ground

Courts holding such sepa-

[1] Supra, § 508.

[2] Peiffer *v.* Com. 15 Penn. St. 469; Wesley *v.* State, 11 Humph. 502; Wiley *v.* State, 1 Swan, 256; Woods *v.* State, 43 Miss. 364. See supra, §§ 518, 783. Compare Com. *v.* McCaul, 1 Va. Cas. 271; Overbee *v.* Com. 1 Robins. Va. 756; McLean *v.* State, 8 Mo. 153. In Early *v.* State, 1 Tex. Ap. 248, it was held that even a separation (without consent) caused by a fire burning the hotel where the jury were confined, vitiates the verdict, though the jurymen all swore that they heard nothing from outside as to the case.

[3] State *v.* Prescott, 7 N. H. 291; Com. *v.* Roby, 12 Pick. 496; State *v.* Babcock, 1 Conn. 401; State *v.* O'Brien, 7 R. I. 337; People *v.* Douglass, 1 Cow. 26; Eastwood *v.* People 3 Park. C. R. 25; S. C., 14 N. Y. 562; State *v.* Cucuel, 2 Vroom, 249; Philips *v.* Com. 19 Grat. 485; State *v.* Tilghman, 11 Ired. 514; Cohron *v.* State, 20 Ga. 752; Caleb *v.* State, 39 Miss. 721; Jumpertz *v.* People, 21 Ill. 373; Reins *v.* State, 30 Ill. 256; Creek *v.* State, 24 Ind. 151; Maher *v.* State, 3 Minn. 444; Rowan *v.* State, 30 Wis. 132; State *v.* Dolling, 37 Wis. 396; Hines *v.* State, 8 Humph. 597; Cornelius *v.* State, 7 Eng. (Ark.) 732; Madden *v.* State, 1 Kans. 340; People *v.* Symonds, 22 Cal. 348; reviewing People *v.* Backus, 5 Cal. 275.

ration fatal only where there is proof of tampering.

for new trial when sustained by proof of tampering, the burden of which is on the defendant.[1] It is further held that such separation is within the discretion of the judge trying the case, not subject to revision on error.[2]

The latter view held as to misdemeanors.

§ 825. 2. In felonies not capital, and misdemeanors, it is for the defendant to prove tampering; and separation is within the discretion of the court.[3]

When irregularities may be cured by consent.

§ 826. 3. Even should separation, prior to charge of court, irregularly take place, without tampering, this, according to the preponderance of authority, may be cured by the defendant's consent.[4]

Intrusion of officer during deliberations.

§ 827. As has been already noticed,[5] the officer having charge of the jury should be duly sworn to keep them "in some convenient and private place," &c., "and not suffer any person to speak with them," &c. Should the jury be accompanied by an unsworn officer, the verdict will be set aside unless it appear affirmatively that it was not in any way influenced by the inadvertence.[6] A series of officers may be successively sworn for this purpose, to keep up the chain of attendance.[7] But it is not, in all jurisdictions, necessary that the officer should have a special jurat.[8] Nor is it ground for new trial that among the deputy sheriffs who had custody of the jury was one who was a witness on the trial for the prosecution,[9] though it has been held otherwise when the officer actually in close attendance was such a witness.[10]

[1] State v. Camp, 23 Vt. 551. See People v. Reagle, 60 Barb. 527; Medler v. State, 26 Ind. 171; Mann v. State, 3 Head (Tenn.), 373; State v. Jones, 7 Nev. 408.

[2] Sargent v. State, 11 Ohio, 472; State v. Engle, 13 Ohio, 490; Davis v. State, 15 Ohio, 72; State v. Anderson, 2 Bailey, 565; State v. McElmurray, 3 Strobh. 34. Supra, §§ 733, 814.

[3] See cases cited supra, §§ 814, 815; State v. Madoil, 12 Fla. 151.

[4] Supra, §§ 351, 518, 733.

[5] Supra, § 738.

[6] McIntyre v. People, 38 Ill. 514; Wilhelm v. People, 72 Ill. 468; Brucker v. State, 16 Wis. 333; Luster v. State, 11 Humph. 169; Hare v. State, 4 How. (Miss.) 187; McCann v. State, 9 S. & M. 465; though see Trim v. Com. 18 Grat. 983.

[7] Wormeley's case, 8 Grat. 712. See Com. v. Jenkins, Thach. C. C. 118.

[8] Davis v. State, 15 Ohio, 72; Stone v. State, 4 Humph. 27.

[9] Read v. Com. 22 Grat. 924. See infra, § 835.

[10] State v. Snyder, 20 Kans. 306; McElrath v. State, 2 Swan, 378. Infra, § 850.

The irregular intrusion even of a legally qualified officer on the deliberations of the jury may be a ground for new trial.[1]

§ 828. The jury are entitled to take out with them such papers and instruments of evidence as have been admitted in the case, provided all asked for are sent out, and the action of the court in this respect be at the close of the trial, in open court, and before the parties.[2] Should the jury receive any material paper or other article, likely to affect their deliberations, which has not been put in evidence,

Improper reception of materials of proof ground for new trial.

[1] People *v.* Knapp, Sup. Ct. Mich. 1879. In this case Cooley, J., said: —

"It is not claimed that the officer can with propriety be allowed to be within hearing when the jury are deliberating. Whether he does or does not converse with them, his presence to some extent must operate as a restraint upon their proper freedom of action and expression. When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every case, and the jury sent out as of course where they do not notify the court that it is not needful. The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out. And if any one may be present, why not several? Why may not the officer bring in his friends to listen to what must often be interesting discussions, and then defend his conduct on proof that they did nothing but listen?

"But the circumstances of particular cases may make it specially mischievous. In their private deliberations the jury are likely to have occasion to comment with freedom upon the conduct and motives of parties and witnesses, and to express views and beliefs that they could not express publicly without making bitter enemies. Now the law provides no process for ascertaining whether the officer is indifferent and without prejudice or favor as between the parties; and as it is admitted he has no business in the room, it may turn out that he goes there because of his bias, and in order that he may report to a friendly party what may have been said to his prejudice, or that he may protect him against unfavorable comment through the unwillingness of jurors to criticise freely the conduct and motives of one person in the presence of another who is his known friend. Or the officer may be present with a similar purpose to protect a witness whose testimony was likely to be criticised and condemned by some of the jurors."

This, however, goes too far. There are many cases in which officers in charge are necessarily in attendance during the jury's deliberations. Such attendance should only be ground to set aside the verdict when it interferes with freedom of deliberation, or when the officer is shown to have a bias in the case, or, as has been seen, not to have been duly qualified.

[2] Rainforth *v.* State, 61 Ill. 365.

this, if leading to a conviction, will be a cause for setting aside the verdict.[1]

In another volume[2] will be found an enumeration of the cases in which the jury are permitted to inspect articles material to the issue. If this be done out of court, in the absence of the defendant, it is a fatal irregularity. Hence, experiments by a jury with old boots to see whether they would make tracks of a particular kind, such experiments being out of court, and without leave of court, will vitiate a conviction.[3] But it is otherwise when the court grant leave, in the presence of parties, to take out the articles in question. Thus it is no ground for a new trial that the court permitted the jury to take out a bottle of ale which was a part of the ale whose manufacture was the subject of the trial.[4] But it is settled that a verdict will be set aside when the jury, during their deliberations, receive a paper of any character, not in evidence, calculated to lead them to the verdict they render.[5] It is otherwise where a paper, without the action of the successful party, finds its way into the jury-box, but is not read by the jury.[6]

[1] Supra, § 729; Co. Lit. 227; 2 Hale P. C. 306; R. v. Sutton, 4 M. & S. 532; Whitney v. Whitman, 5 Mass. 405; Com. v. Edgerly, 10 Allen, 184; Yates v. People, 38 Ill. 527; Atkins v. State, 16 Ark. 568; People v. Page, 1 Idaho, 114.

[2] Whart. Crim. Ev. § 312.

[3] State v. Saunders, 68 Mo. 120.

[4] State v. McCafferty, 64 Me. 223. As to what papers go out see Udderzook v. Com. 76 Penn. St. 340.

Where the solicitor for the plaintiffs, after the evidence was concluded, delivered a bundle of depositions to the jury, a portion of which were not in evidence, the verdict for the plaintiffs was set aside, though the jury swore that they had not opened the bundle. 2 Hale P. C. 308.

[5] Vicary v. Farthing, Cro. Eliz. 411; Lonsdale v. Brown, 4 Wash. C. C. 148; Hackley v. Hastee, 3 Johns. 252; Sheaff v. Gray, 2 Yeates, 273; Alexander v. Jamieson, 5 Binn. 238; Com. v. Landis, 34 Leg. Int. 204; 8 Phila. 453; State v. Tindall, 10 Richards. 212; State v. Taylor, 20 Kans. 643.

[6] Hix v. Drury, 5 Pick. 296; Com. v. Edgerton, 10 Allen, 184.

It has been held that a new trial will not be granted after conviction in a capital case merely because the jury, during their deliberations, became possessed of and read a newspaper, containing a report of the trial, but no comments thereon which could prejudice the prisoner; nor because they had the statute defining the offence under trial before them during their deliberations. People v. Gaffney, 14 Abb. Pr. R. (N. S.) 36. It is otherwise where the reports are imperfect. Walker v. State, 37 Tex. 366. See Wilson v. People, 4 Park. C. R. 619.

In Farrar v. State, 2 Oh. St. 54,

§ 829. The old rule was that if a jury send for a book, on their own motion, after they have retired, and read it, their verdict is avoided;[1] and this distrust has been extended so far as to withhold from the jury treatises on law which both parties consent to permit the jury to read. Thus on one occasion, Lord Tenterden, though the counsel on both sides consented, refused to send out to the jury, on their request, a copy of Selwyn's Law of Nisi Prius, observing that the proper course for the jury to adopt was for them to come into court, state their question, and receive the law from the court.[2] The reception by the jury, without application to and consent of the court, of the statutes bearing on the case, has been held ground for setting aside a verdict of conviction.[3]

So of irregular reception of books.

§ 829 *a*. Does the reception by the jury of a report of the evidence avoid the verdict? It certainly does not when the jury do not read the paper, or read only collateral matters from the same paper not relative to the case. Thus where the officers attending upon the jury, under a mistake of duty, permitted them to read the newspapers, the officers first inspecting them, and cutting out everything that in any manner related to the trial; and it appeared that, in point of fact, the jurors never saw anything in any newspaper relative to the trial, and after the charge from the court were not allowed to see any until after they had delivered their verdict; it was held, by Judge Story, that this was an irregularity in the officers, but not

So of reception of reports of evidence.

where a jury, without the knowledge or aid of any one, procured a part of a newspaper containing the charge of the judge in the cause, and used it to guide their deliberations, although the report was accurate, the verdict was set aside.

[1] Vin. Abr. pl. 18; Co. Lit. 227. See Farrar *v.* State, 2 Oh. St. 54.

[2] Burrows *v.* Unwin, 3 C. & P. 310.

In a case of treason, before Wilson, Blair, and Patterson, Justices, in the U. S. Circuit Court, the jury, as is stated by Mr. Dallas, were permitted, with consent of parties, to take with them Foster's Crown Law, and the Acts of Congress. U. S. *v.* Vigol, 2 Dallas, 347; Whart. State Tr. 176.

The Supreme Court of Louisiana, in 1871, in a case where the allegation was that the jury, in considering their verdict, were allowed by the trial judge, "to have in their room Wharton's Crim. Law, to consult in relation to their verdict," declared "that we see no force in the point." State *v.* Tally, 23 La. An. 678.

[3] State *v.* Kimball, 50 Me. 509; State *v.* Patterson, 45 Vt. 308; State *v.* Smith, 6 R. I. 33. See Merrill *v.* Navy, 6 R. I. 33; but see *contra*, People *v.* Gaffney, 14 Abb. Pr. (N. S.) 36.

sufficient to justify the court in setting aside a verdict and granting a new trial, or treating the matter as a mistrial.[1] But where the jury, on their own motion, obtain, after they retire, a report of the judge's charge, which they use to guide their deliberations, this, as has been seen, has been held ground to set aside a verdict of conviction.[2] But it has been ruled that the mere fact of a jury becoming possessed, after retiring, of an accurate newspaper report of the evidence, without any comments thereon, is not ground to set aside the verdict;[3] though it is otherwise when the report is imperfect.[4]

And so of irregular communication of court.

§ 830. It is irregular even for the trial judge, after the jury have retired, to confer with them except in the presence of the parties; and if any communication is so made by him to them, in any way calculated to prejudice the defendant, this will avoid the verdict.[5] Whatever, as to the merits, passes from the judge to the jury, should be in the presence of the parties, open to their correction at the time, and to exception, so that it may be open to a revisory court. It has therefore been held that the sending in by the judge of a prior written charge to a grand jury will avoid the verdict;[6] and the same result was reached where the judge, after the jury had retired, and had declared that they were unable to agree, told the jury that the case was a peculiar one, and that he had reason to believe they had been tampered with;[7] and where, as we have seen, the jury obtained possession of a part of a newspaper containing the charge or part of the

[1] U. S. *v.* Gibert, 2 Sumn. 21.

[2] Farrar *v.* State, 2 Oh. St. 54.

[3] People *v.* Gaffney, 14 Abb. Pr. R. (N. S.) 36. See Gilson *v.* People, 4 Park. C. R. 619.

[4] Walker *v.* State, 37 Tex. 366.

[5] See supra, § 547; Sargent *v.* Roberts, 1 Pick. 337; Com. *v.* Ricketson, 5 Met. (Mass.) 412; Hall *v.* State, 8 Ind. 439; Hoberg *v.* State, 3 Minn. 262; Crawford *v.* State, 12 Ga. 142; State *v.* Frisby, 19 La. An. 143; State *v.* Alexander, 66 Mo. 148; Witt *v.* State, 5 Cold. (Tenn.) 11; Taylor *v.* State, 42 Tex. 504.

[6] Holton *v.* State, 2 Fla. 476. Judge Edmonds, on a trial for murder, sent word to a jury, who had applied to him for a law book on manslaughter, that they "had nothing to do with manslaughter." This was communicated to them by the officer in the absence of counsel, but was held not sufficient ground for a new trial. But see People *v.* Carnal, 1 Park. C. R. 256, 262, 676; S. C., 2 Park. C. R. 777-9.

[7] State *v.* Ladd, 40 La. An. R. 271.

charge of the judge on the issue before them.[1] It is not, however, ground to set aside the verdict that the judge, in presence of counsel on both sides, charged the jury a second time upon matters of evidence, after they returned to court, stating they could not agree, but without request for further instructions;[2] and so where, after the jury had retired to consult on their verdict they sent a note in writing to the court, in absence of parties and counsel, requesting advice on certain points in the case, and the judge returned the writing without reply, and directed the officer to hand a volume of reports to the foreman, and to request him to read a part of a decision, to the effect that a jury in such circumstances could not communicate with the judge except in open court.[3] And a new trial was refused when the court, after the jury retired, read evidence to them in the absence of the prisoner and his counsel,[4] and where, under similar circumstances, the judge, in the absence of defendant's counsel, read to the jury an opinion from a volume of reports as to the importance of juries harmonizing.[5] But such precedents should not be extended so as to permit an opinion bearing on the merits to be given by the judge to the jury in the absence of the defendant.[6]

And so of conversing with others, and reception of information as to the case.

§ 831. It is well settled that if a jury, after they are sworn in a case, and before its sealing for rendition, hear other testimony than that rendered in the case, or converse with strangers on the subject of the case, it will vitiate the whole procedure.[7] But where the jury had retired to consider on their verdict, and afterwards came into court, on their own motion, to ask explanations from a witness, who stated an additional and important fact, not before stated by him, but which fact the court immediately told the jury they were to disregard; it was held, that the affidavit of a juror stat-

[1] Farrar *v.* State, 2 Oh. St. 54.

In Florida (Dixon *v.* State, 13 Fla. 636), it is held not to be error to permit the jury to take out the whole (otherwise as to part) of the written charge of the court.

[2] Com. *v.* Snelling, 15 Pick. 321. See Crawford *v.* State, 12 Ga. 142.

[3] Com. *v.* Jenkins, Thacher's C. C. 118.

[4] Jackson *v.* Com. 19 Grat. 656; *contra*, Wade *v.* State, 12 Ga. 25.

[5] State *v.* Pike, 65 Me. 111.

[6] Supra, § 547.

[7] Perkins *v.* Knight, 2 N. H. 474; Knight *v.* Freeport, 13 Mass. 218; State *v.* Tilghman, 11 Ired. 513. Infra, § 851. As to English practice, see R. *v.* Martin, L. R. 1 C. C. 378; and see supra, §§ 721–9.

ing that he founded his verdict entirely upon this additional fact, would not authorize a new trial.[1]

And so of presence of party.

§ 832. But the mere presence of a party to the cause exercises such undue influence as to vitiate the procedure.[2] Thus where it appeared that the prosecutor had been in the room with the jury during their deliberations, it was held ground for new trial, though he was acting officially as high sheriff, and though there was no misconduct shown.[3] But this is not to be stretched so far as to require a new trial because one of the deputy sheriffs, having charge of the jury, is called as a witness in the case.[4]

And so of testimony submitted by juror or others.

§ 833. If any testimony material to the issue be acted on by the jury, without having been previously submitted in evidence, but be communicated to the jury by one of their number, it will avoid the verdict.[5] Thus verdicts have been set aside where an unsworn by-stander, during the trial, stated to one of the jury that the testimony of a witness under examination was true,[6] and where the sheriff handed to the jury, while deliberating, loose papers, purporting

[1] Hudson *v.* State, 9 Yerger, 408. See State *v.* Noblett, 2 Jones Law (N. C.), 418.

Where a medical witness for the Commonwealth, being accidentally present at the hotel when the jury were brought there by the sheriff to be lodged for the night, invited the jury in the presence of the sheriff to drink with him, and some of them accepted the invitation, it was ruled that as this act was inadvertent, but intended only as an act of courtesy, and as it was all in the presence of the sheriff, it was not sufficient to set aside the verdict. Thompson's case, 8 Grat. 638. Nor is it any ground for a new trial that the jury passed through crowds of people going to the hotel where they dined, or that they dined at the public table at the hotel, under the charge of their officer, no one speaking to, or tampering with them. Jumpertz *v.* People, 21 Ill. 275; Adams *v.* People, 47 Ill. 376; Howe *v.* State, 1 Humph. 491; Browning *v.* State, 33 Miss. 47. Nor does the visiting of the jury by a stranger, with reasonable refreshments, under the supervision of the officer in charge, vitiate the verdict, no conversation as to the case having taken place. Com. *v.* Roby, 12 Pick. 496.

[2] Odle *v.* State, 6 Bax. 159. See Love *v.* State, 6 Bax. 154.

[3] M'Elrath *v.* State, 2 Swan, 378.

[4] Read *v.* Com. 22 Grat. 924. But see State *v.* Snyder, 20 Kans. 306; cited supra, § 827.

[5] R. *v.* Rosser, 7 C. & P. 648; R. *v.* Heath, 18 How. St. Tr. 123; R. *v.* Sutton, 1 M. & Sel. 532, 541; State *v.* Powell, 2 Halst. 244; Howser *v.* Com. 51 Penn. St. 332; Sam *v.* State, 1 Swan (Tenn.), 61; Anschicks *v.* State, 6 Tex. Ap. 524.

[6] Dempsey *v.* People, 47 Ill. 323.

to be the evidence in the case, not knowing what the papers consisted of.[1] But it does not follow that a new trial will be ordered because the jury take into consideration general knowledge of the character of the transaction. Thus, in an indictment for a seditious libel, tending to excite public outrages, the judge referred to the personal knowledge of the jury for proof of the fact that serious riots had for some time back been occurring in the particular neighborhood, and it was held that such a reference was right, such riot forming part of the history of the country;[2] and where one of the jury communicated to his fellows mere opinions as to witnesses in the case, this has been ruled to be no ground for a new trial.[3] But the case is different where the issue is affected by the irregular submission, by one juror to the others, of material facts, connected with the merits.[4] Thus where one of the jurymen stated to his fellows, after they had retired, that he had heard a witness, whose credibility was attacked at the trial, sworn before the grand jury, and that his statement was the same as he had made on the trial, and it appeared that this statement had much influence in producing the verdict of guilty, it was held that this proceeding was illegal, and vitiated the verdict.[5]

§ 834. *Visiting the scene of the res gestae*, by a part of a jury, under an officer's charge, after the case is committed to them, is ground for a new trial.[6] It is otherwise, however, if the visit is merely casual.[7]

And so of visiting scene of offence.

§ 835. As we have seen, the inadvertent intrusion of strangers will not be cause for a new trial unless coupled with proof of communication made as to the case under trial.[8] *A fortiori* is this the case when the visitor is a qualified officer, present casually, though unsworn as to the particular issue; no interference being proved.[9] Nor is it ground for new

But not accidental intrusion of stranger.

[1] Pound *v.* State, 43 Ga. 88.

[2] R. *v.* Sutton, 4 M. & S. 532.

[3] Nolen *v.* State, 2 Head, 520. See Purinton *v.* Humphreys, 6 Greenl. 379; Price *v.* Warren, 1 Hen. & Munf. 385.

[4] Talmadge *v.* Northrop, 1 Root, 522; State *v.* Andrews, 29 Conn. 100; Martin *v.* State, 25 Ga. 494.

[5] Donston *v.* State, 6 Humph. 275.

[6] Supra, § 707; Eastwood *v.* People, 3 Park. C. R. 25; S. C., 14 N. Y. 562; Ruloff *v.* People, 18 N. Y. 179.

[7] State *v.* Brown, 64 Mo. 368; State *v.* Adams, 20 Kans. 311.

[8] Supra, § 831; Luster *v.* State, 11 Humph. 169.

[9] Supra, §§ 729, 821, *et seq.*; Trim *v.* Com. 18 Grat. 983.

trial that the jury were left for a short time unattended, no intrusion by other persons being shown.[1]

Nor casual exhibition of evidence.

§ 836. It may happen that instruments of evidence may inadvertently be seen by the jury, or remarks overheard by them, not, however, through any design on the part of the prosecution to obtain an unfair advantage, or with any effect on the jury. If on such grounds verdicts should be set aside, few verdicts would stand. In such cases, therefore, the information being communicated casually, and no effect on the jury being produced, sufficient ground for a new trial is not laid. Thus where during the trial and before verdict inadvertent remarks to the prejudice of the defendant are made by strangers in the hearing of jurymen, this will not operate to disturb the verdict if it be shown that such remarks were not promoted by the prosecution, or voluntarily entertained and weighed by the jurymen.[2] The same rule has been applied to the casual exhibition of a material paper,[3] and to other fortuitous exhibition of facts bearing on the case, but coming from strangers, and not influencing the result.[4] And there is sound reason for this distinction. If jurors are allowed voluntarily to receive and weigh evidence not rendered on trial, no case could be decided fairly. On the other hand, if casual remarks as to the case made in the presence of a juror, not in any way influencing him, should require a new trial, no case would be decided at all; for there is no case in which one of the parties could not manage to have such remarks made.

And so of the mere approach of strangers.

§ 837. It is at all events clear that, as a general rule, the accidental approach of strangers, unless improper conversation as to the case is entertained, will not avoid the verdict.[5] Thus handing five dollars casually to a

[1] People *v.* Kelly, 46 Cal. 337; State *v.* Turner, 25 La. An. 573.

[2] State *v.* Ayer, 3 Foster (N. H.), 301; State *v.* Andrews, 29 Conn. 100; State *v.* Cucuel, 31 N. J. L. (2 Vroom) 249; Hall's case, 6 Leigh, 615.

[3] State *v.* Taylor, 20 Kans. 643. Supra, § 825.

[4] Rowe *v.* State, 11 Humph. 491; Eppes *v.* State, 19 Ga. 102; Chase *v.* State, 46 Miss. 683; Stanton *v.* State, 13 Ark. 319; March *v.* State, 44 Tex. 64. Where burglars' tools, found on the defendant, were, during a recess of the court, while the cause was on the trial, exhibited, and their use explained in the presence of one of the jurors, with the knowledge of the defendant and his counsel, and no objection wsa made until after verdict, it was held that the objection was to be regarded as waived. State *v.* Rand, 33 N. H. 216.

[5] Supra, § 821; State *v.* Tilghman,

juror, in payment of a debt, by a by-stander, without any reference or connection with the case under trial, is no ground for a new trial.[1] gers, and trivial conversation.

§ 838. When, however, a communication, not on its face trivial, is shown to have been made to the jury, during their deliberations, from outside, it will be ground for disturbing the verdict unless it be shown to have in no way touched the merits of the case on trial.[2] Presumption against such communications.

§ 839. The fact that a juror was asleep or otherwise inattentive during the trial is not ground for a new trial, where it could have been a matter of exception at the time and was passed over.[3] Inattention of juror must be excepted to at time.

§ 840. Cases may occur in which a juror, by his contumacious disregard of the directions of the court, may make a new trial necessary.[4] This has been ruled to be the case where a juror, in disobedience to the repeated directions of the court, took notes of the evidence, which notes he retained.[5] But the mere taking of notes by a juror, without objection, is no ground for revision.[6] But otherwise as to disobedience to court, resulting in injury.

§ 841. In New York any indulgence in spirituous liquors, during trial, by the old rule, avoided the verdict.[7] "We cannot," declared the Supreme Court, "allow jurors thus of their own accord to drink spirituous liquor while thus engaged in the course of a cause. We are satisfied that there has been no mischief, but the rule is absolute, and does not meddle with consequences, nor should exceptions be multiplied. We have set aside verdicts in error for this cause, where the parties consented that the jury should drink."[8] This, however, is no longer held in New York,[9] though in New Hamp- Intoxication ground for new trial.

11 Ired. 513; State v. Baker, 63 N. C. 276; Rowe v. State, 11 Humph. 491; McCann v. State, 9 S. & M. 465; Ned v. State, 33 Miss. 364; Stanton v. State, 13 Ark. 317; Coker v. State, 20 Ark. 51.

[1] Martin v. People, 54 Ill. 225.

[2] Ibid.; Pope v. State, 36 Miss. 122; State v. Anderson, 4 Nev. 265; State v. Harris, 12 Nev. 414. See Hartung v. People, 4 Park. C. R. 256, 319, as reversed in 22 N. Y. 95.

[3] U. S. v. Boyden, 1 Low. 266; Baxter v. People, 3 Gilm. 386; Cogswell v. State, 49 Ga. 103.

[4] See supra, § 717.

[5] Cheek v. State, 35 Ind. 492. See supra, § 956.

[6] Cluck v. State, 40 Ind. 263.

[7] Dennison v. Collins, 1 Cow. 111; Rose v. Smith, 4 Cow. 17.

[8] Brant v. Fowler, 7 Cow. 562.

[9] Wilson v. Abrahams, 1 Hill, 207.

shire, Indiana, and Iowa, verdicts have been set aside because spirituous liquor was given to the jury during their deliberation.[1] On the other hand, Judge Story, in a capital case, held it would not avoid a verdict to show that some of the jurors drank ardent spirits during the trial, when the prisoner's counsel consented in open court to this indulgence to those whose health might require it, unless it was also shown that the indulgence was grossly abused and operated injuriously to the defendant;[2] and this view is now generally accepted.[3] Clearly, however, intoxication by any of the jury during their deliberations is ground for setting aside the verdict.[4] And so it has been held properly in Ohio, that "the separation of a juror from his fellows, after the case has been finally submitted and before they have agreed upon a verdict, for the purpose of obtaining and drinking intoxicating liquors, when not explained or shown to be excusable, is such misconduct of the juror as will entitle the prisoner to a new trial." [5]

Casting lots by jurors, or other irregularity in their consultations.

§ 842. Where the jury have cast lots, or resorted to chance in any way whatever, to determine their verdict, a new trial will be ordered in all cases in which the jurors bound themselves, before the lot, to abide by the result.[6] Where, however, such a method of determining the views of the particular jurors as to the degree is taken without any previous agreement by which the

[1] State *v.* Bullard, 16 N. H. 139; Davis *v.* State, 35 Ind. 496; State *v.* Baldy, 17 Iowa, 39; Ryan *v.* Harrow, 27 Iowa, 494. But see State *v.* McLaughlin, 44 Iowa, 82; State *v.* Bruce, 48 Iowa, 530.

[2] U. S. *v.* Gibert. 2 Sumner, 21; and see Coleman *v.* Moody, 4 H. & M. 1; Stone *v.* State, 4 Humphreys, 37. "Cider" is at all events unexceptionable. Com. *v.* Roby, 12 Pick. 496. See notes in 21 Alb. L. J. 40.

[3] State *v.* Cucuel, 31 N. J. L. (2 Vroom) 249; Com. *v.* Beale, reported Whart. Crim. Law, 7th ed. § 3320; Thompson's case, 8 Grat. 638; Creek *v.* State, 24 Ind. 151; Davis *v.* People, 19 Ill. 74; State *v.* Bruce, 48 Iowa, 530; Roman *v.* State, 41 Wis. 312; State *v.* Caulfield, 23 La. An. 148; Pope *v.* State, 36 Miss. 121; Russell *v.* State, 53 Miss. 368; State *v.* Upton, 20 Mo. 397; Kee *v.* State, 28 Ark. 155; Tuttle *v.* State, 6 Tex. Ap. 556; though see in Texas, as to capital cases, Jones *v.* State, 13 Tex. 168. A new trial, however, will be granted if a juror is "treated" by the prosecutor. Infra, §§ 849 *et seq.* See supra, § 730.

[4] Hogshead *v.* State, 6 Humph. 59. This is conceded in most of the cases cited; and see Pelham *v.* Page, 1 Eng. (Ark.) 535.

[5] Weis *v.* State, 22 Oh. St. 486.

[6] Hale *v.* Cove, 1 Strange, 642;

jurors bind themselves individually to adopt a mean result, but where each juror reserves to himself the right of dissenting, and where all, after consideration, agree to a compromise based on their individual estimates, the finding will rarely be disturbed.[1] And where one of the jury, through a mistaken sense of duty, thought he ought to assent to the views of a majority, and thereby concurred in a verdict of murder, such mistake was held no ground for a new trial.[2] The same conclusion was reached where the jury concurred in opinion as to the guilt of the prisoner, but differed as to the length of the time for which he should be sentenced to the penitentiary; and they agreed that each one should state the time for which he would send him to the penitentiary, and that the aggregate of these periods, divided by twelve, should be the verdict, and after it was done they struck off the odd months, and all agreed to the verdict, understanding what it was.[3] Nor will mistake by a juror as to the nature of the punishment, nor as to the action of the court, be ordinarily ground for revision;[4] nor is it ground that a juror believed the sentence would be commuted.[5]

Parr *v.* Seames, Barnes, 438; Mellish *v.* Arnold, Bunb. 51; Thompson *v.* Com. 8 Grat. 637; State *v.* Barnstetter, 65 Mo. 149; Crabtree *v.* State, 3 Sneed (Tenn.), 302; Leverett *v.* State, 1 Tex. L. J. 113; Birchard *v.* Booth, 4 Wis. 67. See Monroe *v.* State, 5 Ga. 85; Hilliard on New Trials (1873), 160; and compare supra, §§ 731–2.

[1] Thompson *v.* Com. 8 Grat. 637; Dooley *v.* State, 28 Ind. 239; Leverett *v.* State, 1 Tex. L. J. 113.

[2] Com. *v.* Drew, 4 Mass. 391. See Galvin *v.* State, 6 Cold. 283.

[3] Thompson *v.* Com. 8 Grat. 638.

[4] State *v.* McConkey, 49 Iowa, 499; State *v.* Shock, 68 Mo. 552.

[5] State *v.* Wallman, 31 La. An. 176.

Where, however, a juror was not satisfied of the guilt of the prisoner, but assented to a verdict of guilty under an impression (suggested by his fellow-jurors) that the governor would pardon the defendant if the jury by their verdict recommended it; it was held, in Tennessee, that this was sufficient cause to set aside the verdict. Crawford *v.* State, 2 Yerger, 60.

And so a juror's affidavit that he believed the prisoner was innocent, and that he assented to a verdict of guilty under the belief, induced by the assertions of his fellow-jurors, that there were fatal defects in the proceedings which would prevent the prisoner from being sent to the penitentiary, and that the governor would pardon the defendant if recommended to mercy in the verdict, was held in the same State sufficient to set aside the verdict. Cochran *v.* State, 7 Humph. 544. In this case, the case of Crawford *v.* State, 2 Yerg. 60, was referred to and approved. And so where the juror's affidavit was that he yielded against his judgment and conscience, because a great majority of

Otherwise as to mere collateral levity.

§ 843. But mere collateral levity on the part of the jury will be no ground to set aside a verdict, unless it appeared that such levity interfered with their deliberations.[1]

Absolute preadjudication by

§ 844. When it appears after trial that a juror had beforehand prejudged the case, but had improperly withheld this fact before acceptance, or when asked as to opinion

the jury favored the verdict. Galvin *v.* State, 6 Cold. 283. But these cases cannot be sustained without making jury trials inoperative in all cases of serious disagreement between jurors. Infra, § 847.

[1] Com. *v.* Beale, Phila. 1854. "It is further alleged," said Thompson, J., "that the jury misbehaved by singing and acting in a trifling manner while in the jury-room, and immediately before rendering their verdict. That some of the jurors displayed levity of conduct, which, when casually overheard, might have seemed unbecoming, may be perfectly true; but there is no proof that such levity attended or interfered with their deliberations. On the contrary, the evidence shows that the noises alluded to occurred after their deliberations had ceased, and while they were waiting for the arrival of the hour to which the court had adjourned. The gentlemen who happened to overhear the noise alluded to state that it continued from the time they first heard it until the jury returned to court, — showing that it was not during their deliberations, but after they had agreed. This would not, therefore, be sufficient to affect their verdict. Comparing the time at which the jury left the court with the time at which they dined, and the subsequent noise in their room, it seems probable that they had agreed on their verdict before dinner — in which case, the meat and drink used at dinner could not have affected their deliberations. For the reasons adverted to, much censure was cast upon the jury during the argument, but without the production of sufficient evidence to induce us to believe that the interests of the defendant were prejudiced by the alleged improprieties. The hearsay testimony of what one of the jurors said a day or two after the verdict had been rendered is inadmissible upon any principle whatever, and we therefore decline entirely to consider it. 'To yield to accusations against jurors, lightly made, or without strong proof,' says Judge Rogers (Com. *v.* Flanagan, 7 W. & S. 421), 'would weaken, if not bring into contempt, that useful and indispensable institution in the administration of justice.' And again he observes: 'We must not lend too ready an ear to such applications; for it is to be feared that, were we to do so as soon as the accused was convicted, the trial of jurors would begin.' The truth of these remarks is illustrated by the proceedings in the present case; and we feel ourselves bound to declare that the evidence before us is insufficient to cast upon the jury the imputation of moral turpitude or dishonest conduct." The remark of a juror, during a recess of the trial, that there was no use in taking up time in trying to humbug the jury, and the lawyer who made the shortest speech would win the case, is not such conduct as will vitiate the verdict. Taylor *v.* California Stage Co. 6 Cal. 228. See, however, Jim *v.* State, 4 Humph. 289.

on *voir dire* had given false answers, and such formation of opinion was unknown to the party at the time, a new trial will be granted.[1] And it was held a sufficient reason for a new trial that one of the jurors,

juror or judge ground for new trial when a surprise.

[1] U. S. *v.* Fries, 1 Whart. St. Tr. 606; People *v.* Bodine, 1 Denio, 281; People *v.* Vermilyea, 7 Cow. 108; Heath *v.* Com. 1 Robins. Va. 735; Com. *v.* Jones, 1 Leigh, 598; State *v.* McDonald, 9 W. Va. 456; State *v.* Strauder, 11 W. Va. 745; Parks *v.* State, 4 Oh. St. 234; Sellers *v.* People, 3 Scam. 412; Barlow *v.* State, 2 Blackf. 114; Romaine *v.* State, 7 Ind. 63; State *v.* Gillick, 7 Clarke (Iowa), 289; Presbury *v.* Com. 9 Dana, 263; Norfleet *v.* State, 4 Sneed, 340; State *v.* Hopkins, 1 Bay, 373; State *v.* Duncan, 6 Ired. 98; State *v.* Patrick, 3 Jones L. 443; Wade *v.* State, 12 Ga. 25; Ray *v.* State, 15 Ga. 223; Keener *v.* State, 18 Ga. 194; Burroughs *v.* State, 33 Ga. 403; Cody *v.* State, 3 How. Miss. 27; Lisle *v.* State, 6 Mo. 426; State *v.* Taylor, 64 Mo. 358; State *v.* Parks, 21 La. An. 251; Henrie *v.* State, 41 Tex. 573; Austin *v.* State, 42 Tex. 355; Hilliard on New Trials (1873), 174–5. And see for other cases infra, § 845. This is eminently the case when the juror procured himself to be fraudulently inserted in the panel. State *v.* Bell, 81 N. C. 591. Supra, § 495. As to challenges see supra, §§ 611 *et seq.* Where a juror, during the progress of the cause, after the evidence was opened, expressed a decided opinion as to the guilt of the defendant in the hearing of by-standers, it was held that though in so doing he was guilty of gross misconduct, it was no cause to set aside the verdict. Com. *v.* Gallagher, 4 Penn. L. J. 512; 2 Clark, 297, per Bell, President J. See State *v.* Ayer, 3 Foster (N. H.), 301; Brakefield *v.* State, 1 Sneed, 215. If the prisoner has neglected to avail himself before the trial of any of the means provided by law for ascertaining the incompetency of a juror, on account of prejudice, he will not be entitled to a new trial on the ground of such prejudice. State *v.* Daniels, 44 N. H. 383; Meyer *v.* State, 19 Ark. 156; State *v.* Anderson, 4 Nev. 265. It is enough if the defendant's counsel knew of the incapacity. State *v.* Tuller, 34 Conn. 280; but see, for a less stringent rule, Willis *v.* People, 32 N. Y. 715. On a trial in Virginia, after a verdict of conviction for murder in the first degree, the defendant adduced testimony that two of the jurors who tried the case, and who, on the *voir dire*, declared that they had not formed or expressed an opinion as to the guilt or innocence of the defendant, had, in fact, previous to the trial, expressed decided opinions that the defendant was guilty and ought to be hung, of which circumstance the defendant alleged he had no knowledge until since the verdict was rendered; and on this ground he moved to set aside the verdict. It was held by the Court of Appeals that, 1st. Such inquiry was open, and the evidence admissible, for the purpose of showing perjury and corruption in the jurors; but, 2d. It belonged exclusively to the judge who presided at the trial to weigh the conflicting credibility of the witnesses adduced by the prisoner, and of the jurors, and to decide whether, in justice to the prisoner, and upon all the circumstances of the case, a new trial ought not to be awarded. Heath *v.* Com. 1 Robins. 735. As to discharging jury upon discovery, during trial,

some time before the trial, declared "such a man as Fries (the defendant) ought to be hung, who brings on such a disturbance," of which fact, until after the trial, the defendant had no notice.[1] The same ruling under the same limitations took place where the foreman had declared that the plaintiff should never have a verdict, whatever witnesses he produced;[2] and where a juror had stated on the morning of trial that he had come from home for the purpose of hanging every counterfeiting rascal, and that he was determined to hang the prisoner at all events.[3] A qualified opinion, however, dependent on a particular state of facts, will be no ground for new trial;[4] and where a juror stated that if it was true the prisoner had made the attempt to commit the crime charged upon him, he would go to the penitentiary; it was held sufficient ground was not laid.[5] The defendant, at the same time, by omitting to examine the juryman as to bias, ordinarily is precluded from taking subsequent exception,[6] and a new trial will not be granted because of vague opinions against the prisoner existing in the minds of several of the jury in particular;[7] nor of a general excitement against him at the time of trial, in the community at large;[8] nor because the judge himself had been the author of an account of a former trial of

of such prejudice or incompetency, see supra, §§ 509, 725.

[1] U. S. v. Fries, 1 Whart. St. Tr. 606. See State v. Williams, 14 W. Va. 851.

[2] 2 Salk. 645.

[3] State v. Hopkins, 1 Bay, 373. See Ibid. 377.

[4] State v. Benner, 64 Me. 267; State v. Ayer, 8 Fost. (N. H.) 301; State v. Hayden, 51 Vt. 296; Com. v. Flanagan, 7 Watts & S. 415, 421; Kennedy v. Com. 2 Va. Cas. 510; Poore v. Com. 2 Va. Cas. 474; Brown v. Com. 2 Va. Cas. 516; Com. v. Hughes, 5 Rand. 655; Mitchum v. State, 11 Ga. 616; Anderson v. State, 14 Ga. 709; Jim v. State, 15 Ga. 535; O'Shields v. State, 55 Ga. 656; Howerton v. State, 1 Meigs, 262; State v. Davis, 20 Mo. 391; State v. Ward, 14 La. An. 673.

[5] Kennedy v. State, 2 Va. Cas. 510. Under the California statute, the objection must be made before verdict. People v. Fair, 43 Cal. 137; People v. Mortimer, 46 Cal. 114; overruling People v. Plummer, 9 Cal. 298.

[6] Ibid.; Yanez v. State, 6 Tex. Ap. 429. Infra, § 845.

[7] Com. v. Flanagan, 7 Watts & S. 422; Poore v. Com. 2 Va. Cas. 474. See State v. Howard, 17 N. H. 171; State v. Fox, 1 Dutch. 566; Wright v. State, 18 Ga. 383; Rice v. State, 7 Ind. 332; People v. King, 27 Cal. 507.

[8] Com. v. Flanagan, 7 Watts & S. 422; though if such excitement pervade the jury-box, and work an unjust result, the verdict should be set aside. People v. Acosta, 10 Cal. 195.

the prisoner, containing severe reflections on him, it appearing that such fact was not known in sufficient time to have influenced the jury in their deliberations.[1] Yet any unfair bias on part of the judge, which by any way is exhibited to the jury, and which is hence prejudicial to the defendant, is ground for revision.[2]

Error of the court on the allowance or rejection of challenges belongs to a distinct branch of law previously discussed.[3]

Otherwise when party knew of objection in time to challenge.

§ 845. But a new trial will not be granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge, and knew, or might have known, in the exercise of due care, the facts beforehand.[4]

Absolute incapacity of juror ground for new trial, but not qualified.

§ 846. Where it turns out after verdict that one of the jurors was absolutely incapable of acting as such, and that this fact was unknown to the defendant at the time, and could not, with due diligence, have been known to him, this is a ground for a new trial. This has been held in a case where it appeared that one of the jurors was not a freeholder, this being a statutory necessity;[5] or was an infant;[6] or was not the person actually summoned on the jury, though bearing the same name.[7] But disqualifications not

[1] Vance *v.* Com. 2 Va. Cas. 162.

[2] Supra, § 605.

[3] Supra, §§ 605 *et seq.*

[4] R. *v.* Sutton, 8 B. & C. 417; 2 M. & R. 406; McAllister *v.* State, 17 Ala. 434; George *v.* State, 39 Miss. 570; State *v.* Taylor, 64 Mo. 358; Givens *v.* State, 6 Tex. 344; Yanez *v.* State, 6 Tex. Ap. 429, and cases supra, § 844.

Where by-standers were called as jurors in a capital case, and, at the instance of the prisoner, sworn and examined touching their indifferency, and then elected by the prisoner and sworn of the jury; upon objections to the indifferency of these jurors, discovered after the trial, not inconsistent with what was disclosed by the jurors themselves on their examination touching their indifferency, it was held that the court ought not to set aside a verdict of guilty, just in itself, though the objections be such, that if known and disclosed before the jurors were elected and sworn, there might have been good cause to challenge the jurors; much less, if the objections be such as would not have been good cause of challenge. Com. *v.* Jones, 1 Leigh, 598; Presbury *v.* Com. 9 Dana, 203. Supra, § 844, note.

[5] Supra, §§ 844–45, 845; infra, § 886; State *v.* Babcock, 1 Conn. 401; Dowdy *v.* Com. 9 Grat. 727. See Stanton *v.* Beadle, 4 T. R. 473.

[6] Russell *v.* Barn, Barnes, 455; R. *v.* Tremaine, 7 D. & R. 684; 5 B. & C. 254.

[7] McGill *v.* State, 34 Oh. St. 328. Compare R. *v.* Sullivan, 8 Ad. & E. 831; People *v.* Ransom, 7 Wend. 417.

absolute, which are ground for challenge, may not be ground for a new trial.[1] This is the case with alienage;[2] with non-residence;[3] with irreligion,[4] with consanguinity with the prosecutor;[5] with membership of the grand jury which found the bill.[6] The defendant, in any view, to avail himself of such defect, must have been, without negligence, ignorant of it until after verdict; and if he neglects to question the juror at the proper time, disqualification cannot be set up as ground for new trial.[7]

Juror inadmissible to impeach verdict.

§ 847. Though the former practice was different, it is now settled, in England, that a juror is inadmissible to impeach the verdict of his fellows.[8] "It would open each juror," declared Mansfield, C. J., "to great temptation, and would unsettle every verdict in which there could be found upon the jury a man who could be induced to throw discredit on their common deliberations."[9] Nor are subsequent declarations of jurymen, after a general verdict, admissible to explain or qualify it,[10] though the affidavits of by-standers, as to what passed within their knowledge touching the delivery of the verdict, may be received.[11] In this country the English rule has generally been adopted,[12] though the affidavits of jurors will be

[1] State *v.* Fisher, 3 N. & Mc. 261; Ash *v.* State, 56 Ga. 583.

[2] State *v.* Quarrel, 2 Bay, 150. See Hollingsworth *v.* Duane, 4 Dall. 353; though see Chase *v.* People, 40 Ill. 352; Brown *v.* La Crosse, 21 Wis. 51; Hill *v.* People, 16 Mich. 351. Supra, § 699; infra, § 886. The question depends on the applicatory statute.

Whether a colored person can claim colored jurymen see supra, § 783 *a*.

[3] Costly *v.* State, 19 Ga. 614.

[4] McClure *v.* State, 1 Yerg. 206. See R. *v.* Tremaine, supra.

[5] Supra, § 661; McLellan *v.* Crofton, 6 Greenl. 307; Eggleton *v.* Smiley, 17 Johns. 133; Edwards *v.* State, 53 Ga. 428; McDonald *v.* Beall, 55 Ga. 288; Harley *v.* State, 29 Ark. 17; Jones *v.* People, 2 Col. T. 351.

[6] Supra, § 661; Barlow *v.* State, 2 Blackf. 114; Bennett *v.* State, 24 Wis. 24; Davis *v.* State, 54 Ala. 39; McGehee *v.* Shafer, 9 Tex. 20; State *v.* Madoil, 12 Fla. 151.

[7] Supra, §§ 351, 733, 844; infra, §§ 886-89; R. *v.* Sutton, 8 B. & C. 417; Parks *v.* State, 4 Oh. St. 234; Gillooley *v.* State, 58 Ind. 182; McAllister *v.* State, 17 Ga. 434; Lisle *v.* State, 58 Ind. 182.

[8] See Whart. Crim. Ev. § 510.

[9] Owen *v.* Warburton, 1 N. R. 326; Hindle *v.* Birch, 1 Moore, 455; Aylett *v.* Jewel, 1 W. Blac. 1299; Vaise *v.* Delaval, 1 Term Rep. 11; Straker *v.* Graham, 4 M. & W. 721. See Hilliard on New Trials (1873), 241.

[10] Clark *v.* Stevenson, 2 W. Blac. 803.

[11] R. *v.* Wooller, 6 M. & S. 366.

[12] Supra, § 379; Whart. Crim. Ev. § 510; State *v.* Pike, 65 Me. 111; State *v.* Ayer, 3 Fost. 301; Com. *v.* Drew, 4 Mass. 391; State *v.* Freeman, 5 Conn. 348; Dan *v.* Tucker, 4

entertained for the purpose of explaining, correcting, or enforcing their verdict.[1] Thus where a doubt existed, in consequence of confusion in the court-room, as to what the exact verdict was, the affidavits of jurors and by-standers were received for the purpose of showing the facts of the case, though all reference was excluded as to the motives or intentions with which such verdict was agreed to, or the circumstances attending the deliberations which led to it.[2] In Tennessee the English rule appears to be rejected altogether,[3] though it is proper to observe that in that State, in one instance at least, a disposition has been shown to conform more closely to the general practice, it having been held that affidavits by jurors, that they founded their verdict upon particular parts of the testimony given in court, which particular testimony might abstractly be illegal, are not sufficient to authorize a new trial.[4]

Yet, at the same time, there is danger of construing the rule in such a way as to work great wrong, by so shielding with secrecy the deliberations of the jury as to permit these deliberations to be irresponsibly conducted in such a way as to outrage public and private rights. The true view is this: Jurors cannot

Johns. 487; People *v.* Columbia, 1 Wend. 297; People *v.* Carnal, 1 Parker C. R. 256, 262, 676; S. C., 2 Park. C. R. 777; Cluggage *v.* Swan, 4 Binn. 150; Reed *v.* Com. 22 Grat. 924; State *v.* Godwin, 5 Ired. 401; Bellamy *v.* Pippin, 74 N. C. 46; State *v.* Smallwood, 78 N. C. 560; State *v.* Doon, Charlton, 1; State *v.* Coupenhaver, 39 Mo. 320; State *v.* Branstetter, 65 Mo. 149; State *v.* Alexander, 66 Mo. 148; Bennett *v.* State, 3 Ind. 167; Stanley *v.* Sutherland, 54 Ind. 339; State *v.* Millecan, 15 La. An. 557; State *v.* Fruge, 28 La. An. 657; Hudson *v.* State, 9 Yerg. 408; State *v.* Horne, 9 Kans. 119; People *v.* Baker, 1 Cal. 403; People *v.* Doyall, 48 Cal. 85; Johnson *v.* State, 27 Tex. 758. As to grand jurors see supra, § 379.

In Iowa, it is said that an affidavit as to a fellow-juror drinking intoxicating liquors is only to be received when no other evidence is obtainable, and ought to be explicit. State *v.* McLaughlin, 44 Iowa, 82.

[1] Cogan *v.* Ebden, 1 Burr. 383; R. *v.* Woodfall, 5 Burr. 2667; State *v.* Ayer, 3 Foster, N. H. 301; State *v.* Howard, 17 N. H. 171; Dana *v.* Tucker, 4 Johns. 487; Jackson *v.* Dickenson, 15 Johns. 309; Cochran *v.* Street, 1 Wash. R. 79.

In California such evidence is now admissible by statute. Donner *v.* Palmer, 23 Cal. 40.

[2] R. *v.* Woodfall, 5 Burr. 2667; R. *v.* Simons, Sayer, 35.

[3] Crawford *v.* State, 2 Yerg. 60; Cochran *v.* State, 7 Humph. 544. Supra, § 842.

[4] Hudson *v.* State, 9 Yerg. 408. See, as to grand jurors, supra, § 379; Whart. Crim. Ev. § 510.

be received to qualify by parol testimony matters of record; nor can they be permitted to state matters concerning their deliberations which may be proved *aliunde*. From necessity, however, when gross injustice has been wrought from misconduct or misapprehension in their deliberations, they may be permitted to prove such misconduct or misapprehension. Thus it has been held that they may prove that the case was decided by lot;[1] or that the instructions of the court were utterly misunderstood;[2] and a distinction has been taken to the effect that though a juror cannot be admitted to stultify his own action, yet he may be permitted to prove gross misconduct in his fellows.[3]

In the United States, as a rule, an affidavit of a juror cannot be admitted to purge his conduct from the imputation of impropriety.[4] In exceptional cases, however, such affidavits have been received.[5]

And so are affidavits attacking jury.

§ 848. The court, also, will not permit affidavits to be read imputing improper motives to the jury, or tending to impeach their integrity.[6] And where a juror has denied, on oath, before the triers, having formed and expressed an opinion in a criminal case, the affidavit of a single witness to the contrary has been held insufficient to disturb the verdict.[7]

6. *Misconduct by the Prevailing Party.*

Such misconduct ground for new trial.

§ 849. Any misconduct by the prevailing party, intended to affect the jury, and tending so to do, will be cause for a new trial,[8] and even an acquittal obtained by fraud or embracery will be no bar to a subsequent indict-

[1] Wright *v.* Illinois Tel. Co. 20 Iowa, 19. See People *v.* Hughes, 29 Cal. 257; State *v.* Horne, 9 Kans. 718. Supra, § 842.

[2] Packard *v.* U. S. 1 Iowa, 225; R. *v.* Simons, Sayer, 35.

[3] Deacon *v.* Shreve, 2 Zab. N. J. 176; and see Com. *v.* Mead, 12 Gray, 167; and the remarks of Taney, C. J., in U. S. *v.* Reid, 12 How. 361.

[4] French *v.* Smith, 4 Vt. 363; Ray *v.* State, 15 Ga. 223; McGuffie *v.* State, 17 Ga. 497; Sawyer *v.* Hannibal R. R. 37 Mo. 240; Organ *v.* State, 26 Miss. 78; People *v.* Hughes, 29 Cal. 257; People *v.* Backus, 5 Cal. 275. See Hilliard on New Trials (1873), 247.

[5] Taylor *v.* Greely, 3 Greenl. 204; Fries's case, 1 Wh. St. Tr. 605; Moffett *v.* Bowman, 6 Grat. 219.

[6] Onions *v.* Naish, 7 Price, 203; Hartwright *v.* Badham, 11 Price, 383; Cooke *v.* Green, 11 Price, 736; Graham on New Trials, 126.

[7] Epps *v.* State, 19 Ga. 102.

[8] 2 Hale P. C. 308; State *v.* Hascall, 6 N. H. 352; Knight *v.* Inhabi-

ment.[1] Nor need such misconduct be traced directly to the party prevailing. Any perversion of justice by means *dehors* the trial, against which ordinary care could not guard, will justify the court in setting the verdict aside.[2]

§ 850. Evidence that the prosecutor, by exhibiting papers at places where the jury boarded, had been attempting to bias and influence them, will be sufficient to sustain a motion for new trial;[3] and so where it appeared that the prosecutor spent a night in a room with the jury during their deliberations, the conviction being for manslaughter, and the prosecutor having acted officially as high sheriff both when prosecuting the suit and attending the jury.[4]

And so of undue influence on jury.

§ 851. Where papers, as has already been seen, not in evidence, are surreptitiously handed to the jury, the verdict will be avoided;[5] and the same result will take place where it appears that a witness on one side has been spirited away by the opposite party.[6] Such efforts, however, must be traced to a party or his agents; for the mere absenting of himself by a witness will not be sufficient ground.[7]

And so of tampering with evidence.

§ 852. A new trial will be granted when it appears any unfair trick or artifice had been employed, resulting in a verdict in favor of the party using it.[8] Thus a new trial was granted where the defendant, by the artifice of the prosecuting attorney, went to trial without countervailing testimony, under the belief that certain witnesses of the State were absent, when they are present, and concealed by the prosecution.[9]

And so of trick of opposite side.

§ 853. A new trial will not be granted simply because counsel,

tants, &c. 13 Mass. 218; Jeffries *v.* Randall, 14 Mass. 205.

[1] See supra, §§ 451, 784 *et seq.*; Hylliard *v.* Nichols, 2 Root, 176. See Ohio Code Cr. Proc. § 192.

[2] Willis *v.* People, 32 N. Y. 715.

[3] State *v.* Hascall, 6 N. H. 352. Compare Coster *v.* Merest, 3 Brod. & B. 272; 7 Moore, 87; Spenceley *v.* De Willot, 7 East, 108.

[4] McElrath *v.* State, 2 Swan, 378. See supra, § 827.

[5] Co. Lit. 227; Graves *v.* Short, Cro. Eliz. 616; Palmer, 325. Supra, §§ 831 *et seq.*

[6] Bull. N. P. 328.

[7] Grovenor *v.* Fenwick, 7 Mod. 156.

[8] Anderson *v.* George, 1 Burr. 352; Graham on New Trials, 56; Bodington *v.* Harris, 1 Bing. 187; Niles *v.* Brackett, 15 Mass. 378; Jackson *v.* Warford, 7 Wend. 62; March *v.* State, 44 Tex. 64.

[9] Shepherd *v.* State, 64 Ind. 43; Curtis *v.* State, 6 Cold. (Tenn.) 9.

But not for remarks of opposite counsel unless objected to at time.

in their addresses, travelled beyond the evidence, unless the court was called upon to interpose, and, on a case requiring it, refused to do so.[1] But it is otherwise where the court allows the prosecuting counsel to charge the defendant with other offences beside that on trial.[2]

7. *After-discovered Evidence.*

§ 854. After-discovered evidence, in order to afford a proper ground for the granting of a new trial, must possess the following qualifications: —

It must have been discovered since the former trial.

It must be such as reasonable diligence on the part of the defendant could not have secured at the former trial.

It must be material in its object, and not merely cumulative and corroborative, or collateral.

It must be such as ought to produce, on another trial, an opposite result on the merits.

It must go to the merits, and not rest on merely a technical defence.[3]

Motion must be special.

§ 855. There are, in addition, one or two preliminary points of practice which must be conformed to before a motion on this ground will be entertained. It is necessary that the party should mention in his affidavit the witnesses by name, and what he expects to prove by them; and that either the witnesses themselves should state, on oath, the

[1] Supra, §§ 560, 577; Davis *v.* State, 33 Ga. 98. See Com. *v.* Hanlon, 3 Brewst. 461.

[2] Supra, § 561; State *v.* Smith, 75 N. C. 306; State *v.* Mahly, 68 Mo. 315. See State *v.* Cluck, 40 Ind. 265; Long *v.* State, 56 Ind. 182.

[3] State *v.* Carr, 1 Foster (N. H.), 166; Com. *v.* Murray, 2 Ashm. 41; Com. *v.* Williams, 2 Ashm. 69; Thompson *v.* Com. 8 Grat. 637; Read *v.* Com. 22 Grat. 924; Carter *v.* State, 46 Ga. 637; State *v.* Burnside, 37 Mo. 343; State *v.* Wyatt, 50 Mo. 309. In Pennsylvania (Moore *v.* The Phila. Bank, 5 Serg. & Rawle, 41), it was said by the court that it is incumbent on the party who asks for a new trial, on the ground of newly-discovered testimony, to satisfy the court: 1st. That the evidence has come to his knowledge since the trial; 2d. That it was not owing to the want of diligence that it did not come sooner; and 3d. That it would probably produce a different verdict if a new trial were granted. The same distinctions were afterwards adopted by Judge King. Com. *v.* Murray, 2 Ashm. 41. See Ohio Code Cr. Proc. § 192.

evidence they can give, or that the party should give his own belief to the statement to be made by the witnesses.[1]

§ 856. But the rule will not ordinarily be granted if supported only by the affidavit of the party. The motion, if practicable, must be accompanied by the affidavit of the newly-discovered witnesses.[2] Must be supported by affidavits.

§ 857. The adverse party may show, by affidavits, that the witnesses whose testimony is stated to be material are wholly unworthy of credit.[3] May be contested.

§ 858. A motion for a new trial will not ordinarily be heard after a judgment has been regularly perfected, although it be on the ground of evidence newly discovered since the judgment.[4] Must be usually moved before judgment.

§ 859. The evidence must have been discovered since the former trial. In a Georgia case, for instance, where it appeared that the prisoner's attorney had made diligent inquiries as to the prisoner's participation in the *corpus delicti*, but had been misled, it was held that a new trial would be granted on evidence, newly discovered, being offered to the effect that the prisoner did not make the assault charged.[5] But unless newly discovered, the existence of such testimony is not adequate ground.[6] There may, however, be cases, if duly sustained by affidavit, when supposed knowledge of the testimony at the time of the trial may be explained and avoided by proof that the defendant was, at the time, mentally incapable of taking cognizance of facts.[7] Evidence must be newly discovered.

§ 860. A new trial will not at common law be granted on the ground that a co-defendant, tried at the same time and acquitted, was a material witness for the convicted defendant, such testimony not being newly discovered; Acquitted co-defendant as a witness no ground.

[1] Hollingsworth *v.* Napier, 3 Caines, 182; State *v.* Williams, 14 W. Va. 851; Gavignan *v.* State, 55 Miss. 533; Polser *v.* State, 6 Tex. Ap. 510. Infra, § 900.

[2] State *v.* Kellerman, 14 Kans. 135; Farrow *v.* State, 48 Ga. 30; Runnels *v.* State, 28 Ark. 121; Evans *v.* State, 6 Tex. Ap. 513; Tuttle *v.* State, 6 Tex. Ap. 556, and cases in last note.

[3] Parker *v.* Hardy, 24 Pick. 246; Williams *v.* Baldwin, 18 Johns. 489.

[4] Infra, § 890.

[5] Thomas *v.* State, 52 Ga. 509.

[6] Vernon *v.* Hankey, 2 T. R. 113; Com. *v.* Murray, 2 Ashm. 41; Com. *v.* Williams, 2 Ashm. 69; Read *v.* Com. 22 Grat. 924; Roach *v.* State, 34 Ga. 78; Carter *v.* State, 46 Ga. 637.

[7] Thompson *v.* State, 54 Ga. 577.

though the acquitted defendant was then, for the first time, a competent witness.[1] Where, however, after an application for severance, in order to admit the wife of one party as a witness for the other, the former party was acquitted but the latter convicted, and the wife of the former swore in an affidavit to a complete *alibi* as to the latter, it was held that as she herself was not on the record, but was excluded merely by policy of law on the joint trial, and as she had been made competent by the verdict of a jury, a new trial would be granted.[2] But where co-defendants can be witnesses for each other on trial this ground cannot be laid.

Evidence discovered before verdict should be given at once to jury.

§ 861. If new evidence be discovered before the verdict is rendered, it should be submitted to the jury; and if this duty is neglected, unless there is clear proof of mistake, a new trial will not be granted.[3] The judge at the trial has discretion as to the admission of evidence out of the regular and usual course, and must exercise such discretion when necessary to promote justice.[4]

If evidence could have been secured at former trial, ground fails.

§ 862. The evidence must be such as could not have been secured at the former trial by a reasonable diligence on part of the defendant, which fact should appear on the affidavit.[5]

Thus where it appeared that the witness, on whose testimony was sought a new trial, after a conviction of

[1] State *v.* Bean, 36 N. H. 122; People *v.* Vermilyea, 7 Cow. 369; Sawyer *v.* Merrill, 10 Pick. 16. But see Rich *v.* State, 1 Tex. Ap. 206; Lyles *v.* State, 41 Tex. 172. Compare infra, § 873.

[2] Com. *v.* Manson, 2 Ashm. 31.

[3] Supra, §§ 564 *et seq.*; U. S. *v.* Gibert, 2 Sumner, 19; People *v.* Vermilyea, 7 Cow. 369; Com. *v.* Hanlon, 3 Brewster, 461; State *v.* Porter, 26 Mo. 201; Higden *v.* Higden, 2 A. K. Marsh. 42; Cavanah *v.* State, 56 Miss. 300.

[4] See supra, § 566.

[5] Com. *v.* Drew, 4 Mass. 399; Lester *v.* State, 11 Conn. 415; People *v.* Vermilyea, 7 Cow. 369; Com. *v.* Williams, 2 Ashm. 69; Roberts *v.* State, 3 Kelly, 310; O'Dea *v.* State, 57 Ind. 31; Read *v.* Com. 22 Grat. 723; State *v.* Harding, 2 Bay, 267; Wright *v.* State, 34 Ga. 110; McAfee *v.* State, 31 Ga. 411; Carter *v.* State, 46 Ga. 637; Friar *v.* State, 3 How. (Miss.) 422; Holeman *v.* State, 13 Ark. 105; Shaw *v.* State, 27 Tex. 750; Hasselmeyer *v.* State, 6 Tex. App. 21; Collins *v.* State, 6 Tex. App. 72; Hutchinson *v.* State, 6 Tex. Ap. 468. As to affidavit see State *v.* Williams, 14 W. Va. 851.

On a conviction of murder, one of the circumstances adduced in evidence against the defendant was, that blood was seen on his clothes on the day the

murder, was with the prisoner until a late hour of the evening on which the murder was committed, was in court while the trial was progressing, and had gone to a relative of the prisoner and told him what she was able to testify to; the motion was refused.[1]

Nor for withholding of papers which due diligence could have secured.

§ 863. Nor will a new trial be granted because the district attorney withheld in his hands papers important to the defendant, unless the latter used due diligence to obtain them. Thus, where the district attorney told the defendant that certain papers were in the hands of C., who, being applied to, answered they were in the possession of the district attorney, but the defendant did not explain the mistake and apply to the district attorney again, a new trial was refused.[2]

Otherwise in cases of surprise.

§ 864. A new trial will sometimes be granted on the affidavit of a witness, that he was mistaken or surprised at his examination.[3]

Party disabled who neglects to obtain evidence on trial.

§ 865. A party who seeks for a new trial on the ground of newly-discovered evidence is chargeable with laches, if, previous to the trial, he knew that the witness, whose testimony he seeks to introduce as newly discovered, must, probably, from his occupation and employment at the time of the transaction, the subject of the controversy, be

murder was committed, and after it was committed. On a motion for a new trial, he introduced his affidavit, in which he stated that he was surprised by the introduction of this proof, and that the blood was thrown on his clothes by an opossum which he had killed that day. He also introduced the affidavit of a man who stated that he had seen the defendant on that day with the opossum hanging by his side. It was held that this was a case of negligence, and not of surprise, within the rule of the law, and that the grounds laid were not sufficient to authorize the granting of a new trial. Gilbert *v.* State, 7 Humph. 524.

[1] Com. *v.* Williams, 2 Ashm. 69.

In a case in Virginia, after a verdict of guilty on an indictment for murder, the prisoner made affidavit that S. C. was a material witness for him in the prosecution; that he was not summoned to attend the trial, because the prisoner had not been informed that he knew anything relating to the affair; and the prisoner considered that his testimony would have an important effect on a subsequent trial of the cause, but no allegation was made of diligence; it was held by the Court of Errors that the new trial was properly refused. Bennett *v.* Com. 8 Leigh, 745.

[2] People *v.* Vermilyea, 7 Cowen, 369. See infra, § 881.

[3] Infra, § 879.

conversant with the facts in relation to the transaction,[1] and especially where, previous to the trial, the party knew, as the witness himself testifies to, what the witness could prove, although at the time of the trial, and while preparing therefor, the party had forgotten the facts.[2] It is not such newly-discovered evidence as will entitle him to a new trial, that the party applying for a new trial could not procure in time the witness whom he seeks to introduce. He should have applied to the court for a postponement; and if without doing this he went to trial without the testimony, a new trial will not be granted for the purpose of letting in such evidence.[3] Nor is the absence of a witness who had not been subpœnaed, a good cause for granting a new trial;[4] though it is otherwise with the sudden illness of a witness in cases where the deposition of the witness cannot be taken, and the witness is material.[5] Nor will a new trial be granted on account of the want of recollection of a fact, which by due attention might have been remembered; "want of recollection being easy to be pretended and hard to be disproved."[6]

Evidence must be material and not cumulative.

§ 866. The evidence offered must be material in its object, and not merely cumulative and corroborative, or collateral.[7] Cumulative evidence is such as goes to support the facts principally controverted on the former trial, and respecting which the party asking for a new trial, as well as the adverse party, produced testimony. Thus, where the defence was epileptic insanity, the alleged fact that the defendant, subsequent to the trial and conviction, had an epileptic

[1] State *v.* Bell, 49 Iowa, 440; State *v.* Adams, 31 La. An. 717; Collins *v.* State, 6 Tex. Ap. 72.

[2] People *v.* Superior Court of New York, 10 Wend. 285; Richie *v.* State, 58 Ind. 355.

[3] Jackson *v.* Malin, 15 Johns. 293; Gordon *v.* Harvey, 4 Call, 450. See State *v.* Frittener, 65 Mo. 422; State *v.* Smith, 65 Mo. 314.

[4] Kelly *v.* Holdship, 1 Browne Pa. 36; Lester *v.* Goode, 2 Murph. 37.

[5] Infra, § 881.

[6] Bond *v.* Cutler, 7 Mass. 205; Duignan *v.* Wyatt, 3 Blackf. 385.

[7] U. S. *v.* Gibert, 2 Sumn. 97; Williams *v.* People, 45 Barb. 201; Com. *v.* Flanagan, 7 Watts & S. 415; Com. *v.* Williams, 2 Ashm. 69; Adams *v.* People, 47 Ill. 376; McAfee *v.* State, 31 Ga. 411; Hoye *v.* State, 39 Ga. 718; Holmes *v.* State, 54 Ga. 303; O'Shields *v.* State, 55 Ga. 696; State *v.* Blennerhassett, Walker, 7; State *v.* Larrimore, 20 Mo. 425; State *v.* Stumbo, 26 Mo. 306; State *v.* Evans, 65 Mo. 574; State *v.* Butler, 67 Mo. 59; St. Louis *v.* State, 8 Neb. 406; People *v.* McDonnell, 47 Cal. 134; Bixby *v.* State, 15 Ark. 395; White *v.* State, 17 Ark. 404; Murray *v.* State, 36 Tex. 642.

fit, is cumulative in this sense, and hence no ground.[1] But it is otherwise if such new evidence consists of a strong mass of proof previously unknown to the party.[2]

Surprise an exception.

§ 867. But though a new trial is not usually granted for the discovery of new evidence to a point which was presented on the former trial, yet a case of surprise will form an exception to the rule.[3]

And so evidence of a distinct class.

§ 868. Nor can it be objected to granting a motion for a new trial, on the ground of newly-discovered evidence, that such evidence is cumulative, if it is of a different kind or character from that adduced on the trial.[4] This is peculiarly the case when strong independent proof of insanity is offered.[5]

New trial not granted merely to discredit opposing witness.

§ 869. Where the object is to discredit a witness on the opposite side, the general rule is that a new trial will not be granted.[6] Thus, where the defendant was convicted of forgery, chiefly on the evidence of B. R., and on a motion for a new trial evidence was produced to show the bias of B. R.; it was held by the Supreme Court of Massachusetts that such evidence was no ground for the motion.[7] And a new trial was refused where, after a verdict of guilty upon an indictment for perjury, the defendant applied for a new trial on account of newly-discovered evidence, and furnished proof that a material witness for the prosecution had, subsequently to his examination upon the stand, expressed strong feelings of hostility toward the prisoner.[8] But it is otherwise where a principal witness testifies that his statement on trial was a mistake.[9]

§ 870. An indictment for perjury against a witness on whose

[1] People *v.* Montgomery, 13 Abbott, Pr. Rep. N. S. 207.

[2] Anderson *v.* State, 43 Conn. 514.

[3] Infra, 881.

[4] Long *v.* State, 54 Ga. 564; Guyott *v.* Butts, 4 Wend. 579.

[5] Anderson *v.* State, 43 Conn. 514.

[6] Com. *v.* Drew, 4 Mass. 399; Com. *v.* Waite, 5 Mass. 261; Com. *v.* Green, 17 Mass. 515; Com. *v.* Williams, 2 Ashm. 69; Thompson *v.* Com. 8 Grat. 637; State *v.* Williams, 14 W. Va. 851; Bland *v.* State, 2 Carter (Ind.), 608; Levining *v.* State, 13 Ga. 513; Brown *v.* State, 55 Ga. 169; Wallace *v.* State, 28 Ark. 531; Herber *v.* State, 7 Tex. 69; Brown *v.* State, 6 Tex. Ap. 286; Hutchinson *v.* State, 6 Tex. Ap. 468; Polser *v.* State, 6 Tex. Ap. 510.

[7] Com. *v.* Waite, 5 Mass. 261. See Hammond *v.* Wadhams, 5 Mass. 353.

[8] State *v.* Carr, 1 Foster, 166; Com. *v.* Drew, 4 Mass. 391.

[9] Mann *v.* State, 44 Tex 642.

testimony the verdict was obtained, unless the case was so gross as to make it probable that the verdict was obtained by perjury, or that the false testimony occasioned a surprise to the opposite party, will not be sufficient cause for new trial.[1] Thus, where the defendant was convicted of bribery, and it was moved to postpone judgment until an indictment, which he had preferred against one Burbage for perjury in his evidence, was determined, it was said by Mansfield, C. J., in answer to the application, "I am clear that Heydon can be no witness in this case, if they mean by this indictment to alleviate the judgment of the court for the bribery, because he is swearing in his own cause. And the witnesses on the indictment having all been previously examined at the former trial makes an end of this motion; for their credit has already been weighed by a jury, and found wanting."[2] In a civil suit the plaintiff obtained a verdict, and had judgment, upon which the defendant brought error, and after argument judgment was affirmed, but before the case came on to be heard in error he preferred an indictment against two of the plaintiff's witnesses for perjury in their evidence at the trial, and shortly afterwards succeeded in obtaining a rule *nisi* for staying an execution upon the judgment, until the trial of the indictment, upon an affidavit made by himself, charging the said witnesses with perjury. Lord Ellenborough, C. J., however, declared, "It would be highly dangerous to allow this rule to be made absolute, for this would be a receipt to every person, after verdict and judgment against him, how to delay the fruit of such judgment, by indicting some of the plaintiff's witnesses for perjury. And should this rule be made absolute, it would, perhaps, prevent the plaintiff from being a witness at the trial of the persons indicted."[3] Where there has been a surprise, however, arising from the unexpected introduction of the alleged perjured witness, a new trial has been granted.[4]

Subsequent indictment for perjury no ground.

[1] R. *v.* Heydon, 1 W. Black. 351; Benfield *v.* Petrie, 3 Douglas, 24; Warwick *v.* Bruce, 4 M. & S. 140; 9 Price, 89; Resp. *v.* Newell, 2 Yeates, 479. That perjury should not be prosecuted during pendency of civil proceedings see Whart. Crim. Law, 8th ed. § 1324.

[2] R. *v.* Heydon, 1 W. Black. 351.

[3] Warwick *v.* Bruce, 4 M. & S. 140; Benfield *v.* Petrie, 3 Doug. 24.

[4] Morrell *v.* Kimball, 1 Greenl. 322; Thurtell *v.* Beaumont, 1 Bing. 339.

§ 871. "After the verdict," said Rogers, J., on a motion for a new trial, after a capital conviction, in Pennsylvania, "when the motion for a new trial is considered, the court must judge not only of the competency but of the effect of evidence. If, with the newly-discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise we are bound to refuse the application."[1] And when the evidence produced is clearly immaterial, this limitation should be strictly enforced.[2]

The evidence offered must be such as ought to produce, on another trial, an opposite result on the merits.

§ 872. *Another essential is that the after-discovered evidence should go to the merits, and not rest on a merely technical defence.* Thus, after a conviction on an indictment for selling *spirituous* liquors, &c., "without being duly licensed as an innholder or common victualler," a new trial will not be granted for the purpose of allowing the defendant to give in evidence a license, which he had omitted to produce, to sell *fermented* liquor, and thus raise a question as to the mere form of the indictment.[3] And in larceny a new trial will not be granted on ground of evidence that the goods did not technically belong to the owner charged in the indictment.[4]

New defence must not be merely technical.

§ 873. We have already seen that even under the old practice, excluding defendants as witnesses, new trials were not granted because a co-defendant, tried at the same time and acquitted, was a material witness for the convicted defendant.[5] Of course, under statutes rehabilitating parties as

Acquittal of co-defendant no ground.

[1] Com. *v.* Flanagan, 7 W. & S. 423. The same point is affirmed in Com. *v.* Manson, 2 Ashm. 31; Thompson *v.* Com. 8 Grat. 637; State *v.* Greenwood, 1 Hayw. 141; Carr *v.* State, 14 Ga. 358; Roach *v.* State, 34 Ga. 78; Jones *v.* State, 48 Ga. 163; Young *v.* State, 56 Ga. 403; Meeks *v.* State, 57 Ga. 329; Rainey *v.* State, 53 Ind. 278; Hauck *v.* State, 1 Tex. Ap. 357.

[2] State *v.* O'Grady, 31 La. An. 378.

Hence the confession of a wife, that she herself had committed the offence without her husband's privity, after the conviction of the husband of forgery, was held not sufficient, when taken in connection with the evidence given on trial, to justify a new trial being granted. State *v.* J. W. 1 Tyler, 417.

[3] Com. *v.* Churchill, 2 Met. 118.

[4] Foster *v.* State, 52 Miss. 595.

[5] U. S. *v.* Gibert, 2 Sumn. 20; State *v.* Bean, 36 N. H. 122; People *v.* Vermilyea, 7 Cowen, 367; Com. *v.* Manson, 2 Ashm. 32; Com. *v.* Chauncey, 2 Ashm. 90; Cavanah *v.* State, 56 Miss. 300; Brackenridge's Law Miscellanies, 220. But see *contra*,

witnesses, where such co-defendants could have been called on trial, their acquittal is in no sense a reason for a new trial.

Refusal to sever defendants may be ground.

§ 874. Though the misjoinder of the defendants, where it appears on record, is subject of demurrer or arrest,[1] and though, when it is developed on evidence, it is properly to be reached by a motion for severance, it not unfrequently becomes the ground of a motion for a new trial, and when wrongfully allowed by the court is a legitimate reason for setting aside the verdict.[2]

Rich *v.* State, 1 Tex. Ap. 206; Lyles *v.* State, 41 Tex. 172; Brown *v.* State, 6 Tex. Ap. 286. Compare supra, §§ 305–6, 860.

[1] See supra, § 307.

[2] People *v.* Vermilyea, 7 Cowen, 383. Supra, § 860.

As has been already stated, in an indictment against several, where the offence is such that it may have been committed by several, they are not of right entitled to be tried separately, but are to be tried in that manner only when the court, on sufficient cause, may think proper. Supra, §§ 295, 755; U. S. *v.* Wilson, 1 Bald. 78; U. S. *v.* Gibert, 2 Sumner, 20; State *v.* Soper, 16 Me. 293; People *v.* Howell, 4 Johns. R. 296; People *v.* Vermilyea 7 Cowen, 108, 383; Com. *v.* Manson, 2 Ashm. 32; State *v.* Smith, 2 Iredell, 402; State *v.* Wise, 7 Richards. 412. See, *per contra*, U. S. *v.* Sharp, Peters C. C. 118; Campbell *v.* Com. 2 Va. Cas. 314. At the same time, where several defendants, entirely disconnected in the transactions through which they are sought to be convicted, are jointly indicted, it would be sound exercise of discretion to grant them separate trials. People *v.* Vermilyea, 7 Cowen, 108. See supra, § 295.

How far one may be a witness for the other, is elsewhere discussed. Whart. Crim. Ev. § 445.

When one co-defendant, by the local law, is inadmissible as a witness for the others, if no evidence be given against him, he is entitled to his discharge as soon as the case of the prosecutor is closed, and may then be examined on behalf of the other defendants. Where there is any evidence against him, he cannot be sworn, but the whole must be submitted together to the jury. Bul. N. P. 285; Peake's Evid. 168; Phil. Evid. 36; 1 East, 312, 313; 6 T. R. 627; 1 Sid. 237; 1 Hale, 303; Com. *v.* Manson, 2 Ashm. 32. On the same principle, where one of the defendants, on an indictment for an assault, submits to a small fine, and is discharged, he may be called on the part of others, with whom he was jointly indicted. And where one defendant has actually pleaded misnomer, he may be received as a witness, because the indictment, as against him, is abated. Ibid. But if he suffers judgment by default, he cannot afterwards become a witness against or in favor of his associates; 5 Esp. Rep. 154; 2 Campb. 333, 334, n.; Bul. N. P. 285; Phil. Ev. 36; since no sentence can be constitutionally imposed on a verdict so obtained. Supra, § 550. See R. *v.* Roberts, 2 Strange, 1208; Jackson *v.* Com. 19 Grat. 656; Rose *v.* State, 20 Ohio, 31; Andrews *v.* State, 2 Sneed (Tenn.), 550.

8. *Absence of Defendant at Trial.*

§ 875. Where, through necessity or mistake, a defendant, in ordinary prosecutions for crime, is absent during the trial, there should be a new trial.[1] Nor is the fact that the counsel of the accused is present during the trial, and at the rendering of the verdict, without making objection to the prisoner's absence, a waiver of his right to be present. Some misdemeanors there indeed are, partaking of the nature of civil process, where, as has been seen, appearance by attorney is permissible,[2] but in all trials in which corporal punishment may be assigned the defendant must personally be present;[3] and this right is so inherent and inalienable, that a judgment will be reversed where it appears that the defendant was absent at the rendition of the verdict, though his presence was at the time waived by his counsel.[4] In crimes of high grade, the record must show the prisoner's presence at trial, verdict, and sentence, *affirmatively*, or else the error will be fatal.[5] But the presence may be inferred from the record, and need not be explicitly stated at each stage of the procedure.[6]

Such absence a ground.

Yet to this rule two exceptions must be expressed. The first is, that it is not to be stretched so as to include occasional voluntary absence for a few moments from the court-room by the defendant, though it should happen that during such brief absence the verdict should happen to be brought in;[7] though in all cases of high crime it would be necessary in such case for the jury to be kept back from formally rendering their verdict until the defendant returns.[8] The second is, that when the defendant behaves so obstreperously that his temporary compulsory removal from the court-room is necessary, he cannot complain of the trial

[1] Supra, §§ 541–550.

[2] Supra, § 541.

[3] Supra, §§ 541 *et seq.*; 1 Chitty's C. L. 413; 2 Hale, 216; Jacobs *v.* Com. 5 Serg. & R. 315; Gladden *v.* State, 12 Fla. 562; Leschi *v.* Terr. 1 Wash. Terr. 23; Shapoonmash *v.* Terr. Ibid. 219.

[4] Supra, §§ 541 *et seq.*, 733. See Prine *v.* Com. 18 Penn. St. 103.

[5] Supra, §§ 541 *et seq.*; Dunn *v.* Com. 6 Barr, 387; Hamilton *v.* Com. 16 Penn. St. 121; State *v.* Smith, 31 La. An. 406.

[6] Lawrence *v.* Com. 30 Grat. 845.

[7] Hill *v.* State, 17 Wis. 675.

[8] Supra, § 550.

proceeding for a short time in his absence, he losing the privilege of objecting by his conduct.[1]

Waiver, so far as concerns this particular right, has been already discussed.[2]

9. *Mistake in Conduct of Case.*

Mistake may be ground if there was due diligence.

§ 876. Where the cause has been prejudiced from some misconception of the judge, or mistake of the party or his counsel, which could not have been avoided by ordinary prudence and care, a new trial will be allowed. Thus, where the counsel were misled by a positive intimation from the court, and refrained from offering evidence,[3] and where the judge misapprehended a material fact, and misdirected the jury,[4] a new trial has been granted. But if due diligence could have avoided the mistake, the rule will be refused. Thus a new trial will not be granted because a juror was taken from the panel, on the erroneous supposition that there was good ground to challenge him, when the defendant did not at the time object.[5]

Mistake of law no ground.

§ 877. Mistake by counsel of law will be no excuse, whether made generally in the conduct of a cause, or in the neglect to object to testimony when offered which might have been excluded.[6] But if objection is made to the introduction of testimony at the proper time, no objection to the judge's charge upon that evidence is afterwards necessary.[7] If an objection to evidence, which objection could have been obviated by further proof, be not made, it will not be received as the ground of a motion for a new trial.[8] Where, however, evidence is not sufficient in law to authorize a verdict, a new trial will be granted, even though no objection be made at the trial.[9] But as a rule there is no new trial because counsel ignorantly neglect to present proper points of law to the court.[10]

[1] U. S. *v.* Davis, 6 Blatch. C. C. 464; Fight *v.* State, 7 Ohio, 180. Supra, §§ 543 *et seq.*

[2] Supra, §§ 541, 733.

[3] Le Flemming *v.* Simpson, 1 M. & Ryl. 269; Dunham *v.* Baxter, 4 Mass. 79.

[4] Supra, §§ 794, 798.

[5] Com. *v.* Stowell, 9 Met. 572.

[6] See cases cited supra, §§ 801 *et seq.*; and infra, § 878.

[7] Supra, §§ 801 *et seq.*; People *v.* Holmes, 5 Wend. 192.

[8] Supra, § 804.

[9] Supra, § 813.

[10] Supra, §§ 708 *et seq.*

§ 878. Mere ordinary negligence of counsel is no ground. Thus, as has been already seen, a new trial will not be granted because the district attorney, by mistake, withholds important papers, unless the defendant uses due diligence to obtain them.[1] But a new trial has been granted where the defendant having otherwise a good case, which would have resulted in an acquittal, was advised by his counsel that certain evidence which was admitted, was not admissible against him, and was so taken by surprise.[2]

Nor is negligence of counsel.

§ 879. Where, as sometimes occurs, witnesses are mistaken in their testimony from temporary incapacity, new trials have been granted.[3] Relief, however, will only be afforded on clear proof of mistake by the witness, not where the party was in error as to what the witness would prove;[4] nor will the court hear evidence admissible to show that a witness used expressions after trial contradicting his testimony in court.[5] At the same time, when a party has been surprised by mistakes in testimony at the trial which he had no reason to expect, and which, if he had had time, he could readily have corrected, justice refuses that a verdict obtained in this way, if manifestly unfair, should be revised.[6]

New trial from unexpected blunder or confusion of witness.

§ 880. If the error is not attributable to misconduct of themselves, or to misdirection of court, it is no ground that the jury rendered their verdict under a mistake as to the degree of punishment the court could inflict.[7]

But not mistake of jury as to punishment.

10. *Surprise.*

§ 881. Where a party or his counsel has been taken by surprise, in the course of a cause, by some accidental circumstance, which could not have been foreseen, in which no laches could be ascribed to either of them, a new trial will be awarded, if the court think the ver-

When genuine and productive of injustice, good ground.

[1] Supra, § 863.

[2] State *v.* Williams, 27 Vt. 824.

[3] Supra, § 864; Scofield *v.* State, 54 Ga. 635. See Richardson *v.* Fisher, 1 Bing. 145; De Giou *v.* Dover, 2 Anst. 517.

[4] Hewlett *v.* Cruchley, 5 Taunt. 277.

[5] R. *v.* Whitehouse, 18 Eng. L. & Eq. Rep. 105; 1 Dears. C. C. 1; Com. *v.* Randall, Thach. C. C. 500.

[6] See supra, § 864.

[7] People *v.* Lee, 17 Cal. 656. But see supra, §§ 842–8.

dict against the weight of evidence properly admissible.[1] Thus, a new trial will be granted where the plaintiff is surprised by the testimony of his own witnesses, who appear to have been tampered with;[2] where a witness has been so much disconcerted as to be unable to testify at the trial;[3] where a material witness, regularly subpœnaed and in attendance, absents himself shortly before the case is called;[4] and where, in a case of seduction, the principal witness lays the seduction on a day which the defendant has no reason to anticipate, being at a time when he was absent from the place, and could easily prove an *alibi*.[5]

So of undue haste in hurrying on trial.

§ 882. New trials will also be granted in cases where the trial was hurried on in such haste as to give the defendant no time to prepare for his defence, provided in the motion for the new trial a substantial defence be disclosed.[6] But mere want of preparation, arising from the defendant having been in prison, is no ground for a new trial.[7]

But absence of witness no ground when testimony is cumulative.

§ 883. Sudden sickness, and consequent absence of a material witness, is no ground for a new trial when the testimony to be established by such witness was proved by other parties.[8]

Ordinary surprise at evidence no ground.

§ 884. The mere fact of a party being surprised by the introduction of unexpected evidence, however, is no ground for a new trial,[9] especially when the affidavit does not show that the "surprising" evidence was not true.[10]

[1] See State *v.* Williams, 27 Vt. 724; Hilliard on New Trials (1873), 51; and cases cited § 879.

[2] Todd *v.* State, 25 Ind. 212. See supra, § 804; Peterson *v.* Barry, 4 Binn. 481.

[3] Ainsworth *v.* Sessions, 1 Root, 175. See supra, §§ 804, 879.

[4] Ruggles *v.* Hall, 14 Johns. 112.

[5] Sargent *v.* ——, 5 Cowen, 106. See supra, §§ 855 *et seq.*, as to what cases the defendant can be relieved in, on the ground of after-discovered evidence of the incompetency or bias of witnesses.

[6] An indictment was found November 21, for a murder committed on the 11th of October previous. The defendant was put upon trial immediately and convicted, and sentenced for murder in the second degree. The case did not appear to be an aggravated one. The defendant made affidavit that he had been surprised by the evidence, and had had no time for a proper defence. It was held, in Indiana, that under these and other circumstances of the case, a new trial should have been granted. Rosencrants *v.* State, 6 Ind. 407. Supra, § 600.

[7] Yanez *v.* State, 20 Tex. 656.

[8] Supra, §§ 590, 600; Young *v.* Com. 4 Grat. 550.

[9] Supra, § 804; R. *v.* Hollingberry, 6 D. & R. 345; 4 B. & C. 329; Willard *v.* Wetherbee, 4 N. H. 118; Wholford *v.* Com. 4 Grat. 553.

[10] People *v.* Jocelyn, 29 Cal. 562.

§ 885. In general, as has been seen, the production of unexpected evidence impeaching the character of a witness is no reason to set aside the verdict.[1]

Nor is unexpected bias of witness.

11. *Irregularity in Summoning of Jury.*

§ 886. Generally speaking, under the statutes, the mistake or informality of the officers charged with summoning, returning, and empanelling the jury, will be no ground for a new trial, unless there has been fraud or collusion, or material injury to the defendant.[2] But it is a good ground of objection at common law to the jury, that they have been improperly chosen, or chosen by an unauthorized officer, or that the officers in attendance had permitted irregularities.[3] Where one who had been challenged on the principal panel was afterwards sworn in under another name as a talesman;[4] and where talesmen were summoned and returned and placed on the trial, who were incompetent or who had not been drawn according to statute, new trials have been ordered.[5] If the party, however, is aware of the objections to a juror or talesman, and neglects his challenge, no new trial will be granted;[6] as the ob-

Ordinarily defects in jury process no ground.

[1] Supra, §§ 802, 869; Com. *v.* Drew, 4 Mass. 391; Com. *v.* Green, 17 Mass. 515.

[2] R. *v.* Hunt, 4 Barn. & Ald. 430; Amherst *v.* Hadley, 1 Pick. 38; People *v.* Ransom, 7 Wend. 417; Dewar *v.* Spence, 2 Whart. 211; Com. *v.* Chauncey, 2 Ashm. 90; Com. *v.* Gallagher, 4 Penn. Law Jour. 511; 2 Clark, 86. See, as to grand jury, supra, §§ 344 *et seq.*

In Pennsylvania, by the Act of 21st February, 1814, no verdict can be set aside, nor shall any judgment be arrested for any defect or error in the jury process; "but a trial, or an agreement to try on the merits, or pleading guilty, or the general issue, shall be a waiver of all errors and defects in or relative and appertaining to the said precept, *venire*, drawing, and summoning of jurors." See Com. *v.* Chauncey, 2 Ashmead, 90; Com. *v.* Gallagher, 4 Penn. Law Jour. 511; 2 Clark, 86. It has been held, under this act that standing mute is as much a waiver as pleading to the issue. Com. *v.* Dyott, 5 Whart. 67. In New York, under the Revised Statutes, it was held that a non-compliance of the clerk to put the names of all the persons returned as jurors in a box, from which juries are to be drawn, is not fatal. People *v.* Ransom, 7 Wend. 417.

[3] As a signal illustration of this see R. *v.* O'Connell, 11 Cl. & F. 155; Pamph. R. Arm. & T.; Lord Denman's Life, ii. 172.

[4] Parker *v.* Thornton, 2 Lord Raymond, 1410; though see R. *v.* Hunt, 4 B. & A. 430. See supra, § 846.

[5] R. *v.* Tremaine, 7 D. & R. 684; 5 B. & C. 254; Kennedy *v.* Williams, 2 Nott & McC. 79. See Com. *v.* Gallagher, 4 Penn. L. J. 520. Supra, § 846.

[6] Supra, § 845. See R. *v.* Sullivan,

jection that the juror had not been drawn and returned according to law comes too late after the verdict.[1] Thus, where one of the jury had been drawn more than twenty days before the time when the *venire* was made returnable, exception not having been made until after verdict, a new trial was refused.[2] And a new trial will not be granted because the clerk, in calling over the jury, pursued the order in which they were empanelled, instead of that in which their names appeared in the *venire*.[3] Nor is it ground for new trial that jurors and witnesses in a criminal case are sworn by an acting deputy clerk, who has not been appointed regularly or sworn in.[4]

§ 887. After the verdict, irregularities in the summoning of the grand jury or in the finding of the bill, not appearing on the record, cannot be noticed on a motion for a new trial.[5]

And so of irregularities in finding bill.

§ 888. The question of subsequent discovery of incompetency of a juror has been already discussed.[6]

§ 889. It is also settled, as we have already seen, that objections to the competency of jurors, on ground of preadjudication, must be taken before empanelling, or at the time when the party becomes first acquainted with the objection.[7] Nor is popular excitement at the time of the trial in itself a ground for new trial,[8] unless the jury be swept away by it into an unjust verdict.[9]

Prejudice in jury. Popular excitement.

IV. AT WHAT TIME MOTION FOR NEW TRIALS MUST BE MADE.

§ 890. An application for a new trial cannot, in general, be made after an application for arrest in the judgment;[10] though there are cases in which, if it appear that manifest injustice will ensue from a strict observance of the rule, the court will waive the formality, and admit the defendant to a rehearing;[11] and now the Court of Queen's Bench, in its dis-

Motion must be prompt.

1 P. & D. 96; 8 Ad. & El. 831; Howland *v.* Gifford, 1 Pick. 43.

1 See supra, § 845.

2 State *v.* Hascall, 6 N. H. 352.

3 State *v.* Slack, 1 Bailey, 330.

4 Mobley *v.* State, 46 Miss. 501.

5 Supra, § 350.

6 Supra, §§ 846 *et seq.*

7 Supra, §§ 844.

8 Com. *v.* Flanagan, 7 W. & S. 418; Brinkley *v.* State, 54 Ga. 71. Supra, § 844.

9 People *v.* Acosta, 10 Cal. 195.

10 1 Ch. C. L. 658; Resp. *v.* Lacaze, 2 Dall. 118.

11 R. *v.* Gough, 2 Dougl. 791; Bac.

cretion, hears motions in arrest of judgment before applications for a new trial.[1] In extreme cases, the court, especially if the punishment be capital, will hear the motion even after sentence imposed.[2] But the ordinary practice requires notice of the motion to be given within four days after verdict.[3] This, however, may be at discretion enlarged.[4]

When verdict set aside new trial at once ordered.

§ 891. Where a verdict has been set aside in a criminal case as imperfect, a *venire facias de novo* may at once be awarded, and a new trial had, either on the same indictment or another.[5]

V. AS TO WHOM MOTION APPLIES.

Any defendant may move.

§ 892. Any defendant, within the proper time, may apply for a new trial.

Defendant must be personally in court.

§ 893. The defendant, according to the old practice, must be personally in court at the application;[6] and where there are several defendants, all of them who have been convicted must be actually present, unless a special ground be laid for dispensing with the general rule.[7] But such presence, even in felonies, is not always regarded as essential.[8]

New trial may be granted as to one of several.

§ 894. Where some of the defendants have been convicted and others acquitted, a new trial may be granted to the former, without impeaching the verdict so far as it relates to the latter.[9] It is otherwise, however, when the conviction of the one is an essential condition of the conviction of the other.[10]

Abr. Trial (L.), 1; Chitty C. L. 658; R. *v.* Holt, 5 T. R. 436; People *v.* M'Kay, 18 Johns. 212.

[1] R. *v.* Rowlands, 2 Den. C. C. 386. See 6 T. R. 627; Bac. Abr. Trial (L.), 1.

[2] See Com. *v.* McElhaney, 111 Mass. 439. See, however, Willis *v.* State, 62 Ind. 391.

[3] R. *v.* Newman, 1 El. & Bl. 268; Dears. C. C. 85.

[4] Com. *v.* Gibson, 2 Va. Cas. 70.

[5] Com. *v.* Gibson, 2 Va. Cas. 70.

[6] Supra, § 548; 2 Burr. 930; 2 Stra. 844, 1227; 1 W. Bla. R. 209.

[7] R. *v.* Teal, 11 East, 307; 1 Sess. Cas. 428; Com. Dig. Indictment, N.; 1 Chit. C. L. 659; R. *v.* Fielder, 2 D. & R. 46.

[8] Supra, § 548.

[9] R. *v.* Mawbey, 6 T. R. 638; Com. *v.* Roby, 12 Pick. 496; Kemp *v.* Com. 18 Grat. 969; Seborn *v.* State, 51 Ga. 164.

[10] Jackson *v.* State, 54 Ga. 439. See supra, § 755.

VI. WHEN THE CONVICTION IS FOR ONLY PART OF THE INDICTMENT.

1. *Acquittal on One of Two Counts.*

New trial only on convicted counts.

§ 895. When there has been an acquittal on one count and a conviction on another, and the counts are for distinct offences, a new trial can only be granted on the count on which there has been a conviction; and it is error, on a second trial, to put the defendant on trial on the former.[1] It has been, however, ruled that where an indictment is for but one offence, charged in various ways, and the defendant is convicted upon some counts and acquitted as to others, the granting of a new trial on his motion opens the whole merits.[2]

2. *Conviction of Minor Offence included in Major.*

Conviction of minor is acquittal of major.

§ 896. Where two offences are included in one count, there has been a distinction taken which though specious is unsound. It has been held that where one count includes burglary and larceny, after acquittal of the greater offence but conviction of the less, and when a new trial is obtained, the whole case is reopened, and the defendant exposed on the second trial to the double charge.[3] But the true view is, that a conviction of the *minor* offence is to operate as an acquittal of the *major*.[4]

The law in reference to new trials after convictions for manslaughter, or murder in the second degree, has already been stated.[5]

[1] Supra, § 788; U. S. *v.* Davenport, 1 Deady, 264; Stuart *v.* Com. 28 Grat. 950; State *v.* Malling, 11 Iowa, 239; Campbell *v.* State, 9 Yerg. 333; Esmon *v.* State, 1 Swan, 14; Morris *v.* State, 8 S. & M. 762; State *v.* Kettleman, 35 Mo. 105; State *v.* Fritz, 27 La. An. 360. But see State *v.* Stanton, 1 Ired. 424; State *v.* Commis. 3 Hill S. C. 239. Compare remarks supra, § 788.

[2] Leslie *v.* State, 18 Oh. St. 390. But see supra, § 788.

[3] See supra, §§ 465, 742, 789.

[4] Supra, §§ 455, 465, 789; Com. *v.* Herty, 109 Mass. 348; People *v.* Knapp, 26 Mich. 112; Bell *v.* State, 48 Ala. 684; Lewis *v.* State, 51 Ala. 1, and other cases cited supra, § 455; State *v.* Martin, 30 Wis. 216.

[5] Supra, §§ 465–8, 789. See Whart. Crim. Law, 8th ed. § 541.

VII. BY WHAT COURT NEW TRIAL MAY BE GRANTED.

1. *Appellate Courts.*

§ 897. At common law the court trying the case is the sole tribunal by whom a new trial can be granted; and its refusal so to do, being matter of discretion, is no ground for a writ of error.[1] In most of the States, however, provision is made for obtaining revision by an appellate court.[2] When such a rehearing is had the appellate court is not bound to reëxamine the witness and hear the evidence *verbatim*, but, when there is no official stenographer, may hear the material facts proved, and the evidence adduced at the trial, from the trial court notes, aided by those of the counsel on both sides.[3]

Appellate court may revise evidence from notes.

2. *When Judge trying Case dies or leaves Office.*

§ 898. In the Circuit Court of the United States sitting in Philadelphia, it has been held that where the judge trying a case died pending a motion for a new trial, his successor will decline hearing the case, and will grant a new trial.[4] But in Wisconsin it is said that a defendant can be sentenced by a judge succeeding in office the judge before whom the trial was had.[5]

Conflict of opinion on this point.

VIII. IN WHAT FORM.

§ 899. Upon ground *primâ facie* sufficient, the court, on application, will award a rule to show cause why a new trial should not be granted.[6] On this, in England, the puisne judge of the court applies to the judge who tried the case, unless he be one of the judges of the court hearing the motion, for a report of the trial, and a statement of his opinion respecting its merits.[7] If he signify his dissatisfaction, the remedy prayed for is usually allowed; if he declare his con-

Rule to show cause to be first granted.

[1] Supra, § 779; infra, § 902; Lester *v.* State, 11 Conn. 415.

[2] See infra, §§ 902, 927–8.

[3] Jones's case, 1 Leigh, 598. Infra, § 899.

[4] U. S. *v.* Harding, 1 Wall. Jr. 127. Supra, § 515; infra, § 929.

[5] Pegalow *v.* State, 20 Wis. 61. See State *v.* Abram, 4 Ala. 272. Compare infra, § 929.

[6] Bul. N. P. 327; Tidd, 884; Hand. Prac. 12.

[7] Bul. N. P. 327; Tidd, 884.

currence with the verdict, it is commonly refused; but if he merely report the evidence, without giving any decided and satisfactory opinion, the court will admit the question to be argued before them.[1] If they find there is no ground for the application, they will discharge the rule; but if solid ground be shown, they make it absolute.[2]

Motion must state reasons.

§ 900. The motion should state specifically the reasons relied on by the party making it.[3] To simply say that the court erred in refusing to admit, or in admitting competent or incompetent evidence, is insufficient. The evidence in question must be specified, and the name of the witness, when the evidence is given, stated.[4] When the ground is after-discovered evidence, the motion must be supported by affidavits of the witnesses to be produced.[5]

IX. COSTS.

Costs may await second trial.

§ 901. The practice as to the imposition of costs is the same in criminal cases as in civil.[6] And the court, even when an indictment after verdict is removed by *certiorari* to a higher court on ground of surprise, may direct that the costs shall await the result of the second trial.[7]

X. ERROR.

Error does not usually lie to action of court.

§ 902. We have just seen that at common law refusing a new trial is not ground for error.[8] When, however, by statute, error in such case lies, the refusal of the court below will not be reversed unless it should affirmatively and plainly appear to the appellate court that the decision of the court below was wrong.[9]

[1] R. T. H. 23; Barnes, 439. See Simpson *v.* Norton, 45 Me. 281.

[2] 1 Chitty's C. L. 660.

[3] Hilliard on New Trials (1873), 28. Supra, § 855.

[4] Cheek *v.* State, 37 Ind. 533; People *v.* Ah Sam, 41 Cal. 645; State *v.* Kellerman, 14 Kans. 135; Runnels *v.* State, 28 Ark. 121. Supra, § 855.

[5] Supra, § 855.

[6] R. *v.* Ford, 1 N. & M. 776; Hilliard on New Trials (1873), 65.

[7] R. *v.* Whitehouse, Dears. C. C. 1.

[8] Supra, § 897.

[9] Grayson's case, 6 Grat. 723; Read *v.* Com. 22 Grat. 924. Supra, §§ 779, 897.

CHAPTER XIX.

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§ 905. BY the ordinary rules of court a defendant is allowed four days in which to move in arrest of judgment or for a new trial. To previous chapters the reader is referred for a discussion of these motions: it is proposed at present, on the supposition, either that they have been made and refused, or that a final judgment has been entered against the defendant on demurrer, to consider the law bearing on the subject of sentence.

I. DEFENDANT TO BE ASKED IF HE HAS ANYTHING TO SAY, ETC.

In felonies this is essential.

§ 906. At common law, in all felonies, when capital, the practice has been for the clerk, before sentence is pronounced, to ask the defendant if he has anything to say why sentence should not be pronounced; and it is essential that it should appear on record that this was done.[1] In several States the rule is that the absence of such an averment will require the remittal by a court of error of the record to the trial court for a new sentence.[2] In other States the failure of

[1] Supra, § 550; 1 Ch. C. L. 709; 2 Ld. Raym. 1409; R. *v.* Geary, 2 Salk. 630; R. *v.* Speke, 3 Salk. 358; Safford *v.* People, 1 Park. C. R. 474; Graham *v.* People, 63 Barb. 468; West *v.* State, 2 Zab. 212; Hamilton *v.* Com. 16 Penn. St. 121; Dougherty *v.* Com. 69 Penn. St. 286; McCue *v.* Com. 78 Penn. St. 185; Mullen *v.* State, 45 Ala. 43; Crocker *v.* State, 47 Ala. 53; James *v.* State, 45 Miss. 572. Infra, § 915.

In New York, where the exemplification that comes to the court in error does not show that the question was asked, a *certiorari* may be granted to the oyer and terminer to bring up the whole record. Graham *v.* People, 6 Lansing, 149.

In Edwards *v.* State, 47 Miss. 581, it was said that it was sufficient in error when the record averred that the court, "after hearing the defendant," proceeded to pass sentence. See State *v.* Fritz, 27 La. An. 360; State *v.* Hugel, 27 La. An. 375. That the defendant must have been present in court during sentence see supra, § 550.

[2] McCue *v.* Com. 78 Penn. St. 185; Dodge *v.* People, 4 Neb. 220; Keech *v.* State, 15 Fla. 591. See supra, § 780.

the record in this respect has been held not to be ground for a reversal, though it is agreed on all sides that the form is one proper to be used.[1] But this address is not to be viewed as an invitation to the defendant to bring forward additional motions in arrest of judgment, or for a new trial. These motions have, according to the usual practice, been already made and disposed of. The object of the address is to give the defendant the opportunity to personally lay before the court, statements which, by the strict rules of law, could not have been admitted when urged by his counsel in the due course of legal procedure; but which, when thus informally offered from man to man, may be used to extenuate guilt and to mitigate punishment.

II. DISTRIBUTION OF PUNISHMENT AS TO COUNTS.

§ 907. The more exact course, as has been stated, is for the jury, when the indictment contains several counts, to find separately on each count.[2] Should, however, the verdict be general, the prosecuting officer may enter a *nolle prosequi* on the counts which are superfluous, or the court may disregard them, treating their abandonment by the prosecuting officer as virtually a *nolle prosequi*.[3] On the count that remains judgment may be entered.[4]

On general verdict superfluous counts can be got rid of by *nolle prosequi*.

§ 908. Suppose, however, one of the counts on which there has been a general verdict is bad. Here we have a conflict of opinion. Does such bad count vitiate the verdict? So it has been held.[5] But the prevalent and sounder opinion is that in such case the bad count can be got rid of by a *nolle prosequi*, or passed over by the sentencing court, if the record does not show that evidence, inadmissible under the good count, was admitted under the bad.[6] Logically, it is true, a single bad count vitiates the verdict, since it is impossible to

And so even if there be a bad count.

[1] Supra, § 550; Jeffries *v.* Com. 5 Allen, 145; Grady *v.* State, 11 Ga. 253; Sarah *v.* State, 28 Ga. 576; State *v.* Ball, 27 Mo. 324; Jones *v.* State, 51 Miss. 718; State *v.* Taylor, 27 La. An. 393. Where the defendant moves for a new trial or arrest of judgment, it is not fatal that it does not appear from record that the prisoner was asked whether he had anything to say why sentence of death should not be pronounced against him. State *v.* Johnson, 67 N. C. 58; Spigner *v.* State, 58 Ala. 421.

[2] Supra, § 736.

[3] Supra, §§ 292, 738, 740, 771.

[4] Ibid. See Young *v.* R. 3 T. R 98.

[5] Supra, § 771.

[6] Ibid. Compare supra, §§ 292, 737-48.

exclude the hypothesis, on the bare record, that it was on that count that the verdict may have been based. But in cases of this class we are not limited to the bare record. The court trying the case knows to which counts the evidence was applicable, and to which the verdict was attached; and a court of error may well presume that the court below, in sentencing on the good counts, sentenced on counts to which the verdict was properly to be assigned.[1] And, as a general rule, the presumption of regularity may be invoked to sustain the conclusion that the verdict went to the good counts; and this presumption is eminently applicable to cases in which the counts vary only in matters of form, or in which they are for successive stages of the same offence.[2] But it will be error in such cases to impose a sentence exceeding that which could have been given on the good counts;[3] though in some jurisdictions this is not ground for reversal, when the appellate court may by statute reduce the sentence.[4] And it is not error when the sentence is less than could have been legally imposed.[5]

Conflict as to general sentence when one count is bad.

§ 909. Another contingency arises when the jury find a verdict of guilty on each count, but on this verdict there is a general judgment and sentence in the court below. Should this judgment be reversed in error, if one of the counts turns out, on examination in the court of error, to be defective? The conflict of opinion on this point has been already noticed.[6]

[1] Supra, §§ 771.

[2] As sustaining the view in the text see Kane *v.* People, 8 Wend. 203; People *v.* Gates, 13 Wend. 311; People *v.* Costello, 1 Denio, 83. To the effect that the presumption in error is that the evidence in the court below sustained the verdict see Slack *v.* People, 80 Ill. 32; Brennan *v.* Shinkle, 89 Ill. 604; Doll *v.* Anderson, 27 Cal. 248.

[3] Infra, § 927.

[4] Infra, §§ 927–8; Com. *v.* Kirby, 2 Cush. 577.

[5] Infra, § 918.

[6] Supra, § 771.

Whether, when two distinct offences are joined, and the defendant is found guilty on each count, there can be a lumping sentence on the whole, has been doubted. In England the negative has been held. R. *v.* Robinson, 1 Moody, 413.

In Massachusetts, it has been said that when there is a verdict of guilty on each of several inconsistent counts, this is a mistrial, and there can be no *nolle prosequi*. Com. *v.* Fitchburg R. R. 120 Mass. 372. But usually when a greater and a less offence are joined in two counts, and there is a general verdict, the court sentences for the greater. Supra, § 292.

§ 909 *a*. Where there are several counts, a judgment and sentence upon one of these counts, no action being taken as to the others, disposes of the whole indictment, and operates as an acquittal upon or discontinuance of the other counts.[1]

A verdict and judgment as to one count disposes of the others.

§ 910. Next have we to consider whether, when there is a series of counts, all good, on which there have been separate verdicts, the court trying the case can impose

Successive imprisonments may

[1] See cases, supra, § 740.

Where a general verdict of guilty has been rendered upon an indictment containing several counts for distinct offences, and a sentence of imprisonment has been awarded upon some of the counts, under which sentence he has been imprisoned, the defendant cannot, at a subsequent term, be brought up and sentenced over upon another count in the same indictment. Com. *v.* Foster, 122 Mass. 317. As to this point, see infra § 913.

In Massachusetts we have the following, in 1880: In an indictment containing two counts the defendants were charged in the first with the larceny of a cow, and in the second with receiving the same cow knowing the same to have been stolen. At the trial there was evidence tending to show that the cow had been stolen, and that recently after said larceny the cow was in possession of the defendants. The prosecuting officer went to the jury on both counts, and the court, among other instructions not objected to, especially instructed the jury that there was no evidence in the case to authorize a verdict of guilty on the second count. The jury found the defendants guilty on each count, and the verdict was taken and affirmed by the court in the usual way against both defendants. Defendants then moved in arrest of judgment that the indictment charged two distinct offences; that the verdict was inconsistent and void, and that the finding was contrary to law and in violation of the instructions given by the court. Thereupon the district attorney moved for leave to *nolle prosequi* the second count, which the court granted, against defendants' objection. The court then overruled the motion in arrest of judgment, and the defendants excepted. It was held that the *nolle prosequi* affected only the proceedings subsequent to it, not the record of what is antecedent. By that record it appears that there had been a larceny, and but one larceny. The defendants could not be guilty upon both counts, because in law the guilty receiver of stolen goods cannot himself be the thief; nor can the thief be guilty of receiving stolen goods which he himself has stolen. The fact that the verdict was inconsistent with the views of the presiding judge does not invalidate it as a verdict after it had been recorded and affirmed. The finding of guilty upon both counts is inconsistent in law and conclusive of a mistrial. To assume that the error is corrected by a *nolle prosequi* of either count by the district attorney is to permit the district attorney to determine, instead of the jury, upon which count the defendants were guilty. Com. *v.* Haskins, S. Ct. Mass. 1880; 10 Cent. L. J. 236.

be given on successive counts.

a separate sentence on each count. That this can be done we have numerous authoritative rulings.[1] Nor, when the offences are distinct, is there any reason why, on a conviction on each count, such convictions should not, in all cases where the counts are for a chain of cognate offences, be treated as would be convictions on separate indictments. To require each distinct though cognate offence to be placed in a distinct indictment is to oppress the defendant, by loading him with unnecessary costs, and exposing him to the exhaustion of a series of trials, which the prosecution would encounter with unwaning strength, and with the benefit derived from a knowledge of its own case, and that of the defendant.[2] Vexatiously splitting civil actions into a multitude of independent suits has been held an indictable offence;[3] and in suits for penalties, when the suits are unduly multiplied, rules for consolidation are granted as a matter of course.[4] In criminal cases, from the peculiar degree of oppressiveness which would result from a splitting of prosecutions, the practice of uniting counts for cognate offences has always been encouraged, not merely because in this way the labor of the courts and the expenses of prosecution are greatly diminished, but because the interests of defendants are thereby subserved.[5] In New York, however, in 1875, it was

[1] 1 Ch. Cr. L. 718; Russ. on Cr. 4th Eng. ed. 1030; Archbold's C. P. 17th ed. 173; R. *v.* Wilkes, 4 Burr. 2527; R. *v.* Jones, 2 Camp. 121; Douglass *v.* R. 13 Q. B. 42; R. *v.* O'Connell, 11 Cl. & F. 241, Tindal, C. J.; Gregory *v.* R. 15 Q. B. 974; R. *v.* Castro, L. R. 9 Q. B. D. 350; Com. *v.* Gillespie, 7 S. & R. 476; Com. *v.* Sylvester, Brightly R. 331, Com. *v.* Birdsall, 69 Penn. St. 482 (though see Com. *v.* Hartman, 5 Barr, 60; Henwood *v.* Com. 52 Penn. St. 424); Kroer *v.* People, 78 Ill. 294; Fletcher *v.* People, 81 Ill. 116; State *v.* Gummer, 22 Wis. 441; State *v.* Thomas, 14 Richards. 163; Storrs *v.* State, 3 Mo. 9.

In Massachusetts it has been determined that when there has been such a conviction of distinct offences, the court may impose a lumping sentence, consisting of a term of imprisonment such as could have been imposed had there been convictions on separate indictments. Charlton *v.* Com. 5 Met. 532; Booth *v.* Com. 5 Met. 535. See Com. *v.* Hills, 10 Cush. 530. "It is not necessary," said Shaw, C. J. (5 Met. 533), "in such cases, to award separate sentences, where they (the offences) are so far alike that the whole of the judgment is but the sum of the several sentences to which the convict is liable." See Com. *v.* Cain, 102 Mass. 487; Com. *v.* Carey, 103 Mass. 214. Am. Law Rev. October, 1875, p. 172.

[2] Supra, § 294.

[3] Com. *v.* McCulloch, 15 Mass. 247.

[4] See supra, §§ 285, 294 *et seq.*

[5] That rules to consolidate in such cases are granted in the federal courts

ruled by the Court of Appeal, that even where there are separate verdicts of guilty on each of several cognate counts, the defendant can only be sentenced on a single count.[1] But this ruling is not likely to be elsewhere sustained, unless required by statute.[2]

§ 911. What has just been said supposes that the counts describe separate offences, of each of which the jury convicted. Otherwise, there can be properly no sentence except for the punishment proper for a single count, for it would be monstrous to say that the judge can impose on the defendant the aggregate penalties of two offences when the offences are virtually identical. We may illustrate this by noticing the effect of a general verdict of guilty on an indictment containing a count for an assault, and a count for assault and battery, supposing the offences to have been committed by the same act. The law imposes certain penalties for assault and battery, which penalties are designed to cover the assault as well as the battery. To sentence the defendant to the penalties for an assault, as averred in the first count, and then again for an assault *and* battery, as averred in the second count, would expose him to a double punishment for the same offence. The only legitimate course, when the several counts are simply successive stages of one offence, is, in accordance with the view already given, to impose the sentence on the count containing the highest offence, dropping the rest.[3] This, to repeat once

But not where counts are for distinct offences.

we have already seen, supra, §§ 285 *et seq.*

[1] People *v.* Liscomb, 60 N. Y. 559; and see Buck *v.* State, 1 Oh. St. 61.

[2] Supra, §§ 292, 737–40. See U. S. *v.* O'Callahan, 6 McLean, 598, and cases cited above.

In Illinois it is said that on a conviction on a series of counts, separate imprisonment may be imposed on each count, but the sentence is not to fix the day and hour on which each successive imprisonment is to begin. The sentence should specify the length of time on each count, and provide that the imprisonment on each count after the first shall begin when the imprisonment on the count before it terminated. Johnson *v.* People, 83 Ill. 431. See Peters, ex parte, 4 Dillon, 169.

In Polinsky *v.* People, 73 N. Y. 65, it was held that where a defendant was convicted on an indictment in which he is charged with an offence punishable by fine, and also with one punishable by imprisonment, there is no legal objection to a sentence of fine and imprisonment.

[3] See supra, §§ 292, 740–2, 908–9; State *v.* Hood, 51 Me. 363; State *v.* Hooker, 17 Vt. 658; State *v.* Merwin, 34 Conn. 113; State *v.* Tuller, 34 Conn. 280; Conkey *v.* People, 1 Abb. N. Y. App. Dec. 418; Cook *v.* State,

more a distinction important to keep in mind in cases of this class, is on the supposition that the several counts are simply for separate stages or modifications of the same offence.

III. DEFENDANT'S PRESENCE ESSENTIAL.

§ 912. This point has been already discussed, and it has been shown that in all cases of corporal punishment the defendant's presence at the sentence is requisite.[1]

IV. AMENDMENT OR STAY.

§ 913. As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session;[2] and it has been said that even during subsequent sessions, down to the period of the execution of the sentence, the court may further amend, or stay proceedings, or respite.[3] But the mere entry of a rule to reconsider, at the term when the sentence was imposed, does not, it is generally held, give the court the right, after execution of the sentence has substantially begun, to revise the sentence at future terms.[4] And a majority of the judges of the Supreme Court of the United States have gone so far as to hold that when cumulative penalties are given by a statute, and one of these, a fine, is imposed and satisfied, the sentence cannot, after such satisfaction, be amended, even during the term of its imposition, by adding the other penalty.[5] Nor, as we have

Court may amend during term.

4 Zabr. 843; Manley *v.* State, 7 Md. 149; Cawley *v.* State, 37 Ala. 152; State *v.* McCue, 39 Mo. 112. That this does not apply to *distinct* offences see Charlton *v.* Com. 5 Met. (Mass.) 532; Booth *v.* Com. 5 Met. (Mass.) 535; Kite *v.* Com. 11 Met. (Mass.) 581.

[1] Supra, § 550.

[2] R. *v.* Fitzgerald, 1 Salk. 400; Com. *v.* Weymouth, 2 Allen, 144; Hazlett, in re, 1 Crumrine (Pitts.), 169; Lee *v.* State, 32 Oh. St. 113; Mason, in re, 8 Mich. 70; People *v.* Thompson, 4 Cal. 238.

In Basse *v.* U. S. 9 Wall. 39, the court held that after a sentence to jail upon plea of guilty, and after the prisoner was committed and was serving out his sentence, the court might for good cause, at the same term, set the sentence aside. See also Cheang-Kee *v.* U. S. 3 Wall. 320; People *v.* Duffy, 5 Barb. 205; Jobe *v.* State, 28 Ga. 235.

[3] Miller's case, 9 Cow. 730; State *v.* Cockerham, 2 Ired. 204; Fults *v.* State, 2 Sneed, 232. But see McCarthy *v.* State, 56 Miss. 295.

[4] Com. *v.* Malloy, 57 Penn. St. 291.

[5] Lange, ex parte, 18 Wal. 163. See Scott *v.* Davis, 31 La. An. 249.

seen, after a sentence on one count, can the court, at a subsequent term, sentence on another.[1]

V. CAPITAL PUNISHMENT.

§ 914. When the indictment is so drawn as to sustain a verdict of either murder in the first or murder in the second degree, and there is a general verdict of guilty, it has been held error to sentence for murder in the first degree; and a court of error may reverse on this ground, and impose a sentence of murder in the second degree.[2] In Wisconsin, under such circumstances, a new trial is granted.[3] But in most jurisdictions, by statute, if not at common law, the verdict must specify the degree.[4]

On verdict of guilty, on indictment for murder court will sentence for second degree.

§ 915. Before imposing sentence of death, it is eminently the duty of the court patiently and considerately to hear whatever final remarks may be made by the prisoner in reference to his guilt. Nor is it possible, on such conspicuous occasions, for a humane and conscientious judge to avoid preceding the sentence by such observations as may tend to give a public moral force to this last and most terrible judgment of the law. Whether he shall say anything at this time, however, and what he shall say, is wholly at the discretion of the judge. The question put to the prisoner has been already specifically discussed.[5]

Defendant to be asked as to sentence and may reply.

§ 916. The form of sentence depends mainly on the local statutory law. By the English common law, as followed in several of our States, it is not the function of the court to fix the time and place of execution in the original sentence.[6] This in some jurisdictions is done by the chief magistrate of the State, in signing the warrant;[7] in some

Sentence depends on statute.

[1] Com. v. Foster, 122 Mass. 317, cited supra, § 909 a. See State v. Davis, 31 La. An. 249.

[2] Johnson v. Com. 24 Penn. St. 386; State v. McCormick, 27 Iowa, 402.

In New York such a verdict has been held to be for the first degree. Kennedy v. People, 39 N. Y. 245. See fully Whart. Crim. Law, 8th ed. § 543.

[3] Hogan v. State, 30 Wis. 437.

[4] Whart. Crim. Law, 8th ed. § 543.

[5] Supra, § 906.

[6] R. v. Doyle, 4 Leach, 67; R. v. Wyatt, R. & R. 230; Gray v. State, 55 Ala. 81; People v. Murphy, 45 Cal. 137.

[7] 2 Hale P. C. 399; R. v. King, 3 Burr. 1812; Howard, ex parte, 17 N. H. 545; Webster v. Com. 5 Cush. 386; Lowenberg v. People, 27 N. Y. 336;

by the court, on subsequent motion. And if the time designated for execution elapses without such execution, by stay of execution or otherwise, a new time for execution is to be assigned, the judgment still remaining in force.[1] The mode of punishment is hereafter noticed.[2]

Pregnancy is ground of respite.

§ 917. In the frequency of capital punishments in the old English practice, it was not uncommon for female prisoners to claim the benefit of the law that no woman should be executed while she is quick with child. The practice, under such circumstances, is for the woman, when called prior to sentence to say whether she has anything to allege why sentence of death should not be passed upon her, to plead orally her pregnancy, upon which the sheriff is forthwith directed to empanel a jury of matrons. This jury being sworn to inquire as to whether the prisoner is "quick with child," they retire with the prisoner; and the court is governed by their verdict to the same extent that it would be by the verdict of a jury empanelled to try any issue of fact. In the hearing before the jury, surgeons may be called to testify as experts.[3] If the verdict be found in

Cathcart *v.* Com. 37 Penn. St. 108. In Alabama the sentence specifies the day. Aaron *v.* State, 40 Ala. 308. See People *v.* Murphy, 45 Cal. 137.

[1] R. *v.* Harris, 1 Ld. Ray. 482; Howard, ex parte, 17 N. H. 545; Lowenberg *v.* People, 27 N. Y. 336; State *v.* Oscar, 13 La. An. 297. Compare Bland *v.* State, 2 Ind. 608. Infra, § 928.

It is not error for the trial court to pronounce sentence of death upon a conviction of murder, before determining a motion for a new trial filed prior to sentence. State *v.* Hoyt, 46 Conn.

[2] Infra, §§ 918 *et seq.*

[3] In R. *v.* Webster, London, 1879, an application of this character was made to Denman, J., sitting at the Old Bailey. The law, as stated by the judge, was that the woman must be "quick with child." A jury was empanelled from women in the gallery of the court-room. The judge, in summing up, said: "This is a very unusual inquiry, ladies of the jury, and it has never happened to me before. The law is that, if it be established to the satisfaction of the jury that the prisoner is quick with child, then the execution must be respited. If you feel that it would be desirable, before deciding that issue, that you should retire into the jury-room, you are warranted in doing so — and I should desire you to do it. At the same time, as women who are married, I feel sure that you will be of opinion that the judgment of a person who has for years practised as an accoucheur, who appears to be a fair-minded, clear-minded, and a skilful man in medical matters, is entitled to be taken — not that the prisoner is in a condition of pregnancy, but whether she is or is not quick with child."

The jury occupied two or three minutes in deliberation in the box.

the defendant's favor, she is respited from session to session until the delivery of the child.[1] In New York, this right is prescribed by statute.[2] But, when no statute exists, it without question obtains at common law.[3]

VI. CORPORAL PUNISHMENT.

§ 918. The moulding of sentences of imprisonment is in the discretion of the court, provided the statutory bounds be not exceeded.[4] Even a statute providing that sentence shall be pronounced within a certain time after judgment is directory, though delay in this respect is not to operate to the prejudice of the prisoner.[5] The power of amendment of sentence reserved to the court has been already discussed.[6]

Limits of sentence to be determined by statute. Discretion allowed to courts.

The place of imprisonment need not at common law be designated in the sentence.[7]

The revision in error of sentences of imprisonment has also been already noticed.[8] Judgment, it has been held, will not be reversed for a sentence of imprisonment *less* than that permitted by law, if the statutory character of the punishment be not changed.[9] But in any view, where a sentence is divisible, the defective part may be stricken out in review.[10]

Mr. Avory: Have you agreed upon your verdict?

The Forewoman: Yes.

Mr. Avory: Do you find that the prisoner is with child — quick child — or not?

The Forewoman: Not.

Mr. Avory: You say she is not.

The prisoner was then removed from the dock.

[1] See 4 Black. Comm. 395 (though Blackstone maintains that a *second* pregnancy cannot be consecutively pleaded to the same sentence, to which Christian demurs); 1 Hale P. C. 369, 370; 1 Ch. C. L. 759. A form will be found in R. *v.* Wycherly, 8 C. & P. 262.

[2] 2 R. S. 658, § 20.

[3] State *v.* Arden, 1 Bay, 487. In Holeman *v.* State, 13 Ark. 105, which was a case of larceny, the plea was overruled.

[4] Supra, § 913; McCulley *v.* State, 62 Ind. 428.

[5] R. *v.* Wyatt, R. & R. 230; John *v.* State, 2 Ala. 290. See infra, § 923.

[6] Supra, § 913.

[7] Infra, § 926.

[8] Supra, §§ 750, 771, 906; infra, § 927.

[9] Rawlins *v.* State, 2 Md. 201; Behler *v.* State, 22 Ind. 345; McQuoid *v.* People, 3 Gilm. 76; Haney *v.* State, 5 Wis. 529; Wattingham *v.* State, 5 Sneed, 64; Ooton *v.* State, 5 Ala. 463; Barada *v.* State, 13 Mo. 94; State *v.* Evans, 23 La. An. 525. Supra, §§ 780, 907; though see Rice *v.* Com. 12 Met. (Mass.) 246; Taff *v.* State, 39 Conn. 82; Brown *v.* State, 47 Ala. 53.

[10] Taff *v.* Com. 39 Conn. 82; Kane

Where a party is subject to two distinct penalties by statute for the same offence, he cannot assign the omission of one of them in the sentence as ground for reversal of judgment.[1]

The punishments, *e. g.* fine and imprisonment, may be cumulatively imposed.[2]

Where a statute prescribes alternative penalties, one only can be inflicted.[3]

The practice when the jury graduate the imprisonment in their verdict has been treated in a prior chapter.[4]

It is within the discretion of the court, on application, to hear affidavits in aggravation or mitigation of sentence.[5]

Fine and imprisonment usual common law penalties.

§ 919. By the common law, as now modified in American practice, fine and imprisonment, in cases not capital, are the usual punishments;[6] and when a statute creates an offence without assigning a penalty, fine and imprisonment are the penalties to be imposed.[7] At one time it was maintained by a Pennsylvania judge, zealous of common law traditions, that on common scolds ducking could be inflicted, but this view was rejected by the Supreme Court, and now no longer is countenanced.[8] "Whipping" will be presently considered.

"Cruel and unusual punishment" is unlawful.

§ 920. The constitutional provision in this respect has been held not to apply to state courts. Its principle, however, must be considered as part of the common law of each State.[9] But in 1879, an ordinance in San Francisco, providing for the cutting off the queues of Chinese as a mode of punishment, was held by Field, J., of the Supreme Court of the United States, to conflict with the federal Consti-

v. People, 8 Wend. 205; Beck *v.* Com. 25 Penn. St. 11; Weaver *v.* Com. 29 Penn. St. 445; Kennedy *v.* State, 62 Ind. 136; David *v.* State, 40 Ala. 69; State *v.* Evans, 23 La. An. 525.

[1] Dodge *v.* State, 4 Zab. 455.

[2] Polinsky *v.* People, 73 N. Y. 65.

[3] State *v.* Kearney, 1 Hawks, 53. Infra, § 924.

[4] Supra, § 752.

[5] Infra, § 945.

[6] State *v.* Dewer, 65 N. C. 572; Conner *v.* Com. 13 Bush, 718.

[7] U. S. *v.* Coolidge, 1 Gall. 488; Res. *v.* De Longchamps, 1 Dall. 111. See State *v.* Danforth, 3 Conn. 112. When a party is sentenced to a fine, the court is at liberty to imprison him until the fine is paid. Jackson, ex parte, 96 U. S. 727. Infra, § 924.

[8] James *v.* Com. 12 S. & R. 220. See U. S. *v.* Royall, 3 Cranch C. C. 620.

[9] Pervear *v.* Com. 5 Wall. 476; Barker *v.* People, 3 Cow. 688; James *v.* Com. 12 S. & R. 220.

tution, on the ground that hostile and discriminating legislation by a State against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution.[1]

§ 921. But what are "cruel and unusual?" Certainly not solitary imprisonment at hard labor, though, when introduced, such penalties were unusual, and by eminent philanthropists were held to be cruel.[2] Nor can whipping be so pronounced.[3] It has been found to be the most efficacious of penalties in checking certain classes of brutal crimes;[4] and it may be far less cruel than certain durations and kinds of imprisonment. It cannot be rejected, therefore, as conflicting with the principle embodied in the constitutional sanction above given; though in some jurisdictions it may be forbidden by statute.[5]

"Whipping" not cruel and unusual.

Shooting, as a method of death, may be inflicted under the Utah statute.[6]

[1] Ho Ah Kow *v.* Nunan, 9 Cent. L. J. 142; 20 Alb. L. J. 250.

In China, however, if we can trust Jules Verne's Chinaman in China, the cutting away of queues is a mode of penal discipline.

[2] See Whitten *v.* State, 47 Ga. 497.

[3] See U. S. *v.* Collins, 2 Curtis C. C. 194; Com. *v.* Wyatt, 6 Rand. 694; State *v.* Kearney, 1 Hawks, 54. Compare Whart. Crim. Law, 8th ed. § 872.

[4] See 1 Wh. & St. Med. Jur. §§ 170, 539, note *s*, and notes given infra.

[5] By act of Congress, it is forbidden in military and naval discipline. See R. Stat. U. S. § 5328.

[6] Wilkerson *v.* Utah, 99 U. S. 130.

In Lord Macaulay's Report on Indian Code we have the following: —

"We have not thought it desirable to place flogging in the list of punishments. If inflicted for atrocious crimes with a severity proportioned to the magnitude of those crimes, that punishment is open to the very serious objections which may be urged against all cruel punishments, and which are so well known that it is unnecessary for us to recapitulate them. When inflicted on men of mature age, particularly if they be of decent stations of life, it is a punishment of which the severity consists, to a great extent, in the disgrace which it causes; and to that extent the arguments which we have used against public exposure apply to flogging.

"It has been represented to us by some functionaries in Bengal, that the best mode of stimulating the lower officers of police to the active discharge of their duties is by flogging, and that since the abolition of that punishment in this presidency, the magistrates of the lower provinces have found great difficulty in managing that class of persons.

"This difficulty has not been experienced in any other part of India. We therefore cannot, without much stronger evidence than is now before us, believe that it is impracticable to make the police officers of the lower

VII. FINES.

§ 922. By a statute of the United States, a fine or penalty imposed as "a judgment or sentence" against any person in criminal cases "shall be declared a judgment debt, and (unless pardoned or remitted by the Presi-

May be collected by execution.

provinces efficient without resorting to corporal punishment. The objections to the old system are obvious. To inflict on a public servant, who ought to respect himself and to be respected by others, an ignominious punishment, which leaves an indelible mark, and to suffer him still to remain a public servant, to place a stigma on him which renders him an object of contempt to the mass of the population, and to continue to intrust him with any portion, however small, of the powers of government, appears to us to be a course which nothing but the strongest necessity can justify.

"The moderate flogging of young offenders for some petty offences is not open, at least in any serious degree, to the objections which we have stated. Flogging does not inflict upon a boy that sort of ignominy which it causes to a grown man. Up to a certain age, boys, even of the higher classes, are often corrected with stripes by their parents and guardians; and this circumstance takes away a considerable part of the disgrace of stripes inflicted on a boy by order of a magistrate. In countries where a bad system of prison discipline exists, the punishment of flogging has in such cases one great advantage over that of imprisonment. The young offender is not exposed even for a day to the contaminating influence of an ill-regulated jail. It is our hope and belief, however, that the reforms which are now under consideration will prevent the jails of India from exercising any such contaminating influence; and, if that should be the case, we are inclined to think that the effect of a few days passed in solitude or in hard and monotonous labor would be more salutary than that of stripes."

Compare the discussion in Woolsey's Political Philosophy, § 116.

In 1877 the English home secretary issued a circular proposing the following inquiries: 1. Is the penal law against crimes of brutal violence, as distinguished from trifling crimes on the one hand, and indecent assaults on the other, sufficiently stringent, and if not, in what way should it be amended? . . . . 4. Should flogging be authorized for other kinds of violence than those now provided by law? 5. Has flogging been efficacious in putting down the offences for which it is now authorized as a punishment by law? To the first of the questions the lord chief justice of the Queen's Bench, the chief baron, two judges, and three barons, answered that the present law is not sufficiently stringent; while on the other hand the lord chief justice of the Common Pleas, four judges, and one baron, replied that the present law is stringent enough. As to punishment by flogging, Chief Justice Cockburn was of the opinion that flogging had been found efficacious, and that it was an appropriate punishment for violence in cases of brutal assault, where, from the nature of the assault, it appeared that bodily injury was intended, and such injury actually resulted. To this opinion inclined a large majority of those consulted. On the other hand, Justice

dent) may be collected on execution in the common form of law."[1] In several of the States similar statutes are in force, and it has also been held that the same practice exists at common law.[2] Process of this kind is supplementary to that specified by the sentence, of imprisonment until the fine be paid. For, by the sentence, the defendant stands committed until the fine and costs shall be paid;[3] and this commitment is technically, when the sentence is simply a fine, to the sheriff, though in practice, and under statute, it usually is to the keeper of the county prison.[4] When the imprisonment is simply auxiliary to the collection of the fine, it is not such an imprisonment as to fall within the constitutional guarantees respecting imprisonments for crimes.[5] But when the statute prescribes fine *or* imprisonment, the two cannot be cumulatively attached, though imprisonment may be imposed until the payment of the fine.[6]

Joint fines are hereafter discussed.[7]

VIII. FORM OF SENTENCE.

§ 923. The sentence must be definite, exact, and peremptory. Hence it has been held error for the sentence to recite that the court is "of *opinion*" that the defendant should pay a fine, &c., the true form being, "it is considered" Must be definite.

Keating was opposed to this punishment, and pronounced it simply retaliatory and unsuitable. He argued that the number of lashes that would exhaust one man would be taken by another with comparative indifference. The same objection, however, may be made to all other forms of punishment.

On this topic may be consulted Herbert Spencer's Essay on Prison Ethics, in which he takes the ground that punishment is to be proportioned to character. "For the more civilized, dread of a long, monotonous, criminal discipline may suffice; but for the less civilized there must be inflictions of bodily pain and death." Whipping is prescribed for male offenders in the Draft Code reported by the English Commissioners of 1879.

[1] Act of Feb. 20, 1863; Rev. Stat. U. S. § 1041.

[2] Kane *v.* People, 8 Wend. 203; Tongate, ex parte, 31 Ind. 370; Beasley *v.* State, 2 Yerg. 481. See Strafford *v.* Jackson, 14 N. H. 16.

[3] Infra, § 924; R. *v.* Layton, 1 Salk. 353; Harris *v.* Com. 23 Pick. 280.

[4] R. *v.* Bethel, 5 Mod. 20; R. *v.* Layton, 1 Salk. 353; Harris *v.* Com. 23 Pick. 280; Hill *v.* State, 2 Yerg. 247. See Kane *v.* People, 8 Wend. 203.

[5] Bollig, ex parte, 31 Ill. 88.

[6] Infra, § 924.

[7] Infra, § 940.

that he shall,[1] &c.; and also to incorporate a condition of remission,[2] and also when instead of a definite an indefinite termination is assigned.[3] Nor can indefiniteness be cured by an appeal to other records.[4] But, as has been seen, it is not necessary in the sentence to fix the time and place of execution.[5]

But under statute may present alternative.

§ 924. Where, however, a statute prescribes an alternative punishment, the court may impose such, as where fine is prescribed, or imprisonment until fine is paid.[6] The two, however, cannot be cumulatively attached.[7] And two distinct punishments cannot at different times be inflicted on one verdict.[8] Thus when the defendant under one verdict is twice sentenced by the court to two punishments, to be inflicted at different places and of different duration, the last sentence is void.[9]

Day of sentence is first day of imprisonment.

§ 925. The day of sentence is reckoned as the first day of imprisonment, supposing the defendant to be put actually in custody on that day.[10] It is enough to specify that the imprisonment shall continue "for the term of three years" from the date of incarceration or imprisonment.[11]

Prison need not at common law be specified.

§ 926. It is not error to omit to specify in a sentence the prison in which the prisoner is to be confined,[12] nor to use "penitentiary" as convertible with "prison."[13]

[*For form in capital cases see supra*, § 914.]

[1] R. *v.* King, 7 Q. B. 782; Knowles *v.* State, 2 Root, 282.

[2] State *v.* Bennett, 4 Dev. & B. 44.

[3] R. *v.* Rainer, 1 Sid. 214.

[4] Picket *v.* State, 22 Oh. St. 405; State *v.* Huber, 8 Kans. 447.

[5] Supra, § 916.

[6] Supra, § 722; Jackson, ex parte, 96 U. S. 727; State *v.* Shattuck, 45 N. H. 205; Harris *v.* Com. 23 Pick. 280; Brownbridge *v.* People, 38 Mich. 751; Morgan *v.* State, 47 Ala. 34.

[7] State *v.* Kearney, 1 Hawks, 53. See Whart. Crim. Law, 8th ed. §§ 1871–73; Piper *v.* Com. 14 Grat. 710.

[8] Supra, §§ 913.

[9] State *v.* Davis, 31 La. Ann. 249.

[10] Meyers, ex parte, 44 Mo. 279. See People *v.* Warden, 66 N. Y. 343.

[11] People *v.* Hughes, 29 Cal. 257; State *v.* Smith, 10 Nev. 107; Hollon *v.* Hopkins, 21 Kans. 638.

In Migotti *v.* Colville, 14 Cox C. C. 263, a sentence of one calendar month's imprisonment is held to expire on the day preceding that day which corresponds numerically in the next succeeding month with the day on which the sentence was passed. If there is no such corresponding day in the next month, then the sentence expires on the last day of that month.

[12] Weed *v.* People, 31 N. Y. 465. See Atkinson *v.* R. 3 Bro. P. C. 517; and cases cited supra, § 916.

[13] Millar *v.* State, 2 Kans. 174. But see Wilson *v.* People, infra, § 927.

Where a case has been removed for

IX. SENTENCE BY APPELLATE COURT.

§ 927. It has already been observed that at common law an appellate court, on reversing a judgment for error in the sentence, is held in England and in some parts of the United States to be incapable of reimposing sentence, and to be obliged to discharge the prisoner.[1] This proposition, however, is not universally accepted; and now, under statutes, if not at common law, the practice is for the appellate court to correct and renew sentences even in capital cases,[2] or the court may remit the record to the court of trial, with directions to impose the proper sentence.[3] Yet in jurisdictions where no common law right in this respect is recognized, the statutes are to be construed as giving only that authority which they nakedly convey. Thus in Michigan a statute exists which requires, when an excessive punishment is given by the court below, that the judgment shall only be reversed for the excess. This statute has been ruled not to apply to a sentence to the "state prison," for an offence only punishable in the county jail. In this case, it has been held, the judgment must be reversed *in toto* and the prisoner discharged.[4] And ordinarily a sentence exceeding that allowable on the good counts of an indictment will be reversed,[5] or modified if such be the local practice.[6]

By statute appellate court may sentence.

For a sentence *less* than that permitted by law, it has been held, there will be no reversal.[7]

§ 928. A repetition by an appellate court of a sentence of death on a prisoner, while the judgment of the court on which he is tried is still valid, is an informality which

In capital and other cases rec-

revision, the sentence must be executed by the sheriff of the county in which the trial was had. State *v.* Twiggs, 1 Wins. N. C. 142.

[1] Supra, § 780.

[2] People *v.* Phillips, 42 N. Y. 200; Drew *v.* Com. 1 Whart. 279; Daniels *v.* Com. 7 Penn. St. 371; White *v.* Com. 3 Brewst. 30; Mills *v.* Com. 13 Penn. St. 631; Montgomery *v.* State, 7 Oh. St. 107; Kelly *v.* State, 3 Sm. & M. 518; State *v.* Thompson, 46 Iowa, 699; and cases cited supra, § 780.

[3] Beale *v.* Com. 25 Penn. St. 11; State *v.* Lawrence, 81 N. C. 521; State *v.* Thorne, 81 N. C. 555. Infra, § 928.

[4] Wilson *v.* People, 24 Mich. 410; but see Millar *v.* State, 2 Kans. 174.

[5] Brown *v.* State, 47 Ala. 47; State *v.* Bean, 21 Mo. 269.

[6] Com. *v.* Kirby, 2 Cush. 577; Johnston *v.* Com. 85 Penn. St. 54.

[7] Supra, § 918.

to acquit in a case where the facts demand a conviction, practically repudiated, and since its only operation now is mischievous, it is time it should be rejected in theory as well as reality. For, independently of the reasons already mentioned, an attempt to carry it out in practice would involve a trial in endless absurdity. Thus, for instance, what questions of law are of more vital interest to a prisoner on trial than those of the admissibility of dying declarations, or of confessions? If the jury are to judge of the law, what grosser invasions of their rights, and those of the prisoner, could be, than to take from the jury the decision of questions thus distinctly within their province, and which, so far from being collateral to, as has been urged, are in most instances direct to, the matter of guilt? And yet there is no judge sitting with a jury on the trial of a criminal case, who does not take to himself alone the hearing of the preliminary evidence as to whether the declarations were uttered under a consciousness of approaching dissolution, or whether the confession was extorted by duress or solicitation. The line of authority here and in England is unbroken, that in such and in kindred cases the court alone is to determine.[1] But if such be the law, as a matter of principle the jury have no more moral right to convict or acquit a man against the charge of the court that such evidence was to be stricken out, if improvidently let in, than they would to convict or acquit him on the evidence if actually excluded. And this view is strengthened by the fact, that in England and this country the statutory or constitutional provisions giving juries the power of determining as to whether a written document is unlawful or not go no further than the particular instance of indictment for libel.

Jury are at common law not judges of law.

§ 810. The conclusion we must therefore accept is that the jury are no more the judges of law in criminal than in civil cases, with the qualification that, owing to the peculiar doctrine of *autrefois acquit*, a criminal *acquittal* cannot be overhauled by the court.[2] In the federal courts such is now the established rule.[3]

[1] See Whart. Crim. Ev. §§ 297, 523 *et seq.*

[2] As to law of *autrefois acquit* see supra, §§ 435 *et seq.*

[3] U. S. *v.* Fenwick, 4 Cranch C. C. 675; Stettinius *v.* U. S. 5 Cranch C. C. 573; U. S. *v.* Battiste, 2 Sumner, 243; U. S. *v.* Morris, 1 Curt. C. C.

Independently of the federal courts, which have been already

43. See, as to same case, 2 Curtis's Life & Works, 176; U. S. *v.* Riley, 5 Blatch. 204; U. S. *v.* Greathouse, 4 Sawyer, 457; 2 Abbott U. S. 364.

To the same effect is the reply of the late Judge Thompson, while presiding in the United States Circuit Court, in the city of New York, on the trial of a criminal case, when requested by one of the counsel to charge the jury that they were judges both of the law and the fact. His answer was: "I sha'n't; they ain't."

Equally emphatic was the direction of Mr. Justice Hunt, on the trial of Miss Anthony, in 1873. U. S. *v.* Anthony, 11 Blatch. 200. Infra, § 812.

On this principle can be sustained the action of Judge Curtis, and that of Judge Grier and Judge Kane, in Philadelphia, in prosecutions where they held that it was a good cause of challenge that a juryman differed from the court in his view of the constitutionality of the statute on which the prosecution rested. Certainly if the jury were the judges of the law, this would have been as arbitrary an act as was that of James II., who polled the Court of King's Bench as to the dispensing power, and dismissed the judges who refused beforehand to pledge themselves to hold the prerogative constitutional. On the assumption that the jury are judges of the law as well as the court, there is no more reason, *a priori*, that the court should set aside a juror, than that the jury should set aside the judge. See supra, § 666.

"It is the duty of the court," says Chief Justice Shaw, of Massachusetts, in 1845, "to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide, contrary to such opinion or direction of the court in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner, as they are conscientiously bound to decide on all questions of fact according to the evidence." See Com. *v.* Anthes, 5 Gray, 185. It seems, however, that the same court will not prevent counsel addressing the jury on the law. Com. *v.* Porter, 10 Met. (Mass.) 286. See Com. *v.* White, Ibid. 14.

In Massachusetts the following statute was subsequently passed: —

In all trials for criminal offences, it shall be the duty of the jury to try, according to established forms and principles of law, all causes which shall be committed to them, and after having received the instructions of the court, to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to find a special verdict at their election; but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon all collateral and incidental proceedings, and also to charge the jury, and to allow bills of exception; and the court may grant a new trial in cases of conviction. Supplement to Rev. Stats. 1855, c. 153.

noticed, it may now be considered that the courts of Maine,[1]

Under this act it was held that the jury have no rightful power to determine questions of law involved in the issue against the instructions of the court. Com. *v.* Anthes, 5 Gray, 185 — Dewey and Thomas, JJ., dissenting. See Com. *v.* Rock, 10 Gray, 4.

It was also held, that the legislature cannot, consistently with the Constitution of the Commonwealth, confer on the jury, in criminal trials, the rightful power to determine questions of law involved in the issue, against the instructions of the court, even by a statute which also provides that the jury shall try the cases according to established forms and principles of law, and that the court shall superintend the course of the trials, decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon collateral and incidental proceedings, and charge the jury, and allow bills of exception, and may grant a new trial in cases of conviction. By Shaw, C. J., Metcalf, Bigelow, and Merrick, JJ.; *contra*, Dewey and Thomas, JJ. Com. *v.* Anthes, 5 Gray, 185; S. P., Com. *v.* Rock, 10 Gray, 4.

It has also been ruled that a refusal of the presiding judge to allow the defendant's counsel in a criminal case to read to the jury the whole of the statute, upon one section of which the prosecution is founded, is no ground of exception, if he is allowed to read all those parts which he contends affect the construction of that section, and to comment to the jury upon the whole of the statute. Com. *v.* Austin, 7 Gray, 51.

In Connecticut, a statute making juries judges of the law does not relieve them, it is said, from the duty of obeying the law as it actually is. State *v.* Buckley, 40 Conn. 246.

In New York, though before the re-

[1] State *v.* Wright, 53 Me. 336.

In this case, Appleton, C. J., in the course of his opinion, said: —

"The question seems never to have been directly before the Supreme Court of the United States sitting in banc; but several of the judges of that court, namely, Baldwin, Thompson, Story, and Curtis, as we have already seen, have emphatically denied the right of the jury to decide the law in any case, civil or criminal; and we cannot doubt that such will be the decision of the full court if the question ever comes before them.

"The following States unite in the doctrine that it is the duty of the jury to be governed by the law as it is laid down by the court: N. Hampshire, in Pierce *v.* State, 13 N. H. 536; Massachusetts, in Com. *v.* Porter, 10 Met. 263; Com. *v.* Anthes, 5 Gray, 185; Rhode Island, in Dorr's Trial, 121; New York, in People *v.* Pine, 2 Barb. 566; Carpenter *v.* People, 8 Barb. 610; Safford *v.* People, 1 Parker, 474; Duffy *v.* People, 26 N. Y. (Smith), 588; Pennsylvania, in Penn. *v.* Bell, Addison, 160; 2 Whart. Crim. Law, § 3106; Virginia, in Davenport *v.* Com. 1 Leigh, 588; Com. *v.* Garth, 3 Leigh, 761; Howel *v.* Com. 5 Grat. 664; North Carolina, in State *v.* Peace, 1 Jones (Law), 251; Ohio, in Montgomery *v.* State, 11 Oh. 424; Robbins *v.* State, 8 Oh. St. R. (N. S.) 131; Kentucky, in Montee *v.* Com. 3 J. J. Marsh. 150; Com. *v.* Van Tuyl, 1 Metc. (Ky.) 1; Alabama, in Pierson *v.* State, 12 Ala. 153; Batre *v.* State, 18 Ala. 119; Missouri, in Hardy *v.* State, 7 Mo. 607; Mississippi, in Williams *v.* State, 32 Miss. (3 George), 389; Arkansas, in Pleas-

New Hampshire,[1] Massachusetts,[2] Rhode Island,[3] New York,[4]

cent Constitution the inclination was otherwise, the same view has been solemnly held in more than one case of recent date. Bennett *v.* People, 49 N. Y. 141; cited infra, § 812; People *v.* Pine, 2 Barb. 566 — Barculo, J. See Carpenter *v.* People, 8 Barb. 610; Duffy *v.* People, 26 N. Y. 588. Compare People *v.* Finnegan, 1 Park. C. R. 147; 1 Park. C. R. 453; S. C., 26 How. Pr. 195; *contra*, People *v.* Thayers, Ibid. 595; People *v.* Videto, Ibid. 603. See, to the same effect, a valuable article in 5 Bost. Law Rep. N. S. 2 (May, 1852).

In Pennsylvania, though till 1879 there was no reported decision on the express point from the Supreme Court in banc, it has not been usual to leave to the jury the law to decide. A very strong leaning to the contrary is shown by Gibson, C. J., in closing a charge in a capital case: "If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it." Com. *v.* Harman, 4 Barr, 269. So, in a homicide case, in which the popular sentiment, excited by the recent riots in Kensington, set so strongly against the prisoner as to make possible a conviction on insufficient evidence, Rogers, J., in charging the jury, said: "You are, it is true, judges in a criminal case, in one sense, of both law and fact, for your verdict, as in civil cases, must pass on law and fact together. If you

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ant *v.* State, 8 Eng. (13 Ark.) 360; Texas, in Nels *v.* State, 2 Texas, 280; Tennessee, in McGowan *v.* State, 9 Yerger, 184.

"In Indiana the decisions are influenced by local legislation, and are therefore unimportant. There are, however, two well considered decisions in that State in which the right of the jury to determine the law is denied. 2 Black. 156; 2 Carter, 617; *contra*, 4 Black. 150, 247; 10 Ind. 503. State *v.* Holder, 5 Geo. 441, and some other cases in that State (Georgia), have been supposed by some to be in favor of the doctrine. But this is an error. In that State the subject is regulated by express statutory law, and their decisions have no bearing upon the question as a common law right.

"In Vermont, in State *v.* Croteau, 23 Vt. 14, a majority of the court held that, in criminal cases, the jury are judges of the law as well as the facts, but the doctrine was resisted in a very able dissenting opinion by Judge Bennett; and in a later case (State *v.* McDonnell, 32 Vt. 523), the presiding judge declared to the jury that to him such a doctrine was "most absurd and nonsensical," and the full court held the remark unexceptionable.

"In Maine, in State *v.* Snow, 18 Me. 346, the court seems to have taken it for granted that the law was settled in favor of the right of the jury to determine the law in criminal cases, and gave the question apparently very little consideration. Two cases only are cited. One of them (Croswell's case, 3 Johns. Cases, 337) establishes no such doctrine; and the other (Com. *v.* Knapp, 10 Pick. 497) has been emphatically overruled by the same court which made the decision."

[1] Pierce *v.* State, 13 N. H. 536.

[2] Com. *v.* Porter, 10 Met. 286; Com. *v.* White, Ibid. 14; Com. *v.* Abbott, 13 Met. 120; though now modified by statute given in a prior note to this section.

[3] Dorr's Trial, 121; 7 Bost. L. R. 347.

[4] See cases given above.

Virginia,[1] North Carolina,[2] Ohio,[3] Kentucky,[4] Alabama,[5] Missis-

acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. The popular impression is, that this power to definitely close a prosecution by an acquittal arises from a right on the jury's part to decide the law as well as the facts according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law, that no man can twice be put in jeopardy for the same offence. No matter from what cause an acquittal results, the defendant cannot be retried. If, for instance, it should result from a usurpation by the court of the facts of the case, which undoubtedly belong to the jury, the acquittal would be final; and yet it would be very improper to draw from such a result the assumption that the disposition of the facts belongs to the court. It is important for you to keep this distinction in mind, remembering that while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. The sanctity of your conclusion, in case of an acquittal, arises not from any inherent dominion on your part over the law, but from the principle that no man shall be twice put in jeopardy for the same offence, a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk, or an error of the attorney general. You are bound, notwithstanding this, to conform your verdict to the law of the land, in the same way that the two latter functionaries are bound to conform their conduct to the same standard; for it would be productive of the wildest consequences to establish the principle, that any officer whatever, in a criminal case, should be relieved from the restraint of the law as settled in a uniform system by the supreme authority. For your part, your duty is to receive the law for the purposes of this trial from the court. If an error injurious to the prisoner occurs, it will be rectified by the revision of the court in banc. But an error resulting from either a conviction or acquittal against the law can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim, that the law belongs to the court and the facts to the jury. My duty is, therefore, at the outset, to charge you that while you will in this case form your own judgment of the facts, you will receive the law as it is given to you by the court." Com. *v.* Sherry, Whart. on Homicide, App. Not varying

[1] Howel *v.* Com. 5 Grat. 664; and cases cited infra.

[2] State *v.* Peace, 1 Jones (Law), 251.

[3] Montgomery *v.* State, 11 Oh. 424; Robbins *v.* State, 8 Oh. St. 131; Adams *v.* State, 29 Oh. St. 412.

[4] Montee *v.* Com. 3 J. J. Marsh. 150; Com. *v.* Van Tuyl, 1 Metc. (Ky.) 1.

[5] Pierson *v.* State, 12 Ala. 153; Batre *v.* State, 18 Ala. 119, reviewing State *v.* Jones, 5 Ala. 666.

sippi,[1] Missouri,[2] Arkansas,[3] California,[4] South Carolina,[5] and Texas,[6] unite in the doctrine that the jury must take the law from the court; while the contrary seems to be held in Vermont,[7] Tennessee,[8] Georgia,[9] Maryland,[10] Louisiana,[11] Illinois,[12]

much from this is the language of Sergeant, J., in a charge in a case of misdemeanor: "The point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the court. If you believe the evidence in the whole case, you must find the defendant guilty." Com. *v.* Vansickle, Brightly R. 73. Infra, § 812.

In 1879, however, in Kane *v.* Com. Leg. Int. May 23, 1879, Ch. Just. Sharswood, speaking for the court, declared it error for a judge to say to the jury, "The law is for the court, and you will be governed by it, or you will not, as you have sworn to do, try the case by the law and by the evidence." "The distinction," says Ch. Just. Sharswood, "between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No court should give a binding instruction to a jury, which they are powerless to enforce, by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instructions, but beyond this they have

[1] Cothran *v.* State, 39 Miss. 541.

[2] Hardy *v.* State, 7 Mo. 607. See State *v.* Jones, 64 Mo. 391.

[3] Pleasant *v.* State, 2 Eng. (13 Ark.) 360. By the Constitution, however, the jury are judges of the law. See Patterson *v.* State, 2 Eng. 59.

[4] People *v.* Stewart, 7 Cal. 140; People *v.* Anderson, 44 Cal. 65.

[5] State *v.* Drawdy, 14 Richards. 87.

[6] Nels *v.* State, 2 Tex. 280.

[7] State *v.* Croteau, 23 Vt. 14; but see State *v.* McDonnell, 32 Vt. 523.

[8] Nelson *v.* State, 2 Swan, 237.

[9] Holder *v.* State, 5 Ga. 441; Ricks *v.* State, 16 Ga. 600; McGuffie *v.* State, 17 Ga. 497; McPherson *v.* State, 22 Ga. 478; McDaniel *v.* State, 30 Ga. 853; Clarke *v.* State, 35 Ga. 75; McMath *v.* State, 55 Ga. 303. See O'Neil *v.* State, 48 Ga. 66. But in Habersham *v.* State, 56 Ga. 61, it was said that it was the duty of the jury to take the law from the court.

[10] Franklin *v.* State, 12 Md. 236. This was in obedience to a constitutional provision that the jury are to be judges of the law. But at the same time it was held that, on the question of the *constitutionality* of laws, the jury were to take the law from the court. See Wheeler *v.* State, 42 Md. 563.

[11] State *v.* Jurche, 17 La. An. 71; State *v.* Saliba, 18 La. An. 35. But a subsequent case qualifies this by declaring that though the jury have the *power*, they have not the moral right, to reject the law of the court. State *v.* Tally, 23 La. An. 677.

[12] Falk *v.* People, 42 Ill. 331. See, however, Mullinix *v.* People, 76 Ill. 211, in which the defendant asked the court below to charge the jury that they were "sole judges of the law." The court, however, told the jury that it was "their duty to accept and act upon the law, as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court." The Supreme Court held that this was eminently proper.

and Indiana.[1] In most of the latter States, however, the result is exacted by statute. So far as concerns the question immediately in discussion, it is not anywhere disputed that if a jury, whatever may be its supposed elementary rights, finds against the court's charge, the verdict should be set aside.[2]

Court bound to hear counsel as to law.

§ 811. It has been ruled in Virginia, that upon a question of law addressed to the court at *nisi prius*, the judge is not bound to hear an argument from the prisoner's counsel, if his opinion is already formed.[3] The same point was made in Fries's case, by Judge Chase. But in the latter case the ruling of the court in this respect was the subject of an impeachment in which a conviction was barely escaped. The proper view is that on all questions of law, the court, before decision, is bound to hear counsel, with proper limits as to time.

Court may direct acquittal or conviction.

§ 812. Can a judge direct a jury peremptorily to acquit or convict, if in his opinion this is required by the evidence? Unless there is a statutory provision to the contrary, this is within the province of the court, supposing that there is no disputed fact on which it is essential for the jury to pass.[4] A remarkable illustration of a conviction

no right to go. The argument in favor of their taking the law from the court is addressed, very properly, *ad verecundiam*. The court is appointed to instruct them, and their opinion is the best evidence of what the law is." For a discussion of this opinion, see South. Law Jour. for 1879, p. 352, *et seq.*; 1 Crim. Law Mag. 47. But this is greatly modified in a subsequent case (Com. *v.* Nicholson), November 10, 1879, where the Supreme Court say: "The court below had an undoubted right to instruct the jury as to the law, and to warn them, as they did, against finding contrary to it. This is very different from telling them that they must find the defendant guilty, *which is what is meant by a binding instruction in a criminal case.*" This may be considered as virtually recalling the points in which the opinion on Kane *v.* Com. differs from prior opinions in the same court. See 1 Crim. Law Mag. 242.

In Virginia, not only is it held that the jury has no right to take the law except from the court, but it has been ruled expressly, that counsel will not be permitted to address an argument on the law except to the court. Davenport *v.* Com. 1 Leigh, 588; Com. *v.* Garth, 3 Leigh, 761; Howel *v.* Com. 5 Grat. 664. See, on these decisions, a learned article in 6 Am. Jurist, 237; and see fully supra, §§ 573 *et seq.*

[1] Warren *v.* State, 4 Blackf. 150; Williams *v.* State, 10 Ind. 503. See, also, 5 Law Rep. (N. S.) 6; Clem *v.* State, 31 Ind. 480; McCarthey *v.* State, 56 Ind. 203.

[2] Daily *v.* State, 10 Ind. 536. See supra, § 548.

[3] Howel *v.* Com. 5 Grat. 664.

[4] See, however, *contra*, State *v.* Dixon, 75 N. C. 275; Tucker *v.* State, 57

thus directed has been already noticed.[1] Where the whole case, leaving out disputed facts, requires an acquittal, a direction to acquit is eminently proper;[2] and there are instances of unfounded prosecutions pressed by popular prejudice when such a course is the peremptory duty of the judge.[3] Where a demurrer to evidence is allowed, the opinion of the court to this effect may be compelled by the defendant by filing such a demurrer.[4]

4. *Verdict against Evidence.*

§ 813. A conviction contrary to the weight of evidence will be set aside, and such is more particularly the case when any of the material allegations of the indictment remain unproved.[5] Thus, where the defendant was charged with burning the shop of B. & C., and no evidence was offered as to ownership;[6] where the evidence, on a charge of passing an altered note, failed to show that the prisoner knew of the alteration at the time of the passing;[7] where, on a trial for marking hogs with intent to steal them, there was no reasonable evidence of a guilty intent;[8] where, on a charge

Verdict against evidence may be set aside.

Ga. 503; Perkins *v.* State, 50 Ala. 154.

[1] U. S. *v.* Anthony, 11 Blatch. 200, by Hunt, J., 1873. See Whart. Crim. Law, 8th ed. § 88.

[2] State *v.* Gustave, 27 La. An. 395. See State *v.* Bowen, 16 Kans. 475.

[3] See Com. *v.* Fitchburg R. R. 10 Allen, 189; State *v.* Jaeger, 66 Mo. 208. That a judge has not this right is intimated in Howell *v.* People, 5 Hun, 620; S. C., 69 N. Y. 607.

"It has been a disputed question whether the court has power to direct an acquittal, or whether its power is advisory merely, which might or might not be acquiesced in by the prosecuting attorney or by the jury. Practically the result is the same. It is very rare that the prosecuting officer will not accede to the opinion of the court, and still more rare to convict against the advice of the court that it would be improper." . . . . "I can see no reason, therefore, why the court may not, in a case presenting a question of law only, instruct the jury to acquit the prisoner, or to direct an acquittal and enforce the direction; nor why it is not the duty of the court to do so." People *v.* Bennett, 49 N. Y. 141 (1872) — Church, C. J. See also People *v.* Harris, 1 Edm. Sel. Cas. 453.

[4] Supra, §§ 407, 706.

[5] U. S. *v.* Duval, Gilpin, 356; Com. *v.* Briggs, 5 Pick. 429; State *v.* Lyon, 12 Conn. 487; Resp. *v.* Lacaze, 2 Dall. 118; Ball *v.* Com. 8 Leigh, 726; Falk *v.* People, 42 Ill. 331; State *v.* Anderson, 2 Bailey, 565; State *v.* Fisher, 2 N. & M. 261; Bedford *v.* State, 5 Humph. 553; State *v.* Bird, 1 Mo. 417.

[6] State *v.* Lyon, 12 Conn. 487.

[7] State *v.* Anderson, 2 Bailey, 565.

[8] State *v.* Bird, 1 Mo. 417.

of receiving stolen goods, no evidence existed as to the *scienter*;[1] where, on the same charge, the indictment averred a former conviction for the same offence, but no proof was offered on trial to prove the identity of the defendant with the former defendant;[2] where the *corpus delicti* was not proved;[3] in each of these cases a conviction was set aside on account of the insufficiency of the testimony to support the verdict. If, however, there be conflicting evidence on both sides, and the question be one of doubt, it seems the verdict will generally be permitted to stand;[4] and this, though the court may differ from the jury as to the preponderance of the evidence.[5]

5. *Irregularity in Conduct of Jury.*

Mere inadvertent and innoxious separation not generally ground for new trial.

§ 814. The general rule is that the verdict will not be set aside on account of inadvertent irregularity in a jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them for the proper exercise of their functions.[6] An exception, however, formerly existed in England, and is still recognized in

[1] Bedford *v.* State, 5 Humph. 553.

[2] Com. *v.* Briggs, 5 Pick. 429.

[3] Ball *v.* Com. 8 Leigh, 726; State *v.* Hogard, 12 Minn. 293.

[4] Com. *v.* Flanigan, 7 W. & S. 415, 422; Com. *v.* Gallagher, 4 Penn. L. J. 514; 2 Clark, 297; Jerry *v.* State, 1 Blackf. 395; Taylor *v.* State, 4 Ind. 540; Williams *v.* State, 45 Ind. 157; Winfield *v.* State, 3 Iowa, 339; State *v.* Elliott, 15 Iowa, 72; Kirby *v.* State, 3 Humph. 289; Leake *v.* State, 10 Humph. 144; Cassels *v.* State, 4 Yerger, 152; State *v.* Sims, 2 Bailey, 291; Matthis *v.* State, 33 Ga. 24; Davis *v.* State, 33 Ga. 98; Thompson *v.* State, 55 Ga. 47; Mitchell *v.* State, 55 Ga. 556; State *v.* Burnside, 37 Mo. 343; State *v.* Connell, 49 Mo. 282; Bennett *v.* State, 13 Ark. 694; Pleasants *v.* State, 15 Ark. 624; Craft *v.* State, 3 Kans. 450; People *v.* Simpson, 50 Cal. 304; Palmer *v.* People, 4 Neb. 68.

[5] Ibid. See McLane *v.* State, 4 Ga. 335; State *v.* Connell, 49 Mo. 282; People *v.* Ah-Loy, 10 Cal. 301; Monroe *v.* State, 23 Tex. 210; Pleasants *v.* State, 15 Ark. 624; State *v.* Crozier, 12 Nev. 300. See *contra*, Rafferty *v.* People, 72 Ill. 37.

The general court in Virginia will only set aside a verdict, because it is contrary to the evidence, in a case where the jury has plainly decided against the evidence, or without evidence. Hill's case, 2 Grattan, 594. Where the evidence is contradictory, and the verdict is against the weight of evidence, though a new trial may be granted by the court trying the case at their discretion, their decision is not examinable by an appellate court. See Grayson *v.* Com. 6 Grat. 712; State *v.* Cruise, 16 Mo. 391; Herber *v.* State, 7 Tex. 69.

[6] State *v.* Prescott, 7 N. H. 290; Com. *v.* Roby, 12 Pick. 496, 519;

several of the United States, in felonies, where the jury separate after the opening of the evidence. While on the one hand the present practice in England, and in a portion of the American courts, is to sustain the verdict when the separation has been inadvertent or necessary, and no abuse has resulted from it; on the other hand, it has been considered in several instances that the mere separation, after the case is committed to the jury, is in itself reason for a new trial.[1]

§ 815. The latter doctrine was pressed with great rigor by the early common law authorities in all cases, both civil and criminal; it being agreed that by "the law of England, a jury, after the evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed."[2] A more humane system has since been recognized; and in all cases, not capital, it appears that juries are permitted to separate whenever in the discretion of the court it seems proper.[3] In capital cases however, in some States, under no circumstances will separation be permitted until a verdict is agreed on;[4] and so far, as has been already seen,[5] has this doctrine been pushed in several instances in this country, that it has been held that if a jury when once charged and sworn be discharged, except in case of such necessity as may be considered as the act of God, such discharge is a bar to a second trial.[6]

In some courts this view is not accepted.

State *v.* Babcock, 1 Conn. 401; People *v.* Douglass, 4 Cowen, 26; Bebee *v.* People, 5 Hill, 32; Martin *v.* Com. 2 Leigh, 745; Tooel *v.* Com. 11 Leigh, 714; McCarter *v.* Com. 11 Leigh, 633; Stone *v.* State, 4 Humph. 27; State *v.* Fox, Geo. Decis. part i. 35; State *v.* Peter, Ibid. 46; Whitney *v.* State, 8 Mo. 165; State *v.* Barton, 19 Mo. 227; State *v.* Igo, 21 Mo. 459. For English practice see R. *v.* Woolf, 1 Chitty R. 401.

[1] See this examined, in reference to the plea of once in jeopardy, supra, §§ 490 *et seq.*; and, as to general conduct of jury, supra, §§ 720, 721.

[2] Co. Lit. 227. See Bac. Ab. Verdicts, pl. 19; Com. Dig. Inquest, F. Supra, §§ 720 *et seq.*, 814.

[3] R. *v.* Woolf, 1 Chitty R. 401; 1 Ch. C. L. 664.

[4] Cochran *v.* State, 7 Humph. 544. See supra, §§ 508–11, 720 *et seq;* Bac. Abr. Juries, G.

[5] See supra, §§ 490, 511.

[6] *Pennsylvania.* — In a capital case before the Supreme Court of Pennsylvania, in 1851, it appeared by the record that, "on the 15th of March,

§ 816. Separation before the case is opened and the jury charged does not seem, even in the strictest practice, to be considered cause for setting aside a verdict.[1] Thus, where the jury had been empanelled and sworn, and where, before any evidence was given, three of the

Separation before case is opened always permissible.

1851, after the jury were sworn, it was agreed by the counsel of the Commonwealth and the counsel of the defendant, and agreed by the court, that the jurors sworn in this case be permitted to separate and return to their respective homes, and return to the jury-box on Tuesday morning next, March 18th," when they all attended, and a verdict of murder in the first degree was rendered. The judgment was reversed, and the prisoner ordered back for another trial. Peiffer *v.* Com. 15 Penn. St. 471. See supra, § 733.

Subsequently, on the trial of a party charged with burglary, the jury, after being cautioned by the court to avoid all conversation with any person about the case, were allowed to separate at the usual times of adjournment. McCreary *v.* Com. 29 Penn. St. 323.

Virginia. — In Virginia, the weight of authority is, that in cases of felony it is not necessary, in order to set aside the verdict, to show actual tampering, or conversation on the subject of the trial, with a juryman, but that the mere fact of the separation from the custody of the officer is usually sufficient. See Philips *v.* Com. 19 Grat. 485. Judge Nelson, who delivered the opinion of the court in an early case (Com. *v.* M'Caul, 1 Va. Cases, 271), said: "From the mode in which collusion and tampering is generally carried on, such circumstance is generally known to no person except the one tampering and the person tampered with, or the persons between whom a conversation may be held, which might influence a verdict. If you question either of these persons on the subject, he must criminate or declare himself innocent; and you lay before him an inducement not to give correct testimony." A verdict of conviction in a later case of felony, was set set aside where, pending the trial, and before the testimony was closed, five of the jury received permission to retire from the court-room accompanied by the sheriff, and another juror thereupon left the jury-box without the knowledge of the court, passed out of the court-house through a crowd of persons collected about the door, and remained absent a few minutes, after which he returned into the court; having (as he deposed) held no communication whatever with any person during his absence, but not having been, during that period, in charge of the sheriff, or even seen by him. Overbee *v.* Com. 1 Robins. (Va.) 756. But the bare possibility of tampering, it is conceded, is not adequate reason for a new trial. Sprouce *v.* Com. 2 Va. Cas. 375. Thus, upon trial of an indictment for murder, the jury, not agreeing on a verdict, were, after dark, adjourned over till the next morning, and committed to two sheriffs to be enclosed in a room to be prepared for them; in conducting them from the court-house to the room, one

[1] State *v.* Cucuel, 2 Vroom, 249; McFadden *v.* Com. 23 Penn. St. 12; Martin *v.* Com. 2 Leigh, 745; Cohron *v.* State, 20 Ga. 752. Supra, §§ 517, 718.

jurors separated from their fellows for a brief space of time, it was ruled that such separation, before any evidence given, was

juror separated from his fellows, moved twenty-five yards from them and the sheriffs having them in charge, told a servant whom he met with to take care of his horse, and said nothing else to any one, and no one speaking to him, when he was immediately pursued by one of the sheriffs, and brought back to the rest of the jury, his separation from his fellows not exceeding a minute, and he being a yet shorter time out of sight of the sheriffs. The jury having found the prisoner guilty of murder in the first degree, it was held that such separation was no cause for setting aside the verdict. M'Carter *v.* Com. 11 Leigh, 633; Tooel *v.* Com. Ibid. 714. See Martin *v.* Com. 2 Leigh, 745. A similar result, in a later case, was reached, where one of the jurors, during the progress of a capital case, left his fellow-jurors for a few moments during the night, and then, without meeting any stranger, returned. Thompson's case, 8 Grat. 638; S. P., State *v.* Cucuel, 2 Vroom (N. J.), 249. See supra, §§ 718–9. And in the same State, where the jury, in another case, were placed at night upstairs, in a tavern, in five lodging-rooms, which were separated from each other by a passage, into which they all opened, the doors of the lodging-rooms being generally open, but the door of the passage being constantly closed, it was held that the disposition of the jury had been in compliance with law. Kennedy *v.* Com. 2 Va. Cas. 510.

In *Tennessee*, it has been determined that where there is an unauthorized separation of a jury for fifteen or twenty minutes, it is not necessary for the prisoner to prove that they were during their absence tampered with; it is sufficient if they might have been. M'Lain *v.* State, 10 Yerg. 241; Jarnagin *v.* State, 10 Yerg. 529; though see Stone *v.* State, 4 Humph. 27. Where, however, it was affirmatively shown that no communication with other persons was had, a new trial was refused. Hines *v.* State, 8 Humph. 597. In felonies, however, a separation from day to day, even with the prisoner's consent, vitiates the verdict. Wiley *v.* State, 1 Swan (Tenn.), 256.

In *Louisiana*, it is said that in all criminal cases the separation of the jury, though by leave of the court, and with the consent of the accused and his counsel, will vitiate the verdict, if such separation take place after the evidence had been closed, and the charge given. State *v.* Populus, 12 La. An. 710. See State *v.* Evans, 21 La. An. 321.

In *Minnesota*, when the court, after charging the jury, gave them a recess of five minutes, in which they were allowed to leave the court-room and go at large, without being in charge of an officer, and without objection from either side, this was held to be ground for a new trial. State *v.* Parrant, 16 Minn. 178.

New York. — Irregular Reception of Evidence, or Conversing with Strangers on the Case, fatal, but mere Separation not by itself sufficient Ground. — In New York, mere separation, without permission, appears formerly to have been considered *primâ facie* evidence of misbehavior. See Spencer, Ch. J., 18 Johnson, 218. But the better opinion now is, that, to vitiate the verdict, reasonable suspicion of abuse must exist. Horton *v.* Horton, 2 Cowen, 589; People *v.* Douglass, 4 Cowen, 26; Oliver *v.* Trustees, 5 Cowen, 284; People *v.* Ransom, 7

no cause for setting aside a verdict of conviction; especially in the case at bar, where the separation was so momentary, that

Wend. 423; People *v.* Bebee, 5 Hill (N. Y.), 32. "The conclusion from these cases," said Sutherland, J., "appears to me to be this: that any mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jury themselves, will not be a sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court are satisfied that the party complaining has not, and could not, have sustained any injury from it." People *v.* Ransom, 7 Wend. 423. But where a jury, empanelled to try a prisoner upon an indictment for murder, were allowed to leave the court-house during the trial, under the charge of two sworn constables, and, having left the court-house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some with them on their return, and drank spirituous liquor, though not enough to affect them in the least, and one of them conversed with strangers on the subject of the trial; it was held, that though the mere separation was not, in itself, fatal, the drinking of spirituous liquor, and the conversing on the case, were sufficient reasons for a new trial. People *v.* Douglass, 4 Cowen, 26. After the evidence in a trial for murder had all been submitted, six of the jury, leaving their fellows, went, under the charge of an officer, on a walk for exercise, in the course of which they visited and viewed the premises where the homicide was alleged to have been committed, and returned after an absence of an hour. No person had been permitted to speak to them, and no improper conduct had taken place. But after conviction and sentence this was ruled to be good ground for a new trial. Eastwood *v.* People, 3 Parker C. R. 25; S. C., 14 N. Y. 562. See supra, § 707.

In the same State it has been held that on the record alone it is not error in law, in a capital trial, for the judge, with the assent of the prisoner, to permit the jury to separate from time to time before the charge is given to them, and they retire to deliberate upon their verdict. Ibid.; Stephens *v.* People, 19 N. Y. 549. But the consent of a prisoner to his trial by less than a full jury of twelve is a nullity, and a conviction thereby produced is illegal. Ruloff *v.* People, 18 N. Y. 179. See supra, § 733.

In New Hampshire, Connecticut, North Carolina, Indiana, and Missouri, something beyond mere Separation must be shown. — In New Hampshire, after a review of the authorities, the more liberal rule was adopted; it being determined that it is necessary to show something more than mere separation to set aside the verdict (State *v.* Prescott, 7 N. H. 290); and the same course appears to be pursued in Connecticut (State *v.* Babcock, 1 Conn. 401), in North Carolina (State *v.* Miller, 1 Dev. & Bat. 500; see 1 Hayw. 238), and in Indiana. Wyatt *v.* State, 1 Blackf. 257; Porter *v.* State, 2 Carter, 435; Creek *v.* State, 24 Ind. 151. In this State a statute exists permitting separation during trial and before submission of the case. Evans *v.* State, 7 Ind. 271. The same view is taken in Missouri. State *v.* Brannon, 45 Mo. 329; State *v.* Dougherty, 55 Mo. 69.

In South Carolina, Separation is at Discretion of Court. — In South Carolina, the jury, it is said, are not required to remain together even after they are charged, though the case be

any tampering with the jurors was hardly possible.[1] In another case, in empanelling a jury for trial on an indictment for felony, capital (State *v.* McKee, 1 Bailey, 651); and it is ruled that it is within the sound discretion of the presiding judge to allow a juror to leave the jury-box for a brief time, even during the trial of a capital case. State *v.* McElmurray, 3 Strobh. 33.

In Mississippi, Burden on Prosecution to disprove Impropriety. — In Mississippi the tendency of authority is to set aside a verdict after separation, unless it affirmatively appear there was nothing communicated to the jury on the subject of the trial. McCann *v.* State, 9 Sm. & Mars. 465; Nelms *v.* State, 13 Ibid. 500; Boles *v.* State, 13 Ibid. 398; Hare *v.* State, 4 How. (Miss.) 194; Browning *v.* State, 33 Miss. 48.

Where one of the jury, pending the trial, being at the window of the court-room, called to a person in the street and asked him to request his (the juror's) wife to send him his supper, to which the person thus addressed replied that "he would," and the supper was sent, as requested, and the person who brought it came into the room where the jury were confined, but was not permitted to deliver it to the juror, the officer in charge of the jury receiving it from his hands, and delivering it to the juror; and it appeared that the officer also kept the person who brought the supper on the opposite side of the room, sixty feet from the jury, while the supper was being eaten, and the officer also testified that nothing passed between the juror and the person addressed by him in the street, except what is above stated; and that to his knowledge the jury conversed with no one; it was held, that there was no improper tampering with, or sinister influence brought to bear on, the jury, and there was no cause for setting aside the verdict. Ned *v.* State, 33 Miss. 364.

In *Ohio*, by the Code of Criminal Procedure, §§ 164, 165, "in the trial of felonies, the jury shall not be permitted to separate, after being sworn, until discharged by the court. In the trial of misdemeanors, they shall not be permitted to separate after receiving the charge of the court, until discharged." See Davis *v.* State, 15 Oh. 72; Hurley *v.* State, 6 Oh. 399; Poage *v.* State, 3 Oh. St. 229; Dobbins *v.* State, 14 Oh. St. 493. Supra, § 505.

In *Illinois* and *Arkansas*, in case of separation, the burden is said to be on the prosecution to show that the defendant was not prejudiced by the separation. Jumpertz *v.* State, 21 Ill. 375; Russell *v.* People, 44 Ill. 508; Adams *v.* People, 47 Ill. 376; Cornelius *v.* State, 7 Eng. (Ark.) 782.

In *California*, it was once said that if a juror, in a criminal trial, separate without leave of the court, though with the prisoner's consent, and if the separation was such that he might have been improperly influenced by others, the verdict will be set aside. People *v.* Backus, 5 Cal. 275. This decision, however, was declared in 1861 to go "to the verge of the true rule, if not beyond;" and where the jurors separated for the purposes of nature, and it was in evidence that no one communicated with them during this momentary separation, the Supreme Court refused to set aside the verdict. People *v.* Bonney, 19 Cal. 426. And subsequently it was decided that separation without permission

[1] McFadden *v.* Com. 23 Penn. St. 12.

eight were elected and sworn, and three elected but not sworn; one, who had been sworn, separated from the rest, went some miles off and stayed some hours; the other ten were put in charge of the sheriff, to be kept together and separate from other persons, till the ensuing morning; the absconding juryman was taken the same night, and placed in the same room with the other jurymen till next morning; but there appeared to have been no conversation on the subject of the prosecution; the next morning, by allowance of the court, this juryman was challenged by the prisoner for cause, and set aside, and the jury was then completed. On a motion for a new trial, after conviction, it was held that the separation of the absconding juryman from his

does not vitiate a verdict, if it be shown that no injury resulted thereby to the defendant. People *v.* Symonds, 22 Cal. 348.

In *Georgia*, in the progress of a trial which lasted several days, upon the adjournment of the court at night the jury were committed to the sheriff, to be kept until next day. The most convenient and suitable accommodation which could be provided for the jury was in the third story of a large hotel, where they were placed in five different rooms opening upon a common passage, which communicated with the street below by flights of stairs, — the doors of their chambers being unlocked during the night, the jurors being unwilling to have them locked, from apprehension of fire during the night, and there being no doors or other fastenings at either end of the passage. It was held that this was not separation of the jury for which the prisoner was entitled to a new trial. Roberts *v.* State, 14 Ga. 8. See also Burtine *v.* State, 18 Ga. 534; Epps *v.* State, 19 Ga. 102. And so, also, where in the morning, before the court met, the jury were walking out, accompanied by the sheriff, for relaxation and exercise, and passed the boundary line separating the county in which the trial is progressing from an adjoining county, and remained in the adjoining county a few minutes, but there was no separation, conversation, or communication with any one, by any of the jurors. Ibid. See State *v.* Perry, 1 Busbee, 330. And so where the jury, through inadvertence, separated and mingled with the crowd, it being proved that no improper communications were made to them. Roberts *v.* State, 14 Ga. 8.

So, in the same State, the jury having come in with a verdict in a capital case, the court inquired if the defendant's counsel would poll the jury, and then if he knew any reason why the verdict should not be received, to both which he replied in the negative. After the verdict was delivered, and the jury dismissed and dispersed, but within ten minutes, the court, remembering that the jury had not been called over each by name before the verdict was delivered, had them reassembled, an oath administered, and each juror sworn that he was in the box when the verdict was delivered, that he heard it read, that it found the defendant guilty of murder, and that he agreed to it. It was held that there was no ground for a new trial. Mitchell *v.* State, 22 Ga. 211. See supra, § 751.

fellows, and his subsequent association with them, though he was afterwards struck from the panel, did not vitiate the verdict, and was no good reason for a new trial.[1] Yet in all cases jurors, after being sworn, should be directed by the court to hear or read nothing on the subject of the case.

In misdemeanors jury may separate during trial.

§ 817. In misdemeanors there is no difficulty in practice in permitting the jury to separate during the trial. Thus, in a case which has been generally followed in this country, on a motion for a new trial, after conviction for conspiracy, it appeared that the trial had lasted two days; that on the first day the court sat from the morning till eleven o'clock at night; and that on the adjournment the jury separated, going to their several homes, and returned the next morning. The separation was without the knowledge of the defendant and his counsel, and without the consent of the court. It was held, however, not to constitute ground for disturbing the verdict of guilty which the jury rendered.[2]

[1] Tooel *v.* Com. 11 Leigh, 714. Supra, § 518.

[2] "I am of opinion," said Abbot, C. J., "that there is no sufficient foundation for the present application. The application is grounded upon the suggestion of these two facts: First, that the jury had dispersed during the night. Secondly, that the fact was not known to the defendants until after the trial was over. Now, the trial began between nine and ten in the morning; it had proceeded until eleven o'clock at night, or later, before the evidence on the part of the prosecution was closed. Learned counsel were employed separately, for several defendants. It must be assumed, that in that stage of the case evidence would be laid before the jury on the part of the defendants. It became matter, therefore, of necessity, that the trial should be adjourned, and an adjournment, accordingly, took place from the necessity of the case, the jury being fatigued both in mind and body; and it would have been most injurious to the case of the defendants, even if the judge and jury had had strength enough to go on till the trial came to a close; I say, most injurious to the case of the defendants, if their case was heard by persons whose minds were exhausted with fatigue, as it would have been if an adjournment had not taken place. An adjournment of this nature is not necessarily followed by the dispersion of the jury, for in many cases they are kept together till the final close of the trial. But I am of opinion that, in a case of misdemeanor, their dispersion does not vitiate the verdict; and I found my opinion upon the admitted fact that there are many instances, of late years, in which juries, upon trials for misdemeanors, have dispersed and gone to their abodes, during the night for which the adjournment took place, and I consider every instance in which that has been done to be proof that it may be lawfully done. It is said that in some of those instances the

§ 818. Even in felonies less than capital the jury are generally permitted to separate at the adjournments of the court until the period when, at the close of the trial, the case is finally committed to their charge. After this, they must remain together until they agree, or until they are discharged by the court.[1]

And so in felonies less than capital.

§ 819. Separation, after the jury are sworn and the case opened, has in capital cases been considered a ground for new trial, even without any evidence that the jury were communicated with concerning the case;[2] and if

But not generally in capital felonies.

adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion that that can make no difference. I think the consent of the defendant, in such case, ought not to be asked; and my reason for thinking so is, that if that question is put to him, he cannot be supposed to exercise a fair choice in the answer he gives, for it must be supposed that he will not oppose any obstacle to it; for if he refuses to accede to such an accommodation, it will excite that feeling against him which every person, standing in the situation of a defendant, would wish to avoid. I am also of opinion, that the consent of the judge would not make, in such case, that lawful which was unlawful in itself; for if the law requires that the jury shall, at all events, be kept together until the close of a trial for misdemeanor, it does not appear to me that the judge would have any power to dispense with it. The only difference that can exist between the fact of the jury separating, with or without the approbation of the judge, as it seems to me, is this: that if it be done without the consent or approbation of the judge, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation. But though it may be a misdemeanor in them to separate without his consent, it will not avoid the verdict, in a case of this kind, as it would if the law required the jury to be absolutely kept together. It seems to me, that the law has vested in the judge the discretion of saying whether or not, in any particular case, it may be allowed to the jury to go to their own homes, during a necessary adjournment throughout the night. For these reasons, it appears to me that there is no ground for the present application; and, I conceive, we ought not to give any reason to suppose that any doubt exists, when none really exists in our minds." R. *v.* Woolf, 1 Ch. R. 401. See Ex parte Hill, 3 Cowen, 355; Wyatt *v.* State, 1 Blackf. 25; State *v.* Miller, 1 Dev. & Bat. 500; State *v.* Carstaphen, 2 Hayw. 238. In Indiana such separation is allowed in all cases by statute. Evans *v.* State, 7 Ind. 271.

[1] Com. *v.* Tobin, 125 Mass. 203; McCreary *v.* Com. 29 Penn. St. 323. Otherwise in Ohio by statute. See supra, § 815, note.

[2] Peiffer *v.* Com. 15 Penn. St. 468; Wesley *v.* State, 11 Humph. 502; where it was said that the irregularity could not be cured by the prisoner's consent. Compare Quinn *v.* State, 14 Ind. 589; Jumpertz *v.* People, 21 Ill. 375; Woods *v.* State, 43 Miss.

the object is to exclude tampering, such a precaution is as necessary *before* as *after* the final committal of the case. Yet lately a laxer practice has arisen, based on the difficulty of keeping juries together, without sickness or great business inconvenience, during protracted trials; and cases are not unfrequent in which, even on capital issues, juries have been permitted to separate at the adjournments of the court, down to the period in which the case is finally committed to their deliberation.[1] Nor can it be denied that there is growing reason for the acceptance of this view. No juries composed of right materials can be kept together day and night during the trial of a case which lasts for days if not for weeks, without great discomfort and risk to themselves, and positive damage to the business community. We have, therefore, to decide between one of three courses. We must go on with a case, according to the old English fashion, day and night, until it terminates; or we must make up our juries from idlers, if not vagrants, whose seclusion will be no public loss, and perhaps not much inconvenience to themselves; or, if we summon business and family men charged with other duties, and thus competent to decide difficult issues, we must permit such adjournments and separations during trial as will preserve the health and protect the business relations of the jurors. Of course stringent charge should be made in the latter case to the jurors to listen to nothing out of court on the subject of the case; and these admonitions should be followed, not only by new trials, but by severe punishment of the offending jurors, if the injunction be not obeyed.[2]

Court in such cases may adjourn from day to day.

§ 820. In cases of such sicknesses or temporary incapacities as do not permanently touch the competency of the jury, the court may adjourn the jury from day to day, until the incapacity is removed; nor is there

364; McLean *v.* State, 8 Mo. 153; State *v.* Frank, 23 La. An. 213. Poage *v.* State, 3 Oh. St. 229, may be cited under Ohio statute.

[1] State *v.* Babcock, 1 Conn. 401; State *v.* Feller, 25 Iowa, 67; State *v.* Anderson, 2 Bailey, 565; State *v.* McKee, 1 Bailey, 651; State *v.* Ryan, 13 Minn. 370. See Eastwood *v.* People, 3 Park. C. R. 25; Stephens *v.* People, 19 N. Y. 549; State *v.* McElmurray, 3 Strobh. 33. The question of consent is discussed supra, § 733.

[2] Striking remarks on this point of Strong, J., are reported in Stephens *v.* People, 19 N. Y. 550.

any reason to doubt that, with the limitations hereinafter expressed, the jury, due caution being given them by the court, may be permitted to separate. On this point may be studied the remarks of Judge Story, in a case where the principal witness for the prosecution refusing to testify, the case was brought to a stand-still, whereupon the court, on motion of the district attorney, discharged the jury, and remanded the case for another trial. "In misdemeanors," said the learned judge, "there is certainly a larger discretion, and, until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose that, in the course of the trial, the accused should be reduced to such a situation as to be totally incapable of vindicating himself, shall the trial proceed, that he be condemned? Suppose a juryman taken suddenly ill, and incapable of attending to the cause, shall the prisoner be acquitted? Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared that on Lee's testimony depended a conviction or acquittal, would it be reasonable that the cause should proceed? Lee may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion that the government is not bound to proceed, but that the case be suspended until the close of the term, that we may see whether the witness will not consent to an examination." [1] From the printed report it does not appear that the order of court was that the jury should be *discharged*, but merely that the case should be *postponed*. And what has just been quoted applies to a mere motion to adjourn the trial.

In England short adjournments have been permitted to enable a witness to be instructed as to the nature of an oath; [2] but in felonies it is said that the judge has no power even to order an adjournment from day to day on account of absence of prosecutor or witnesses.[3] It is otherwise, however, when a juror or

[1] U. S. *v.* Coolidge, 2 Gallison, 364. See also U. S. *v.* Haskell, 4 Wash. C. C. 402; State *v.* Bullock, 63 N. C. 570; and see supra, §§ 508, 723 *et seq.*

[2] See Whart. Crim. Ev. §§ 371 *et seq.*

[3] R. *v.* Tempest, 1 F. & F. 381; R. *v.* Parr, 2 F. & F. 861; R. *v.* Robson, 4 F. & F. 360; R. *v.* Perkins, Ld. Raym. 64.

prisoner is taken so ill as to be unable to proceed with the trial.[1]

§ 821. *Summary of Law as to Separation of Jurors after the Final Commitment to them of the Case.* — 1. Separation of the jury, in a capital case, after they have been sworn and empanelled, in such a way as to expose them to tampering, may be ground for a new trial. The authorities, however, differ as to whether, (1.) This ground is absolute; or, (2.) *Primâ facie*, subject to be rebutted by proof from the prosecution that no improper influence reached the jury; or, (3.) Merely contingent, upon proof to be offered by the defence that a tampering really took place.

Conflict of opinion as to whether separation after commitment of case is permissible.

§ 822. (1.) Among those holding the *first* view, the courts of Pennsylvania, Louisiana, Mississippi, and Tennessee take, at least in capital cases, the most extreme position, they maintaining that even consent of prisoner cannot, in such cases, cure a separation.[2]

Courts holding such separation fatal.

§ 823. (2.) That such separation, in a capital case, is *primâ facie* ground for a new trial, subject to be rebutted by proof from the prosecution that no improper influence reached the jury, is the position generally taken by the American courts.[3]

Courts holding such separation only *primâ facie* ground.

§ 824. (3.) There are, however, cases in which it has been held that separation of the jury is only ground

Courts holding such sepa-

[1] Supra, § 508.

[2] Peiffer *v.* Com. 15 Penn. St. 469; Wesley *v.* State, 11 Humph. 502; Wiley *v.* State, 1 Swan, 256; Woods *v.* State, 43 Miss. 364. See supra, §§ 518, 783. Compare Com. *v.* McCaul, 1 Va. Cas. 271; Overbee *v.* Com. 1 Robins. Va. 756; McLean *v.* State, 8 Mo. 153. In Early *v.* State, 1 Tex. Ap. 248, it was held that even a separation (without consent) caused by a fire burning the hotel where the jury were confined, vitiates the verdict, though the jurymen all swore that they heard nothing from outside as to the case.

[3] State *v.* Prescott, 7 N. H. 291; Com. *v.* Roby, 12 Pick. 496; State *v.* Babcock, 1 Conn. 401; State *v.* O'Brien, 7 R. I. 337; People *v.* Douglass, 1 Cow. 26; Eastwood *v.* People 3 Park. C. R. 25; S. C., 14 N. Y. 562; State *v.* Cucuel, 2 Vroom, 249; Philips *v.* Com. 19 Grat. 485; State *v.* Tilghman, 11 Ired. 514; Cohron *v.* State, 20 Ga. 752; Caleb *v.* State, 39 Miss. 721; Jumpertz *v.* People, 21 Ill. 373; Reins *v.* State, 30 Ill. 256; Creek *v.* State, 24 Ind. 151; Maher *v.* State, 3 Minn. 444; Rowan *v.* State, 30 Wis. 132; State *v.* Dolling, 37 Wis. 396; Hines *v.* State, 8 Humph. 597; Cornelius *v.* State, 7 Eng. (Ark.) 732; Madden *v.* State, 1 Kans. 340; People *v.* Symonds, 22 Cal. 348; reviewing People *v.* Backus, 5 Cal. 275.

ration fatal only where there is proof of tampering.

for new trial when sustained by proof of tampering, the burden of which is on the defendant.[1] It is further held that such separation is within the discretion of the judge trying the case, not subject to revision on error.[2]

The latter view held as to misdemeanors.

§ 825. 2. In felonies not capital, and misdemeanors, it is for the defendant to prove tampering; and separation is within the discretion of the court.[3]

When irregularities may be cured by consent.

§ 826. 3. Even should separation, prior to charge of court, irregularly take place, without tampering, this, according to the preponderance of authority, may be cured by the defendant's consent.[4]

Intrusion of officer during deliberations.

§ 827. As has been already noticed,[5] the officer having charge of the jury should be duly sworn to keep them "in some convenient and private place," &c., "and not suffer any person to speak with them," &c. Should the jury be accompanied by an unsworn officer, the verdict will be set aside unless it appear affirmatively that it was not in any way influenced by the inadvertence.[6] A series of officers may be successively sworn for this purpose, to keep up the chain of attendance.[7] But it is not, in all jurisdictions, necessary that the officer should have a special jurat.[8] Nor is it ground for new trial that among the deputy sheriffs who had custody of the jury was one who was a witness on the trial for the prosecution,[9] though it has been held otherwise when the officer actually in close attendance was such a witness.[10]

[1] State *v.* Camp, 23 Vt. 551. See People *v.* Reagle, 60 Barb. 527; Medler *v.* State, 26 Ind. 171; Mann *v.* State, 3 Head (Tenn.), 373; State *v.* Jones, 7 Nev. 408.

[2] Sargent *v.* State, 11 Ohio, 472; State *v.* Engle, 13 Ohio, 490; Davis *v.* State, 15 Ohio, 72; State *v.* Anderson, 2 Bailey, 565; State *v.* McElmurray, 3 Strobh. 34. Supra, §§ 733, 814.

[3] See cases cited supra, §§ 814, 815; State *v.* Madoil, 12 Fla. 151.

[4] Supra, §§ 351, 518, 733.

[5] Supra, § 738.

[6] McIntyre *v.* People, 38 Ill. 514; Wilhelm *v.* People, 72 Ill. 468; Brucker *v.* State, 16 Wis. 333; Luster *v.* State, 11 Humph. 169; Hare *v.* State, 4 How. (Miss.) 187; McCann *v.* State, 9 S. & M. 465; though see Trim *v.* Com. 18 Grat. 983.

[7] Wormeley's case, 8 Grat. 712. See Com. *v.* Jenkins, Thach. C. C. 118.

[8] Davis *v.* State, 15 Ohio, 72; Stone *v.* State, 4 Humph. 27.

[9] Read *v.* Com. 22 Grat. 924. See infra, § 835.

[10] State *v.* Snyder, 20 Kans. 306; McElrath *v.* State, 2 Swan, 378. Infra, § 850.

The irregular intrusion even of a legally qualified officer on the deliberations of the jury may be a ground for new trial.[1]

§ 828. The jury are entitled to take out with them such papers and instruments of evidence as have been admitted in the case, provided all asked for are sent out, and the action of the court in this respect be at the close of the trial, in open court, and before the parties.[2] Should the jury receive any material paper or other article, likely to affect their deliberations, which has not been put in evidence,

Improper reception of materials of proof ground for new trial.

[1] People *v.* Knapp, Sup. Ct. Mich. 1879. In this case Cooley, J., said: —

"It is not claimed that the officer can with propriety be allowed to be within hearing when the jury are deliberating. Whether he does or does not converse with them, his presence to some extent must operate as a restraint upon their proper freedom of action and expression. When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every case, and the jury sent out as of course where they do not notify the court that it is not needful. The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out. And if any one may be present, why not several? Why may not the officer bring in his friends to listen to what must often be interesting discussions, and then defend his conduct on proof that they did nothing but listen?

"But the circumstances of particular cases may make it specially mischievous. In their private deliberations the jury are likely to have occasion to comment with freedom upon the conduct and motives of parties and witnesses, and to express views and beliefs that they could not express publicly without making bitter enemies. Now the law provides no process for ascertaining whether the officer is indifferent and without prejudice or favor as between the parties; and as it is admitted he has no business in the room, it may turn out that he goes there because of his bias, and in order that he may report to a friendly party what may have been said to his prejudice, or that he may protect him against unfavorable comment through the unwillingness of jurors to criticise freely the conduct and motives of one person in the presence of another who is his known friend. Or the officer may be present with a similar purpose to protect a witness whose testimony was likely to be criticised and condemned by some of the jurors."

This, however, goes too far. There are many cases in which officers in charge are necessarily in attendance during the jury's deliberations. Such attendance should only be ground to set aside the verdict when it interferes with freedom of deliberation, or when the officer is shown to have a bias in the case, or, as has been seen, not to have been duly qualified.

[2] Rainforth *v.* State, 61 Ill. 365.

this, if leading to a conviction, will be a cause for setting aside the verdict.[1]

In another volume[2] will be found an enumeration of the cases in which the jury are permitted to inspect articles material to the issue. If this be done out of court, in the absence of the defendant, it is a fatal irregularity. Hence, experiments by a jury with old boots to see whether they would make tracks of a particular kind, such experiments being out of court, and without leave of court, will vitiate a conviction.[3] But it is otherwise when the court grant leave, in the presence of parties, to take out the articles in question. Thus it is no ground for a new trial that the court permitted the jury to take out a bottle of ale which was a part of the ale whose manufacture was the subject of the trial.[4] But it is settled that a verdict will be set aside when the jury, during their deliberations, receive a paper of any character, not in evidence, calculated to lead them to the verdict they render.[5] It is otherwise where a paper, without the action of the successful party, finds its way into the jury-box, but is not read by the jury.[6]

[1] Supra, § 729; Co. Lit. 227; 2 Hale P. C. 306; R. v. Sutton, 4 M. & S. 532; Whitney v. Whitman, 5 Mass. 405; Com. v. Edgerly, 10 Allen, 184; Yates v. People, 38 Ill. 527; Atkins v. State, 16 Ark. 568; People v. Page, 1 Idaho, 114.

[2] Whart. Crim. Ev. § 312.

[3] State v. Saunders, 68 Mo. 120.

[4] State v. McCafferty, 64 Me. 223. As to what papers go out see Udderzook v. Com. 76 Penn. St. 340.

Where the solicitor for the plaintiffs, after the evidence was concluded, delivered a bundle of depositions to the jury, a portion of which were not in evidence, the verdict for the plaintiffs was set aside, though the jury swore that they had not opened the bundle. 2 Hale P. C. 308.

[5] Vicary v. Farthing, Cro. Eliz. 411; Lonsdale v. Brown, 4 Wash. C. C. 148; Hackley v. Hastee, 3 Johns. 252; Sheaff v. Gray, 2 Yeates, 273; Alexander v. Jamieson, 5 Binn. 238; Com. v. Landis, 34 Leg. Int. 204; 8 Phila. 453; State v. Tindall, 10 Richards. 212; State v. Taylor, 20 Kans. 643.

[6] Hix v. Drury, 5 Pick. 296; Com. v. Edgerton, 10 Allen, 184.

It has been held that a new trial will not be granted after conviction in a capital case merely because the jury, during their deliberations, became possessed of and read a newspaper, containing a report of the trial, but no comments thereon which could prejudice the prisoner; nor because they had the statute defining the offence under trial before them during their deliberations. People v. Gaffney, 14 Abb. Pr. R. (N. S.) 36. It is otherwise where the reports are imperfect. Walker v. State, 37 Tex. 366. See Wilson v. People, 4 Park. C. R. 619.

In Farrar v. State, 2 Oh. St. 54,

§ 829. The old rule was that if a jury send for a book, on their own motion, after they have retired, and read it, their verdict is avoided;[1] and this distrust has been extended so far as to withhold from the jury treatises on law which both parties consent to permit the jury to read. Thus on one occasion, Lord Tenterden, though the counsel on both sides consented, refused to send out to the jury, on their request, a copy of Selwyn's Law of Nisi Prius, observing that the proper course for the jury to adopt was for them to come into court, state their question, and receive the law from the court.[2] The reception by the jury, without application to and consent of the court, of the statutes bearing on the case, has been held ground for setting aside a verdict of conviction.[3]

So of irregular reception of books.

§ 829 *a*. Does the reception by the jury of a report of the evidence avoid the verdict? It certainly does not when the jury do not read the paper, or read only collateral matters from the same paper not relative to the case. Thus where the officers attending upon the jury, under a mistake of duty, permitted them to read the newspapers, the officers first inspecting them, and cutting out everything that in any manner related to the trial; and it appeared that, in point of fact, the jurors never saw anything in any newspaper relative to the trial, and after the charge from the court were not allowed to see any until after they had delivered their verdict; it was held, by Judge Story, that this was an irregularity in the officers, but not

So of reception of reports of evidence.

where a jury, without the knowledge or aid of any one, procured a part of a newspaper containing the charge of the judge in the cause, and used it to guide their deliberations, although the report was accurate, the verdict was set aside.

[1] Vin. Abr. pl. 18; Co. Lit. 227. See Farrar *v.* State, 2 Oh. St. 54.

[2] Burrows *v.* Unwin, 3 C. & P. 310.

In a case of treason, before Wilson, Blair, and Patterson, Justices, in the U. S. Circuit Court, the jury, as is stated by Mr. Dallas, were permitted, with consent of parties, to take with them Foster's Crown Law, and the Acts of Congress. U. S. *v.* Vigol, 2 Dallas, 347; Whart. State Tr. 176.

The Supreme Court of Louisiana, in 1871, in a case where the allegation was that the jury, in considering their verdict, were allowed by the trial judge, "to have in their room Wharton's Crim. Law, to consult in relation to their verdict," declared "that we see no force in the point." State *v.* Tally, 23 La. An. 678.

[3] State *v.* Kimball, 50 Me. 509; State *v.* Patterson, 45 Vt. 308; State *v.* Smith, 6 R. I. 33. See Merrill *v.* Navy, 6 R. I. 33; but see *contra*, People *v.* Gaffney, 14 Abb. Pr. (N. S.) 36.

sufficient to justify the court in setting aside a verdict and granting a new trial, or treating the matter as a mistrial.[1] But where the jury, on their own motion, obtain, after they retire, a report of the judge's charge, which they use to guide their deliberations, this, as has been seen, has been held ground to set aside a verdict of conviction.[2] But it has been ruled that the mere fact of a jury becoming possessed, after retiring, of an accurate newspaper report of the evidence, without any comments thereon, is not ground to set aside the verdict;[3] though it is otherwise when the report is imperfect.[4]

And so of irregular communication of court.

§ 830. It is irregular even for the trial judge, after the jury have retired, to confer with them except in the presence of the parties; and if any communication is so made by him to them, in any way calculated to prejudice the defendant, this will avoid the verdict.[5] Whatever, as to the merits, passes from the judge to the jury, should be in the presence of the parties, open to their correction at the time, and to exception, so that it may be open to a revisory court. It has therefore been held that the sending in by the judge of a prior written charge to a grand jury will avoid the verdict;[6] and the same result was reached where the judge, after the jury had retired, and had declared that they were unable to agree, told the jury that the case was a peculiar one, and that he had reason to believe they had been tampered with;[7] and where, as we have seen, the jury obtained possession of a part of a newspaper containing the charge or part of the

[1] U. S. v. Gibert, 2 Sumn. 21.

[2] Farrar v. State, 2 Oh. St. 54.

[3] People v. Gaffney, 14 Abb. Pr. R. (N. S.) 36. See Gilson v. People, 4 Park. C. R. 619.

[4] Walker v. State, 37 Tex. 366.

[5] See supra, § 547; Sargent v. Roberts, 1 Pick. 337; Com. v. Ricketson, 5 Met. (Mass.) 412; Hall v. State, 8 Ind. 439; Hoberg v. State, 3 Minn. 262; Crawford v. State, 12 Ga. 142; State v. Frisby, 19 La. An. 143; State v. Alexander, 66 Mo. 148; Witt v. State, 5 Cold. (Tenn.) 11; Taylor v. State, 42 Tex. 504.

[6] Holton v. State, 2 Fla. 476. Judge Edmonds, on a trial for murder, sent word to a jury, who had applied to him for a law book on manslaughter, that they "had nothing to do with manslaughter." This was communicated to them by the officer in the absence of counsel, but was held not sufficient ground for a new trial. But see People v. Carnal, 1 Park. C. R. 256, 262, 676; S. C., 2 Park. C. R. 777–9.

[7] State v. Ladd, 40 La. An. R. 271.

charge of the judge on the issue before them.[1] It is not, however, ground to set aside the verdict that the judge, in presence of counsel on both sides, charged the jury a second time upon matters of evidence, after they returned to court, stating they could not agree, but without request for further instructions;[2] and so where, after the jury had retired to consult on their verdict they sent a note in writing to the court, in absence of parties and counsel, requesting advice on certain points in the case, and the judge returned the writing without reply, and directed the officer to hand a volume of reports to the foreman, and to request him to read a part of a decision, to the effect that a jury in such circumstances could not communicate with the judge except in open court.[3] And a new trial was refused when the court, after the jury retired, read evidence to them in the absence of the prisoner and his counsel,[4] and where, under similar circumstances, the judge, in the absence of defendant's counsel, read to the jury an opinion from a volume of reports as to the importance of juries harmonizing.[5] But such precedents should not be extended so as to permit an opinion bearing on the merits to be given by the judge to the jury in the absence of the defendant.[6]

And so of conversing with others, and reception of information as to the case.

§ 831. It is well settled that if a jury, after they are sworn in a case, and before its sealing for rendition, hear other testimony than that rendered in the case, or converse with strangers on the subject of the case, it will vitiate the whole procedure.[7] But where the jury had retired to consider on their verdict, and afterwards came into court, on their own motion, to ask explanations from a witness, who stated an additional and important fact, not before stated by him, but which fact the court immediately told the jury they were to disregard; it was held, that the affidavit of a juror stat-

[1] Farrar *v.* State, 2 Oh. St. 54.

In Florida (Dixon *v.* State, 13 Fla. 636), it is held not to be error to permit the jury to take out the whole (otherwise as to part) of the written charge of the court.

[2] Com. *v.* Snelling, 15 Pick. 321. See Crawford *v.* State, 12 Ga. 142.

[3] Com. *v.* Jenkins, Thacher's C. C. 118.

[4] Jackson *v.* Com. 19 Grat. 656; *contra*, Wade *v.* State, 12 Ga. 25.

[5] State *v.* Pike, 65 Me. 111.

[6] Supra, § 547.

[7] Perkins *v.* Knight, 2 N. H. 474; Knight *v.* Freeport, 13 Mass. 218; State *v.* Tilghman, 11 Ired. 513. Infra, § 851. As to English practice, see R. *v.* Martin, L. R. 1 C. C. 378; and see supra, §§ 721–9.

ing that he founded his verdict entirely upon this additional fact, would not authorize a new trial.[1]

And so of presence of party.

§ 832. But the mere presence of a party to the cause exercises such undue influence as to vitiate the procedure.[2] Thus where it appeared that the prosecutor had been in the room with the jury during their deliberations, it was held ground for new trial, though he was acting officially as high sheriff, and though there was no misconduct shown.[3] But this is not to be stretched so far as to require a new trial because one of the deputy sheriffs, having charge of the jury, is called as a witness in the case.[4]

And so of testimony submitted by juror or others.

§ 833. If any testimony material to the issue be acted on by the jury, without having been previously submitted in evidence, but be communicated to the jury by one of their number, it will avoid the verdict.[5] Thus verdicts have been set aside where an unsworn by-stander, during the trial, stated to one of the jury that the testimony of a witness under examination was true,[6] and where the sheriff handed to the jury, while deliberating, loose papers, purporting

[1] Hudson *v.* State, 9 Yerger, 408. See State *v.* Noblett, 2 Jones Law (N. C.), 418.

Where a medical witness for the Commonwealth, being accidentally present at the hotel when the jury were brought there by the sheriff to be lodged for the night, invited the jury in the presence of the sheriff to drink with him, and some of them accepted the invitation, it was ruled that as this act was inadvertent, but intended only as an act of courtesy, and as it was all in the presence of the sheriff, it was not sufficient to set aside the verdict. Thompson's case, 8 Grat. 638. Nor is it any ground for a new trial that the jury passed through crowds of people going to the hotel where they dined, or that they dined at the public table at the hotel, under the charge of their officer, no one speaking to, or tampering with them. Jumpertz *v.* People, 21 Ill. 275; Adams *v.* People, 47 Ill. 376; Howe *v.* State, 1 Humph. 491; Browning *v.* State, 33 Miss. 47. Nor does the visiting of the jury by a stranger, with reasonable refreshments, under the supervision of the officer in charge, vitiate the verdict, no conversation as to the case having taken place. Com. *v.* Roby, 12 Pick. 496.

[2] Odle *v.* State, 6 Bax. 159. See Love *v.* State, 6 Bax. 154.

[3] M'Elrath *v.* State, 2 Swan, 378.

[4] Read *v.* Com. 22 Grat. 924. But see State *v.* Snyder, 20 Kans. 306; cited supra, § 827.

[5] R. *v.* Rosser, 7 C. & P. 648; R. *v.* Heath, 18 How. St. Tr. 123; R. *v.* Sutton, 1 M. & Sel. 532, 541; State *v.* Powell, 2 Halst. 244; Howser *v.* Com. 51 Penn. St. 332; Sam *v.* State, 1 Swan (Tenn.), 61; Anschicks *v.* State, 6 Tex. Ap. 524.

[6] Dempsey *v.* People, 47 Ill. 323.

to be the evidence in the case, not knowing what the papers consisted of.[1] But it does not follow that a new trial will be ordered because the jury take into consideration general knowledge of the character of the transaction. Thus, in an indictment for a seditious libel, tending to excite public outrages, the judge referred to the personal knowledge of the jury for proof of the fact that serious riots had for some time back been occurring in the particular neighborhood, and it was held that such a reference was right, such riot forming part of the history of the country;[2] and where one of the jury communicated to his fellows mere opinions as to witnesses in the case, this has been ruled to be no ground for a new trial.[3] But the case is different where the issue is affected by the irregular submission, by one juror to the others, of material facts, connected with the merits.[4] Thus where one of the jurymen stated to his fellows, after they had retired, that he had heard a witness, whose credibility was attacked at the trial, sworn before the grand jury, and that his statement was the same as he had made on the trial, and it appeared that this statement had much influence in producing the verdict of guilty, it was held that this proceeding was illegal, and vitiated the verdict.[5]

§ 834. *Visiting the scene of the res gestae*, by a part of a jury, under an officer's charge, after the case is committed to them, is ground for a new trial.[6] It is otherwise, however, if the visit is merely casual.[7]

And so of visiting scene of offence.

§ 835. As we have seen, the inadvertent intrusion of strangers will not be cause for a new trial unless coupled with proof of communication made as to the case under trial.[8] *A fortiori* is this the case when the visitor is a qualified officer, present casually, though unsworn as to the particular issue; no interference being proved.[9] Nor is it ground for new

But not accidental intrusion of stranger.

[1] Pound *v.* State, 43 Ga. 88.

[2] R. *v.* Sutton, 4 M. & S. 532.

[3] Nolen *v.* State, 2 Head, 520. See Purinton *v.* Humphreys, 6 Greenl. 379; Price *v.* Warren, 1 Hen. & Munf. 385.

[4] Talmadge *v.* Northrop, 1 Root, 522; State *v.* Andrews, 29 Conn. 100; Martin *v.* State, 25 Ga. 494.

[5] Donston *v.* State, 6 Humph. 275.

[6] Supra, § 707; Eastwood *v.* People, 3 Park. C. R. 25; S. C., 14 N. Y. 562; Ruloff *v.* People, 18 N. Y. 179.

[7] State *v.* Brown, 64 Mo. 368; State *v.* Adams, 20 Kans. 311.

[8] Supra, § 831; Luster *v.* State, 11 Humph. 169.

[9] Supra, §§ 729, 821, *et seq.*; Trim *v.* Com. 18 Grat. 983.

trial that the jury were left for a short time unattended, no intrusion by other persons being shown.[1]

Nor casual exhibition of evidence.

§ 836. It may happen that instruments of evidence may inadvertently be seen by the jury, or remarks overheard by them, not, however, through any design on the part of the prosecution to obtain an unfair advantage, or with any effect on the jury. If on such grounds verdicts should be set aside, few verdicts would stand. In such cases, therefore, the information being communicated casually, and no effect on the jury being produced, sufficient ground for a new trial is not laid. Thus where during the trial and before verdict inadvertent remarks to the prejudice of the defendant are made by strangers in the hearing of jurymen, this will not operate to disturb the verdict if it be shown that such remarks were not promoted by the prosecution, or voluntarily entertained and weighed by the jurymen.[2] The same rule has been applied to the casual exhibition of a material paper,[3] and to other fortuitous exhibition of facts bearing on the case, but coming from strangers, and not influencing the result.[4] And there is sound reason for this distinction. If jurors are allowed voluntarily to receive and weigh evidence not rendered on trial, no case could be decided fairly. On the other hand, if casual remarks as to the case made in the presence of a juror, not in any way influencing him, should require a new trial, no case would be decided at all; for there is no case in which one of the parties could not manage to have such remarks made.

And so of the mere approach of strangers.

§ 837. It is at all events clear that, as a general rule, the accidental approach of strangers, unless improper conversation as to the case is entertained, will not avoid the verdict.[5] Thus handing five dollars casually to a

[1] People *v.* Kelly, 46 Cal. 337; State *v.* Turner, 25 La. An. 573.

[2] State *v.* Ayer, 3 Foster (N. H.), 301; State *v.* Andrews, 29 Conn. 100; State *v.* Cucuel, 31 N. J. L. (2 Vroom) 249; Hall's case, 6 Leigh, 615.

[3] State *v.* Taylor, 20 Kans. 643. Supra, § 825.

[4] Rowe *v.* State, 11 Humph. 491; Eppes *v.* State, 19 Ga. 102; Chase *v.* State, 46 Miss. 683; Stanton *v.* State, 13 Ark. 319; March *v.* State, 44 Tex. 64. Where burglars' tools, found on the defendant, were, during a recess of the court, while the cause was on the trial, exhibited, and their use explained in the presence of one of the jurors, with the knowledge of the defendant and his counsel, and no objection wsa made until after verdict, it was held that the objection was to be regarded as waived. State *v.* Rand, 33 N. H. 216.

[5] Supra, § 821; State *v.* Tilghman,

juror, in payment of a debt, by a by-stander, without any reference or connection with the case under trial, is no ground for a new trial.[1] gers, and trivial conversation.

§ 838. When, however, a communication, not on its face trivial, is shown to have been made to the jury, during their deliberations, from outside, it will be ground for disturbing the verdict unless it be shown to have in no way touched the merits of the case on trial.[2] Presumption against such communications.

§ 839. The fact that a juror was asleep or otherwise inattentive during the trial is not ground for a new trial, where it could have been a matter of exception at the time and was passed over.[3] Inattention of juror must be excepted to at time.

§ 840. Cases may occur in which a juror, by his contumacious disregard of the directions of the court, may make a new trial necessary.[4] This has been ruled to be the case where a juror, in disobedience to the repeated directions of the court, took notes of the evidence, which notes he retained.[5] But the mere taking of notes by a juror, without objection, is no ground for revision.[6] But otherwise as to disobedience to court, resulting in injury.

§ 841. In New York any indulgence in spirituous liquors, during trial, by the old rule, avoided the verdict.[7] "We cannot," declared the Supreme Court, "allow jurors thus of their own accord to drink spirituous liquor while thus engaged in the course of a cause. We are satisfied that there has been no mischief, but the rule is absolute, and does not meddle with consequences, nor should exceptions be multiplied. We have set aside verdicts in error for this cause, where the parties consented that the jury should drink."[8] This, however, is no longer held in New York,[9] though in New Hamp- Intoxication ground for new trial.

11 Ired. 513; State v. Baker, 63 N. C. 276; Rowe v. State, 11 Humph. 491; McCann v. State, 9 S. & M. 465; Ned v. State, 33 Miss. 364; Stanton v. State, 13 Ark. 317; Coker v. State, 20 Ark. 51.

[1] Martin v. People, 54 Ill. 225.

[2] Ibid.; Pope v. State, 36 Miss. 122; State v. Anderson, 4 Nev. 265; State v. Harris, 12 Nev. 414. See Hartung v. People, 4 Park. C. R. 256, 319, as reversed in 22 N. Y. 95.

[3] U. S. v. Boyden, 1 Low. 266; Baxter v. People, 3 Gilm. 386; Cogswell v. State, 49 Ga. 103.

[4] See supra, § 717.

[5] Cheek v. State, 35 Ind. 492. See supra, § 956.

[6] Cluck v. State, 40 Ind. 263.

[7] Dennison v. Collins, 1 Cow. 111; Rose v. Smith, 4 Cow. 17.

[8] Brant v. Fowler, 7 Cow. 562.

[9] Wilson v. Abrahams, 1 Hill, 207.

shire, Indiana, and Iowa, verdicts have been set aside because spirituous liquor was given to the jury during their deliberation.[1] On the other hand, Judge Story, in a capital case, held it would not avoid a verdict to show that some of the jurors drank ardent spirits during the trial, when the prisoner's counsel consented in open court to this indulgence to those whose health might require it, unless it was also shown that the indulgence was grossly abused and operated injuriously to the defendant;[2] and this view is now generally accepted.[3] Clearly, however, intoxication by any of the jury during their deliberations is ground for setting aside the verdict.[4] And so it has been held properly in Ohio, that "the separation of a juror from his fellows, after the case has been finally submitted and before they have agreed upon a verdict, for the purpose of obtaining and drinking intoxicating liquors, when not explained or shown to be excusable, is such misconduct of the juror as will entitle the prisoner to a new trial." [5]

Casting lots by jurors, or other irregularity in their consultations.

§ 842. Where the jury have cast lots, or resorted to chance in any way whatever, to determine their verdict, a new trial will be ordered in all cases in which the jurors bound themselves, before the lot, to abide by the result.[6] Where, however, such a method of determining the views of the particular jurors as to the degree is taken without any previous agreement by which the

[1] State *v.* Bullard, 16 N. H. 139; Davis *v.* State, 35 Ind. 496; State *v.* Baldy, 17 Iowa, 39; Ryan *v.* Harrow, 27 Iowa, 494. But see State *v.* McLaughlin, 44 Iowa, 82; State *v.* Bruce, 48 Iowa, 530.

[2] U. S. *v.* Gibert. 2 Sumner, 21; and see Coleman *v.* Moody, 4 H. & M. 1; Stone *v.* State, 4 Humphreys, 37. "Cider" is at all events unexceptionable. Com. *v.* Roby, 12 Pick. 496. See notes in 21 Alb. L. J. 40.

[3] State *v.* Cucuel, 31 N. J. L. (2 Vroom) 249; Com. *v.* Beale, reported Whart. Crim. Law, 7th ed. § 3320; Thompson's case, 8 Grat. 638; Creek *v.* State, 24 Ind. 151; Davis *v.* People, 19 Ill. 74; State *v.* Bruce, 48 Iowa, 530; Roman *v.* State, 41 Wis. 312; State *v.* Caulfield, 23 La. An. 148; Pope *v.* State, 36 Miss. 121; Russell *v.* State, 53 Miss. 368; State *v.* Upton, 20 Mo. 397; Kee *v.* State, 28 Ark. 155; Tuttle *v.* State, 6 Tex. Ap. 556; though see in Texas, as to capital cases, Jones *v.* State, 13 Tex. 168. A new trial, however, will be granted if a juror is "treated" by the prosecutor. Infra, §§ 849 *et seq.* See supra, § 730.

[4] Hogshead *v.* State, 6 Humph. 59. This is conceded in most of the cases cited; and see Pelham *v.* Page, 1 Eng. (Ark.) 535.

[5] Weis *v.* State, 22 Oh. St. 486.

[6] Hale *v.* Cove, 1 Strange, 642;

jurors bind themselves individually to adopt a mean result, but where each juror reserves to himself the right of dissenting, and where all, after consideration, agree to a compromise based on their individual estimates, the finding will rarely be disturbed.[1] And where one of the jury, through a mistaken sense of duty, thought he ought to assent to the views of a majority, and thereby concurred in a verdict of murder, such mistake was held no ground for a new trial.[2] The same conclusion was reached where the jury concurred in opinion as to the guilt of the prisoner, but differed as to the length of the time for which he should be sentenced to the penitentiary; and they agreed that each one should state the time for which he would send him to the penitentiary, and that the aggregate of these periods, divided by twelve, should be the verdict, and after it was done they struck off the odd months, and all agreed to the verdict, understanding what it was.[3] Nor will mistake by a juror as to the nature of the punishment, nor as to the action of the court, be ordinarily ground for revision;[4] nor is it ground that a juror believed the sentence would be commuted.[5]

Parr *v.* Seames, Barnes, 438; Mellish *v.* Arnold, Bunb. 51; Thompson *v.* Com. 8 Grat. 637; State *v.* Barnstetter, 65 Mo. 149; Crabtree *v.* State, 3 Sneed (Tenn.), 302; Leverett *v.* State, 1 Tex. L. J. 113; Birchard *v.* Booth, 4 Wis. 67. See Monroe *v.* State, 5 Ga. 85; Hilliard on New Trials (1873), 160; and compare supra, §§ 731–2.

[1] Thompson *v.* Com. 8 Grat. 637; Dooley *v.* State, 28 Ind. 239; Leverett *v.* State, 1 Tex. L. J. 113.

[2] Com. *v.* Drew, 4 Mass. 391. See Galvin *v.* State, 6 Cold. 283.

[3] Thompson *v.* Com. 8 Grat. 638.

[4] State *v.* McConkey, 49 Iowa, 499; State *v.* Shock, 68 Mo. 552.

[5] State *v.* Wallman, 31 La. An. 176.

Where, however, a juror was not satisfied of the guilt of the prisoner, but assented to a verdict of guilty under an impression (suggested by his fellow-jurors) that the governor would pardon the defendant if the jury by their verdict recommended it; it was held, in Tennessee, that this was sufficient cause to set aside the verdict. Crawford *v.* State, 2 Yerger, 60.

And so a juror's affidavit that he believed the prisoner was innocent, and that he assented to a verdict of guilty under the belief, induced by the assertions of his fellow-jurors, that there were fatal defects in the proceedings which would prevent the prisoner from being sent to the penitentiary, and that the governor would pardon the defendant if recommended to mercy in the verdict, was held in the same State sufficient to set aside the verdict. Cochran *v.* State, 7 Humph. 544. In this case, the case of Crawford *v.* State, 2 Yerg. 60, was referred to and approved. And so where the juror's affidavit was that he yielded against his judgment and conscience, because a great majority of

Otherwise as to mere collateral levity.

§ 843. But mere collateral levity on the part of the jury will be no ground to set aside a verdict, unless it appeared that such levity interfered with their deliberations.[1]

Absolute preadjudication by

§ 844. When it appears after trial that a juror had beforehand prejudged the case, but had improperly withheld this fact before acceptance, or when asked as to opinion

the jury favored the verdict. Galvin *v.* State, 6 Cold. 283. But these cases cannot be sustained without making jury trials inoperative in all cases of serious disagreement between jurors. Infra, § 847.

[1] Com. *v.* Beale, Phila. 1854. "It is further alleged," said Thompson, J., "that the jury misbehaved by singing and acting in a trifling manner while in the jury-room, and immediately before rendering their verdict. That some of the jurors displayed levity of conduct, which, when casually overheard, might have seemed unbecoming, may be perfectly true; but there is no proof that such levity attended or interfered with their deliberations. On the contrary, the evidence shows that the noises alluded to occurred after their deliberations had ceased, and while they were waiting for the arrival of the hour to which the court had adjourned. The gentlemen who happened to overhear the noise alluded to state that it continued from the time they first heard it until the jury returned to court, — showing that it was not during their deliberations, but after they had agreed. This would not, therefore, be sufficient to affect their verdict. Comparing the time at which the jury left the court with the time at which they dined, and the subsequent noise in their room, it seems probable that they had agreed on their verdict before dinner — in which case, the meat and drink used at dinner could not have affected their deliberations. For the reasons adverted to, much censure was cast upon the jury during the argument, but without the production of sufficient evidence to induce us to believe that the interests of the defendant were prejudiced by the alleged improprieties. The hearsay testimony of what one of the jurors said a day or two after the verdict had been rendered is inadmissible upon any principle whatever, and we therefore decline entirely to consider it. 'To yield to accusations against jurors, lightly made, or without strong proof,' says Judge Rogers (Com. *v.* Flanagan, 7 W. & S. 421), 'would weaken, if not bring into contempt, that useful and indispensable institution in the administration of justice.' And again he observes: 'We must not lend too ready an ear to such applications; for it is to be feared that, were we to do so as soon as the accused was convicted, the trial of jurors would begin.' The truth of these remarks is illustrated by the proceedings in the present case; and we feel ourselves bound to declare that the evidence before us is insufficient to cast upon the jury the imputation of moral turpitude or dishonest conduct." The remark of a juror, during a recess of the trial, that there was no use in taking up time in trying to humbug the jury, and the lawyer who made the shortest speech would win the case, is not such conduct as will vitiate the verdict. Taylor *v.* California Stage Co. 6 Cal. 228. See, however, Jim *v.* State, 4 Humph. 289.

on *voir dire* had given false answers, and such formation of opinion was unknown to the party at the time, a new trial will be granted.[1] And it was held a sufficient reason for a new trial that one of the jurors,

juror or judge ground for new trial when a surprise.

[1] U. S. *v.* Fries, 1 Whart. St. Tr. 606; People *v.* Bodine, 1 Denio, 281; People *v.* Vermilyea, 7 Cow. 108; Heath *v.* Com. 1 Robins. Va. 735; Com. *v.* Jones, 1 Leigh, 598; State *v.* McDonald, 9 W. Va. 456; State *v.* Strauder, 11 W. Va. 745; Parks *v.* State, 4 Oh. St. 234; Sellers *v.* People, 3 Scam. 412; Barlow *v.* State, 2 Blackf. 114; Romaine *v.* State, 7 Ind. 63; State *v.* Gillick, 7 Clarke (Iowa), 289; Presbury *v.* Com. 9 Dana, 263; Norfleet *v.* State, 4 Sneed, 340; State *v.* Hopkins, 1 Bay, 373; State *v.* Duncan, 6 Ired. 98; State *v.* Patrick, 3 Jones L. 443; Wade *v.* State, 12 Ga. 25; Ray *v.* State, 15 Ga. 223; Keener *v.* State, 18 Ga. 194; Burroughs *v.* State, 33 Ga. 403; Cody *v.* State, 3 How. Miss. 27; Lisle *v.* State, 6 Mo. 426; State *v.* Taylor, 64 Mo. 358; State *v.* Parks, 21 La. An. 251; Henrie *v.* State, 41 Tex. 573; Austin *v.* State, 42 Tex. 355; Hilliard on New Trials (1873), 174–5. And see for other cases infra, § 845. This is eminently the case when the juror procured himself to be fraudulently inserted in the panel. State *v.* Bell, 81 N. C. 591. Supra, § 495. As to challenges see supra, §§ 611 *et seq.* Where a juror, during the progress of the cause, after the evidence was opened, expressed a decided opinion as to the guilt of the defendant in the hearing of by-standers, it was held that though in so doing he was guilty of gross misconduct, it was no cause to set aside the verdict. Com. *v.* Gallagher, 4 Penn. L. J. 512; 2 Clark, 297, per Bell, President J. See State *v.* Ayer, 3 Foster (N. H.), 301; Brakefield *v.* State, 1 Sneed, 215. If the prisoner has neglected to avail himself before the trial of any of the means provided by law for ascertaining the incompetency of a juror, on account of prejudice, he will not be entitled to a new trial on the ground of such prejudice. State *v.* Daniels, 44 N. H. 383; Meyer *v.* State, 19 Ark. 156; State *v.* Anderson, 4 Nev. 265. It is enough if the defendant's counsel knew of the incapacity. State *v.* Tuller, 34 Conn. 280; but see, for a less stringent rule, Willis *v.* People, 32 N. Y. 715. On a trial in Virginia, after a verdict of conviction for murder in the first degree, the defendant adduced testimony that two of the jurors who tried the case, and who, on the *voir dire*, declared that they had not formed or expressed an opinion as to the guilt or innocence of the defendant, had, in fact, previous to the trial, expressed decided opinions that the defendant was guilty and ought to be hung, of which circumstance the defendant alleged he had no knowledge until since the verdict was rendered; and on this ground he moved to set aside the verdict. It was held by the Court of Appeals that, 1st. Such inquiry was open, and the evidence admissible, for the purpose of showing perjury and corruption in the jurors; but, 2d. It belonged exclusively to the judge who presided at the trial to weigh the conflicting credibility of the witnesses adduced by the prisoner, and of the jurors, and to decide whether, in justice to the prisoner, and upon all the circumstances of the case, a new trial ought not to be awarded. Heath *v.* Com. 1 Robins. 735. As to discharging jury upon discovery, during trial,

some time before the trial, declared "such a man as Fries (the defendant) ought to be hung, who brings on such a disturbance," of which fact, until after the trial, the defendant had no notice.[1] The same ruling under the same limitations took place where the foreman had declared that the plaintiff should never have a verdict, whatever witnesses he produced;[2] and where a juror had stated on the morning of trial that he had come from home for the purpose of hanging every counterfeiting rascal, and that he was determined to hang the prisoner at all events.[3] A qualified opinion, however, dependent on a particular state of facts, will be no ground for new trial;[4] and where a juror stated that if it was true the prisoner had made the attempt to commit the crime charged upon him, he would go to the penitentiary; it was held sufficient ground was not laid.[5] The defendant, at the same time, by omitting to examine the juryman as to bias, ordinarily is precluded from taking subsequent exception,[6] and a new trial will not be granted because of vague opinions against the prisoner existing in the minds of several of the jury in particular;[7] nor of a general excitement against him at the time of trial, in the community at large;[8] nor because the judge himself had been the author of an account of a former trial of

of such prejudice or incompetency, see supra, §§ 509, 725.

[1] U. S. v. Fries, 1 Whart. St. Tr. 606. See State v. Williams, 14 W. Va. 851.

[2] 2 Salk. 645.

[3] State v. Hopkins, 1 Bay, 373. See Ibid. 377.

[4] State v. Benner, 64 Me. 267; State v. Ayer, 8 Fost. (N. H.) 301; State v. Hayden, 51 Vt. 296; Com. v. Flanagan, 7 Watts & S. 415, 421; Kennedy v. Com. 2 Va. Cas. 510; Poore v. Com. 2 Va. Cas. 474; Brown v. Com. 2 Va. Cas. 516; Com. v. Hughes, 5 Rand. 655; Mitchum v. State, 11 Ga. 616; Anderson v. State, 14 Ga. 709; Jim v. State, 15 Ga. 535; O'Shields v. State, 55 Ga. 656; Howerton v. State, 1 Meigs, 262; State v. Davis, 20 Mo. 391; State v. Ward, 14 La. An. 673.

[5] Kennedy v. State, 2 Va. Cas. 510. Under the California statute, the objection must be made before verdict. People v. Fair, 43 Cal. 137; People v. Mortimer, 46 Cal. 114; overruling People v. Plummer, 9 Cal. 298.

[6] Ibid.; Yanez v. State, 6 Tex. Ap. 429. Infra, § 845.

[7] Com. v. Flanagan, 7 Watts & S. 422; Poore v. Com. 2 Va. Cas. 474. See State v. Howard, 17 N. H. 171; State v. Fox, 1 Dutch. 566; Wright v. State, 18 Ga. 383; Rice v. State, 7 Ind. 332; People v. King, 27 Cal. 507.

[8] Com. v. Flanagan, 7 Watts & S. 422; though if such excitement pervade the jury-box, and work an unjust result, the verdict should be set aside. People v. Acosta, 10 Cal. 195.

the prisoner, containing severe reflections on him, it appearing that such fact was not known in sufficient time to have influenced the jury in their deliberations.[1] Yet any unfair bias on part of the judge, which by any way is exhibited to the jury, and which is hence prejudicial to the defendant, is ground for revision.[2]

Error of the court on the allowance or rejection of challenges belongs to a distinct branch of law previously discussed.[3]

Otherwise when party knew of objection in time to challenge.

§ 845. But a new trial will not be granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge, and knew, or might have known, in the exercise of due care, the facts beforehand.[4]

Absolute incapacity of juror ground for new trial, but not qualified.

§ 846. Where it turns out after verdict that one of the jurors was absolutely incapable of acting as such, and that this fact was unknown to the defendant at the time, and could not, with due diligence, have been known to him, this is a ground for a new trial. This has been held in a case where it appeared that one of the jurors was not a freeholder, this being a statutory necessity;[5] or was an infant;[6] or was not the person actually summoned on the jury, though bearing the same name.[7] But disqualifications not

[1] Vance *v.* Com. 2 Va. Cas. 162.

[2] Supra, § 605.

[3] Supra, §§ 605 *et seq.*

[4] R. *v.* Sutton, 8 B. & C. 417; 2 M. & R. 406; McAllister *v.* State, 17 Ala. 434; George *v.* State, 39 Miss. 570; State *v.* Taylor, 64 Mo. 358; Givens *v.* State, 6 Tex. 344; Yanez *v.* State, 6 Tex. Ap. 429, and cases supra, § 844.

Where by-standers were called as jurors in a capital case, and, at the instance of the prisoner, sworn and examined touching their indifferency, and then elected by the prisoner and sworn of the jury; upon objections to the indifferency of these jurors, discovered after the trial, not inconsistent with what was disclosed by the jurors themselves on their examination touching their indifferency, it was held that the court ought not to set aside a verdict of guilty, just in itself, though the objections be such, that if known and disclosed before the jurors were elected and sworn, there might have been good cause to challenge the jurors; much less, if the objections be such as would not have been good cause of challenge. Com. *v.* Jones, 1 Leigh, 598; Presbury *v.* Com. 9 Dana, 203. Supra, § 844, note.

[5] Supra, §§ 844–45, 845; infra, § 886; State *v.* Babcock, 1 Conn. 401; Dowdy *v.* Com. 9 Grat. 727. See Stanton *v.* Beadle, 4 T. R. 473.

[6] Russell *v.* Barn, Barnes, 455; R. *v.* Tremaine, 7 D. & R. 684; 5 B. & C. 254.

[7] McGill *v.* State, 34 Oh. St. 328. Compare R. *v.* Sullivan, 8 Ad. & E. 831; People *v.* Ransom, 7 Wend. 417.

absolute, which are ground for challenge, may not be ground for a new trial.[1] This is the case with alienage;[2] with non-residence;[3] with irreligion,[4] with consanguinity with the prosecutor;[5] with membership of the grand jury which found the bill.[6] The defendant, in any view, to avail himself of such defect, must have been, without negligence, ignorant of it until after verdict; and if he neglects to question the juror at the proper time, disqualification cannot be set up as ground for new trial.[7]

Juror inadmissible to impeach verdict.

§ 847. Though the former practice was different, it is now settled, in England, that a juror is inadmissible to impeach the verdict of his fellows.[8] "It would open each juror," declared Mansfield, C. J., "to great temptation, and would unsettle every verdict in which there could be found upon the jury a man who could be induced to throw discredit on their common deliberations."[9] Nor are subsequent declarations of jurymen, after a general verdict, admissible to explain or qualify it,[10] though the affidavits of by-standers, as to what passed within their knowledge touching the delivery of the verdict, may be received.[11] In this country the English rule has generally been adopted,[12] though the affidavits of jurors will be

[1] State *v.* Fisher, 3 N. & Mc. 261; Ash *v.* State, 56 Ga. 583.

[2] State *v.* Quarrel, 2 Bay, 150. See Hollingsworth *v.* Duane, 4 Dall. 353; though see Chase *v.* People, 40 Ill. 352; Brown *v.* La Crosse, 21 Wis. 51; Hill *v.* People, 16 Mich. 351. Supra, § 699; infra, § 886. The question depends on the applicatory statute.

Whether a colored person can claim colored jurymen see supra, § 783 *a*.

[3] Costly *v.* State, 19 Ga. 614.

[4] McClure *v.* State, 1 Yerg. 206. See R. *v.* Tremaine, supra.

[5] Supra, § 661; McLellan *v.* Crofton, 6 Greenl. 307; Eggleton *v.* Smiley, 17 Johns. 133; Edwards *v.* State, 53 Ga. 428; McDonald *v.* Beall, 55 Ga. 288; Harley *v.* State, 29 Ark. 17; Jones *v.* People, 2 Col. T. 351.

[6] Supra, § 661; Barlow *v.* State, 2 Blackf. 114; Bennett *v.* State, 24 Wis. 24; Davis *v.* State, 54 Ala. 39; McGehee *v.* Shafer, 9 Tex. 20; State *v.* Madoil, 12 Fla. 151.

[7] Supra, §§ 351, 733, 844; infra, §§ 886-89; R. *v.* Sutton, 8 B. & C. 417; Parks *v.* State, 4 Oh. St. 234; Gillooley *v.* State, 58 Ind. 182; McAllister *v.* State, 17 Ga. 434; Lisle *v.* State, 58 Ind. 182.

[8] See Whart. Crim. Ev. § 510.

[9] Owen *v.* Warburton, 1 N. R. 326; Hindle *v.* Birch, 1 Moore, 455; Aylett *v.* Jewel, 1 W. Blac. 1299; Vaise *v.* Delaval, 1 Term Rep. 11; Straker *v.* Graham, 4 M. & W. 721. See Hilliard on New Trials (1873), 241.

[10] Clark *v.* Stevenson, 2 W. Blac. 803.

[11] R. *v.* Wooller, 6 M. & S. 366.

[12] Supra, § 379; Whart. Crim. Ev. § 510; State *v.* Pike, 65 Me. 111; State *v.* Ayer, 3 Fost. 301; Com. *v.* Drew, 4 Mass. 391; State *v.* Freeman, 5 Conn. 348; Dan *v.* Tucker, 4

entertained for the purpose of explaining, correcting, or enforcing their verdict.[1] Thus where a doubt existed, in consequence of confusion in the court-room, as to what the exact verdict was, the affidavits of jurors and by-standers were received for the purpose of showing the facts of the case, though all reference was excluded as to the motives or intentions with which such verdict was agreed to, or the circumstances attending the deliberations which led to it.[2] In Tennessee the English rule appears to be rejected altogether,[3] though it is proper to observe that in that State, in one instance at least, a disposition has been shown to conform more closely to the general practice, it having been held that affidavits by jurors, that they founded their verdict upon particular parts of the testimony given in court, which particular testimony might abstractly be illegal, are not sufficient to authorize a new trial.[4]

Yet, at the same time, there is danger of construing the rule in such a way as to work great wrong, by so shielding with secrecy the deliberations of the jury as to permit these deliberations to be irresponsibly conducted in such a way as to outrage public and private rights. The true view is this: Jurors cannot

Johns. 487; People *v.* Columbia, 1 Wend. 297; People *v.* Carnal, 1 Parker C. R. 256, 262, 676; S. C., 2 Park. C. R. 777; Cluggage *v.* Swan, 4 Binn. 150; Reed *v.* Com. 22 Grat. 924; State *v.* Godwin, 5 Ired. 401; Bellamy *v.* Pippin, 74 N. C. 46; State *v.* Smallwood, 78 N. C. 560; State *v.* Doon, Charlton, 1; State *v.* Coupenhaver, 39 Mo. 320; State *v.* Branstetter, 65 Mo. 149; State *v.* Alexander, 66 Mo. 148; Bennett *v.* State, 3 Ind. 167; Stanley *v.* Sutherland, 54 Ind. 339; State *v.* Millecan, 15 La. An. 557; State *v.* Fruge, 28 La. An. 657; Hudson *v.* State, 9 Yerg. 408; State *v.* Horne, 9 Kans. 119; People *v.* Baker, 1 Cal. 403; People *v.* Doyall, 48 Cal. 85; Johnson *v.* State, 27 Tex. 758. As to grand jurors see supra, § 379.

In Iowa, it is said that an affidavit as to a fellow-juror drinking intoxicating liquors is only to be received when no other evidence is obtainable, and ought to be explicit. State *v.* McLaughlin, 44 Iowa, 82.

[1] Cogan *v.* Ebden, 1 Burr. 383; R. *v.* Woodfall, 5 Burr. 2667; State *v.* Ayer, 3 Foster, N. H. 301; State *v.* Howard, 17 N. H. 171; Dana *v.* Tucker, 4 Johns. 487; Jackson *v.* Dickenson, 15 Johns. 309; Cochran *v.* Street, 1 Wash. R. 79.

In California such evidence is now admissible by statute. Donner *v.* Palmer, 23 Cal. 40.

[2] R. *v.* Woodfall, 5 Burr. 2667; R. *v.* Simons, Sayer, 35.

[3] Crawford *v.* State, 2 Yerg. 60; Cochran *v.* State, 7 Humph. 544. Supra, § 842.

[4] Hudson *v.* State, 9 Yerg. 408. See, as to grand jurors, supra, § 379; Whart. Crim. Ev. § 510.

be received to qualify by parol testimony matters of record; nor can they be permitted to state matters concerning their deliberations which may be proved *aliunde*. From necessity, however, when gross injustice has been wrought from misconduct or misapprehension in their deliberations, they may be permitted to prove such misconduct or misapprehension. Thus it has been held that they may prove that the case was decided by lot;[1] or that the instructions of the court were utterly misunderstood;[2] and a distinction has been taken to the effect that though a juror cannot be admitted to stultify his own action, yet he may be permitted to prove gross misconduct in his fellows.[3]

In the United States, as a rule, an affidavit of a juror cannot be admitted to purge his conduct from the imputation of impropriety.[4] In exceptional cases, however, such affidavits have been received.[5]

And so are affidavits attacking jury.

§ 848. The court, also, will not permit affidavits to be read imputing improper motives to the jury, or tending to impeach their integrity.[6] And where a juror has denied, on oath, before the triers, having formed and expressed an opinion in a criminal case, the affidavit of a single witness to the contrary has been held insufficient to disturb the verdict.[7]

6. *Misconduct by the Prevailing Party.*

Such misconduct ground for new trial.

§ 849. Any misconduct by the prevailing party, intended to affect the jury, and tending so to do, will be cause for a new trial,[8] and even an acquittal obtained by fraud or embracery will be no bar to a subsequent indict-

[1] Wright *v.* Illinois Tel. Co. 20 Iowa, 19. See People *v.* Hughes, 29 Cal. 257; State *v.* Horne, 9 Kans. 718. Supra, § 842.

[2] Packard *v.* U. S. 1 Iowa, 225; R. *v.* Simons, Sayer, 35.

[3] Deacon *v.* Shreve, 2 Zab. N. J. 176; and see Com. *v.* Mead, 12 Gray, 167; and the remarks of Taney, C. J., in U. S. *v.* Reid, 12 How. 361.

[4] French *v.* Smith, 4 Vt. 363; Ray *v.* State, 15 Ga. 223; McGuffie *v.* State, 17 Ga. 497; Sawyer *v.* Hannibal R. R. 37 Mo. 240; Organ *v.* State, 26 Miss. 78; People *v.* Hughes, 29 Cal. 257; People *v.* Backus, 5 Cal. 275. See Hilliard on New Trials (1873), 247.

[5] Taylor *v.* Greely, 3 Greenl. 204; Fries's case, 1 Wh. St. Tr. 605; Moffett *v.* Bowman, 6 Grat. 219.

[6] Onions *v.* Naish, 7 Price, 203; Hartwright *v.* Badham, 11 Price, 383; Cooke *v.* Green, 11 Price, 736; Graham on New Trials, 126.

[7] Epps *v.* State, 19 Ga. 102.

[8] 2 Hale P. C. 308; State *v.* Hascall, 6 N. H. 352; Knight *v.* Inhabi-

ment.[1] Nor need such misconduct be traced directly to the party prevailing. Any perversion of justice by means *dehors* the trial, against which ordinary care could not guard, will justify the court in setting the verdict aside.[2]

§ 850. Evidence that the prosecutor, by exhibiting papers at places where the jury boarded, had been attempting to bias and influence them, will be sufficient to sustain a motion for new trial;[3] and so where it appeared that the prosecutor spent a night in a room with the jury during their deliberations, the conviction being for manslaughter, and the prosecutor having acted officially as high sheriff both when prosecuting the suit and attending the jury.[4]

And so of undue influence on jury.

§ 851. Where papers, as has already been seen, not in evidence, are surreptitiously handed to the jury, the verdict will be avoided;[5] and the same result will take place where it appears that a witness on one side has been spirited away by the opposite party.[6] Such efforts, however, must be traced to a party or his agents; for the mere absenting of himself by a witness will not be sufficient ground.[7]

And so of tampering with evidence.

§ 852. A new trial will be granted when it appears any unfair trick or artifice had been employed, resulting in a verdict in favor of the party using it.[8] Thus a new trial was granted where the defendant, by the artifice of the prosecuting attorney, went to trial without countervailing testimony, under the belief that certain witnesses of the State were absent, when they are present, and concealed by the prosecution.[9]

And so of trick of opposite side.

§ 853. A new trial will not be granted simply because counsel,

tants, &c. 13 Mass. 218; Jeffries *v.* Randall, 14 Mass. 205.

[1] See supra, §§ 451, 784 *et seq.*; Hylliard *v.* Nichols, 2 Root, 176. See Ohio Code Cr. Proc. § 192.

[2] Willis *v.* People, 32 N. Y. 715.

[3] State *v.* Hascall, 6 N. H. 352. Compare Coster *v.* Merest, 3 Brod. & B. 272; 7 Moore, 87; Spenceley *v.* De Willot, 7 East, 108.

[4] McElrath *v.* State, 2 Swan, 378. See supra, § 827.

[5] Co. Lit. 227; Graves *v.* Short, Cro. Eliz. 616; Palmer, 325. Supra, §§ 831 *et seq.*

[6] Bull. N. P. 328.

[7] Grovenor *v.* Fenwick, 7 Mod. 156.

[8] Anderson *v.* George, 1 Burr. 352; Graham on New Trials, 56; Bodington *v.* Harris, 1 Bing. 187; Niles *v.* Brackett, 15 Mass. 378; Jackson *v.* Warford, 7 Wend. 62; March *v.* State, 44 Tex. 64.

[9] Shepherd *v.* State, 64 Ind. 43; Curtis *v.* State, 6 Cold. (Tenn.) 9.

But not for remarks of opposite counsel unless objected to at time.

in their addresses, travelled beyond the evidence, unless the court was called upon to interpose, and, on a case requiring it, refused to do so.[1] But it is otherwise where the court allows the prosecuting counsel to charge the defendant with other offences beside that on trial.[2]

7. *After-discovered Evidence.*

§ 854. After-discovered evidence, in order to afford a proper ground for the granting of a new trial, must possess the following qualifications: —

It must have been discovered since the former trial.

It must be such as reasonable diligence on the part of the defendant could not have secured at the former trial.

It must be material in its object, and not merely cumulative and corroborative, or collateral.

It must be such as ought to produce, on another trial, an opposite result on the merits.

It must go to the merits, and not rest on merely a technical defence.[3]

Motion must be special.

§ 855. There are, in addition, one or two preliminary points of practice which must be conformed to before a motion on this ground will be entertained. It is necessary that the party should mention in his affidavit the witnesses by name, and what he expects to prove by them; and that either the witnesses themselves should state, on oath, the

[1] Supra, §§ 560, 577; Davis *v.* State, 33 Ga. 98. See Com. *v.* Hanlon, 3 Brewst. 461.

[2] Supra, § 561; State *v.* Smith, 75 N. C. 306; State *v.* Mahly, 68 Mo. 315. See State *v.* Cluck, 40 Ind. 265; Long *v.* State, 56 Ind. 182.

[3] State *v.* Carr, 1 Foster (N. H.), 166; Com. *v.* Murray, 2 Ashm. 41; Com. *v.* Williams, 2 Ashm. 69; Thompson *v.* Com. 8 Grat. 637; Read *v.* Com. 22 Grat. 924; Carter *v.* State, 46 Ga. 637; State *v.* Burnside, 37 Mo. 343; State *v.* Wyatt, 50 Mo. 309. In Pennsylvania (Moore *v.* The Phila. Bank, 5 Serg. & Rawle, 41), it was said by the court that it is incumbent on the party who asks for a new trial, on the ground of newly-discovered testimony, to satisfy the court: 1st. That the evidence has come to his knowledge since the trial; 2d. That it was not owing to the want of diligence that it did not come sooner; and 3d. That it would probably produce a different verdict if a new trial were granted. The same distinctions were afterwards adopted by Judge King. Com. *v.* Murray, 2 Ashm. 41. See Ohio Code Cr. Proc. § 192.

evidence they can give, or that the party should give his own belief to the statement to be made by the witnesses.[1]

§ 856. But the rule will not ordinarily be granted if supported only by the affidavit of the party. The motion, if practicable, must be accompanied by the affidavit of the newly-discovered witnesses.[2] Must be supported by affidavits.

§ 857. The adverse party may show, by affidavits, that the witnesses whose testimony is stated to be material are wholly unworthy of credit.[3] May be contested.

§ 858. A motion for a new trial will not ordinarily be heard after a judgment has been regularly perfected, although it be on the ground of evidence newly discovered since the judgment.[4] Must be usually moved before judgment.

§ 859. The evidence must have been discovered since the former trial. In a Georgia case, for instance, where it appeared that the prisoner's attorney had made diligent inquiries as to the prisoner's participation in the *corpus delicti*, but had been misled, it was held that a new trial would be granted on evidence, newly discovered, being offered to the effect that the prisoner did not make the assault charged.[5] But unless newly discovered, the existence of such testimony is not adequate ground.[6] There may, however, be cases, if duly sustained by affidavit, when supposed knowledge of the testimony at the time of the trial may be explained and avoided by proof that the defendant was, at the time, mentally incapable of taking cognizance of facts.[7] Evidence must be newly discovered.

§ 860. A new trial will not at common law be granted on the ground that a co-defendant, tried at the same time and acquitted, was a material witness for the convicted defendant, such testimony not being newly discovered; Acquitted co-defendant as a witness no ground.

[1] Hollingsworth *v.* Napier, 3 Caines, 182; State *v.* Williams, 14 W. Va. 851; Gavignan *v.* State, 55 Miss. 533; Polser *v.* State, 6 Tex. Ap. 510. Infra, § 900.

[2] State *v.* Kellerman, 14 Kans. 135; Farrow *v.* State, 48 Ga. 30; Runnels *v.* State, 28 Ark. 121; Evans *v.* State, 6 Tex. Ap. 513; Tuttle *v.* State, 6 Tex. Ap. 556, and cases in last note.

[3] Parker *v.* Hardy, 24 Pick. 246; Williams *v.* Baldwin, 18 Johns. 489.

[4] Infra, § 890.

[5] Thomas *v.* State, 52 Ga. 509.

[6] Vernon *v.* Hankey, 2 T. R. 113; Com. *v.* Murray, 2 Ashm. 41; Com. *v.* Williams, 2 Ashm. 69; Read *v.* Com. 22 Grat. 924; Roach *v.* State, 34 Ga. 78; Carter *v.* State, 46 Ga. 637.

[7] Thompson *v.* State, 54 Ga. 577.

though the acquitted defendant was then, for the first time, a competent witness.[1] Where, however, after an application for severance, in order to admit the wife of one party as a witness for the other, the former party was acquitted but the latter convicted, and the wife of the former swore in an affidavit to a complete *alibi* as to the latter, it was held that as she herself was not on the record, but was excluded merely by policy of law on the joint trial, and as she had been made competent by the verdict of a jury, a new trial would be granted.[2] But where co-defendants can be witnesses for each other on trial this ground cannot be laid.

Evidence discovered before verdict should be given at once to jury.

§ 861. If new evidence be discovered before the verdict is rendered, it should be submitted to the jury; and if this duty is neglected, unless there is clear proof of mistake, a new trial will not be granted.[3] The judge at the trial has discretion as to the admission of evidence out of the regular and usual course, and must exercise such discretion when necessary to promote justice.[4]

If evidence could have been secured at former trial, ground fails.

§ 862. The evidence must be such as could not have been secured at the former trial by a reasonable diligence on part of the defendant, which fact should appear on the affidavit.[5]

Thus where it appeared that the witness, on whose testimony was sought a new trial, after a conviction of

[1] State *v.* Bean, 36 N. H. 122; People *v.* Vermilyea, 7 Cow. 369; Sawyer *v.* Merrill, 10 Pick. 16. But see Rich *v.* State, 1 Tex. Ap. 206; Lyles *v.* State, 41 Tex. 172. Compare infra, § 873.

[2] Com. *v.* Manson, 2 Ashm. 31.

[3] Supra, §§ 564 *et seq.*; U. S. *v.* Gibert, 2 Sumner, 19; People *v.* Vermilyea, 7 Cow. 369; Com. *v.* Hanlon, 3 Brewster, 461; State *v.* Porter, 26 Mo. 201; Higden *v.* Higden, 2 A. K. Marsh. 42; Cavanah *v.* State, 56 Miss. 300.

[4] See supra, § 566.

[5] Com. *v.* Drew, 4 Mass. 399; Lester *v.* State, 11 Conn. 415; People *v.* Vermilyea, 7 Cow. 369; Com. *v.* Williams, 2 Ashm. 69; Roberts *v.* State, 3 Kelly, 310; O'Dea *v.* State, 57 Ind. 31; Read *v.* Com. 22 Grat. 723; State *v.* Harding, 2 Bay, 267; Wright *v.* State, 34 Ga. 110; McAfee *v.* State, 31 Ga. 411; Carter *v.* State, 46 Ga. 637; Friar *v.* State, 3 How. (Miss.) 422; Holeman *v.* State, 13 Ark. 105; Shaw *v.* State, 27 Tex. 750; Hasselmeyer *v.* State, 6 Tex. App. 21; Collins *v.* State, 6 Tex. App. 72; Hutchinson *v.* State, 6 Tex. Ap. 468. As to affidavit see State *v.* Williams, 14 W. Va. 851.

On a conviction of murder, one of the circumstances adduced in evidence against the defendant was, that blood was seen on his clothes on the day the

murder, was with the prisoner until a late hour of the evening on which the murder was committed, was in court while the trial was progressing, and had gone to a relative of the prisoner and told him what she was able to testify to; the motion was refused.[1]

Nor for withholding of papers which due diligence could have secured.

§ 863. Nor will a new trial be granted because the district attorney withheld in his hands papers important to the defendant, unless the latter used due diligence to obtain them. Thus, where the district attorney told the defendant that certain papers were in the hands of C., who, being applied to, answered they were in the possession of the district attorney, but the defendant did not explain the mistake and apply to the district attorney again, a new trial was refused.[2]

Otherwise in cases of surprise.

§ 864. A new trial will sometimes be granted on the affidavit of a witness, that he was mistaken or surprised at his examination.[3]

Party disabled who neglects to obtain evidence on trial.

§ 865. A party who seeks for a new trial on the ground of newly-discovered evidence is chargeable with laches, if, previous to the trial, he knew that the witness, whose testimony he seeks to introduce as newly discovered, must, probably, from his occupation and employment at the time of the transaction, the subject of the controversy, be

murder was committed, and after it was committed. On a motion for a new trial, he introduced his affidavit, in which he stated that he was surprised by the introduction of this proof, and that the blood was thrown on his clothes by an opossum which he had killed that day. He also introduced the affidavit of a man who stated that he had seen the defendant on that day with the opossum hanging by his side. It was held that this was a case of negligence, and not of surprise, within the rule of the law, and that the grounds laid were not sufficient to authorize the granting of a new trial. Gilbert *v.* State, 7 Humph. 524.

[1] Com. *v.* Williams, 2 Ashm. 69.

In a case in Virginia, after a verdict of guilty on an indictment for murder, the prisoner made affidavit that S. C. was a material witness for him in the prosecution; that he was not summoned to attend the trial, because the prisoner had not been informed that he knew anything relating to the affair; and the prisoner considered that his testimony would have an important effect on a subsequent trial of the cause, but no allegation was made of diligence; it was held by the Court of Errors that the new trial was properly refused. Bennett *v.* Com. 8 Leigh, 745.

[2] People *v.* Vermilyea, 7 Cowen, 369. See infra, § 881.

[3] Infra, § 879.

conversant with the facts in relation to the transaction,[1] and especially where, previous to the trial, the party knew, as the witness himself testifies to, what the witness could prove, although at the time of the trial, and while preparing therefor, the party had forgotten the facts.[2] It is not such newly-discovered evidence as will entitle him to a new trial, that the party applying for a new trial could not procure in time the witness whom he seeks to introduce. He should have applied to the court for a postponement; and if without doing this he went to trial without the testimony, a new trial will not be granted for the purpose of letting in such evidence.[3] Nor is the absence of a witness who had not been subpœnaed, a good cause for granting a new trial;[4] though it is otherwise with the sudden illness of a witness in cases where the deposition of the witness cannot be taken, and the witness is material.[5] Nor will a new trial be granted on account of the want of recollection of a fact, which by due attention might have been remembered; "want of recollection being easy to be pretended and hard to be disproved."[6]

Evidence must be material and not cumulative.

§ 866. The evidence offered must be material in its object, and not merely cumulative and corroborative, or collateral.[7] Cumulative evidence is such as goes to support the facts principally controverted on the former trial, and respecting which the party asking for a new trial, as well as the adverse party, produced testimony. Thus, where the defence was epileptic insanity, the alleged fact that the defendant, subsequent to the trial and conviction, had an epileptic

[1] State *v.* Bell, 49 Iowa, 440; State *v.* Adams, 31 La. An. 717; Collins *v.* State, 6 Tex. Ap. 72.

[2] People *v.* Superior Court of New York, 10 Wend. 285; Richie *v.* State, 58 Ind. 355.

[3] Jackson *v.* Malin, 15 Johns. 293; Gordon *v.* Harvey, 4 Call, 450. See State *v.* Frittener, 65 Mo. 422; State *v.* Smith, 65 Mo. 314.

[4] Kelly *v.* Holdship, 1 Browne Pa. 36; Lester *v.* Goode, 2 Murph. 37.

[5] Infra, § 881.

[6] Bond *v.* Cutler, 7 Mass. 205; Duignan *v.* Wyatt, 3 Blackf. 385.

[7] U. S. *v.* Gibert, 2 Sumn. 97; Williams *v.* People, 45 Barb. 201; Com. *v.* Flanagan, 7 Watts & S. 415; Com. *v.* Williams, 2 Ashm. 69; Adams *v.* People, 47 Ill. 376; McAfee *v.* State, 31 Ga. 411; Hoye *v.* State, 39 Ga. 718; Holmes *v.* State, 54 Ga. 303; O'Shields *v.* State, 55 Ga. 696; State *v.* Blennerhassett, Walker, 7; State *v.* Larrimore, 20 Mo. 425; State *v.* Stumbo, 26 Mo. 306; State *v.* Evans, 65 Mo. 574; State *v.* Butler, 67 Mo. 59; St. Louis *v.* State, 8 Neb. 406; People *v.* McDonnell, 47 Cal. 134; Bixby *v.* State, 15 Ark. 395; White *v.* State, 17 Ark. 404; Murray *v.* State, 36 Tex. 642.

fit, is cumulative in this sense, and hence no ground.[1] But it is otherwise if such new evidence consists of a strong mass of proof previously unknown to the party.[2]

Surprise an exception.

§ 867. But though a new trial is not usually granted for the discovery of new evidence to a point which was presented on the former trial, yet a case of surprise will form an exception to the rule.[3]

And so evidence of a distinct class.

§ 868. Nor can it be objected to granting a motion for a new trial, on the ground of newly-discovered evidence, that such evidence is cumulative, if it is of a different kind or character from that adduced on the trial.[4] This is peculiarly the case when strong independent proof of insanity is offered.[5]

New trial not granted merely to discredit opposing witness.

§ 869. Where the object is to discredit a witness on the opposite side, the general rule is that a new trial will not be granted.[6] Thus, where the defendant was convicted of forgery, chiefly on the evidence of B. R., and on a motion for a new trial evidence was produced to show the bias of B. R.; it was held by the Supreme Court of Massachusetts that such evidence was no ground for the motion.[7] And a new trial was refused where, after a verdict of guilty upon an indictment for perjury, the defendant applied for a new trial on account of newly-discovered evidence, and furnished proof that a material witness for the prosecution had, subsequently to his examination upon the stand, expressed strong feelings of hostility toward the prisoner.[8] But it is otherwise where a principal witness testifies that his statement on trial was a mistake.[9]

§ 870. An indictment for perjury against a witness on whose

[1] People *v.* Montgomery, 13 Abbott, Pr. Rep. N. S. 207.

[2] Anderson *v.* State, 43 Conn. 514.

[3] Infra, 881.

[4] Long *v.* State, 54 Ga. 564; Guyott *v.* Butts, 4 Wend. 579.

[5] Anderson *v.* State, 43 Conn. 514.

[6] Com. *v.* Drew, 4 Mass. 399; Com. *v.* Waite, 5 Mass. 261; Com. *v.* Green, 17 Mass. 515; Com. *v.* Williams, 2 Ashm. 69; Thompson *v.* Com. 8 Grat. 637; State *v.* Williams, 14 W. Va. 851; Bland *v.* State, 2 Carter (Ind.), 608; Levining *v.* State, 13 Ga. 513; Brown *v.* State, 55 Ga. 169; Wallace *v.* State, 28 Ark. 531; Herber *v.* State, 7 Tex. 69; Brown *v.* State, 6 Tex. Ap. 286; Hutchinson *v.* State, 6 Tex. Ap. 468; Polser *v.* State, 6 Tex. Ap. 510.

[7] Com. *v.* Waite, 5 Mass. 261. See Hammond *v.* Wadhams, 5 Mass. 353.

[8] State *v.* Carr, 1 Foster, 166; Com. *v.* Drew, 4 Mass. 391.

[9] Mann *v.* State, 44 Tex 642.

testimony the verdict was obtained, unless the case was so gross as to make it probable that the verdict was obtained by perjury, or that the false testimony occasioned a surprise to the opposite party, will not be sufficient cause for new trial.[1] Thus, where the defendant was convicted of bribery, and it was moved to postpone judgment until an indictment, which he had preferred against one Burbage for perjury in his evidence, was determined, it was said by Mansfield, C. J., in answer to the application, "I am clear that Heydon can be no witness in this case, if they mean by this indictment to alleviate the judgment of the court for the bribery, because he is swearing in his own cause. And the witnesses on the indictment having all been previously examined at the former trial makes an end of this motion; for their credit has already been weighed by a jury, and found wanting."[2] In a civil suit the plaintiff obtained a verdict, and had judgment, upon which the defendant brought error, and after argument judgment was affirmed, but before the case came on to be heard in error he preferred an indictment against two of the plaintiff's witnesses for perjury in their evidence at the trial, and shortly afterwards succeeded in obtaining a rule *nisi* for staying an execution upon the judgment, until the trial of the indictment, upon an affidavit made by himself, charging the said witnesses with perjury. Lord Ellenborough, C. J., however, declared, "It would be highly dangerous to allow this rule to be made absolute, for this would be a receipt to every person, after verdict and judgment against him, how to delay the fruit of such judgment, by indicting some of the plaintiff's witnesses for perjury. And should this rule be made absolute, it would, perhaps, prevent the plaintiff from being a witness at the trial of the persons indicted."[3] Where there has been a surprise, however, arising from the unexpected introduction of the alleged perjured witness, a new trial has been granted.[4]

Subsequent indictment for perjury no ground.

[1] R. *v.* Heydon, 1 W. Black. 351; Benfield *v.* Petrie, 3 Douglas, 24; Warwick *v.* Bruce, 4 M. & S. 140; 9 Price, 89; Resp. *v.* Newell, 2 Yeates, 479. That perjury should not be prosecuted during pendency of civil proceedings see Whart. Crim. Law, 8th ed. § 1324.

[2] R. *v.* Heydon, 1 W. Black. 351.

[3] Warwick *v.* Bruce, 4 M. & S. 140; Benfield *v.* Petrie, 3 Doug. 24.

[4] Morrell *v.* Kimball, 1 Greenl. 322; Thurtell *v.* Beaumont, 1 Bing. 339.

§ 871. "After the verdict," said Rogers, J., on a motion for a new trial, after a capital conviction, in Pennsylvania, "when the motion for a new trial is considered, the court must judge not only of the competency but of the effect of evidence. If, with the newly-discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise we are bound to refuse the application." [1] And when the evidence produced is clearly immaterial, this limitation should be strictly enforced.[2]

The evidence offered must be such as ought to produce, on another trial, an opposite result on the merits.

§ 872. *Another essential is that the after-discovered evidence should go to the merits, and not rest on a merely technical defence.* Thus, after a conviction on an indictment for selling *spirituous* liquors, &c., "without being duly licensed as an innholder or common victualler," a new trial will not be granted for the purpose of allowing the defendant to give in evidence a license, which he had omitted to produce, to sell *fermented* liquor, and thus raise a question as to the mere form of the indictment.[3] And in larceny a new trial will not be granted on ground of evidence that the goods did not technically belong to the owner charged in the indictment.[4]

New defence must not be merely technical.

§ 873. We have already seen that even under the old practice, excluding defendants as witnesses, new trials were not granted because a co-defendant, tried at the same time and acquitted, was a material witness for the convicted defendant.[5] Of course, under statutes rehabilitating parties as

Acquittal of co-defendant no ground.

[1] Com. *v.* Flanagan, 7 W. & S. 423. The same point is affirmed in Com. *v.* Manson, 2 Ashm. 31; Thompson *v.* Com. 8 Grat. 637; State *v.* Greenwood, 1 Hayw. 141; Carr *v.* State, 14 Ga. 358; Roach *v.* State, 34 Ga. 78; Jones *v.* State, 48 Ga. 163; Young *v.* State, 56 Ga. 403; Meeks *v.* State, 57 Ga. 329; Rainey *v.* State, 53 Ind. 278; Hauck *v.* State, 1 Tex. Ap. 357.

[2] State *v.* O'Grady, 31 La. An. 378.

Hence the confession of a wife, that she herself had committed the offence without her husband's privity, after the conviction of the husband of forgery, was held not sufficient, when taken in connection with the evidence given on trial, to justify a new trial being granted. State *v.* J. W. 1 Tyler, 417.

[3] Com. *v.* Churchill, 2 Met. 118.

[4] Foster *v.* State, 52 Miss. 595.

[5] U. S. *v.* Gibert, 2 Sumn. 20; State *v.* Bean, 36 N. H. 122; People *v.* Vermilyea, 7 Cowen, 367; Com. *v.* Manson, 2 Ashm. 32; Com. *v.* Chauncey, 2 Ashm. 90; Cavanah *v.* State, 56 Miss. 300; Brackenridge's Law Miscellanies, 220. But see *contra*,

witnesses, where such co-defendants could have been called on trial, their acquittal is in no sense a reason for a new trial.

Refusal to sever defendants may be ground.

§ 874. Though the misjoinder of the defendants, where it appears on record, is subject of demurrer or arrest,[1] and though, when it is developed on evidence, it is properly to be reached by a motion for severance, it not unfrequently becomes the ground of a motion for a new trial, and when wrongfully allowed by the court is a legitimate reason for setting aside the verdict.[2]

Rich *v.* State, 1 Tex. Ap. 206; Lyles *v.* State, 41 Tex. 172; Brown *v.* State, 6 Tex. Ap. 286. Compare supra, §§ 305–6, 860.

[1] See supra, § 307.

[2] People *v.* Vermilyea, 7 Cowen, 383. Supra, § 860.

As has been already stated, in an indictment against several, where the offence is such that it may have been committed by several, they are not of right entitled to be tried separately, but are to be tried in that manner only when the court, on sufficient cause, may think proper. Supra, §§ 295, 755; U. S. *v.* Wilson, 1 Bald. 78; U. S. *v.* Gibert, 2 Sumner, 20; State *v.* Soper, 16 Me. 293; People *v.* Howell, 4 Johns. R. 296; People *v.* Vermilyea 7 Cowen, 108, 383; Com. *v.* Manson, 2 Ashm. 32; State *v.* Smith, 2 Iredell, 402; State *v.* Wise, 7 Richards. 412. See, *per contra*, U. S. *v.* Sharp, Peters C. C. 118; Campbell *v.* Com. 2 Va. Cas. 314. At the same time, where several defendants, entirely disconnected in the transactions through which they are sought to be convicted, are jointly indicted, it would be sound exercise of discretion to grant them separate trials. People *v.* Vermilyea, 7 Cowen, 108. See supra, § 295.

How far one may be a witness for the other, is elsewhere discussed. Whart. Crim. Ev. § 445.

When one co-defendant, by the local law, is inadmissible as a witness for the others, if no evidence be given against him, he is entitled to his discharge as soon as the case of the prosecutor is closed, and may then be examined on behalf of the other defendants. Where there is any evidence against him, he cannot be sworn, but the whole must be submitted together to the jury. Bul. N. P. 285; Peake's Evid. 168; Phil. Evid. 36; 1 East, 312, 313; 6 T. R. 627; 1 Sid. 237; 1 Hale, 303; Com. *v.* Manson, 2 Ashm. 32. On the same principle, where one of the defendants, on an indictment for an assault, submits to a small fine, and is discharged, he may be called on the part of others, with whom he was jointly indicted. And where one defendant has actually pleaded misnomer, he may be received as a witness, because the indictment, as against him, is abated. Ibid. But if he suffers judgment by default, he cannot afterwards become a witness against or in favor of his associates; 5 Esp. Rep. 154; 2 Campb. 333, 334, n.; Bul. N. P. 285; Phil. Ev. 36; since no sentence can be constitutionally imposed on a verdict so obtained. Supra, § 550. See R. *v.* Roberts, 2 Strange, 1208; Jackson *v.* Com. 19 Grat. 656; Rose *v.* State, 20 Ohio, 31; Andrews *v.* State, 2 Sneed (Tenn.), 550.

8. *Absence of Defendant at Trial.*

§ 875. Where, through necessity or mistake, a defendant, in ordinary prosecutions for crime, is absent during the trial, there should be a new trial.[1] Nor is the fact that the counsel of the accused is present during the trial, and at the rendering of the verdict, without making objection to the prisoner's absence, a waiver of his right to be present. Some misdemeanors there indeed are, partaking of the nature of civil process, where, as has been seen, appearance by attorney is permissible,[2] but in all trials in which corporal punishment may be assigned the defendant must personally be present;[3] and this right is so inherent and inalienable, that a judgment will be reversed where it appears that the defendant was absent at the rendition of the verdict, though his presence was at the time waived by his counsel.[4] In crimes of high grade, the record must show the prisoner's presence at trial, verdict, and sentence, *affirmatively*, or else the error will be fatal.[5] But the presence may be inferred from the record, and need not be explicitly stated at each stage of the procedure.[6]

Such absence a ground.

Yet to this rule two exceptions must be expressed. The first is, that it is not to be stretched so as to include occasional voluntary absence for a few moments from the court-room by the defendant, though it should happen that during such brief absence the verdict should happen to be brought in;[7] though in all cases of high crime it would be necessary in such case for the jury to be kept back from formally rendering their verdict until the defendant returns.[8] The second is, that when the defendant behaves so obstreperously that his temporary compulsory removal from the court-room is necessary, he cannot complain of the trial

[1] Supra, §§ 541–550.

[2] Supra, § 541.

[3] Supra, §§ 541 *et seq.*; 1 Chitty's C. L. 413; 2 Hale, 216; Jacobs *v.* Com. 5 Serg. & R. 315; Gladden *v.* State, 12 Fla. 562; Leschi *v.* Terr. 1 Wash. Terr. 23; Shapoonmash *v.* Terr. Ibid. 219.

[4] Supra, §§ 541 *et seq.*, 733. See Prine *v.* Com. 18 Penn. St. 103.

[5] Supra, §§ 541 *et seq.*; Dunn *v.* Com. 6 Barr, 387; Hamilton *v.* Com. 16 Penn. St. 121; State *v.* Smith, 31 La. An. 406.

[6] Lawrence *v.* Com. 30 Grat. 845.

[7] Hill *v.* State, 17 Wis. 675.

[8] Supra, § 550.

proceeding for a short time in his absence, he losing the privilege of objecting by his conduct.[1]

Waiver, so far as concerns this particular right, has been already discussed.[2]

9. *Mistake in Conduct of Case.*

Mistake may be ground if there was due diligence.

§ 876. Where the cause has been prejudiced from some misconception of the judge, or mistake of the party or his counsel, which could not have been avoided by ordinary prudence and care, a new trial will be allowed. Thus, where the counsel were misled by a positive intimation from the court, and refrained from offering evidence,[3] and where the judge misapprehended a material fact, and misdirected the jury,[4] a new trial has been granted. But if due diligence could have avoided the mistake, the rule will be refused. Thus a new trial will not be granted because a juror was taken from the panel, on the erroneous supposition that there was good ground to challenge him, when the defendant did not at the time object.[5]

Mistake of law no ground.

§ 877. Mistake by counsel of law will be no excuse, whether made generally in the conduct of a cause, or in the neglect to object to testimony when offered which might have been excluded.[6] But if objection is made to the introduction of testimony at the proper time, no objection to the judge's charge upon that evidence is afterwards necessary.[7] If an objection to evidence, which objection could have been obviated by further proof, be not made, it will not be received as the ground of a motion for a new trial.[8] Where, however, evidence is not sufficient in law to authorize a verdict, a new trial will be granted, even though no objection be made at the trial.[9] But as a rule there is no new trial because counsel ignorantly neglect to present proper points of law to the court.[10]

[1] U. S. *v.* Davis, 6 Blatch. C. C. 464; Fight *v.* State, 7 Ohio, 180. Supra, §§ 543 *et seq.*

[2] Supra, §§ 541, 733.

[3] Le Flemming *v.* Simpson, 1 M. & Ryl. 269; Dunham *v.* Baxter, 4 Mass. 79.

[4] Supra, §§ 794, 798.

[5] Com. *v.* Stowell, 9 Met. 572.

[6] See cases cited supra, §§ 801 *et seq.*; and infra, § 878.

[7] Supra, §§ 801 *et seq.*; People *v.* Holmes, 5 Wend. 192.

[8] Supra, § 804.

[9] Supra, § 813.

[10] Supra, §§ 708 *et seq.*

§ 878. Mere ordinary negligence of counsel is no ground. Thus, as has been already seen, a new trial will not be granted because the district attorney, by mistake, withholds important papers, unless the defendant uses due diligence to obtain them.[1] But a new trial has been granted where the defendant having otherwise a good case, which would have resulted in an acquittal, was advised by his counsel that certain evidence which was admitted, was not admissible against him, and was so taken by surprise.[2]

Nor is negligence of counsel.

§ 879. Where, as sometimes occurs, witnesses are mistaken in their testimony from temporary incapacity, new trials have been granted.[3] Relief, however, will only be afforded on clear proof of mistake by the witness, not where the party was in error as to what the witness would prove;[4] nor will the court hear evidence admissible to show that a witness used expressions after trial contradicting his testimony in court.[5] At the same time, when a party has been surprised by mistakes in testimony at the trial which he had no reason to expect, and which, if he had had time, he could readily have corrected, justice refuses that a verdict obtained in this way, if manifestly unfair, should be revised.[6]

New trial from unexpected blunder or confusion of witness.

§ 880. If the error is not attributable to misconduct of themselves, or to misdirection of court, it is no ground that the jury rendered their verdict under a mistake as to the degree of punishment the court could inflict.[7]

But not mistake of jury as to punishment.

10. *Surprise.*

§ 881. Where a party or his counsel has been taken by surprise, in the course of a cause, by some accidental circumstance, which could not have been foreseen, in which no laches could be ascribed to either of them, a new trial will be awarded, if the court think the ver-

When genuine and productive of injustice, good ground.

[1] Supra, § 863.

[2] State *v.* Williams, 27 Vt. 824.

[3] Supra, § 864; Scofield *v.* State, 54 Ga. 635. See Richardson *v.* Fisher, 1 Bing. 145; De Giou *v.* Dover, 2 Anst. 517.

[4] Hewlett *v.* Cruchley, 5 Taunt. 277.

[5] R. *v.* Whitehouse, 18 Eng. L. & Eq. Rep. 105; 1 Dears. C. C. 1; Com. *v.* Randall, Thach. C. C. 500.

[6] See supra, § 864.

[7] People *v.* Lee, 17 Cal. 656. But see supra, §§ 842–8.

dict against the weight of evidence properly admissible.[1] Thus, a new trial will be granted where the plaintiff is surprised by the testimony of his own witnesses, who appear to have been tampered with;[2] where a witness has been so much disconcerted as to be unable to testify at the trial;[3] where a material witness, regularly subpœnaed and in attendance, absents himself shortly before the case is called;[4] and where, in a case of seduction, the principal witness lays the seduction on a day which the defendant has no reason to anticipate, being at a time when he was absent from the place, and could easily prove an *alibi*.[5]

So of undue haste in hurrying on trial.

§ 882. New trials will also be granted in cases where the trial was hurried on in such haste as to give the defendant no time to prepare for his defence, provided in the motion for the new trial a substantial defence be disclosed.[6] But mere want of preparation, arising from the defendant having been in prison, is no ground for a new trial.[7]

But absence of witness no ground when testimony is cumulative.

§ 883. Sudden sickness, and consequent absence of a material witness, is no ground for a new trial when the testimony to be established by such witness was proved by other parties.[8]

Ordinary surprise at evidence no ground.

§ 884. The mere fact of a party being surprised by the introduction of unexpected evidence, however, is no ground for a new trial,[9] especially when the affidavit does not show that the "surprising" evidence was not true.[10]

[1] See State *v.* Williams, 27 Vt. 724; Hilliard on New Trials (1873), 51; and cases cited § 879.

[2] Todd *v.* State, 25 Ind. 212. See supra, § 804; Peterson *v.* Barry, 4 Binn. 481.

[3] Ainsworth *v.* Sessions, 1 Root, 175. See supra, §§ 804, 879.

[4] Ruggles *v.* Hall, 14 Johns. 112.

[5] Sargent *v.* ——, 5 Cowen, 106. See supra, §§ 855 *et seq.*, as to what cases the defendant can be relieved in, on the ground of after-discovered evidence of the incompetency or bias of witnesses.

[6] An indictment was found November 21, for a murder committed on the 11th of October previous. The defendant was put upon trial immediately and convicted, and sentenced for murder in the second degree. The case did not appear to be an aggravated one. The defendant made affidavit that he had been surprised by the evidence, and had had no time for a proper defence. It was held, in Indiana, that under these and other circumstances of the case, a new trial should have been granted. Rosencrants *v.* State, 6 Ind. 407. Supra, § 600.

[7] Yanez *v.* State, 20 Tex. 656.

[8] Supra, §§ 590, 600; Young *v.* Com. 4 Grat. 550.

[9] Supra, § 804; R. *v.* Hollingberry, 6 D. & R. 345; 4 B. & C. 329; Willard *v.* Wetherbee, 4 N. H. 118; Wholford *v.* Com. 4 Grat. 553.

[10] People *v.* Jocelyn, 29 Cal. 562.

§ 885. In general, as has been seen, the production of unexpected evidence impeaching the character of a witness is no reason to set aside the verdict.[1]

Nor is unexpected bias of witness.

11. *Irregularity in Summoning of Jury.*

§ 886. Generally speaking, under the statutes, the mistake or informality of the officers charged with summoning, returning, and empanelling the jury, will be no ground for a new trial, unless there has been fraud or collusion, or material injury to the defendant.[2] But it is a good ground of objection at common law to the jury, that they have been improperly chosen, or chosen by an unauthorized officer, or that the officers in attendance had permitted irregularities.[3] Where one who had been challenged on the principal panel was afterwards sworn in under another name as a talesman;[4] and where talesmen were summoned and returned and placed on the trial, who were incompetent or who had not been drawn according to statute, new trials have been ordered.[5] If the party, however, is aware of the objections to a juror or talesman, and neglects his challenge, no new trial will be granted;[6] as the ob-

Ordinarily defects in jury process no ground.

[1] Supra, §§ 802, 869; Com. *v.* Drew, 4 Mass. 391; Com. *v.* Green, 17 Mass. 515.

[2] R. *v.* Hunt, 4 Barn. & Ald. 430; Amherst *v.* Hadley, 1 Pick. 38; People *v.* Ransom, 7 Wend. 417; Dewar *v.* Spence, 2 Whart. 211; Com. *v.* Chauncey, 2 Ashm. 90; Com. *v.* Gallagher, 4 Penn. Law Jour. 511; 2 Clark, 86. See, as to grand jury, supra, §§ 344 *et seq.*

In Pennsylvania, by the Act of 21st February, 1814, no verdict can be set aside, nor shall any judgment be arrested for any defect or error in the jury process; "but a trial, or an agreement to try on the merits, or pleading guilty, or the general issue, shall be a waiver of all errors and defects in or relative and appertaining to the said precept, *venire*, drawing, and summoning of jurors." See Com. *v.* Chauncey, 2 Ashmead, 90; Com. *v.* Gallagher, 4 Penn. Law Jour. 511; 2 Clark, 86. It has been held, under this act that standing mute is as much a waiver as pleading to the issue. Com. *v.* Dyott, 5 Whart. 67. In New York, under the Revised Statutes, it was held that a non-compliance of the clerk to put the names of all the persons returned as jurors in a box, from which juries are to be drawn, is not fatal. People *v.* Ransom, 7 Wend. 417.

[3] As a signal illustration of this see R. *v.* O'Connell, 11 Cl. & F. 155; Pamph. R. Arm. & T.; Lord Denman's Life, ii. 172.

[4] Parker *v.* Thornton, 2 Lord Raymond, 1410; though see R. *v.* Hunt, 4 B. & A. 430. See supra, § 846.

[5] R. *v.* Tremaine, 7 D. & R. 684; 5 B. & C. 254; Kennedy *v.* Williams, 2 Nott & McC. 79. See Com. *v.* Gallagher, 4 Penn. L. J. 520. Supra, § 846.

[6] Supra, § 845. See R. *v.* Sullivan,

jection that the juror had not been drawn and returned according to law comes too late after the verdict.[1] Thus, where one of the jury had been drawn more than twenty days before the time when the *venire* was made returnable, exception not having been made until after verdict, a new trial was refused.[2] And a new trial will not be granted because the clerk, in calling over the jury, pursued the order in which they were empanelled, instead of that in which their names appeared in the *venire*.[3] Nor is it ground for new trial that jurors and witnesses in a criminal case are sworn by an acting deputy clerk, who has not been appointed regularly or sworn in.[4]

And so of irregularities in finding bill.

§ 887. After the verdict, irregularities in the summoning of the grand jury or in the finding of the bill, not appearing on the record, cannot be noticed on a motion for a new trial.[5]

§ 888. The question of subsequent discovery of incompetency of a juror has been already discussed.[6]

Prejudice in jury. Popular excitement.

§ 889. It is also settled, as we have already seen, that objections to the competency of jurors, on ground of preadjudication, must be taken before empanelling, or at the time when the party becomes first acquainted with the objection.[7] Nor is popular excitement at the time of the trial in itself a ground for new trial,[8] unless the jury be swept away by it into an unjust verdict.[9]

IV. AT WHAT TIME MOTION FOR NEW TRIALS MUST BE MADE.

Motion must be prompt.

§ 890. An application for a new trial cannot, in general, be made after an application for arrest in the judgment;[10] though there are cases in which, if it appear that manifest injustice will ensue from a strict observance of the rule, the court will waive the formality, and admit the defendant to a rehearing;[11] and now the Court of Queen's Bench, in its dis-

1 P. & D. 96; 8 Ad. & El. 831; Howland *v.* Gifford, 1 Pick. 43.

2 See supra, § 845.

3 State *v.* Hascall, 6 N. H. 352.

4 State *v.* Slack, 1 Bailey, 330.

5 Mobley *v.* State, 46 Miss. 501.

6 Supra, §§ 846 *et seq.*

7 Supra, §§ 844.

8 Com. *v.* Flanagan, 7 W. & S. 418; Brinkley *v.* State, 54 Ga. 71. Supra, § 844.

9 People *v.* Acosta, 10 Cal. 195.

10 1 Ch. C. L. 658; Resp. *v.* Lacaze, 2 Dall. 118.

11 R. *v.* Gough, 2 Dougl. 791; Bac.

cretion, hears motions in arrest of judgment before applications for a new trial.[1] In extreme cases, the court, especially if the punishment be capital, will hear the motion even after sentence imposed.[2] But the ordinary practice requires notice of the motion to be given within four days after verdict.[3] This, however, may be at discretion enlarged.[4]

When verdict set aside new trial at once ordered.

§ 891. Where a verdict has been set aside in a criminal case as imperfect, a *venire facias de novo* may at once be awarded, and a new trial had, either on the same indictment or another.[5]

V. AS TO WHOM MOTION APPLIES.

Any defendant may move.

§ 892. Any defendant, within the proper time, may apply for a new trial.

Defendant must be personally in court.

§ 893. The defendant, according to the old practice, must be personally in court at the application;[6] and where there are several defendants, all of them who have been convicted must be actually present, unless a special ground be laid for dispensing with the general rule.[7] But such presence, even in felonies, is not always regarded as essential.[8]

New trial may be granted as to one of several.

§ 894. Where some of the defendants have been convicted and others acquitted, a new trial may be granted to the former, without impeaching the verdict so far as it relates to the latter.[9] It is otherwise, however, when the conviction of the one is an essential condition of the conviction of the other.[10]

Abr. Trial (L.), 1; Chitty C. L. 658; R. *v.* Holt, 5 T. R. 436; People *v.* M'Kay, 18 Johns. 212.

[1] R. *v.* Rowlands, 2 Den. C. C. 386. See 6 T. R. 627; Bac. Abr. Trial (L.), 1.

[2] See Com. *v.* McElhaney, 111 Mass. 439. See, however, Willis *v.* State, 62 Ind. 391.

[3] R. *v.* Newman, 1 El. & Bl. 268; Dears. C. C. 85.

[4] Com. *v.* Gibson, 2 Va. Cas. 70.

[5] Com. *v.* Gibson, 2 Va. Cas. 70.

[6] Supra, § 548; 2 Burr. 930; 2 Stra. 844, 1227; 1 W. Bla. R. 209.

[7] R. *v.* Teal, 11 East, 307; 1 Sess. Cas. 428; Com. Dig. Indictment, N.; 1 Chit. C. L. 659; R. *v.* Fielder, 2 D. & R. 46.

[8] Supra, § 548.

[9] R. *v.* Mawbey, 6 T. R. 638; Com. *v.* Roby, 12 Pick. 496; Kemp *v.* Com. 18 Grat. 969; Seborn *v.* State, 51 Ga. 164.

[10] Jackson *v.* State, 54 Ga. 439. See supra, § 755.

VI. WHEN THE CONVICTION IS FOR ONLY PART OF THE INDICTMENT.

1. *Acquittal on One of Two Counts.*

New trial only on convicted counts.

§ 895. When there has been an acquittal on one count and a conviction on another, and the counts are for distinct offences, a new trial can only be granted on the count on which there has been a conviction; and it is error, on a second trial, to put the defendant on trial on the former.[1] It has been, however, ruled that where an indictment is for but one offence, charged in various ways, and the defendant is convicted upon some counts and acquitted as to others, the granting of a new trial on his motion opens the whole merits.[2]

2. *Conviction of Minor Offence included in Major.*

Conviction of minor is acquittal of major.

§ 896. Where two offences are included in one count, there has been a distinction taken which though specious is unsound. It has been held that where one count includes burglary and larceny, after acquittal of the greater offence but conviction of the less, and when a new trial is obtained, the whole case is reopened, and the defendant exposed on the second trial to the double charge.[3] But the true view is, that a conviction of the *minor* offence is to operate as an acquittal of the *major*.[4]

The law in reference to new trials after convictions for manslaughter, or murder in the second degree, has already been stated.[5]

[1] Supra, § 788; U. S. *v.* Davenport, 1 Deady, 264; Stuart *v.* Com. 28 Grat. 950; State *v.* Malling, 11 Iowa, 239; Campbell *v.* State, 9 Yerg. 333; Esmon *v.* State, 1 Swan, 14; Morris *v.* State, 8 S. & M. 762; State *v.* Kettleman, 35 Mo. 105; State *v.* Fritz, 27 La. An. 360. But see State *v.* Stanton, 1 Ired. 424; State *v.* Commis. 3 Hill S. C. 239. Compare remarks supra, § 788.

[2] Leslie *v.* State, 18 Oh. St. 390. But see supra, § 788.

[3] See supra, §§ 465, 742, 789.

[4] Supra, §§ 455, 465, 789; Com. *v.* Herty, 109 Mass. 348; People *v.* Knapp, 26 Mich. 112; Bell *v.* State, 48 Ala. 684; Lewis *v.* State, 51 Ala. 1, and other cases cited supra, § 455; State *v.* Martin, 30 Wis. 216.

[5] Supra, §§ 465–8, 789. See Whart. Crim. Law, 8th ed. § 541.

VII. BY WHAT COURT NEW TRIAL MAY BE GRANTED.

1. *Appellate Courts.*

§ 897. At common law the court trying the case is the sole tribunal by whom a new trial can be granted; and its refusal so to do, being matter of discretion, is no ground for a writ of error.[1] In most of the States, however, provision is made for obtaining revision by an appellate court.[2] When such a rehearing is had the appellate court is not bound to reëxamine the witness and hear the evidence *verbatim*, but, when there is no official stenographer, may hear the material facts proved, and the evidence adduced at the trial, from the trial court notes, aided by those of the counsel on both sides.[3]

Appellate court may revise evidence from notes.

2. *When Judge trying Case dies or leaves Office.*

§ 898. In the Circuit Court of the United States sitting in Philadelphia, it has been held that where the judge trying a case died pending a motion for a new trial, his successor will decline hearing the case, and will grant a new trial.[4] But in Wisconsin it is said that a defendant can be sentenced by a judge succeeding in office the judge before whom the trial was had.[5]

Conflict of opinion on this point.

VIII. IN WHAT FORM.

§ 899. Upon ground *primâ facie* sufficient, the court, on application, will award a rule to show cause why a new trial should not be granted.[6] On this, in England, the puisne judge of the court applies to the judge who tried the case, unless he be one of the judges of the court hearing the motion, for a report of the trial, and a statement of his opinion respecting its merits.[7] If he signify his dissatisfaction, the remedy prayed for is usually allowed; if he declare his con-

Rule to show cause to be first granted.

[1] Supra, § 779; infra, § 902; Lester *v.* State, 11 Conn. 415.

[2] See infra, §§ 902, 927–8.

[3] Jones's case, 1 Leigh, 598. Infra, § 899.

[4] U. S. *v.* Harding, 1 Wall. Jr. 127. Supra, § 515; infra, § 929.

[5] Pegalow *v.* State, 20 Wis. 61. See State *v.* Abram, 4 Ala. 272. Compare infra, § 929.

[6] Bul. N. P. 327; Tidd, 884; Hand. Prac. 12.

[7] Bul. N. P. 327; Tidd, 884.

currence with the verdict, it is commonly refused; but if he merely report the evidence, without giving any decided and satisfactory opinion, the court will admit the question to be argued before them.[1] If they find there is no ground for the application, they will discharge the rule; but if solid ground be shown, they make it absolute.[2]

Motion must state reasons.

§ 900. The motion should state specifically the reasons relied on by the party making it.[3] To simply say that the court erred in refusing to admit, or in admitting competent or incompetent evidence, is insufficient. The evidence in question must be specified, and the name of the witness, when the evidence is given, stated.[4] When the ground is after-discovered evidence, the motion must be supported by affidavits of the witnesses to be produced.[5]

IX. COSTS.

Costs may await second trial.

§ 901. The practice as to the imposition of costs is the same in criminal cases as in civil.[6] And the court, even when an indictment after verdict is removed by *certiorari* to a higher court on ground of surprise, may direct that the costs shall await the result of the second trial.[7]

X. ERROR.

Error does not usually lie to action of court.

§ 902. We have just seen that at common law refusing a new trial is not ground for error.[8] When, however, by statute, error in such case lies, the refusal of the court below will not be reversed unless it should affirmatively and plainly appear to the appellate court that the decision of the court below was wrong.[9]

[1] R. T. H. 23; Barnes, 439. See Simpson *v.* Norton, 45 Me. 281.

[2] 1 Chitty's C. L. 660.

[3] Hilliard on New Trials (1873), 28. Supra, § 855.

[4] Cheek *v.* State, 37 Ind. 533; People *v.* Ah Sam, 41 Cal. 645; State *v.* Kellerman, 14 Kans. 135; Runnels *v.* State, 28 Ark. 121. Supra, § 855.

[5] Supra, § 855.

[6] R. *v.* Ford, 1 N. & M. 776; Hilliard on New Trials (1873), 65.

[7] R. *v.* Whitehouse, Dears. C. C. 1.

[8] Supra, § 897.

[9] Grayson's case, 6 Grat. 723; Read *v.* Com. 22 Grat. 924. Supra, §§ 779, 897.

CHAPTER XIX.

SENTENCE.

I. Defendant to be asked if he has anything to say.
In felonies this is essential, § 906.

II. Distribution of Punishment as to Counts.
On general verdict, superfluous counts may be got rid of by *nolle prosequi*, § 907.
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III. Defendant's Presence Essential, § 912.

IV. Amendment or Stay.
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VII. Fines.
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IX. Sentence by Appellate Court.
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XI. Successive Imprisonments.
Prisoner may be brought up for second trial by *habeas corpus*, § 931.
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In such cases, prior conviction should be averred, § 935.
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Prior conviction not to be put in evidence until main issue is found against defendant, § 938.
XIII. DISFRANCHISEMENT.
Conviction a prerequisite, § 939.
XIV. JOINT SENTENCES.
Joint defendants may each be fined to full amount, § 940.
XV. BINDINGS TO KEEP THE PEACE.
Defendant, after verdict, may be bound over to keep the peace, § 941.
XVI. CONSIDERATIONS IN ADJUSTING SENTENCE.
Courts have usually large discretion, § 942.
Primary object is retribution; but example and reform to be incidental, § 943.
Evidence may be received in aggravation or mitigation of guilt, § 945.

§ 905. BY the ordinary rules of court a defendant is allowed four days in which to move in arrest of judgment or for a new trial. To previous chapters the reader is referred for a discussion of these motions: it is proposed at present, on the supposition, either that they have been made and refused, or that a final judgment has been entered against the defendant on demurrer, to consider the law bearing on the subject of sentence.

I. DEFENDANT TO BE ASKED IF HE HAS ANYTHING TO SAY, ETC.

In felonies this is essential.

§ 906. At common law, in all felonies, when capital, the practice has been for the clerk, before sentence is pronounced, to ask the defendant if he has anything to say why sentence should not be pronounced; and it is essential that it should appear on record that this was done.[1] In several States the rule is that the absence of such an averment will require the remittal by a court of error of the record to the trial court for a new sentence.[2] In other States the failure of

[1] Supra, § 550; 1 Ch. C. L. 709; 2 Ld. Raym. 1409; R. *v.* Geary, 2 Salk. 630; R. *v.* Speke, 3 Salk. 358; Safford *v.* People, 1 Park. C. R. 474; Graham *v.* People, 63 Barb. 468; West *v.* State, 2 Zab. 212; Hamilton *v.* Com. 16 Penn. St. 121; Dougherty *v.* Com. 69 Penn. St. 286; McCue *v.* Com. 78 Penn. St. 185; Mullen *v.* State, 45 Ala. 43; Crocker *v.* State, 47 Ala. 53; James *v.* State, 45 Miss. 572. Infra, § 915.

In New York, where the exemplification that comes to the court in error does not show that the question was asked, a *certiorari* may be granted to the oyer and terminer to bring up the whole record. Graham *v.* People, 6 Lansing, 149.

In Edwards *v.* State, 47 Miss. 581, it was said that it was sufficient in error when the record averred that the court, "after hearing the defendant," proceeded to pass sentence. See State *v.* Fritz, 27 La. An. 360; State *v.* Hugel, 27 La. An. 375. That the defendant must have been present in court during sentence see supra, § 550.

[2] McCue *v.* Com. 78 Penn. St. 185; Dodge *v.* People, 4 Neb. 220; Keech *v.* State, 15 Fla. 591. See supra, § 780.

the record in this respect has been held not to be ground for a reversal, though it is agreed on all sides that the form is one proper to be used.[1] But this address is not to be viewed as an invitation to the defendant to bring forward additional motions in arrest of judgment, or for a new trial. These motions have, according to the usual practice, been already made and disposed of. The object of the address is to give the defendant the opportunity to personally lay before the court, statements which, by the strict rules of law, could not have been admitted when urged by his counsel in the due course of legal procedure; but which, when thus informally offered from man to man, may be used to extenuate guilt and to mitigate punishment.

II. DISTRIBUTION OF PUNISHMENT AS TO COUNTS.

§ 907. The more exact course, as has been stated, is for the jury, when the indictment contains several counts, to find separately on each count.[2] Should, however, the verdict be general, the prosecuting officer may enter a *nolle prosequi* on the counts which are superfluous, or the court may disregard them, treating their abandonment by the prosecuting officer as virtually a *nolle prosequi*.[3] On the count that remains judgment may be entered.[4]

On general verdict superfluous counts can be got rid of by *nolle prosequi*.

§ 908. Suppose, however, one of the counts on which there has been a general verdict is bad. Here we have a conflict of opinion. Does such bad count vitiate the verdict? So it has been held.[5] But the prevalent and sounder opinion is that in such case the bad count can be got rid of by a *nolle prosequi*, or passed over by the sentencing court, if the record does not show that evidence, inadmissible under the good count, was admitted under the bad.[6] Logically, it is true, a single bad count vitiates the verdict, since it is impossible to

And so even if there be a bad count.

[1] Supra, § 550; Jeffries *v.* Com. 5 Allen, 145; Grady *v.* State, 11 Ga. 253; Sarah *v.* State, 28 Ga. 576; State *v.* Ball, 27 Mo. 324; Jones *v.* State, 51 Miss. 718; State *v.* Taylor, 27 La. An. 393. Where the defendant moves for a new trial or arrest of judgment, it is not fatal that it does not appear from record that the prisoner was asked whether he had anything to say why sentence of death should not be pronounced against him. State *v.* Johnson, 67 N. C. 58; Spigner *v.* State, 58 Ala. 421.

[2] Supra, § 736.

[3] Supra, §§ 292, 738, 740, 771.

[4] Ibid. See Young *v.* R. 3 T. R 98.

[5] Supra, § 771.

[6] Ibid. Compare supra, §§ 292, 737-48.

exclude the hypothesis, on the bare record, that it was on that count that the verdict may have been based. But in cases of this class we are not limited to the bare record. The court trying the case knows to which counts the evidence was applicable, and to which the verdict was attached; and a court of error may well presume that the court below, in sentencing on the good counts, sentenced on counts to which the verdict was properly to be assigned.[1] And, as a general rule, the presumption of regularity may be invoked to sustain the conclusion that the verdict went to the good counts; and this presumption is eminently applicable to cases in which the counts vary only in matters of form, or in which they are for successive stages of the same offence.[2] But it will be error in such cases to impose a sentence exceeding that which could have been given on the good counts;[3] though in some jurisdictions this is not ground for reversal, when the appellate court may by statute reduce the sentence.[4] And it is not error when the sentence is less than could have been legally imposed.[5]

Conflict as to general sentence when one count is bad.

§ 909. Another contingency arises when the jury find a verdict of guilty on each count, but on this verdict there is a general judgment and sentence in the court below. Should this judgment be reversed in error, if one of the counts turns out, on examination in the court of error, to be defective? The conflict of opinion on this point has been already noticed.[6]

[1] Supra, §§ 771.

[2] As sustaining the view in the text see Kane *v.* People, 8 Wend. 203; People *v.* Gates, 13 Wend. 311; People *v.* Costello, 1 Denio, 83. To the effect that the presumption in error is that the evidence in the court below sustained the verdict see Slack *v.* People, 80 Ill. 32; Brennan *v.* Shinkle, 89 Ill. 604; Doll *v.* Anderson, 27 Cal. 248.

[3] Infra, § 927.

[4] Infra, §§ 927–8; Com. *v.* Kirby, 2 Cush. 577.

[5] Infra, § 918.

[6] Supra, § 771.

Whether, when two distinct offences are joined, and the defendant is found guilty on each count, there can be a lumping sentence on the whole, has been doubted. In England the negative has been held. R. *v.* Robinson, 1 Moody, 413.

In Massachusetts, it has been said that when there is a verdict of guilty on each of several inconsistent counts, this is a mistrial, and there can be no *nolle prosequi*. Com. *v.* Fitchburg R. R. 120 Mass. 372. But usually when a greater and a less offence are joined in two counts, and there is a general verdict, the court sentences for the greater. Supra, § 292.

§ 909 *a*. Where there are several counts, a judgment and sentence upon one of these counts, no action being taken as to the others, disposes of the whole indictment, and operates as an acquittal upon or discontinuance of the other counts.[1]

A verdict and judgment as to one count disposes of the others.

§ 910. Next have we to consider whether, when there is a series of counts, all good, on which there have been separate verdicts, the court trying the case can impose

Successive imprisonments may

[1] See cases, supra, § 740.

Where a general verdict of guilty has been rendered upon an indictment containing several counts for distinct offences, and a sentence of imprisonment has been awarded upon some of the counts, under which sentence he has been imprisoned, the defendant cannot, at a subsequent term, be brought up and sentenced over upon another count in the same indictment. Com. *v.* Foster, 122 Mass. 317. As to this point, see infra § 913.

In Massachusetts we have the following, in 1880: In an indictment containing two counts the defendants were charged in the first with the larceny of a cow, and in the second with receiving the same cow knowing the same to have been stolen. At the trial there was evidence tending to show that the cow had been stolen, and that recently after said larceny the cow was in possession of the defendants. The prosecuting officer went to the jury on both counts, and the court, among other instructions not objected to, especially instructed the jury that there was no evidence in the case to authorize a verdict of guilty on the second count. The jury found the defendants guilty on each count, and the verdict was taken and affirmed by the court in the usual way against both defendants. Defendants then moved in arrest of judgment that the indictment charged two distinct offences; that the verdict was inconsistent and void, and that the finding was contrary to law and in violation of the instructions given by the court. Thereupon the district attorney moved for leave to *nolle prosequi* the second count, which the court granted, against defendants' objection. The court then overruled the motion in arrest of judgment, and the defendants excepted. It was held that the *nolle prosequi* affected only the proceedings subsequent to it, not the record of what is antecedent. By that record it appears that there had been a larceny, and but one larceny. The defendants could not be guilty upon both counts, because in law the guilty receiver of stolen goods cannot himself be the thief; nor can the thief be guilty of receiving stolen goods which he himself has stolen. The fact that the verdict was inconsistent with the views of the presiding judge does not invalidate it as a verdict after it had been recorded and affirmed. The finding of guilty upon both counts is inconsistent in law and conclusive of a mistrial. To assume that the error is corrected by a *nolle prosequi* of either count by the district attorney is to permit the district attorney to determine, instead of the jury, upon which count the defendants were guilty. Com. *v.* Haskins, S. Ct. Mass. 1880; 10 Cent. L. J. 236.

be given on successive counts.

a separate sentence on each count. That this can be done we have numerous authoritative rulings.[1] Nor, when the offences are distinct, is there any reason why, on a conviction on each count, such convictions should not, in all cases where the counts are for a chain of cognate offences, be treated as would be convictions on separate indictments. To require each distinct though cognate offence to be placed in a distinct indictment is to oppress the defendant, by loading him with unnecessary costs, and exposing him to the exhaustion of a series of trials, which the prosecution would encounter with unwaning strength, and with the benefit derived from a knowledge of its own case, and that of the defendant.[2] Vexatiously splitting civil actions into a multitude of independent suits has been held an indictable offence;[3] and in suits for penalties, when the suits are unduly multiplied, rules for consolidation are granted as a matter of course.[4] In criminal cases, from the peculiar degree of oppressiveness which would result from a splitting of prosecutions, the practice of uniting counts for cognate offences has always been encouraged, not merely because in this way the labor of the courts and the expenses of prosecution are greatly diminished, but because the interests of defendants are thereby subserved.[5] In New York, however, in 1875, it was

[1] 1 Ch. Cr. L. 718; Russ. on Cr. 4th Eng. ed. 1030; Archbold's C. P. 17th ed. 173; R. *v.* Wilkes, 4 Burr. 2527; R. *v.* Jones, 2 Camp. 121; Douglass *v.* R. 13 Q. B. 42; R. *v.* O'Connell, 11 Cl. & F. 241, Tindal, C. J.; Gregory *v.* R. 15 Q. B. 974; R. *v.* Castro, L. R. 9 Q. B. D. 350; Com. *v.* Gillespie, 7 S. & R. 476; Com. *v.* Sylvester, Brightly R. 331, Com. *v.* Birdsall, 69 Penn. St. 482 (though see Com. *v.* Hartman, 5 Barr, 60; Henwood *v.* Com. 52 Penn. St. 424); Kroer *v.* People, 78 Ill. 294; Fletcher *v.* People, 81 Ill. 116; State *v.* Gummer, 22 Wis. 441; State *v.* Thomas, 14 Richards. 163; Storrs *v.* State, 3 Mo. 9.

In Massachusetts it has been determined that when there has been such a conviction of distinct offences, the court may impose a lumping sentence, consisting of a term of imprisonment such as could have been imposed had there been convictions on separate indictments. Charlton *v.* Com. 5 Met. 532; Booth *v.* Com. 5 Met. 535. See Com. *v.* Hills, 10 Cush. 530. "It is not necessary," said Shaw, C. J. (5 Met. 533), "in such cases, to award separate sentences, where they (the offences) are so far alike that the whole of the judgment is but the sum of the several sentences to which the convict is liable." See Com. *v.* Cain, 102 Mass. 487; Com. *v.* Carey, 103 Mass. 214. Am. Law Rev. October, 1875, p. 172.

[2] Supra, § 294.

[3] Com. *v.* McCulloch, 15 Mass. 247.

[4] See supra, §§ 285, 294 *et seq.*

[5] That rules to consolidate in such cases are granted in the federal courts

ruled by the Court of Appeal, that even where there are separate verdicts of guilty on each of several cognate counts, the defendant can only be sentenced on a single count.[1] But this ruling is not likely to be elsewhere sustained, unless required by statute.[2]

But not where counts are for distinct offences.

§ 911. What has just been said supposes that the counts describe separate offences, of each of which the jury convicted. Otherwise, there can be properly no sentence except for the punishment proper for a single count, for it would be monstrous to say that the judge can impose on the defendant the aggregate penalties of two offences when the offences are virtually identical. We may illustrate this by noticing the effect of a general verdict of guilty on an indictment containing a count for an assault, and a count for assault and battery, supposing the offences to have been committed by the same act. The law imposes certain penalties for assault and battery, which penalties are designed to cover the assault as well as the battery. To sentence the defendant to the penalties for an assault, as averred in the first count, and then again for an assault *and* battery, as averred in the second count, would expose him to a double punishment for the same offence. The only legitimate course, when the several counts are simply successive stages of one offence, is, in accordance with the view already given, to impose the sentence on the count containing the highest offence, dropping the rest.[3] This, to repeat once

we have already seen, supra, §§ 285 *et seq.*

[1] People *v.* Liscomb, 60 N. Y. 559; and see Buck *v.* State, 1 Oh. St. 61.

[2] Supra, §§ 292, 737–40. See U. S. *v.* O'Callahan, 6 McLean, 598, and cases cited above.

In Illinois it is said that on a conviction on a series of counts, separate imprisonment may be imposed on each count, but the sentence is not to fix the day and hour on which each successive imprisonment is to begin. The sentence should specify the length of time on each count, and provide that the imprisonment on each count after the first shall begin when the imprisonment on the count before it terminated. Johnson *v.* People, 83 Ill. 431. See Peters, ex parte, 4 Dillon, 169.

In Polinsky *v.* People, 73 N. Y. 65, it was held that where a defendant was convicted on an indictment in which he is charged with an offence punishable by fine, and also with one punishable by imprisonment, there is no legal objection to a sentence of fine and imprisonment.

[3] See supra, §§ 292, 740–2, 908–9; State *v.* Hood, 51 Me. 363; State *v.* Hooker, 17 Vt. 658; State *v.* Merwin, 34 Conn. 113; State *v.* Tuller, 34 Conn. 280; Conkey *v.* People, 1 Abb. N. Y. App. Dec. 418; Cook *v.* State,

more a distinction important to keep in mind in cases of this class, is on the supposition that the several counts are simply for separate stages or modifications of the same offence.

III. DEFENDANT'S PRESENCE ESSENTIAL.

§ 912. This point has been already discussed, and it has been shown that in all cases of corporal punishment the defendant's presence at the sentence is requisite.[1]

IV. AMENDMENT OR STAY.

§ 913. As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session;[2] and it has been said that even during subsequent sessions, down to the period of the execution of the sentence, the court may further amend, or stay proceedings, or respite.[3] But the mere entry of a rule to reconsider, at the term when the sentence was imposed, does not, it is generally held, give the court the right, after execution of the sentence has substantially begun, to revise the sentence at future terms.[4] And a majority of the judges of the Supreme Court of the United States have gone so far as to hold that when cumulative penalties are given by a statute, and one of these, a fine, is imposed and satisfied, the sentence cannot, after such satisfaction, be amended, even during the term of its imposition, by adding the other penalty.[5] Nor, as we have

Court may amend during term.

4 Zabr. 843; Manley *v.* State, 7 Md. 149; Cawley *v.* State, 37 Ala. 152; State *v.* McCue, 39 Mo. 112. That this does not apply to *distinct* offences see Charlton *v.* Com. 5 Met. (Mass.) 532; Booth *v.* Com. 5 Met. (Mass.) 535; Kite *v.* Com. 11 Met. (Mass.) 581.

[1] Supra, § 550.

[2] R. *v.* Fitzgerald, 1 Salk. 400; Com. *v.* Weymouth, 2 Allen, 144; Hazlett, in re, 1 Crumrine (Pitts.), 169; Lee *v.* State, 32 Oh. St. 113; Mason, in re, 8 Mich. 70; People *v.* Thompson, 4 Cal. 238.

In Basse *v.* U. S. 9 Wall. 39, the court held that after a sentence to jail upon plea of guilty, and after the prisoner was committed and was serving out his sentence, the court might for good cause, at the same term, set the sentence aside. See also Cheang-Kee *v.* U. S. 3 Wall. 320; People *v.* Duffy, 5 Barb. 205; Jobe *v.* State, 28 Ga. 235.

[3] Miller's case, 9 Cow. 730; State *v.* Cockerham, 2 Ired. 204; Fults *v.* State, 2 Sneed, 232. But see McCarthy *v.* State, 56 Miss. 295.

[4] Com. *v.* Malloy, 57 Penn. St. 291.

[5] Lange, ex parte, 18 Wal. 163. See Scott *v.* Davis, 31 La. An. 249.

seen, after a sentence on one count, can the court, at a subsequent term, sentence on another.[1]

V. CAPITAL PUNISHMENT.

§ 914. When the indictment is so drawn as to sustain a verdict of either murder in the first or murder in the second degree, and there is a general verdict of guilty, it has been held error to sentence for murder in the first degree; and a court of error may reverse on this ground, and impose a sentence of murder in the second degree.[2] In Wisconsin, under such circumstances, a new trial is granted.[3] But in most jurisdictions, by statute, if not at common law, the verdict must specify the degree.[4]

On verdict of guilty on indictment for murder court will sentence for second degree.

§ 915. Before imposing sentence of death, it is eminently the duty of the court patiently and considerately to hear whatever final remarks may be made by the prisoner in reference to his guilt. Nor is it possible, on such conspicuous occasions, for a humane and conscientious judge to avoid preceding the sentence by such observations as may tend to give a public moral force to this last and most terrible judgment of the law. Whether he shall say anything at this time, however, and what he shall say, is wholly at the discretion of the judge. The question put to the prisoner has been already specifically discussed.[5]

Defendant to be asked as to sentence and may reply.

§ 916. The form of sentence depends mainly on the local statutory law. By the English common law, as followed in several of our States, it is not the function of the court to fix the time and place of execution in the original sentence.[6] This in some jurisdictions is done by the chief magistrate of the State, in signing the warrant;[7] in some

Sentence depends on statute.

[1] Com. v. Foster, 122 Mass. 317, cited supra, § 909 *a*. See State v. Davis, 31 La. An. 249.

[2] Johnson v. Com. 24 Penn. St. 386; State v. McCormick, 27 Iowa, 402.

In New York such a verdict has been held to be for the first degree. Kennedy v. People, 39 N. Y. 245. See fully Whart. Crim. Law, 8th ed. § 543.

[3] Hogan v. State, 30 Wis. 437.

[4] Whart. Crim. Law, 8th ed. § 543.

[5] Supra, § 906.

[6] R. v. Doyle, 4 Leach, 67; R. v. Wyatt, R. & R. 230; Gray v. State, 55 Ala. 81; People v. Murphy, 45 Cal. 137.

[7] 2 Hale P. C. 399; R. v. King, 3 Burr. 1812; Howard, ex parte, 17 N. H. 545; Webster v. Com. 5 Cush. 386; Lowenberg v. People, 27 N. Y. 336;

by the court, on subsequent motion. And if the time designated for execution elapses without such execution, by stay of execution or otherwise, a new time for execution is to be assigned, the judgment still remaining in force.[1] The mode of punishment is hereafter noticed.[2]

Pregnancy is ground of respite.

§ 917. In the frequency of capital punishments in the old English practice, it was not uncommon for female prisoners to claim the benefit of the law that no woman should be executed while she is quick with child. The practice, under such circumstances, is for the woman, when called prior to sentence to say whether she has anything to allege why sentence of death should not be passed upon her, to plead orally her pregnancy, upon which the sheriff is forthwith directed to empanel a jury of matrons. This jury being sworn to inquire as to whether the prisoner is "quick with child," they retire with the prisoner; and the court is governed by their verdict to the same extent that it would be by the verdict of a jury empanelled to try any issue of fact. In the hearing before the jury, surgeons may be called to testify as experts.[3] If the verdict be found in

Cathcart *v.* Com. 37 Penn. St. 108. In Alabama the sentence specifies the day. Aaron *v.* State, 40 Ala. 308. See People *v.* Murphy, 45 Cal. 137.

[1] R. *v.* Harris, 1 Ld. Ray. 482; Howard, ex parte, 17 N. H. 545; Lowenberg *v.* People, 27 N. Y. 336; State *v.* Oscar, 13 La. An. 297. Compare Bland *v.* State, 2 Ind. 608. Infra, § 928.

It is not error for the trial court to pronounce sentence of death upon a conviction of murder, before determining a motion for a new trial filed prior to sentence. State *v.* Hoyt, 46 Conn.

[2] Infra, §§ 918 *et seq.*

[3] In R. *v.* Webster, London, 1879, an application of this character was made to Denman, J., sitting at the Old Bailey. The law, as stated by the judge, was that the woman must be "quick with child." A jury was empanelled from women in the gallery of the court-room. The judge, in summing up, said: "This is a very unusual inquiry, ladies of the jury, and it has never happened to me before. The law is that, if it be established to the satisfaction of the jury that the prisoner is quick with child, then the execution must be respited. If you feel that it would be desirable, before deciding that issue, that you should retire into the jury-room, you are warranted in doing so — and I should desire you to do it. At the same time, as women who are married, I feel sure that you will be of opinion that the judgment of a person who has for years practised as an accoucheur, who appears to be a fair-minded, clear-minded, and a skilful man in medical matters, is entitled to be taken — not that the prisoner is in a condition of pregnancy, but whether she is or is not quick with child."

The jury occupied two or three minutes in deliberation in the box.

the defendant's favor, she is respited from session to session until the delivery of the child.[1] In New York, this right is prescribed by statute.[2] But, when no statute exists, it without question obtains at common law.[3]

VI. CORPORAL PUNISHMENT.

§ 918. The moulding of sentences of imprisonment is in the discretion of the court, provided the statutory bounds be not exceeded.[4] Even a statute providing that sentence shall be pronounced within a certain time after judgment is directory, though delay in this respect is not to operate to the prejudice of the prisoner.[5] The power of amendment of sentence reserved to the court has been already discussed.[6]

Limits of sentence to be determined by statute. Discretion allowed to courts.

The place of imprisonment need not at common law be designated in the sentence.[7]

The revision in error of sentences of imprisonment has also been already noticed.[8] Judgment, it has been held, will not be reversed for a sentence of imprisonment *less* than that permitted by law, if the statutory character of the punishment be not changed.[9] But in any view, where a sentence is divisible, the defective part may be stricken out in review.[10]

Mr. Avory: Have you agreed upon your verdict?

The Forewoman: Yes.

Mr. Avory: Do you find that the prisoner is with child — quick child — or not?

The Forewoman: Not.

Mr. Avory: You say she is not.

The prisoner was then removed from the dock.

[1] See 4 Black. Comm. 395 (though Blackstone maintains that a *second* pregnancy cannot be consecutively pleaded to the same sentence, to which Christian demurs); 1 Hale P. C. 369, 370; 1 Ch. C. L. 759. A form will be found in R. *v.* Wycherly, 8 C. & P. 262.

[2] 2 R. S. 658, § 20.

[3] State *v.* Arden, 1 Bay, 487. In Holeman *v.* State, 13 Ark. 105, which was a case of larceny, the plea was overruled.

[4] Supra, § 913; McCulley *v.* State, 62 Ind. 428.

[5] R. *v.* Wyatt, R. & R. 230; John *v.* State, 2 Ala. 290. See infra, § 923.

[6] Supra, § 913.

[7] Infra, § 926.

[8] Supra, §§ 750, 771, 906; infra, § 927.

[9] Rawlins *v.* State, 2 Md. 201; Behler *v.* State, 22 Ind. 345; McQuoid *v.* People, 3 Gilm. 76; Haney *v.* State, 5 Wis. 529; Wattingham *v.* State, 5 Sneed, 64; Ooton *v.* State, 5 Ala. 463; Barada *v.* State, 13 Mo. 94; State *v.* Evans, 23 La. An. 525. Supra, §§ 780, 907; though see Rice *v.* Com. 12 Met. (Mass.) 246; Taff *v.* State, 39 Conn. 82; Brown *v.* State, 47 Ala. 53.

[10] Taff *v.* Com. 39 Conn. 82; Kane

Where a party is subject to two distinct penalties by statute for the same offence, he cannot assign the omission of one of them in the sentence as ground for reversal of judgment.[1]

The punishments, *e. g.* fine and imprisonment, may be cumulatively imposed.[2]

Where a statute prescribes alternative penalties, one only can be inflicted.[3]

The practice when the jury graduate the imprisonment in their verdict has been treated in a prior chapter.[4]

It is within the discretion of the court, on application, to hear affidavits in aggravation or mitigation of sentence.[5]

Fine and imprisonment usual common law penalties.

§ 919. By the common law, as now modified in American practice, fine and imprisonment, in cases not capital, are the usual punishments;[6] and when a statute creates an offence without assigning a penalty, fine and imprisonment are the penalties to be imposed.[7] At one time it was maintained by a Pennsylvania judge, zealous of common law traditions, that on common scolds ducking could be inflicted, but this view was rejected by the Supreme Court, and now no longer is countenanced.[8] "Whipping" will be presently considered.

"Cruel and unusual punishment" is unlawful.

§ 920. The constitutional provision in this respect has been held not to apply to state courts. Its principle, however, must be considered as part of the common law of each State.[9] But in 1879, an ordinance in San Francisco, providing for the cutting off the queues of Chinese as a mode of punishment, was held by Field, J., of the Supreme Court of the United States, to conflict with the federal Consti-

v. People, 8 Wend. 205; Beck v. Com. 25 Penn. St. 11; Weaver v. Com. 29 Penn. St. 445; Kennedy v. State, 62 Ind. 136; David v. State, 40 Ala. 69; State v. Evans, 23 La. An. 525.

[1] Dodge v. State, 4 Zab. 455.

[2] Polinsky v. People, 73 N. Y. 65.

[3] State v. Kearney, 1 Hawks, 53. Infra, § 924.

[4] Supra, § 752.

[5] Infra, § 945.

[6] State v. Dewer, 65 N. C. 572; Conner v. Com. 13 Bush, 718.

[7] U. S. v. Coolidge, 1 Gall. 488; Res. v. De Longchamps, 1 Dall. 111. See State v. Danforth, 3 Conn. 112. When a party is sentenced to a fine, the court is at liberty to imprison him until the fine is paid. Jackson, ex parte, 96 U. S. 727. Infra, § 924.

[8] James v. Com. 12 S. & R. 220. See U. S. v. Royall, 3 Cranch C. C. 620.

[9] Pervear v. Com. 5 Wall. 476; Barker v. People, 3 Cow. 688; James v. Com. 12 S. & R. 220.

tution, on the ground that hostile and discriminating legislation by a State against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution.[1]

§ 921. But what are "cruel and unusual?" Certainly not solitary imprisonment at hard labor, though, when introduced, such penalties were unusual, and by eminent philanthropists were held to be cruel.[2] Nor can whipping be so pronounced.[3] It has been found to be the most efficacious of penalties in checking certain classes of brutal crimes;[4] and it may be far less cruel than certain durations and kinds of imprisonment. It cannot be rejected, therefore, as conflicting with the principle embodied in the constitutional sanction above given; though in some jurisdictions it may be forbidden by statute.[5]

"Whipping" not cruel and unusual.

Shooting, as a method of death, may be inflicted under the Utah statute.[6]

[1] Ho Ah Kow *v.* Nunan, 9 Cent. L. J. 142; 20 Alb. L. J. 250.

In China, however, if we can trust Jules Verne's Chinaman in China, the cutting away of queues is a mode of penal discipline.

[2] See Whitten *v.* State, 47 Ga. 497.

[3] See U. S. *v.* Collins, 2 Curtis C. C. 194; Com. *v.* Wyatt, 6 Rand. 694; State *v.* Kearney, 1 Hawks, 54. Compare Whart. Crim. Law, 8th ed. § 872.

[4] See 1 Wh. & St. Med. Jur. §§ 170, 539, note *s*, and notes given infra.

[5] By act of Congress, it is forbidden in military and naval discipline. See R. Stat. U. S. § 5328.

[6] Wilkerson *v.* Utah, 99 U. S. 130.

In Lord Macaulay's Report on Indian Code we have the following: —

"We have not thought it desirable to place flogging in the list of punishments. If inflicted for atrocious crimes with a severity proportioned to the magnitude of those crimes, that punishment is open to the very serious objections which may be urged against all cruel punishments, and which are so well known that it is unnecessary for us to recapitulate them. When inflicted on men of mature age, particularly if they be of decent stations of life, it is a punishment of which the severity consists, to a great extent, in the disgrace which it causes; and to that extent the arguments which we have used against public exposure apply to flogging.

"It has been represented to us by some functionaries in Bengal, that the best mode of stimulating the lower officers of police to the active discharge of their duties is by flogging, and that since the abolition of that punishment in this presidency, the magistrates of the lower provinces have found great difficulty in managing that class of persons.

"This difficulty has not been experienced in any other part of India. We therefore cannot, without much stronger evidence than is now before us, believe that it is impracticable to make the police officers of the lower

VII. FINES.

May be collected by execution.

§ 922. By a statute of the United States, a fine or penalty imposed as "a judgment or sentence" against any person in criminal cases "shall be declared a judgment debt, and (unless pardoned or remitted by the Presi-

provinces efficient without resorting to corporal punishment. The objections to the old system are obvious. To inflict on a public servant, who ought to respect himself and to be respected by others, an ignominious punishment, which leaves an indelible mark, and to suffer him still to remain a public servant, to place a stigma on him which renders him an object of contempt to the mass of the population, and to continue to intrust him with any portion, however small, of the powers of government, appears to us to be a course which nothing but the strongest necessity can justify.

"The moderate flogging of young offenders for some petty offences is not open, at least in any serious degree, to the objections which we have stated. Flogging does not inflict upon a boy that sort of ignominy which it causes to a grown man. Up to a certain age, boys, even of the higher classes, are often corrected with stripes by their parents and guardians; and this circumstance takes away a considerable part of the disgrace of stripes inflicted on a boy by order of a magistrate. In countries where a bad system of prison discipline exists, the punishment of flogging has in such cases one great advantage over that of imprisonment. The young offender is not exposed even for a day to the contaminating influence of an ill-regulated jail. It is our hope and belief, however, that the reforms which are now under consideration will prevent the jails of India from exercising any such contaminating influence; and, if that should be the case, we are inclined to think that the effect of a few days passed in solitude or in hard and monotonous labor would be more salutary than that of stripes."

Compare the discussion in Woolsey's Political Philosophy, § 116.

In 1877 the English home secretary issued a circular proposing the following inquiries: 1. Is the penal law against crimes of brutal violence, as distinguished from trifling crimes on the one hand, and indecent assaults on the other, sufficiently stringent, and if not, in what way should it be amended? . . . . 4. Should flogging be authorized for other kinds of violence than those now provided by law? 5. Has flogging been efficacious in putting down the offences for which it is now authorized as a punishment by law? To the first of the questions the lord chief justice of the Queen's Bench, the chief baron, two judges, and three barons, answered that the present law is not sufficiently stringent; while on the other hand the lord chief justice of the Common Pleas, four judges, and one baron, replied that the present law is stringent enough. As to punishment by flogging, Chief Justice Cockburn was of the opinion that flogging had been found efficacious, and that it was an appropriate punishment for violence in cases of brutal assault, where, from the nature of the assault, it appeared that bodily injury was intended, and such injury actually resulted. To this opinion inclined a large majority of those consulted. On the other hand, Justice

dent) may be collected on execution in the common form of law."[1] In several of the States similar statutes are in force, and it has also been held that the same practice exists at common law.[2] Process of this kind is supplementary to that specified by the sentence, of imprisonment until the fine be paid. For, by the sentence, the defendant stands committed until the fine and costs shall be paid;[3] and this commitment is technically, when the sentence is simply a fine, to the sheriff, though in practice, and under statute, it usually is to the keeper of the county prison.[4] When the imprisonment is simply auxiliary to the collection of the fine, it is not such an imprisonment as to fall within the constitutional guarantees respecting imprisonments for crimes.[5] But when the statute prescribes fine *or* imprisonment, the two cannot be cumulatively attached, though imprisonment may be imposed until the payment of the fine.[6]

Joint fines are hereafter discussed.[7]

VIII. FORM OF SENTENCE.

§ 923. The sentence must be definite, exact, and peremptory. Hence it has been held error for the sentence to recite that the court is "of *opinion*" that the defendant should pay a fine, &c., the true form being, "it is considered" Must be definite.

Keating was opposed to this punishment, and pronounced it simply retaliatory and unsuitable. He argued that the number of lashes that would exhaust one man would be taken by another with comparative indifference. The same objection, however, may be made to all other forms of punishment.

On this topic may be consulted Herbert Spencer's Essay on Prison Ethics, in which he takes the ground that punishment is to be proportioned to character. "For the more civilized, dread of a long, monotonous, criminal discipline may suffice; but for the less civilized there must be inflictions of bodily pain and death." Whipping is prescribed for male offenders in the Draft Code reported by the English Commissioners of 1879.

[1] Act of Feb. 20, 1863; Rev. Stat. U. S. § 1041.

[2] Kane *v.* People, 8 Wend. 203; Tongate, ex parte, 31 Ind. 370; Beasley *v.* State, 2 Yerg. 481. See Strafford *v.* Jackson, 14 N. H. 16.

[3] Infra, § 924; R. *v.* Layton, 1 Salk. 353; Harris *v.* Com. 23 Pick. 280.

[4] R. *v.* Bethel, 5 Mod. 20; R. *v.* Layton, 1 Salk. 353; Harris *v.* Com. 23 Pick. 280; Hill *v.* State, 2 Yerg. 247. See Kane *v.* People, 8 Wend. 203.

[5] Bollig, ex parte, 31 Ill. 88.

[6] Infra, § 924.

[7] Infra, § 940.

that he shall,[1] &c.; and also to incorporate a condition of remission,[2] and also when instead of a definite an indefinite termination is assigned.[3] Nor can indefiniteness be cured by an appeal to other records.[4] But, as has been seen, it is not necessary in the sentence to fix the time and place of execution.[5]

But under statute may present alternative.

§ 924. Where, however, a statute prescribes an alternative punishment, the court may impose such, as where fine is prescribed, or imprisonment until fine is paid.[6] The two, however, cannot be cumulatively attached.[7] And two distinct punishments cannot at different times be inflicted on one verdict.[8] Thus when the defendant under one verdict is twice sentenced by the court to two punishments, to be inflicted at different places and of different duration, the last sentence is void.[9]

Day of sentence is first day of imprisonment.

§ 925. The day of sentence is reckoned as the first day of imprisonment, supposing the defendant to be put actually in custody on that day.[10] It is enough to specify that the imprisonment shall continue "for the term of three years" from the date of incarceration or imprisonment.[11]

Prison need not at common law be specified.

§ 926. It is not error to omit to specify in a sentence the prison in which the prisoner is to be confined,[12] nor to use "penitentiary" as convertible with "prison."[13]

[*For form in capital cases see supra*, § 914.]

[1] R. *v.* King, 7 Q. B. 782; Knowles *v.* State, 2 Root, 282.

[2] State *v.* Bennett, 4 Dev. & B. 44.

[3] R. *v.* Rainer, 1 Sid. 214.

[4] Picket *v.* State, 22 Oh. St. 405; State *v.* Huber, 8 Kans. 447.

[5] Supra, § 916.

[6] Supra, § 722; Jackson, ex parte, 96 U. S. 727; State *v.* Shattuck, 45 N. H. 205; Harris *v.* Com. 23 Pick. 280; Brownbridge *v.* People, 38 Mich. 751; Morgan *v.* State, 47 Ala. 34.

[7] State *v.* Kearney, 1 Hawks, 53. See Whart. Crim. Law, 8th ed. §§ 1871–73; Piper *v.* Com. 14 Grat. 710.

[8] Supra, §§ 913.

[9] State *v.* Davis, 31 La. Ann. 249.

[10] Meyers, ex parte, 44 Mo. 279. See People *v.* Warden, 66 N. Y. 343.

[11] People *v.* Hughes, 29 Cal. 257; State *v.* Smith, 10 Nev. 107; Hollon *v.* Hopkins, 21 Kans. 638.

In Migotti *v.* Colville, 14 Cox C. C. 263, a sentence of one calendar month's imprisonment is held to expire on the day preceding that day which corresponds numerically in the next succeeding month with the day on which the sentence was passed. If there is no such corresponding day in the next month, then the sentence expires on the last day of that month.

[12] Weed *v.* People, 31 N. Y. 465. See Atkinson *v.* R. 3 Bro. P. C. 517; and cases cited supra, § 916.

[13] Millar *v.* State, 2 Kans. 174. But see Wilson *v.* People, infra, § 927.

Where a case has been removed for

IX. SENTENCE BY APPELLATE COURT.

§ 927. It has already been observed that at common law an appellate court, on reversing a judgment for error in the sentence, is held in England and in some parts of the United States to be incapable of reimposing sentence, and to be obliged to discharge the prisoner.[1] This proposition, however, is not universally accepted; and now, under statutes, if not at common law, the practice is for the appellate court to correct and renew sentences even in capital cases,[2] or the court may remit the record to the court of trial, with directions to impose the proper sentence.[3] Yet in jurisdictions where no common law right in this respect is recognized, the statutes are to be construed as giving only that authority which they nakedly convey. Thus in Michigan a statute exists which requires, when an excessive punishment is given by the court below, that the judgment shall only be reversed for the excess. This statute has been ruled not to apply to a sentence to the "state prison," for an offence only punishable in the county jail. In this case, it has been held, the judgment must be reversed *in toto* and the prisoner discharged.[4] And ordinarily a sentence exceeding that allowable on the good counts of an indictment will be reversed,[5] or modified if such be the local practice.[6]

By statute appellate court may sentence.

For a sentence *less* than that permitted by law, it has been held, there will be no reversal.[7]

§ 928. A repetition by an appellate court of a sentence of death on a prisoner, while the judgment of the court on which he is tried is still valid, is an informality which

In capital and other cases rec-

revision, the sentence must be executed by the sheriff of the county in which the trial was had. State *v.* Twiggs, 1 Wins. N. C. 142.

[1] Supra, § 780.

[2] People *v.* Phillips, 42 N. Y. 200; Drew *v.* Com. 1 Whart. 279; Daniels *v.* Com. 7 Penn. St. 371; White *v.* Com. 3 Brewst. 30; Mills *v.* Com. 13 Penn. St. 631; Montgomery *v.* State, 7 Oh. St. 107; Kelly *v.* State, 3 Sm. & M. 518; State *v.* Thompson, 46 Iowa, 699; and cases cited supra, § 780.

[3] Beale *v.* Com. 25 Penn. St. 11; State *v.* Lawrence, 81 N. C. 521; State *v.* Thorne, 81 N. C. 555. Infra, § 928.

[4] Wilson *v.* People, 24 Mich. 410; but see Millar *v.* State, 2 Kans. 174.

[5] Brown *v.* State, 47 Ala. 47; State *v.* Bean, 21 Mo. 269.

[6] Com. *v.* Kirby, 2 Cush. 577; Johnston *v.* Com. 85 Penn. St. 54.

[7] Supra, § 918.

Record remanded to court below for execution.

does not vitiate the proceedings.[1] But it seems that the usual course in a capital case is for the appellate court to remit the record, after revising the same, for proper sentence to the court where the conviction was had.[2] And certainly an appellate court will not modify the sentence of the court below, except for matters merely technical, when the record does not show the circumstances attending the commission of the offence.[3]

The practice of appellate courts, when the sentence of the court below has varied from the statutory limits of imprisonment, has been already discussed.[4]

X. SENTENCE BY SUCCEEDING JUDGE.

§ 929. It has been ruled in Wisconsin that a judge of the Circuit Court may pronounce sentence on a prisoner convicted before his predecessor in office.[5] It was held, however, in Philadelphia, by the United States Circuit Court, that this does not hold when the judge trying the case dies pending a motion for a new trial; but that under such circumstances a new trial will be granted.[6] But it is clear that a Circuit Court of the United States, though held by only one of the two judges that tried the case, may pass sentence.[7]

Such sentence may be regular.

[1] Ferris, in re, 35 N. Y. 262.

[2] McKee *v.* People, 32 N. Y. 239; McCue *v.* Com. 78 Penn. St. 185; Elliott *v.* People, 13 Mich. 365; Picket *v.* State, 22 Oh. St. 405. See cases cited supra, §§ 780, 927.

[3] State *v.* Patton, 19 Iowa, 458.

[4] Supra, §§ 780, 918.

Where, after conviction in New York in 1869, on error to the general term, the judgment of conviction was reversed and the defendant discharged, on error to the Court of Appeals it was held that the conviction was properly reversed; but as a small portion only of the defendant's term of sentence had expired, and it did not appear that a conviction would not be had upon a new trial, it was error to discharge absolutely; and a new trial was ordered. People *v.* Phillips, 42 N. Y. 200 (Foster, J. 1870). See supra, § 773. In the same State it was held in 1873, that when there is a reversal for error in sentence, the prisoner will not be discharged, but the Supreme Court will examine the record of the errors alleged to have been committed on trial, and will grant a new trial if any of these errors are sustained. Graham *v.* People, 63 Barb. 468; Messner *v.* People, 45 N. Y. 1. Supra, § 773.

[5] Pegalow *v.* State, 20 Wis. 61. Supra, § 898.

[6] U. S. *v.* Harding, 1 Wall. Jr. 127. See Bescher *v.* State, 32 Ind. 480. Supra, §§ 515, 898.

[7] U. S. *v.* Gordon, 5 Blatch. C. C. 18.

XI. SUCCESSIVE IMPRISONMENTS.

§ 930. By statutes in England and in most of the United States, as well as at common law, successive imprisonments may be assigned to successive convictions, the defendant being in prison at the time of the second or subsequent trials.

Prisoner may be brought up for second trial by *habeas corpus*.

§ 931. The proper process for obtaining jurisdiction of the person of a prisoner under sentence,[1] in order to try him for another crime, is by *habeas corpus* directed to the keeper of the prison.[2]

Second imprisonment begins at termination of first.

§ 932. When a term of imprisonment is still unexpired, the prisoner being in custody, the proper course is to appoint the second imprisonment to begin at the expiration of the first, to be specifically referred to in the sentence;[3] and a sentence to this effect is sufficiently exact.[4] The same order is taken when there are simultaneous convictions, the sentence prescribing that the term on the second offence is to begin on the expiration of the term assigned to

[1] The fact that a prisoner, committing a murder while serving a sentence in the penitentiary, has some years still to serve, does not prevent his being sentenced to be hung before the expiration of his term. Thomas *v.* People, 67 N. Y. 218.

A defendant imprisoned for life may be brought into court and convicted on an indictment for murder, and sentenced to be hung. Peri *v.* People, 65 Ill. 17.

[2] State *v.* Wilson, 36 Conn. 126.

[3] Wilkes *v.* R. 4 Bro. P. C. 361; Kite *v.* Com. 11 Met. 584; State *v.* Smith, 5 Day, 175; Brown *v.* Com. 4 Rawle, 259; Mills *v.* Com. 13 Penn. St. 631, 634; *contra*, Miller *v.* Allen, 11 Ind. 389. That after judgment and sentence on one count defendant, on a subsequent term, cannot be sentenced on another count, see supra, § 909 *a*.

In Missouri, both convictions, to sustain successive imprisonments, must take place before sentence is pronounced in either case. Meyers, ex parte, 44 Mo. 279. See Turner, ex parte, 45 Mo. 331.

[4] State *v.* Hood, 51 Me. 363; Kite *v.* Com. 11 Met. 581; Williams *v.* State, 18 Oh. St. 46; Com. *v.* Leath, 1 Va. Cas. 151; People *v.* Forbes, 22 Cal. 135. See supra, § 910, as to distinctive practice in New York.

In a Pennsylvania case, the prisoner having been found guilty under two counts charging a higher and a lesser crime, but for the same offence, the court below sentenced him to imprisonment for six years and four months under one count, and to imprisonment, at labor, for three years and ten months under the other count, both terms of imprisonment to commence from the date of the sentence. It was held that so much of the judgment as imposed the shorter term of imprisonment was to be reversed. Johnston *v.* Com. 85 Penn. St. 54. See Miller *v.* Com. 23 Penn. St. 631, as further defining the practice. And see Haskins *v.* Com. supra, § 909 *a*.

the first offence.[1] If the prisoner is pardoned for the first offence, the imprisonment for the second begins at the date of the pardon.[2] And when the judgment is reversed for either offence, the sentence will be remodelled so as to correspond.[3]

An escaped prisoner may be sentenced for escape in like manner.

§ 933. A prisoner who escapes before the expiration of his term may be convicted of such escape, and sentenced, while still imprisoned for his first offence, to a second imprisonment commencing on the expiration of the first.[4] When an escaped prisoner commits a second felony before the term of his imprisonment has expired, but during his escape, he may be put on trial for the second felony; and be sentenced, on conviction, to a term to commence at the expiration of the term for which he was imprisoned.[5]

XII. WHEN SEVERER PUNISHMENT IS ASSIGNED TO SECOND OFFENCE.

§ 934. Statutes are in force in several States providing that when a party is convicted of a second offence he is to be subjected to an aggravated penalty. Such statutes are not in conflict with the constitutional provision as to jeopardy.[6]

In such cases prior conviction

§ 935. The indictment, to sustain such second prosecution, must specially aver the prior conviction or convictions;[7] and when the court is one of oyer and terminer,

[1] R. *v.* Cutbush, L. R. 2 Q. B. 379.

[2] Kite *v.* Com. 11 Met. 581; Brown *v.* Com. 4 Rawle, 259.

[3] Ibid.; Mills *v.* Com. 23 Penn. St. 631. See Opinions of Justices, 13 Gray, 618.

[4] Brunding, ex parte, 47 Mo. 255.

[5] Haggerty *v.* People, 6 Lansing, 347.

When a prisoner escapes from prison, and is retaken after his term expires, it is not necessary that there should be a new award of execution. He may be retaken and confined without any additional suggestion on behalf of the State, or trial of the question of his identity and escape. Haggerty *v.* People, 53 N. Y. 76, reversing 6 Lansing, 32.

[6] People *v.* Stanley, 47 Cal. 113. For discussion of statutes see Com. *v.* Morrow, 9 Phila. 583.

[7] R. *v.* Page, 9 C. & P. 756; R. *v.* Willis, L. R. 1 C. C. 363; R. *v.* Allen, R. & R. 513; Plumbly *v.* Com. 2 Met. (Mass.) 413; Garvey *v.* Com. 8 Gray, 382; Rauch *v.* Com. 78 Penn. St. 490; Maguire *v.* State, 47 Md. 485; Rand *v.* Com. 9 Grat. 938. State *v.* Freeman, 27 Vt. 523, apparently *contra*, was under a special statute. In New York it is unnecessary to aver, in the second indictment, the prior conviction. Johnson *v.* People, 65 Barb. 342; 55 N. Y. 512; but see Gibson *v.* People, 5 Hun, 542.

The verdict for a second offence, in order to sustain the cumulative punishment, must aver the offence to be a second offence. Maguire *v.* State, 47 Md. 485.

or general jurisdiction, an allegation of the fact of general jurisdiction is enough.[1] When, however, "the conviction is alleged to have taken place before a court of special and limited jurisdiction, the indictment should aver such facts as would show that the justice holding such court had jurisdiction, as well of the subject matter as of the person of the prisoner."[2] And where a prior "conviction" is requisite to sustain the second indictment, it is said that not only conviction, but the sentence imposed, should be averred, as conviction in its full sense, and within the scope of the statute, is not complete without the judgment of the court.[3]

should be averred.

§ 936. To sustain the averment of the first conviction it must appear that such conviction was legal, and in a court having jurisdiction.[4]

Former conviction must be legal.

A *foreign* conviction will not sustain the averment, and cannot be made the basis of an aggravated penalty.[5]

Foreign conviction insufficient.

§ 937. The averment of prior conviction is to be proved by the record,[6] sustained by proof of the identity of the person on trial with the one described in the former procedure,[7] as in cases of pleas of former conviction.

Conviction to be proved by record and identification.

§ 937 *a*. The prosecution may elect, if it choose, to ignore the first conviction, and proceed exclusively on the offence under trial, as if it stood alone.[8]

Prosecution may waive first conviction.

§ 938. On the trial of cases in which prior convictions are

[1] People *v.* Golden, 3 Park. C. R. 330.

[2] Jewell, J., People *v.* Powers, 2 Seld. 50, citing 1 Chit. C. L. 138.

[3] Smith *v.* Com. 14 S. & R. 69; but see *contra*, Stevens *v.* People, 1 Hill (N. Y.), 261.

[4] People *v.* Butler, 3 Cow. 347; Rand *v.* Com. 9 Grat. 738.

[5] People *v.* Cæsar, 1 Park. C. R. 345.

[6] R. *v.* Willis, L. R. 1 C. C. 363; Tuttle *v.* Com. 2 Gray, 502. See Johnson *v.* People, 65 Barb. 342; 55 N. Y. 512.

[7] Supra, § 481; R. *v.* Clark, 6 Cox C. C. 210; Smith *v.* Com. 14 S. & R. 69; Hines *v.* State, 26 Ga. 614.

An averment of prior conviction of C. D. and D. H. may be sustained by proof of their conviction severally at different times more than six years previously. Dolan *v.* State, 69 Me. 573. When there is a variance in the names oral evidence of identity is admissible. Ibid. Supra, § 481.

[8] R. *v.* Summers, L. R. 1 C. C. 182.

alleged, is the prosecution to put in evidence, as part of its case, such prior conviction? To do so, it is argued, would be to violate the established principle that a man's character and his previous bad acts are not to be put in evidence unless at his own instance,[1] as well as to invade another well settled safeguard of justice, that the defendant is to be tried, not for being generally bad, but only for the one particular bad act. A majority of the English judges having held, however, in 1834, that it was admissible for the crown to put the prior conviction before the jury as part of its evidence in chief;[2] an act of parliament was passed directing that the prior conviction should not be committed to the jury until they had found the defendant guilty of the subsequent charge, unless he himself puts his character in evidence.[3] In several of the American States similar restrictions exist. Where they do not, it would be well for courts in charging juries to direct them to scrupulously avoid considering the conviction in the prior case as in any way affecting the question of guilt in the case on trial. It should also be remembered that it is much more important to society that the issues of guilt should be single, than that in any one particular case a cumulative sentence should be imposed. On the other hand, as it is necessary, according to the prevailing opinion, that the former conviction should be averred in the indictment, it is hard to see how it can be kept from the jury. The indictment goes to the jury as part of the record. And not only must it thus communicate its contents to the jury, but its essential allegations, of which this is one, must be sustained by proof. And part of this proof, as we have just seen, goes to the fact of identity of person, on which the jury has to pass.[4]

Prior conviction not to be put in evidence until main issue is found against defendant.

[1] See Whart. Crim. Ev. §§ 59–61.

[2] R. v. Jones, 6 C. & P. 391. See Johnson v. People, 65 Barb. 342; 55 N. Y. 512; Long v. State, 36 Tex. 6.

[3] R. v. Martin, Law Rep. 1 C. C. 214; R. v. Key, 5 Cox C. C. 369; 2 Den. C. C. 347.

[4] Supra, § 937. In Maguire v. State, 47 Md. 497, it is said by Alvey, J.: —

"Such being the import of the averment, and the nature of the inquiry before the jury, there can be no good reason for adopting the mode of procedure contended for by the appellant; and the practice in England, until changed by statute, was, as it is here, to allow the prosecution to put the prior conviction before the jury as part of its evidence in chief, and before the accused commenced his evidence in defence. R. v. Jones, 6 C.

XIII. DISFRANCHISEMENT.

§ 939. By the Act of Congress of July 17, 1862, it is provided that all persons guilty of engaging in rebellion shall be incapable of holding office. It has been ruled that as a penalty for crime it is within the power of Congress to impose upon a convicted person disfranchisement of this class.[1] But to attach the disqualification, there must be a conviction in due course of law.[2]

Conviction a prerequisite.

XIV. JOINT SENTENCES.

§ 940. Where two or more persons are sentenced jointly to pay a fine, each may be fined up to the full statutory limit. That limit is not that a certain lumping sum is to be paid to the State by *all* the defendants together; but it is that each wrong-doer is to be made liable to pay such amount in full for his own particular violation of the law. The fact that he is joined with others in the conviction and sentence does not lessen his liability.[3] The same rule applies to the distribution of imprisonment. Each defendant is to be singly sentenced according to his personal deserts.[4]

Fines to be several.

The subject of costs has been already discussed.[5]

XV. BINDINGS TO KEEP THE PEACE.

§ 941. There are cases when, in addition to, or as an alternate for, fine and imprisonment, the court will hold over the defendant in bonds to keep the peace.[6] And this holds good even after acquittals, whenever the judge trying the case has sufficient reason, from the evidence before

Defendant after verdict may be bound over to keep the peace.

& P. 391." To same effect see Thomas's case, 22 Grat. 912.

[1] Huber *v.* Reily, 53 Penn. St. 112.

[2] See The Amy Warwick, 2 Spr. 143; S. C., 2 Black, 635.

[3] Supra, § 314; 2 Hawk. P. C. 635; R. *v.* Atkinson, 2 Ld. Ray. 1248; 11 Mod. 80; Com. *v.* Tower, 8 Met. (Mass.) 527; Com. *v.* Ray, 1 Va. Cas. 262; Com. *v.* Harris, 7 Grat. 600; Caldwell *v.* Com. 7 Dana, 229; McLeod *v.* State, 35 Ala. 395; State *v.* Gay, 10 Mo. 440; State *v.* Hopkins, 7 Blackf. 494; Waltzer *v.* State, 3 Wis. 785; Bennett *v.* State, 30 Tex. 523.

[4] Supra, § 314; State *v.* Hunter, 33 Iowa, 361; Calico *v.* State, 3 Pike, 431. As to joinder of defendants see supra, § 301.

[5] Supra, §§ 314–5.

[6] O'Connell *v.* R. 11 Cl. & F. 155; Dunn *v.* R. 12 Q. B. 1031. See Estes *v.* State, 2 Humph. 496. Supra, § 80.

him, to judge such course necessary to prevent a violation of public peace and law. This power is inherent in all justices of the peace. But unless necessary to protect the public from notorious crime, the court, after acquittal, will not direct the defendant to be detained until articles of the peace against him are prepared.[1]

XVI. CONSIDERATIONS IN ADJUSTING SENTENCE.

Courts have usually large discretion.

§ 942. The polity of England and of the United States commits largely to the court the practical determination of the grade of punishment.[2] In England, and in several of our States, until a very recent period, the court, in mis-

[1] R. *v.* Holt, 7 C. & P. 518. Supra, § 80.

[2] That the court may take testimony on this point see Dick *v.* State, 3 Oh. St. 89.

On the general question of character, as well as on that of the grade of the crime, affidavits may be received in mitigation or aggravation. Infra § 945.

As to recommendation to mercy see supra, § 757.

Three theories have been propounded as to the discretion of the judge in criminal prosecutions. See Berner, § 124.

(1.) By the first, his duties are to be prescribed in every respect by statute. Statute is to define the offence; statute is arbitrarily to specify the punishment. It is obvious that this theory is both despotic and illogical. Cases, nominally of the same offence, as defined in the statute book, *e. g.* larceny, are so various, that it would be gross injustice to apply to each the same uniform penalty. Hence there is no code which does not leave a margin, as to the term of punishment, within which the discretion of the judge may range. Nor, so far as concerns the definition of an offence, is it possible for the theory here contested to be logically executed. A statute, for instance, makes "burglary" indictable. But what is burglary? This has to be determined by the courts. Even if the definition is given by statute, the points of discrimination, in accordance with the well known logical rule, increase with the minuteness of the specification.

(2.) By the second view, the statute declares a particular offence to be punishable, but leaves the punishment absolutely to the discretion of the judge. But this theory, in not imposing at least a maximum of punishment, leaves too much to the caprice of the judge.

(3.) The offence is defined by statute, and the discretion of the judge is allowed to work within a specified margin of punishment. This is a system now almost universally prevalent in the United States.

Whether a minimum as well as a maximum should be attached has been much discussed. Berner, § 124, argues that to leave the limits open is an abdication of duty by the legislature, and leads to despotic and wayward caprice on the part of the judge. Rossi (Traité, vol. ii. 405), says: "La loi perdrait une grande partie de son influence préventive sur l'esprit des

demeanors, was left without any limit as to the term of imprisonment to be imposed, provided that a maximum, in some cases of seven years, in others of ten years, should not be exceeded. Even now we find frequently such limitations as these: imprisonment from "two to fifteen years," or from "two to ten," or "one to seven years." In such cases the question of determining what penalty is to be assigned to a particular offence rests mainly on the discretion of the court.[1] It becomes important, therefore, to consider on what principles this discretion is to be exercised. What object is the judge to have before him in adjusting punishment to crime? What public exigencies has he to satisfy? In answering these inquiries we are met by several conflicting theories.

Primary object retribution; but example and reform to be incidental.

§ 943. It has been shown elsewhere,[2] that the primary object of punishment is the execution of retributory justice; and that unless such justice be shown in a sentence, it is calculated neither to deter others from crime nor to reform the sentenced criminal. At the same time, as is there noticed, example and reform, as well as retribution, are to be kept in view in adjusting a sentence. On these points the following observations may be made.

1. *Example.* An excessive punishment, so far from being an example, as sometimes judges conceive it to be, operates in the contrary direction; first, because the public mind revolts at the undue severity, and an angry contempt of justice is thereby engendered; and, secondly, because excessive punishments are apt to be revoked by the executive, and there is the feeling about them, "This cannot last." Even supposing certain crimes are so prevalent, that at the first glance it would seem politic to signalize convictions by extreme and conspicuous penalties, it must be remembered, in addition to the considerations already given, that the public mind soon adapts itself to a harder grade

citoyens. La jurisprudence des tribunaux serait incertaine, variable; elle ne tarderait pas à offrir des disparates choquantes. Le juge aurait un moyen trop facile de céder, sans trop aventuré sa responsabilité morale, à la prière, a l'intrigue, aux séductions de toute espèce."

[1] Supra, §§ 314–5. See cases in prior notes to this section. People *v.* Warden, 66 N. Y. 342.

[2] Whart. Crim. Law, 8th ed. §§ 1 *et seq.*

of punishment, and that the immediate effect is to require increased punishment for all crimes, not simply an exceptional punishment for the particular crime complained of. Aside from this, there is a sense of unfairness about punishment so inflicted that defeats the very end it is claimed to promote. Men will not be prevented from committing crime by seeing punishment inflicted merely to work such prevention. If the person punished is guilty, and is punished because he is guilty, this acts as a deterrent. But if he is innocent, and is punished, without his consent, in order to produce a docile and law-loving temper in himself and others, the effect is far from being reached. Such an outrage inflicted on him, so far from making him docile and law-loving, will be likely to breed in him a determination to resist, to elude, and, if possible, to trample upon, the sovereign from whom the outrage proceeds; and the temper thus generated in him will be generated in those who are witnesses of the wrong done him. Such, in fact, has been the case where this system has been carried out. At no times have crimes been more rife, and schemes to defy or elude the law more rampant, than in those in which punishments for the sake of example were made most conspicuous and horrible. Nor is this all. To assign this power to the sovereign is to invest him with absolutism. If the object is merely to deter others by a fearful spectacle of torture or death, then innocent as well as guilty may be seized upon as the victims by whom the spectacle is to be exhibited, and the pain inflicted will be measured, not by its relation to the alleged offence, but by the effect it is likely to produce on the public mind. The meting out of justice is of little or no consequence; since there is no logical relation, it is urged, between wrong and punishment. The object is to inflict a conspicuous and horrible penalty arbitrarily, and thus to terrify into submission. But this can only be sustained by the ascription to the sovereign of absolute power.

2. *Reform.* The object of reform is to arouse, by moral and religious influences, the torpid moral sense of the convict, and to form in him habits of honesty, self-control, and obedience to the law; and so far it is an important auxiliary in penal discipline. But reform should not be carried to such a degree as to diminish the necessary painfulness of punishment, since a pun-

ishment which does not inflict pain in some degree proportionate to the crime committed, so far from reforming the criminal, will lead him to regard the wrong done by him as a light thing, so viewed by the public, and tend rather to encourage than to check him in a lawless career. And independently of this moral mischief, a home in which board, lodging, and education are given without expense, will, to the idle and destitute, be a refuge rather to be sought than shunned. To invest, also, the sovereign with the power of compulsory reformation, irrespective of conviction of crime, requires the cession to him of despotic prerogatives. If susceptibility to reformation is the condition of penal discipline, there is no one on whom penal discipline may not be inflicted, as there is no one who may not be more or less reformed. Not only would this make the sovereign the master of the persons of all his subjects, but he would be relieved from fixed restrictions as to the nature of the punishment to be imposed, since the only question in such cases would be "what kind of punishment would work reformation in a person of this particular type?" And, once more, no obdurate and irreclaimable criminal could, on this view, be punished, for the reason that no such criminal could be reformed. Reformation, therefore, if it be adopted as the sole ground and object of punishment, would confer an entire immunity from restraint or punishment on the desperate and incorrigible criminal, while over all others it would establish the surveillance of despotism.

3. *Retribution.* This, so far as concerns public justice, is the primary object of punishment. When, however, an individual, as well as the body politic, is aggrieved, then it is proper, in cases of pecuniary loss, that there should be a pecuniary satisfaction ordered to the party injured. When the offence is one which assails the honor of an individual (as in cases of libel), it is the practice in some jurisdictions to require of the convict an apology, and withdrawal of the charge. And, incidentally, in the application of retribution, prevention and reformation should be subserved.[1]

§ 944. In adjusting sentence, therefore, under our American system, which allows so wide a discretion to the court, not only the simplest but the wisest course for the court is to adapt the

[1] See, for a full discussion, Whart. Crim. Law, 8th ed. §§ 1 *et seq.*

duration of imprisonment to the defendant's guilt, keeping at the same time in view, as forming part of the elements of this guilt, his character, of which susceptibility to reformatory influences is an ingredient.[1] By so doing, if guilt be estimated according to its inveterateness and heinousness, and the sentence moulded accordingly, the objects of the preventive and reformatory systems will be best promoted. And if such a policy be firmly executed, the advantages of what has been called the exemplary theory will be best brought out. The criminal himself will receive the punishment which in justice belongs to his crime. And the example of such punishment, based, not on any capricious or speculative schemes, but on the plain principle that crime is punished because it is crime, will act as a deterrent just in proportion as it is justly imposed and firmly executed.

Evidence may be received as to defendant's character.

§ 945. Although, when the punishment is to be assessed by the jury, it is improper, in order to keep the issue single, to receive evidence of other offences than that charged in the indictment,[2] it is otherwise when, after a verdict of guilty, the court is called upon to sentence. In such case the court may, of its own motion, take notice of a prior conviction of the defendant on its own records, or will hear proof of his character and antecedents, either to aggravate or extenuate his guilt.[3] The proof in the latter relation is taken usually by affidavits.[4] Such evidence, however, is only receivable in matters as to which the court has discretion.[5]

[1] See Whart. Crim. Law, 8th ed. §§ 12, 13.

[2] See Whart. Crim. Ev. §§ 23 *et seq.*

[3] R. *v.* Templeman, 1 Salk. 55; R. *v.* Wilson, 4 T. R. 487; R. *v.* Morgan, 11 East, 457; R. *v.* Mahon, 4 A. & E. 475; R. *v.* Dignam, 7 A. & E. 593; R. *v.* Gregory, 1 C. & K. 228; Com. *v.* Horton, 9 Pick. 206; People *v.* Cochran, 2 Johns. 73; Dick *v.* State, 3 Oh. St. 89; Robbins *v.* State, 20 Ala. 36; People *v.* Jefferson, 52 Cal. 453.

[4] Roscoe's Crim. Ev. § 222.

[5] R. *v.* Ellis, 6 B. & C. 145; Burn's Just. 29th ed. § 933.

The English practice is thus stated in Roscoe's Crim. Ev. pp. 222–23: —

"Where the defendant has been convicted of a misdemeanor in the Queen's Bench, the prosecutor, upon the motion for judgment, may produce affidavits to be read in aggravation of the offence, and the defence may also produce affidavits to be read in mitigation. Affidavits in aggravation are not allowed in felonies, although the record has been removed into the Court of Queen's Bench by *certiorari*. R. *v.* Ellis, 6 B. & C. 145; 3

Burn's Justice, 29th ed. 933. Where a prisoner pleaded guilty at the Central Criminal Court to a misdemeanor, and affidavits were filed both in mitigation and aggravation, the judges refused to hear the speeches of counsel on either side, but formed their judgment of the case by reading the affidavits. R. *v.* Gregory, 1 C. & K. 228; but it is usual to hear counsel in mitigation. See also the same case as to removing from the files of the court affidavits in mitigation containing scandalous and irrelevant matter, such being a contempt of court; and also as to allowing the opposite party to deny by counter-affidavits the affidavits filed in mitigation." See supra, § 416.

CHAPTER XX.

CONTEMPT.

I. When the only Method of Suppression is by Summary Commitment.
- In such cases attachment may issue, § 948.
- Attachments may issue to enforce process, § 949.
- And so as a penalty on disobedience, § 950.
- And so on physical interference with parties, § 951.
- And so on publication of proceedings ordered not to be published, § 952.
- And so as to misconduct of officers of court, § 953.
- And so as to obstruction to testimony, § 954.
- And so as to disorder in presence of court, § 955.
- And so as to misconduct of or tampering with jurymen, § 956.

II. When the Contempt can be suppressed otherwise than by Commitment.
- Criticisms on cases before court constitute contempt, § 957.
- And so as to other publications interfering with due course of justice, § 958.
- But summary commitment only to be used when necessary, § 959.
- In cases of this class an ordinary prosecution is the better course, § 960.
- Danger of depositing such power in courts, § 961.

III. By whom such Commitments may be issued.
- Superior Courts have power to issue common law commitments, § 962.
- Other courts are limited to contempts in their presence, § 963.
- So as to legislatures, § 964.

IV. Indictability of Contempts: Embracery.
- Interference with public justice indictable, § 965.
- So with embracery, or improper interference with jury, § 966.

V. Practice.
- In cases in face of court rule may be made instantly returnable, § 967.
- Otherwise as to contempts not in face of court, § 968.
- Hearing may be inquisitorial, § 969.

VI. Punishment.
- Court may fine and imprison, § 970.
- Commitment must be for fixed period, § 971.
- Fine goes to State, § 972.

VII. Conviction no Bar to other Proceedings.
- Contempt not barred by other procedure, and the converse, § 973.

VIII. Appeal, Error, and Pardon.
- When on record, proceedings may be revised in error, § 974.
- Pardon does not usually release, § 975.

§ 947. Contempt is such disrespect or disobedience to a court or legislature as interferes with the due administration of law

So far as concerns our first inquiry, contempts may be divided as follows: —

I. WHEN THE ONLY METHOD OF SUPPRESSION IS BY SUMMARY COMMITMENT.

II. WHEN THERE ARE OTHER METHODS OF SUPPRESSION.

I. WHEN THE ONLY METHOD OF SUPPRESSION IS BY SUMMARY COMMITMENT.

§ 948. In such cases there is no question that an attachment, on due cause shown, may issue, and the defendant be committed.

In such case attachment may issue.

Among contempts of this class may be mentioned, —

§ 949. If process be impeded, no case can be tried. Hence it is a contempt, punishable by summary commitment, to interfere with process;[1] to disobey rules or orders obedience to which is essential to the progress of the case;[2] to abuse process;[3] to rescue a prisoner under process;[4] and to serve a writ (the offender being the sheriff) improperly, or to refuse to serve it at all, or to make a false return.[5]

Attachment proper to enforce process.

§ 950. The same remedy is applicable to disobedience to an injunction, because unless attachment and commitment in such case be granted, irreparable injury might ensue;[6] to disobedience to an order of court for summary payment, which payment cannot be otherwise enforced;[7] and to disobedience to an order for specific conveyance.[8]

And so as a penalty on disobeying process.

[1] Daniell's Chancery Prac. (1871) 387, note, 411–427, 936; Price *v.* Hutchison, L. R. 9 Eq. 534; Buck *v.* Buck, 60 Ill. 115; People *v.* Bradley, 60 Ill. 390; State *v.* Sparks, 27 Tex. 627.

[2] Daniell's Ch. Prac. (1872) 937; Day's Com. Law Pr. (1872) 313; Archbold's Q. B. Practice (12th ed.), 1711.

[3] Archbold's Q. B. Prac. *ut supra*, 1715.

[4] Archbold's Q. B. Prac. *ut supra*, 1710.

[5] Archbold's Q. B. Prac. *ut supra*, 1710; State *v.* Tipton, 1 Black. 166; People *v.* Marsh, 2 Cow. 493; Summers, ex parte, 5 Ired. 149; Pitman *v.* Clarke, 1 McMullen, 316.

[6] 2 Wait's Prac. (1873) 108, 112; Day's Common Law Prac. (1872) 327; Daniell's Ch. Prac. (1871) 1533; People *v.* Compton, 1 Duer, 512; Woodworth *v.* Rogers, 3 Wood. & M. 135; Potter *v.* Muller, 1 Bond, 601; Rogers Man. Co. *v.* Rogers, 38 Conn. 121; Mead *v.* Norris, 21 Wis. 310.

[7] 2 Wait's Prac. (1873) 249; Ford *v.* Ford, 10 Abb. Pr. N. S. (N. Y.) 74; 41 How. Pr. 169; Remley *v.* De Wall, 41 Ga. 466.

[8] Daniell's Ch. Prac. *ut supra*.

§ 951. It is also a contempt summarily punishable to prevent a party from bringing suit, because in such case it would beg the question to turn the plaintiff back to a common law suit for redress;[1] and to carry off a ward in chancery, attachment being the only mode of enforcing obedience.[2]

And so on physical interference with parties.

§ 952. It is a contempt, also, to publish testimony which the court has ordered not to be published, when the injury cannot be otherwise redressed.[3]

And so on wrongful publication of proceedings.

§ 953. An officer of the court may so conduct himself, during the trial of a cause, as to inflict, if not stopped, irreparable injury; and in such case attachment for contempt is the proper, because the only, remedy. This rule is applied to all misbehavior, in the presence of the court, of attorneys or other officers of the court.[4] And it has been justly extended (not only because such misconduct, consistently with prompt justice, cannot be otherwise properly corrected, but because such officers are the court's confidential servants, trusted by third parties as its representatives) to malpractice of attorneys, as in withholding papers or money from clients,[5] and to clerks, masters, and referees, for any improper conduct or disobedience to the court.[6]

And so as to misconduct of officers of court.

[1] Jones, ex parte, 13 Ves. 237; Littler *v.* Thomson, 2 Beav. 129. See Whittem *v.* State, 36 Ind. 196.

[2] Wellesley, in re, 2 Rus. & M. 639.

[3] R. *v.* Clement, 4 B. & Ald. 218.

[4] Archbold's Q. B. Pract. *ut supra*, 1710; Pitman's case, 1 Curtis, 186; Robinson, ex parte, 19 Wall. 505; Woolley, in re, 11 Bush, 95. As illustrating the necessity of this check see supra, §§ 561 *et seq.* Resignation of officer does not divest power. The Laurens, 1 Abbott U. S. 302. But a publication by an attorney, after a case is ended, reflecting on the court, will not be punished as a contempt. State *v.* Anderson, 40 Iowa, 207. Otherwise, if the case be still pending. Woolley, in re, *ut supra*.

It was ruled in Robinson, ex parte, 19 Wall. 805, that the power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practise. But the power can only be exercised where there has been such conduct on the part of the party complained of as shows him to be unfit to be a member of the profession; and before judgment disbarring him can be rendered, he should have notice of the grounds of complaint against him and opportunity of defence.

[5] Willand, ex parte, 11 C. B. 544; Newberry, in re, 4 Ad. & E. 100; People *v.* Nevins, 1 Hill (N. Y.), 154; Smith, ex parte, 28 Ind. 47. This has been held in North Carolina to apply to publications by attorneys derogatory to court. Biggs, ex parte, 64 N. C. 202; Moore, ex parte, Ibid. 398.

[6] R. *v.* Harland, 8 Dowl. P. C. 328;

§ 954. If obstruction to the rendering of testimony can only be punished by indictment, then even an indictment for such misconduct could, by continuance of the misconduct, be defeated, and no redress could be obtained. Hence it is a contempt, punishable by commitment, for a witness not to attend when subpœnaed, or when under recognizance to attend;[1] for a witness, when attending, to refuse to be sworn;[2] for a witness, when sworn, to refuse to answer;[3] for a third party to induce another to take a false oath;[4] for a third party to endeavor to keep a witness from testifying,[5] supposing such witness to have been subpœnaed;[6] and for a witness, when ordered to leave the court during the examination of other witnesses, to remain in.[7] A justice of the peace, in some States, however, has no such power.[8]

And so as to obstruction to the rendition of testimony.

§ 955. If it would be necessary to prevent disorder in court that an indictment should be tried against the offender, no indictment could be tried against the offender on account of the disorder in court. Hence any disturbance in court is punishable by attachment and commitment.[9] So it is an attachable contempt for an acquitted prisoner to swear vengeance on the prosecuting witnesses within the precincts of the court;[10] for a person to use insulting language to another in the hearing of the officers of the court, and in its

And so as to disorder in the presence of court.

Yates v. Lansing, 9 Johns. 395. See Yates v. People, 6 Johns. 337.

[1] Whart. Crim. Ev. § 349; Archbold's Cr. Pl. (17th ed.) 291; 2 Wait's Prac. (1873) 722; Conkling's Prac. (6th ed.) 410; Day's Common Law Prac. (1872) 293, 311; Roelker, ex parte, 1 Sprague, 276; Burr's Trial, 354; Judson, ex parte, 3 Blatch. C. C. 89, 148; Peck, ex parte, 3 Blatch. C. C. 113; Langdon, ex parte, 25 Vt. 680; Walker, ex parte, 25 Ala. 81.

[2] U. S. v. Coolidge, 2 Gall. 364.

[3] U. S. v. Caton, 1 Cranch, 150; Day's Prac. (1872) 305, 311; People v. Kelley, 24 N. Y. 74; People v. Phelps, 4 Thomp. & C. 467; Holman v. Austin, 34 Tex. 668. This applies to justices of the peace. Paley on Convictions (1866), 329.

[4] Hull v. L'Eplattimer, 49 How. Pr. 500.

[5] Whittem v. State, 36 Ind. 196; but see Burke v. State, 47 Ind. 528; Haskett v. State, 51 Ind. 176; Whart. Crim. Law, 8th ed. § 1333.

[6] McConnell v. State, 46 Ind. 298.

[7] People v. Boscowitch, 20 Cal. 436. See supra, § 564, note.

[8] Rutherford v. Holmes, 5 Hun, 317; 66 N. Y. 368. Infra, § 963.

[9] Archbold's Q. B. Prac. (12th ed.) 1710; 6 Robinson's Practice, 698; U. S. v. Emerson, 4 Cranch, 188; Com. v. Wilson, 1 Phila. 88.

[10] U. S. v. Carter, 3 Cranch C. C. 423.

presence;[1] for the defendant to address the jury when ordered not to do so by the court;[2] for persons in court to apply insulting language to the court, or, in presence of the court, to its process.[3] So it is a contempt to assault a judge, during a recess of the court, for words said or action taken by him when sitting as judge.[4]

And so as to misconduct of, or tampering with, juryman.

§ 956. From the necessities of the case, it is a contempt, punishable by commitment, for a juryman to wilfully misconduct himself, when empanelled during the trial of a case, in such a way as to prevent a fair and decorous trial.[5] And it has been held to be a contempt of court to solicit a juror to give a signal after the jury have retired, to indicate whether they are likely to agree, so as to enable the party soliciting to make a successful bet on the question of agreement,[6] or in other ways to tamper with the jury.[7] The same rule has been applied to sending volunteer information to a grand jury.[8]

II. WHERE THE CONTEMPT CAN BE SUPPRESSED OTHERWISE THAN BY COMMITMENT.

Criticisms on case before court constitute contempt.

§ 957. This brings us to what is called constructive contempt; embracing partisan publications or speeches on a litigated issue; whether consisting in comments on the case, or remarks reflecting on judge, jury, or parties.

By the English law, for proceedings such as these an attachment for contempt may issue. "It is a special contempt, punishable by the committal of the contemner, to misrepresent the proceedings of the court, to abuse the parties to the cause, or to attempt to prejudice the mind of the public against them before

[1] U. S. *v.* Emerson, 4 Cranch C. C. 188.

[2] Tidd's Prac. (Phil. 1856) 860.

[3] Daniell's Chancery Prac. (1871) 387, note *i*, 936; Price *v.* Hutchinson, Law Rep. 9 Eq. 534; Robinson *v.* McElhane, 2 How. N. Y. Prac. 454; Hill *v.* Crandall, 52 Ill. 70.

In New York, under Rev. Stat., such act, to be a contempt, must involve contemptuous behavior during session of court. Bergh's case, 16 Abb. Pr. N. S. 266.

[4] State *v.* Garland, 25 La. An. 532.

[5] See supra, §§ 814-837; Offutt *v.* Parrott, 1 Cranch, 154; State *v.* Helvenston, R. M. Charlt. 48.

[6] State *v.* Doty, 32 N. J. L. (3 Vroom) 403.

[7] Supra, § 729.

[8] Supra, § 367.

its cause is decided, or to publish anything the evident result of which would be to affect the administration of justice." [1]

[1] Dan. Chan. Pr. 836.

As sustaining this we have an argument by Blackburn, J., delivered in 1873, in a conspicuous trial in the Queen's Bench. "Any case which is pending," said this learned judge (R. *v.* Skipworth, 12 Cox C. C. 377-8), "when in a civil or criminal court, ought to be tried by the ordinary means of justice, and in the present case there is an indictment against one of the persons before us which is now standing for trial. That case ought to be fairly tried, but it may happen that proceedings may occur such as have now called upon us to interfere. Sometimes the course is by attacking the judge; sometimes by attempting to induce him to alter his opinion, or to take a course different from that which he would otherwise take; more commonly, there is an attempt to influence the trial by attacking the witnesses or appealing to public justice, so as to prejudice the trial. In all these ways, great mischief may be done, interfering with the due and ordinary course of justice. When the attempt is by an act which is itself punishable, as conspiracy, libel, or assault, the party might, of course, be indicted for it; but the prosecution, though sufficient for the purpose of punishment, might be made greater (better?) for the purpose of prevention; the mischief might be done, and the administration of justice would be prevented or prejudiced. For that reason, from the earliest times, the superior courts of law and equity have exercised the jurisdiction of prosecuting such attempts by summary proceedings for contempt, and having that power, it is our duty, when the occasion comes, to exercise it." Hence, in a case closely related to that in which the opinion just quoted was delivered, after the Tichborne claimant, who had elected to be nonsuited in the ejectment brought by him to establish his right to the Tichborne estates, had been bound over for perjury, he united with some of his supporters in holding public meetings for the obtaining funds to support him in the trial for the latter offence. At these meetings, Messrs. Onslow and Whalley, members of parliament, made speeches imputing perjury and conspiracy to the witnesses for the defence on the trial of the ejectment, and prejudice and partiality to Chief Justice Cockburn, who they said had proved himself unfit to preside at the coming trial. The innocence of the claimant, and the injustice of the treatment to which he had been subjected, were also asserted. It was held by the Queen's Bench, in January, 1873, that this was a contempt subjecting the defendants to fine and imprisonment, but the defendants, disclaiming contempt, were merely fined. R. *v.* Onslow, 12 Cox C. C. 358. And see article in 2 London Law Mag. N. S. (1873) 164. Hence, in the case in which the above opinion of Blackburn, J., was delivered, and in which was adduced language strongly vituperative of the chief justice, and charging him with premeditating injustice in the then approaching Tichborne trial for perjury, the offender, declining to purge himself of the contempt, was imprisoned as well as fined. R. *v.* Skipworth, 12 Cox C. C. 371; Whart. Crim. Law, 8th ed. § 1853.

In State *v.* Anderson, 30 La. An. 557; 1 Southern Law Journal, 183, we have the following opinion of the Supreme Court as to certain publications by officers of the federal govern-

§ 958. In harmony with this view it has been held a contempt to publish *ex parte* extracts from evidence or pleadings;[1] and for a party to an issue in chancery to write to a master in chancery a grossly insulting letter in reference to the master's conduct in the case.[2] And the rule has been applied to publications affecting not only questions to come before juries, but issues pending before judges sitting without juries.[3] The same doctrine has been not infrequently held in the United States,[4] though in most of the

And so as to other publications interfering with due course of justice.

ment in reference to the case then pending: —

"A few years ago — it was within the present decade — a member of the British parliament undertook to influence the course of a public prosecution, then pending in an English court, against a fraudulent claimant of the honors and estates of an ancient house. The criminal trial there, as here, had been preceded by a civil proceeding, and both were of unexampled duration, so that the question, who was the rightful heir of the Tichborne family, had extended beyond the legal circle, and had invaded social and political life. When the unwarrantable publication had been made by the member of parliament under his own signature, in which he had endeavored to bring opprobrium upon the court and its officers by charging that the claimant was falsely accused and maliciously prosecuted, the lord chief justice, Cockburn, promptly repressed his impertinent though not interested zeal by inflicting upon him a fine of £250, and sentenced him, in default of payment, to imprisonment in the county jail. He went to jail, and there remained until a relation released him by paying his fine. On the reassembling of parliament at its next session, the judge formally communicated his action to the House of Commons, that it might be officially known he had not wantonly invaded its privileges, and that body, ever watchful over the inviolability of those privileges, silently approved the judge's vindication of the sanctity of his court. Public opinion, in this instance and in this country, can alone exercise that punitive power, the employment of which is equally well merited on both occasions."

[1] Cheltenham, &c. Railway Co. in re, Law Rep. 8 Eq. 580; in which case a petition in a suit for winding up a company, on ground of fraud, was published by a newspaper before the hearing of the petition, and this was held by Vice Chancellor Malins to be a contempt. But it is not a contempt publicly to solicit subscriptions for the defence of a defendant on a pending criminal charge. R. *v.* Skipworth, 12 Cox C. C. 371.

[2] Charlton's case, 2 My. & Cr. 316.

[3] Daw *v.* Eley, L. Rep. 7 Eq. 49; Tichborne *v.* Mostyn, Law Rep. 7 Eq. 55; Macartney *v.* Corry, Irish R. 7 C. L. 242.

[4] Hollingsworth *v.* Duane, Wall. C. C. 77; U. S. *v.* Duane, Wall. C. C. 102; Tenney, ex parte, 23 N. H. 162. See 1 Hawley's Cr. R. 143; Sturoc, matter of, 48 N. H. 428; State *v.* Matthews, 37 N. H. 450; People *v.* Freer, 1 Caines, 518; Res. *v.* Passmore, 3 Yeates, 441; Oswald's case, 1 Dall. 319; Biggs, ex parte, 64 N. C. 202; State *v.* Morrill, 16 Ark. 384; Stuart *v.* People, 3 Scammon, 405.

States statutes have been enacted divesting the courts of such power.[1]

§ 959. We should remember, however, that summary commitment is a process only to be used when no other remedy can protect public justice from obstruction.[2] For a judge, who supposes himself insulted, to fine and imprison his supposed insulter, may be necessary, as where the insult is in open court, and is of such a character that unless it is summarily stopped and punished the court cannot proceed with its duties; but to enable a judge to punish by summary procedure contempts other than those just mentioned is to set at naught, without adequate reason, some of our highest constitutional sanctions. Such a process dispenses with a grand jury. It inflicts punishment without conviction of a petit jury. It permits the party who supposes himself injured to be the tribunal which binds over, finds the bill, decides both law and fact,

But summary commitment only to be used when necessary.

[1] By the Act of Congress of March 2, 1831 (Brightly U. S. Dig. 189), "the power of the several courts of the United States to issue attachments and inflict summary punishment for contempt of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of the said courts in their official transactions; and the disobedience or resistance by an officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of court." See Poulson, ex parte, 15 Haz. Pa. Reg. 380. The statutes of many of the States are in similar terms.

In a remarkable case before the Supreme Court of Illinois, sitting in Ottawa, Illinois, in November, 1872, a majority of that court held that it was a contempt to publish in a Chicago newspaper an article which, in speaking of a criminal case then pending in error before that court, said that the defendant would be granted a new trial, sentenced to imprisonment, and then pardoned, "because the sum of $1,400 is enough, nowadays, to enable a man to purchase immunity from the consequences of any crime." People v. Wilson, 64 Ill. 195. Ably, however as is the question argued by Lawrence, C. J., and by the majority of the court, and great as is the respect due to Lawrence, C. J., for the independent and bold stand taken by him in this and other points regarding the dignity of the judiciary, the conclusion reached cannot be here accepted for the reasons stated in the text. In the same State, since the repeal of the statute defining the power, it has been held that the courts continue to hold the usual common law powers, but will not exercise them as to publications which do not obstruct courts in the exercise of their functions. Storey v. People, 79 Ill. 45.

[2] See Hirst, in re, 9 Phila. 216; State v. Anderson, 40 Iowa, 207.

convicts, and sentences. We are also told, though as will be seen erroneously, by those who advocate the prerogative to its full extent, that the process is subject neither to writ of error, nor to revision by *habeas corpus*, nor pardon.[1] But the prerogative rests on a vicious line of reasoning. The supposed contempt is such that the judge will or will not be intimidated or swerved by it in the discharge of his duty. If not, then there is no reason for such an extraordinary remedy. If otherwise, then for the judge to confess his weakness in this respect, and to make this confession in so conspicuous a way, is at least as injurious to public justice as is the publication in which the objectionable matter is contained. But there is another view beyond this. We can conceive not only of a weak judge who dreads intimidation, but of a corrupt judge who dreads exposure. To give a bad and bold man of this class an engine so potent as this, is to take away one of the few means by which he can be exposed. Certainly a prerogative so violent and so damaging should not be exercised except in case of necessity.

In cases of this class an ordinary prosecution is the better course.

§ 960. But is such engine, in cases such as those we now contemplate, necessary? Would not a binding over for trial, or a binding over to keep the peace, in each of the above mentioned cases, afford a sufficient remedy? Suppose the case to be one of such criticism on a pending case as is calculated to interfere with a due discharge by court or jury of their respective duties, or to prevent, by fanning a public excitement on the subject, a fair trial. In such case the law of libel may be invoked; and by that law it is indictable not only to comment on a pending case, but to publish *ex parte* extracts from the record or evidence.[2] Our ordinary

[1] See supra, § 530; infra, §§ 974, 999.

[2] See Whart. Crim. Law, 8th ed. §§ 1637 *et seq.*

On this topic Mr. Livingston (Report on Louisiana Code) thus speaks: "It is a trite, and, therefore, probably a true observation, that men forgive injuries much sooner than insults. Judges (although by vesting them with this power we treat them as angels) are men; their passions will be more readily roused by real or fancied insults than they would be by injuries, and nothing can be more at war with justice than passion. Another evil — there is no end to them — is, that, from the nature of the crime, its existence must depend on the temper of the judge who happens to preside. Words which a man of a cool and considerate disposition would pass over without notice, might trouble the serenity of another more suscep-

constitutional remedies are, therefore, sufficient to punish and silence such offenders. The defendant can be arrested and held to bail, or, in default of bail, committed to prison; and if the offence be repeated, and he be at large, the bail can be increased. Or suppose the offence to consist in attempts, out of court, to influence the jury. Here the offender is indictable for embracery, and can be arrested and bailed or committed for this offence.[1] Or suppose the case to consist in slanderous words addressed to the court. If this is during a trial, then a commitment for contempt is necessary, for otherwise no trial, not even that for insti-

tible in his feeling, or irritable by his nature. There is no measure for the offence, but the ever variable one of the human mind. The judge carries the standard in his own breast; and if by close observation you have discovered its probable dimensions, your work is but begun, for every succeeding magistrate has his own scale for the weight of an offence, his own measure for the extent of the punishment.

"A recurrence to the great principle of self-defence, which we have in a former part of this report developed, will serve to show with some certainty, as it is thought, to what extent this power is necessary or proper. Society has, if our reasoning be correct, the right of self-defence. Every department created by that society for its government, every individual composing that society, has the same right, defined to mean the right of defending existence and the operations necessary to existence. But society, as the superintending power, must have, for the purpose of securing these and all other rights belonging to departments and to individuals, the further power to punish. Society alone has this right. Try the law of contempts by this simple rule. Courts of law are the organs of one of the departments of society, and, to avoid confusion, we will select for our example courts of exclusively civil jurisdiction; such courts have the right to defend their own existence, and to repress everything that interferes immediately with the exercise of their legal powers. They have this right, as a legitimate part of society, by the principles of natural law; and if it be curtailed by any constitutional provision, it is a great defect, because self-preservation very frequently requires immediate efforts that would make an application to any other power ineffectual. Everything, then, that is necessary and proper to defend its existence, and secure the free performance of its functions, can with no greater propriety be denied to a court than there would be in forbidding an individual to defend his life against the attack of an assassin. But neither the court nor the individual have necessarily the right to punish, either after the attempt has been repelled or after it has been carried into execution. That is the duty and the right exclusively vested in the whole society. An individual has the right to defend himself against an attack upon his liberty or life; but after he has successfully resisted it, he has no right to punish; yet liberty and life are considered as sufficiently protected by this limited power."

[1] Infra, § 966.

tuting criminal proceedings to prevent such misconduct, could go on. But if the slanderous language be not used during trial, nor in the court-room or its approaches, then it can be sufficiently punished, and its repetition sufficiently guarded against, by an arrest and binding over for trial, or an arrest and binding over to keep the peace. For it is an indictable offence to address slanderous words to a magistrate;[1] and independently of this, an offender of this class may be bound over to keep the peace, and placed under bonds sufficiently heavy, if not to compel good behavior, at least to incarcerate him as completely as if he were imprisoned for contempt. But a binding over to keep the peace has none of the distinctive objections by which commitments for contempt are beset. In such a binding over, the State is the prosecutor, and not the offended judge. The proceedings are not inquisitorial, as is the case with contempt, but the defendant meets the witnesses against him face to face. The writ of *habeas corpus* is open in such case as a remedy, while its application to commitments for contempt is contested where the committing court has jurisdiction.[2] The remedy by binding over, while equally efficacious, is less harsh, and not likely to awaken that public sympathy which often, unconsciously, arises for one who is summarily punished by high prerogative.[3] And while the common law process of binding over gives all due protection to the citizen, that of commitment for constructive contempt may be pleaded, as will presently be seen, as a precedent for incarceration, unrelievable by *habeas corpus*, of those whose criticisms may be deemed contemptuous by legislature if not by executive.

Danger of depositing such power in courts.

§ 961. It may well be asked why, if such an extreme remedy is necessary in case of the judiciary, is it not in case of the executive? The executive, in cases of application for pardon, exercises a semi-judicial function, in which, equally with the judge trying the case, it is important

[1] Whart. Crim. Law, 8th ed. § 1614.

[2] See infra, § 999.

[3] In re Clements (36 L. T. Rep. N. S. 332), Sir George Jessel said: "This jurisdiction of committing for contempt, being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised with the greatest anxiety on the part of the judge to see that there is no other mode which is not open to the objection of arbitrariness, and, to a certain extent, unlimited power, which can be brought to bear upon the subject."

that he should be kept free from the influences of fear, favor, or affection. The executive, when dealing with great questions of war, or almost equally great questions of currency expansion or contraction, should be in an eminent degree superior to the clamor of ignorant or timid or fanatical declaimers, and to the false public sentiment generated by desperate speculators, and even to the true public sentiment generated by a real but baseless panic. Who, however, would consider it consistent with either law or liberty for the executive to summarily arrest and imprison, without the relief of bail, without the interposition of a responsible prosecutor, without examination of witnesses, without the right of subsequent revision by *habeas corpus*, those from whom such publications should issue? Or, to take an alternative still more applicable, is such a prerogative safely to be claimed for the legislature? The legislature is coördinate in power and dignity with the judiciary. The legislature, either federal or state, has no doubt power to punish summarily for contempts by which the exercise of its distinctive functions is physically impeded; but can we rightfully claim for the legislature, power to commit summarily persons criticising, no matter how unfairly or corruptly, measures over which it is still deliberating? But if the exercise of such a power is not permitted to executive or legislature, why should it be conceded to the judiciary? Or, if so conceded to the judiciary, why should we withdraw from the prerogative those general considerations of policy already noticed,[1] which, while retaining for libels common law prosecutions, invoke, in the institution of such prosecutions, peculiar caution, tenderness, and reserve? But however these questions may be determined, two points remain: first, the doctrine of constructive contempt is of recent introduction, not being part of the common law brought with them to this country by our colonists;[2] and, secondly, it is a violent rem-

[1] Whart. Crim. Law, 8th ed. § 1611.

[2] No English case for constructive contempt is reported prior to the American Revolution. The earliest case in which the question arose was that of the printer Almon, proceeded against in 1765, for contempt of court, in publishing an attack on the chief justice, imputing improper and corrupt conduct in his office, and in whose case Sir E. Wilmot, one of the judges, prepared an elaborate judgment vindicating the punishment of the printer by fine and imprisonment, — a judgment, however, never delivered, the proceedings being aban-

edy, justifiable only in cases not reached by bindings over to keep the peace, or bindings over for trial.[1]

doned, and the publication of the proposed judgment, in Sir E. Wilmot's opinion, being, as is stated, without his sanction. So far as concerns inferior courts, the jurisdiction, as will presently be seen, is now expressly denied by the English Queen's Bench, and so far as concerns superior courts, it is justified by Cockburn, Ch. J., only on the fiction of the presence of the sovereign in such courts. "The power of committing for contempts committed in the face of the court is given to inferior courts, but they had not power so to punish contempts committed out of court. There is an obvious distinction between inferior courts created by statute, and superior courts of law or equity. In these superior courts the power is inherent in their constitution, has been coeval with their original institution, and has been always exercised. The origin can be traced to the time when all the courts arose as divisions of the *curia regis* — the Supreme Court of the sovereign, in which he personally, or by his immediate representative, sat to administer justice. The power of the courts in this respect was an emanation from the royal authority, which, when exercised personally, or in the presence of the sovereign, made a contempt of the crown punishable summarily, and hence the power passed to the superior courts when they were created. It is a very different thing when we come to the inferior courts, which have never exercised this power, or have never been recognized as possessing it, and we think in those courts it does not exist." R. *v.* Lefroy, L. R. 8 Q. B. 134, as stated in the London Times of February 1, 1873. A late writer in Notes and Queries gives an interesting sketch of the early history of the offence. "In the collection of laws of Henry I. it is called *contemptus brevium*, or contempt of the king's legal writs. At that time contempt of court was punished with a fine. A remarkable fact in connection with the subject is, that the method of the punishment has become more summary in the later times. In the reign of Henry II., mere disrespect or disturbance was not visited with immediate severity, but the offender was formally indicted. A case has come down to us in which one of the king's judges was insulted, and this method was pursued. The present process of attachment or arrest was only employed in cases where there had been disregard of the legal writs of the court. An early, although scarcely an authentic case of contempt of court, is afforded by the commitment of the Prince of Wales, by Chief Justice Gascoigne, in the reign of Henry IV. As a point of special interest at the present time it may be remarked that efforts to influence jurors were never deemed contempt, but were indictable as a common law offence, known as 'embracery of jurors.'"

[1] As sustaining this view, but in marked conflict with other English cases, see R. *v.* Gilham, M. & M. 165, where it was held by Littledale and Gaselee, JJ., that it was not a contempt, which the judge could interfere to stop, to exhibit in an assize town an inflammatory publication respecting a crime about to be tried in the assizes.

III. BY WHOM SUMMARY COMMITMENTS FOR CONTEMPT MAY BE ISSUED.

Superior courts have power to issue common law commitments.

§ 962. That superior courts have the usual common law power in this respect has been already seen. However this power may be limited, in courts of this class it unquestionably resides.[1]

Other courts limited to contempts in their presence.

§ 963. Inferior courts, justices, and commissioners, are limited, in the issue of summary commitments, to contempts committed in their presence, unless ampler powers be given them by the legislature.[2] Commissioners in the United States Circuit Courts have not

[1] See People *v.* Phelps, 4 Thomp. & C. 467; as to Connecticut see Middlebrook *v.* State, 43 Conn. 257.

In Robinson, ex parte, 19 Wall. 505, it was held that the power is inherent in the courts of the United States; but that the Act of Congress of March 2, 1831, entitled "An Act Declaratory of the Law concerning Contempts of Court," limits the power of the Circuit and District Courts of the United States to three classes of cases: 1st. Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d. Where there has been misbehavior of any officer of the courts in his official transactions; and, 3d. Where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. It was further ruled that the 17th section of the Judiciary Act of 1789, in prescribing fine or imprisonment as the punishment which may be inflicted by the courts of the United States for contempts, operates as a limitation upon the manner in which their power in this respect may be exercised, and is a negation of all other modes of punishment.

[2] R. *v.* Lefroy, L. R. 8 Q. B. 134; Hollingsworth *v.* Duane, Wall. C. C. 79; Clark *v.* May, 2 Gray, 410; Cartwright's case, 114 Mass. 230; Watson, in re, 3 Lans. 408; Kerrigan, in re, 4 Vroom, 344; State *v.* Galloway, 5 Cold. 326; State *v.* Applegate, 2 McCord, 110. In R. *v.* Lefroy, *ut supra*, Cockburn, C. J., said: "We are all of opinion that there must be a prohibition, because a county court judge has no authority to punish a person for contempt not committed in the face of the court. It is true it is laid down by high authorities that every court of record has power to fine and imprison for contempt committed in the face of the court while the court is sitting in the administration of justice. Such a power is obviously necessary for the conduct of public justice and the administration of the law, which may otherwise be interrupted or obstructed unless there is a power to repress such outrages. But it is a very different thing to say that a court shall have power to fine and imprison for contempts not committed in the face of the court, and not amounting to an actual obstruction of

even the power to commit a non-answering witness for contempt. The process must be asked for from the circuit judge.[1] Nor can Congress give them the power.[2]

In Pennsylvania, a justice of the peace, at common law, has not power to commit even for direct contempt. His course, if there be such contempt, is to remit the case to the proper court, in order to obtain the action of such court.[3] A similar view is maintained in New Jersey, where the power is denied to a recorder of a city who is invested with the powers of a justice of the peace.[4] In England, however, the right to commit for con-

its proceedings, but only in the public use of contumelious language, or the publication of articles or comments reflecting on the conduct of the judge. . . . . We need not, however, go so far as that in the present instance; for the statute under which the county courts are constituted, itself points out what is the extent of the power to deal with contempt which the legislature intended to confer upon these courts. The statute provides that in case of certain contempts, either committed in court, or by way of obstruction to the members or officers of the court, a certain power of fine and imprisonment may be exercised. If the county courts in other cases possessed the same power as the superior, there would be this anomaly — that for contempts, however gross, committed in the face of the court, there could only be a small fine or imprisonment, while for other contempts out of court, the sentence might be indefinitely increased. We must understand the legislature, therefore, as intending that the only instances in which the county court judges should have power to punish for contempt are those specified. There has, therefore, been here an excess of jurisdiction, which must be restrained, and the prohibition must be issued." Mr. Justice Quain was of the same opinion. "A judge of an inferior court could only punish for contempt committed in the face of the court. The power to punish for contempt committed out of court had been vested in the superior courts from their very constitution; but it had never been exercised by inferior courts, nor was there any good reason why they should have such power, while there were very strong reasons why they ought not. It was a power to the courts to judge in their own case, and such a power ought not to be conferred upon inferior courts. It was exercised by the superior courts under the greatest possible sense of responsibility; but to confer such a power upon some sixty judges sitting about the country would be very dangerous and detrimental to the due administration of justice. In this case, therefore, there had been an excess of jurisdiction, and the county court judge must be restrained by prohibition."

[1] Judson, in re, 3 Blatch. 148.

[2] Doll, ex parte, 27 Leg. Int. 20; S. C., 11 Int. Rev. Rec. 36; and see Gorman, ex parte, 4 Cranch, 572.

[3] Brooker *v.* Com. 12 S. & R. 175; Albright *v.* Lapp, 26 Penn. St. 99; though by statute (Brightly, 273) the power is given to the justices in Alleghany County.

[4] Kerrigan, in re, 4 Vroom, 344.

tempts in *facie curiae* is reserved to justices;[1] and such is the practice in several of our own States.[2]

So as to legislatures.

§ 964. No doubt sovereign legislatures (*e. g.* the houses of Congress and of state legislatures) have the power to commit for contempts taking place in their presence, or for disobedience to their orders, though this does not include the right to summarily punish the authors for contemptuous or libellous censures on their proceedings.[3] But the power of committal for contempt under any circumstances does not belong to inferior legislatures, such as town councils or town meetings. The remedy for disturbance in such case is binding over to keep the peace, or indictment for disturbing a meeting.

IV. INDICTABILITY OF CONTEMPTS: EMBRACERY.

Interference with public justice indictable.

§ 965. It has been already noticed that attempts to interfere with the production of evidence in a case are indictable at common law.[4] It is also clear that all disorder in a court-room, and all attempts, forcible or fraudulent, to interfere with or prevent the due course of public justice, are in like manner indictable. So, by the better opinion, is insolent, or abusive, or corrupt language addressed to a justice of the peace when in the execution of his office.[5] Whether at-

[1] Paley on Convictions (1866), 329.

[2] State *v.* Towle, 42 N. H. 540; Hill *v.* Crandall, 52 Ill. 70; Robb *v.* McDonald, 29 Iowa, 330. As to New York, the power is said to exist in justices at common law. Cowen's Treatise, § 1334. For this Mr. Cowen cites Mather *v.* Hood, 8 Johns. R. 44; and Richmond *v.* Dayton, 10 Johns. R. 393, — cases, however, which only go to the justices' right to convict of forcible entry, and to bind over for good behavior in case of disorder. The right can now only be exercised in the cases specified by statute. People *v.* Webster, 3 Parker C. R. 503. The statute gives the power to justices in cases where witnesses refuse to answer questions, and when there is a prior oath as to the materiality of the question. Rutherford *v.* Holmes, 66 N. Y. 368; S. C., 5 Hun, 317.

In Illinois neither police magistrates nor justices have this power. Newton *v.* Locklin, 77 Ill. 103. As to Alabama see State *v.* McDuffie, 52 Ala. 4.

[3] 6 Robinson's Practice, 694; Anderson *v.* Dunn, 6 Wheat. 204; Stewart *v.* Blaine, 1 McArthur, 453; Nugent, ex parte, 1 Am. L. J. 107; Burnham *v.* Morrissey, 14 Gray, 226.

[4] Whart. Crim. Law, 8th ed. § 1333.

[5] Supra, § 203; Whart. Crim. Law, 8th ed. § 1616. See R. *v.* Lefroy, cited supra, § 963, in which case Mellor, J., said "that judges of inferior courts have protection, by way of criminal information, in cases of imputations upon their character or conduct

tempt to intimidate or cajole a judge is indictable has been doubted; though it is clearly ground, on reasoning already given, for a binding over to good behavior.

So with *embracery*, or improper interference with jury.

§ 966. By the common law it is an indictable offence to approach jurymen for the purpose of intimidating or influencing them.[1] Under the title of *embracery*, such attempts have been treated as forming a substantive offence, independent of the question of success.[2] By a statute of the United States the offence has in the federal courts a specific penalty.[3]

V. PRACTICE.

In cases in face of court rule may be made instantly returnable.

§ 967. When a contempt, punishable by summary commitment, takes place in the face of the court, the court may order a rule on the offender, returnable instanter, to show cause why he should not be committed; though sometimes the rule to show cause is dispensed with, and the offender simply required to purge himself or stand committed. No evidence need in such case be taken.[4] And in case of the offender absconding, the court may sentence him at any time during the term when he is brought back.[5]

Otherwise as to contempts not in face of court.

§ 968. For contempts not in *facie curiae* a rule to show cause is necessary, and affidavits must be produced, or information presented by the proper officer, to prove the facts. The defendant then, and not till then, is called upon to purge himself from the contempt.[6]

calculated to affect the administration of justice. And it was not thought necessary to give them greater power." To same effect see remarks of Woodward, J., in Albright *v.* Lapp, 26 Penn. St. 99.

[1] Supra, §§ 338, 367, 958.

[2] Supra, §§ 367, 729; Whart. Crim. Law, 8th ed. § 1858; 1 Hawk. b. i. c. 85; Whart. Prec. 1022; State *v.* Sales, 2 Nev. 268.

[3] Supra, § 729.

[4] 4 Bl. Com. (Wend. ed.) 283 *et seq.*; U. S. *v.* Wayne, Wall. C. C. 134. See Durant *v.* Wash. Co. 1 Woolw. 377; Com. *v.* Snowdon, 1 Brewst. 218.

[5] See Middlebrook *v.* State, 43 Conn. 257.

[6] R. *v.* Onslow, 12 Cox C. C. 358; R. *v.* Skipworth, 12 Cox C. C. 371; R. *v.* Lefroy, L. R. 8 Q. B. 134; Judson, in re, 3 Blatch. 148; Lee *v.* Chadwick, 11 Int. Rev. Rec. 133; Stanwood *v.* Green, Ibid. 134; 3 Am. Law T. Rep. 133; Hollingsworth *v.* Duane, Wall. C. C. 141; Whittem *v.* State, 36 Ind. 196; McConnell *v.* State, 46 Ind. 298; Burke *v.* State, 47 Ind. 528; Batchelder *v.* Moore, 42 Cal. 412. See Whart. Crim. Ev. § 350.

§ 969. The process, in the hearing, is inquisitorial, in so far that it calls upon the defendant to purge himself from the contempt. If disrespect is disavowed or apologized for, and reparation, in proper cases, made, then the punishment is mitigated, or made nominal, on payment of costs.[1] So far as concerns *intent*, evidence contradicting that of the witness purging himself cannot be received.[2]

Hearing may be inquisitorial.

V. PUNISHMENT.

§ 970. Where, as in case of a witness not attending through inadvertence, no contempt is intended, and the offence is purged, the court may sentence simply to payment of costs, and require recognizances for good behavior.[3] The court has power, however, as has been seen, to fine and imprison; and in case of attorneys, to strike their names from the roll, or suspend them for a fixed period.[4] No bail, after commitment, it has been said, can be received;[5] but this must be qualified by the position that the court can order bail for good behavior as a substitute for commitment.[6]

Court may fine and imprison.

§ 971. A commitment for contempt, when imposed as a punishment, must be for a fixed period; otherwise it is void. It is otherwise, however, when the commitment is to enforce a particular duty (*e. g.* to testify), in which case the imprisonment may be directed to continue until the duty be performed.[7]

Commitment must be for fixed period.

[1] See, as illustrating practice, R. *v.* Onslow, 12 Cox C. C. 358; Beebee, ex parte, 2 Wall. Jr. 127; U. S. *v.* Scholfield, 1 Cranch, 130; Davis *v.* Sherron, 1 Cranch, 287; People *v.* Few, 2 Johns. R. 290.

[2] U. S. *v.* Dodge, 2 Gall. 313.

[3] U. S. *v.* Caton, 1 Cranch, 150. As to practice in respect to perjury see Brinkley *v.* Brinkley, 47 N. Y. 40; Wells *v.* Com. 21 Grat. 500.

[4] Stephens *v.* Hill, 10 M. & W. 28; Smith *v.* Matham, 4 D. & R. 738. See supra, § 953.

[5] Kearney, ex parte, 7 Wheat. 38; but this rests on the limited appellate power of the U. S. Supreme Court.

[6] See U. S. *v.* Caton, *ut supra*; People *v.* Bennett, 4 Paige, 282.

[7] Supra, §§ 70 *et seq.*; Williamson's case, 26 Penn. St. 23; Com. *v.* Small, Ibid. 42.

Under the federal statute the court imposing a fine for contempt will not remit it, this being solely a matter belonging to the pardoning power, until the executive, on being appealed to, finally refuses to exercise jurisdiction over the matter. Mullee, in re, 7 Blatch. 23; 3 Op. Atty. Gen. 622; 4 Ibid. 458; 5 Ibid. 579. See Kearney, ex parte, 7 Wheat. 38.

§ 972. The *fine* goes to the State; not to any party injured.[1] But it seems that to the fine may be added the plaintiff's counsel fees and costs incurred in resistance of the application.[2]

Fine goes to State.

VII. CONVICTION ON SAME FACTS NO BAR TO PROCEEDINGS FOR CONTEMPT, AND SO OF CONVERSE.

§ 973. Contempt is not barred by other procedure, based on injuries inflicted by the contemptuous act on third parties,[3] the reason being that the personal injury and the contempt, having different juridical relations, each with a distinct penalty, have distinct punishments.[4]

Contempt not barred by other procedure.

VIII. APPEAL, ERROR, AND PARDON.

§ 974. From the high and extreme prerogative that commitment for contempt involves, it is right that when exercised by an inferior court it should be the subject of revision by a superior court, whenever the record can be removed or the issue in any way transferred, either in the way of appeal, or by writ of error. Such is the sound opinion;[5] though where there is no statutory mode of revisal, and the record does not show the facts, the attempt thus to review must necessarily fail.[6] Yet, where there is no process of

When on record, process may be revised in error.

[1] Mullee, in re, 7 Blatch. C. C. 23; Rhodes, in re, 65 N. C. 518; Morris v. Whitehead, 65 N. C. 637.

[2] Doubleday v. Sherman, 8 Blatch. C. C. 45.

[3] Supra, § 444.

[4] See also State v. Woodfin, 5 Ired. 199; State v. Williams, 2 Speers, 26; and see Middlebrook v. State, 43 Conn. 257, for case of modification of sentence.

[5] Langdon, ex parte, 25 Vt. 680; Clarke v. May, 2 Gray, 410; Yates, ex parte, 6 Johns. R. 337; Albany Bk. v. Schermerhorn, 9 Paige, 372; People v. Kelly, 24 N. Y. 74; Pitt v. Davison, 37 N. Y. 235; Hummell, in re, 9 Watts, 416; Com. v. Newton, 1 Grant, 453; Balt. & Oh. R. R. v. Wheeling, 13 Grat. 40; Summers, ex parte, 5 Ired. 149; Cabot v. Yarborough, 27 Ga. 476; Bickley v. Com. 2 J. J. Marsh. 572; Stuart v. People, 3 Scam. 395; Jilz, ex parte, 64 Mo. 205; Rowe, ex parte, 7 Cal. 175; Jordan v. State, 14 Texas, 436. Compare Whittem v. State, 36 Ind. 196, where this view is ably vindicated (though see Burke v. State, 47 Ind. 528); Stokely v. Com. 1 Va. Cas. 330; Howard v. Durand, 36 Ga. 346, where it is said there is an appeal for abuse of discretion. In People v. O'Neill, 47 Cal. 109, it was held that the action of the court below was always reversible for want of jurisdiction.

[6] See, for cases of this, Kearney, ex parte, 7 Wheat. 38; Cooper, in re, 32 Vt. 258; Maulsby, ex parte, 13

appeal, the inferior court may be restrained from proceeding by injunction or prohibition.[1]

Commitments for contempt cannot be reviewed by a coördinate court on *habeas corpus;*[2] though it is held that a federal court may review on *habeas corpus* such a commitment by a state court, when in violation of a federal statute or constitutional sanction.[3]

§ 975. *Pardon*, it has been already noticed, has been held not to release from imprisonment for contempt, though the better opinion is to the contrary.[4] It should be added that the right to pardon and remit has been claimed, in contempts committed in the federal courts, by the President of the United States.[5]

Pardon does not usually release.

Md. 625; Gates *v.* McDaniel, 4 Stew. & P. 69; Adams, ex parte, 25 Miss. 883; State *v.* Thurmond, 37 Tex. 340.

[1] R. *v.* Lefroy, L. R. 8 Q. B. 134, cited fully supra, § 963, note.

[2] People *v.* Jacobs, 66 N. Y. 8; Haines *v.* Haines, 35 Mich. 138; Shattuck *v.* State, 51 Miss. 50; but see more fully infra, § 999.

[3] Infra, §§ 981, 991.

[4] Supra, § 530.

[5] See remarks of Blatchford, J., 7 Blatch. 25; and see State *v.* Sauvinet, 24 La. An. 119. Supra, § 530.

CHAPTER XXI.

HABEAS CORPUS.

Writ available at any stage of imprisonment, § 978.
Cannot be suspended by President or governor, § 979.
State court cannot discharge from federal arrest, § 980.
Federal courts may review state arrests, § 981.
Petition to be verified by affidavit, § 982.
May be applied for by next friend, § 983.
To be directed to custodian and to be served personally, § 984.
Notice to be given to prosecution, § 985.
Writ not granted when relator should be remanded, § 986.
Relator, if in custody, must be produced immediately in court, § 987.
Causes of detention must be returned, § 988.
Return must not be evasive, § 989.
Writ to be enforced by attachment, § 990.
Return may be controverted, § 991.
Discharge from defects of process; and so in cases of oppression, § 992.
Writ may test extradition process, § 993.
Writ may obtain redress from void sentence, § 994.
but cannot overhaul indictment or final judgment, § 995.
cannot collaterally correct errors, § 996.
Military judgments cannot be thus reviewed, § 997.
Nor summary police convictions, § 998.
Nor committals for contempt, § 999.
Court determines questions of fact, § 1000.
Probable cause enough, § 1001.
Evidence not excluded on technical grounds, § 1002.
Remitting evidence by *certiorari*, § 1003.
Affidavits may be received, § 1004.
No discharge for technical defects or variance, § 1005.
Discharge from pardon or limitation, § 1006.
Adjustment of bail, § 1007.
Judgment must be discharge or remander, § 1008.
During hearing custody is in court, § 1009.
No writ of error at common law, § 1010.
How far discharge affects subsequent arrest, § 1011.

Writ available at any stage of imprisonment.

§ 978. THE writ of *habeas corpus*, while the first, is also the last process to which an arrested person can resort for the purpose of having his case tested by a court of justice; and a brief summary of the law in this relation may not improperly close the present volume. The writ is one of the high prerogatives of the people as a sovereign, and its object is to enable any person within the territorial limits of the State, alien or subject, no matter what may be the disabilities or infamy under which he labors, to obtain at any period the judgment of a judicial tribunal as to the legality of an imprisonment in which he may be detained. The origin and

history of the statute providing this writ, however, are beyond our present province; and it is equally out of our range to discuss the cases in which the writ may be used to obtain adjudications on the lawfulness of custody other than that imposed by criminal process. To the writ as a mode of obtaining relief from an arrest under a criminal charge our attention must be confined.[1]

Writ cannot be suspended by President or governor.

§ 979. It is not within the constitutional power of the President of the United States to suspend the operation of the writ, or to authorize such suspension by a military officer. The prerogative of suspending the writ belongs exclusively to Congress.[2] Nor is this function

[1] That the right is by common law see Besset, in re, 6 Q. B. 481. To the same effect is Lord Mansfield's speech in the House of Lords, June, 1758; Campbell's Chief Justices, ii. 453; and Taney, C. J., in Merryman's case, infra. Compare 1 Pomeroy's Archbold, 199 *et seq.*

[2] Merryman, ex parte, Taney, 246; Benedict, in re, Hall, J., Pamph. N. Y. 1862; McCall *v.* McDowell, 1 Abb. U. S. 212; Griffin *v.* Wilcox, 21 Ind. 370; Kemp *v.* State, 16 Wis. 359.

On the topic in the text the following pamphlets may be consulted: —

(1.) Opinion of U. S. Atty. Gen. on the Suspension of the Writ of Habeas Corpus. Wash. 1861.

(2.) Habeas Corpus and Martial Law. By Joel Parker. 1861. Judge Parker here argues that in times of war, "whether foreign or domestic, there may be justifiable refusals to obey the command of the writ, without any act of Congress, or any order or authorization of the President, or any state legislation for that purpose." This, however, does not arise from the President's power to suspend the writ, which he cannot constitutionally do, but from the coördinate jurisdiction of the military authorities.

(3.) The Privilege of the Writ of Habeas Corpus under the Constitution. By Horace Binney. Second edition. Philadelphia: C. Sherman & Son. 1862. In this pamphlet Mr. Binney holds that there is nothing in the constitutional clause "which either directly or by any fair or reasonable implication gives or confines this authority (that of suspension of the writ) to Congress, or takes it from the executive" (p. 31); and an elaborate reply is attempted to Chief Justice Taney's opinion in Merryman's case. A "second part" to the same pamphlet was published by Mr. Binney in the same year, the object of this publication being to "confront a doctrine of certain writers that the *habeas corpus* clause in the Constitution does not give power to anybody to suspend the privilege of the writ, but is only restrictive of the otherwise plenary power of Congress." This pamphlet is a reply to the answers which Mr. Binney's first pamphlet drew forth.

(4.) The Law of War and Confiscation. By S. S. Nicholas. Louisville, 1862.

(5.) Review of Binney on the Habeas Corpus. By J. C. Bullitt. Philadelphia, 1862.

(6.) Remarks on Mr. Binney's

vested in the governor of a State, under a constitution giving the governor power to suppress insurrections.[1]

Treatise. By George M. Wharton. Philadelphia, 1862.

(7.) Reply by Mr. Wharton to Mr. Binney's Criticisms. In these pamphlets the position that the President has no right, on his own motion, to suspend the writ, is sustained with great force. It is not, at the same time, claimed that a return by a military officer in time of war, that the relator is in military custody, is not a sufficient discharge.

(8.) Personal Liberty and Martial Law. Philadelphia, 1862. By Edward Ingersoll.

(9.) Habeas Corpus. By D. A. Mahoney, Prisoner of State. 1863.

(10.) The Suspending Power and the Writ of Habeas Corpus. By James F. Johnson. Philadelphia, 1862.

(11.) Martial Law: What is it, and who can declare it? By Tatlow Jackson. Philadelphia, 1862.

(12.) Authorities cited Antagonistic to Mr. Binney's Conclusions. By Tatlow Jackson. Philadelphia, 1862.

(13.) Judge Curtis on Executive Power; reprinted 2 Curtis's Works, 309. Compare 1 Curtis's Life, 240, 349.

(14.) Judge Leavitt's Decision in Vallandingham's case. Pamph. Philadelphia, 1863.

(15.) Opinions of Founders of Republic on Habeas Corpus, &c. Washington, 1864.

(16.) Facts and Authorities on the Suspension of the Writ of Habeas Corpus, 1864. Anon.

The following conclusions may now (1880) be ventured on the topics discussed in the foregoing publications.

First. The President of the United States has no constitutional power to suspend the writ of *habeas corpus*.

Second. On a return by a general military officer, in time of war, that he holds the relator either as a military subordinate, or as a spy, or as a deserter, or as a prisoner of war, an attachment should be refused. Infra, § 996.

Third. When a person, not in military service, or a prisoner of war, or charged with being a spy or deserter, is arrested by any authority whatsoever, he should be discharged by a federal judge on *habeas corpus*, unless there is evidence produced against him at the hearing sufficient to justify an indictment to be found against him by a grand jury. See Milligan, ex parte, 4 Wall. 3.

Fourth. If the return be that the relator is held under federal authority, the revision by a writ of *habeas corpus* is vested exclusively in the federal courts. Infra, §§ 980, 990.

According to Judge Curtis, "Military law is that system of laws enacted by the legislative power for the government of the army and navy of the United States, and of the militia when called into the actual service of the United States. It has no control whatever over any person, or any property of any citizen. It could not even apply to the teamsters of an army save by force of express provisions of the laws of Congress making such persons amenable thereto. The persons and property of private citizens of the United States are as absolutely exempted from the control of military law as they are exempted from the

[1] Moore, ex parte, 64 N. C. 802. As to restoration of writ by proclamation see Martin, in re, 45 Barb. 142.

§ 980. The writ cannot be used by a state court for the purpose of revising arrests under federal process.[1] Hence, it is the duty of a federal marshal, in whose custody may be a person arrested under federal process, to resist the service on him of any writ commanding him to

State court cannot discharge person under federal arrest.

control of the laws of Great Britain. But there is also martial law. What is this? It is the will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition, of all over whom this law extends. . . . . In time of war, without any special legislation, not the commander-in-chief only, but every commander of an expedition or of a military post, is lawfully empowered by the Constitution and laws of the United States to do whatsoever is necessary to accomplish the lawful objects of his command. . . . . But when the military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. . . . . He has no more lawful authority to hold all the citizens of the entire country, outside of the sphere of his actual operations in the field, amenable to his military edicts, than he has to hold all the property of the country subject to his military requisitions." 2 Curtis's Life & Works, 327. Compare authorities cited in Lawrence's Wheaton, 516–520, as to distinction between martial and military law, and the right to suspend the writ of *habeas corpus*.

Mr. Sumner, in his speech of June 27, 1862, took the ground that the power of Congress in this relation was supreme.

[1] Ableman *v.* Booth, 21 How. 506; Tarble, in re, 13 Wal. 397 (Chase, C. J., diss.); Farrand, in re, 1 Abb. U. S. 140; Ferguson, in re, 9 Johns. 239; State *v.* Zalich, 29 N. J. L. 409; State *v.* Plime, T. U. P. Charlt. 142; Spangler, in re, 11 Mich. 298; Tarble, in re, 25 Wis. 390; Hill, ex parte, 5 Nev. 154; Kelly, ex parte, 37 Ala. 474.

That it is for the state court to determine whether the federal arrest is lega has been ruled in State *v.* Dimick, 12 N. H. 194; Com. *v.* Downes, 24 Pick. 227; Sims, in re, 7 Cush. 285; Barrett, in re, 42 Barb. 479; Com. *v.* Fox, 7 Penn. St. 336; Dougherty *v.* Biddle, Bright. 4; Lockington, in re, Bright. 269; Collier, in re, 6 Oh. St. 55; Bushnell, ex parte, 9 Oh. St. 78; Com. *v.* Wright, 3 Grant's Cas. 437; Com. *v.* Gane, 3 Grant's Cas. 447.

In New York, the jurisdiction is maintained in People *v.* Gaul, 44 Barb. 106; Martin, in re, 45 Barb. 143; Webb, in re, 24 How. Pr. 247; Bennett, in re, 25 How. Pr. 149; but is denied in Hobson, in re, 40 Barb. 62; O'Connell, in re, 48 Barb. 259; People *v.* Fiske, 45 How. Pr. 294.

Concurrent jurisdiction in state courts is asserted in McConologue, in re, 107 Mass. 172; McRoberts, ex parte, 16 Iowa, 600; Holman, ex parte, 28 Iowa, 89; Ohio, &c. R. R. *v.* Fitch, 20 Ind. 505.

But in a note to McConologue, in re, which was decided prior to the report of Tarble's case, it is stated by the reporter that the Massachusetts practice now conforms to the rule in Tarble's case, ousting the state courts of their jurisdiction. The same course was taken in New York in Macdonnell's case in 1873 (11 Blatch. 79).

bring the prisoner before a state court; and he is authorized to call to his aid any force necessary for this purpose.[1] At the same

In this case, Davis, J., of the N. Y. Supreme Court, said: —

"There is no doubt whatever of the power of the state courts, in all cases where persons are deprived of their liberty within their territorial jurisdiction, to issue the writ of *habeas corpus*, for the purpose of inquiring into the cause of the detention; and that power is applicable to all cases where it does not appear upon the face of the petition for the writ that the case is one either extra-territorial, or exclusively within the jurisdiction of some other tribunal. I assume that the petition in this case did not show to Mr. Justice Fancher, who issued this writ, any fact clearly establishing that this prisoner was held by a jurisdiction which precluded the state court from investigating the cause of detention. It, therefore, became the duty of the judge to issue the writ, and it became the duty of the marshal so far to obey it as to make known to the court, in proper form, over his official signature, the cause of the detention of the prisoner by himself. The subject of the jurisdiction of the respective state and federal courts over the detention of prisoners by them, respectively, has, since the breaking out of the rebellion, received a very extended and exhaustive examination. I have, myself, had occasion, in another position, in one or two instances, to give the whole subject a thorough examination, and to present my conclusions to the federal courts, in arguments upon cases arising upon writs of *habeas corpus*, issued for the purpose of compelling the production, by the military officers of the federal government, of persons enlisted in the United States army, and in cases brought before the federal courts to relieve the officers of those courts from obedience to writs issued out of the state courts. The law in such cases is now extremely well settled. It was, of course, brought sharply to the attention of the respective tribunals by the exigencies of the war, inasmuch as it became apparent that, if state judges and state courts were clothed with power to discharge, under the writ of *habeas corpus*, persons who were enlisted in the United States military or naval service, it would be very easy, in some parts of the country, not only to impair, but substantially to destroy, the forces which the government were seeking to use in suppressing the rebellion. Therefore, the question became one of very great importance, and involved the determination of the respective jurisdictional rights and powers of the federal and state governments. The same question, although not in a form which presented it with that directness, but still required its examination to some extent, arose in the case in Wisconsin (U. S. *v.* Booth, 21 How. 506), alluded to by counsel for the respondent. In that case there had been a trial, conviction, and judgment by the federal court, which the state court sought to set aside and disregard, for the purpose of discharging a prisoner held under a final judgment of a federal court. That case involved a very important question, as to the right of a state court to intervene in any case where the federal tribunals had, in due process of law, determined the rights and obligations

[1] Ableman *v.* Booth, 21 How. 506; Tarble, in re, 13 Wall. 397; Norris *v.* Newton, 5 McLean, 92; Robinson, ex parte, 6 McLean, 355.

time, in order to justify a refusal of an attachment on this ground, it must appear on the return that the relator is held under an arrest duly authorized by the proper federal authority.

of citizens of the United States, and subjected them, by judgment, to the consequence of a violation of its laws. But a far more important question arose in the other class of cases to which allusion has been made. I understand the law, as settled in those cases, to be substantially this: that in respect to each other, and in respect of the enforcement of the laws of the United States government and of the state governments, the jurisdictions of the two governments are independent. The United States government, in the enforcement of the laws which the Constitution permits Congress to enact, is regarded as an independent, and, for certain purposes, as substantially a foreign power, as respects the States; and the jurisdiction of the courts of the United States, when enforcing laws enacted by Congress, in conformity with the Constitution, becomes absolutely exclusive. The state courts have no more power to intervene, for the purpose of interfering with the enforcement of those laws through the federal courts, when jurisdiction is legally conferred on those courts, than a State has to interfere with the operation of the laws of a sister State within the territory of the latter. In respect to the enforcement of those laws in the federal tribunals, they stand, in relation to each other, precisely as the State of Pennsylvania stands with respect to the State of New York. The courts of this State certainly have no power to interfere with the action of the courts in the State of Pennsylvania, in the enforcement of the laws of that State; and precisely so far as Congress, under the Constitution, has clothed the federal courts with power, are those courts as independent, while exercising their jurisdiction, as though they were without the territory of the State of New York. This court has, therefore, no power whatever to interfere with the enforcement of the laws of Congress through the federal courts. Those are the settled principles in the cases to which I have alluded." S. C., under name of People *v.* Fiske, 45 How. Pr. 294.

For a discussion of this topic see Whart. Crim. Law, 8th ed. § 267.

The relation of federal and state courts as coördinate powers is discussed supra, §§ 441 *et seq.*, and more fully in Whart. Crim. Law, 8th ed. §§ 264–283, 287 *et seq.*

In U. S. *v.* Cole, Sup. Ct. U. S. 1880, where the relator, a state judge of Virginia, was indicted for excluding colored citizens from a jury on account of race, color, and previous condition of servitude, his petition for a writ of *habeas corpus* was denied. The relator argued that his act was judicial, under state laws, and not amenable to the federal jurisdiction or laws. The court held that the act providing for the punishment of officers who exclude citizens from the jury on account of race or color is constitutional; that relator's act in selecting jurors was ministerial and not judicial; and that although he derived his authority from the State, he was bound, in the discharge of his duties, to obey the federal Constitution and laws. Mr. Justice Strong delivered the prevailing opinion; Mr. Justice Clifford and Mr. Justice Field dissenting. 21 Alb. L. J. 182.

§ 981. On the other hand, the writ may issue from a federal court to relieve a person under arrest by process from a state court, when in alleged violation of the Constitution of the United States.[1] It has also been held that a federal judge may release on *habeas corpus* a person

Federal courts may review state arrests.

[1] U. S. *v.* Jailer of Fayette Co. 2 Abb. U. S. 265 ; Bridges, ex parte, 2 Woods, 428; Sifford, ex parte, 5 Am. L. R. 659 ; Jenkins, ex parte, 2 Wall. Jr. 521; Farrand, in re, 1 Abb. U. S. 140; Ho Ah Kow *v.* Nunan, supra, § 920. See Buell, in re, 3 Dill. 116.

In In re Wong Yung Qui, U. S. Cir. Ct. Cal. 1880, it was held that a federal court may, upon *habeas corpus*, inquire into the validity of a judgment of a state court, where in the petition it is alleged that the judgment, by virtue of which the relator is held in custody, rests upon an act of the legislature passed in violation of the provisions of the federal Constitution or of a treaty of the United States. In this case the relator, a subject of the Empire of China, having been convicted of a misdemeanor committed in removing the dead body of one of his countrymen from the place of interment without a permit, contrary to the California statute of April 1, 1878 (Stat. 1877–78, 1050), was sentenced to pay a fine of $50, or in default to imprisonment for twenty-five days. Failing to pay the fine, he was committed to prison, and sued out this writ. He asked to be discharged on the ground that the act, supra, was passed in violation of the Fourteenth Amendment to the federal Constitution, and also of the Burlingame treaty. The respondent raised a preliminary objection that the court had no jurisdiction in the case of a party held in custody by virtue of a judgment of a state court, to inquire upon *habeas corpus* into the validity of the judgment, where it is regular in form upon its face; and that the state court had jurisdiction to determine the validity of the statute, and having determined it, the determination is conclusive in all other proceedings except upon writ of error to revise the action of the court below. These points were negatived by Judge Sawyer and the relator discharged.

In Clarke, in re, U. S. Sup. Ct. 1880 (21 Alb. L. J. 256), we have the following from Bradley, J., giving the opinion of the court: —

"One question, however, has been raised by the counsel for the government which it is necessary to consider. It is objected that this court cannot proceed upon a writ of *habeas corpus* which was originally presented to a justice of this court, and was postponed and referred by him to the court for its determination.

"We have considered this point with some care, inasmuch as in Kaine's case, reported in 14 Howard, 103, the court held that it could not act upon a writ thus referred to it by Mr. Justice Nelson. But the ground taken there was, that the writ had been issued by him in virtue of his original jurisdiction; though the court was of opinion that it could issue a new writ upon the papers before it in virtue of its own appellate jurisdiction, and would do so if the case required it; but being of opinion that there was no case on the merits the application was discharged. But in this case, however it may have been in that, it is clear that the writ, whether acted upon by the justice who issued it, or by this court, would in fact require a

committed by a state court for contempt in disobeying its orders, when such orders are in contravention of the federal Constitution and statutes.[1] But for a matter relating solely to state jurisdiction, the federal courts have no power of review through this writ;[2] and it has been argued that a conviction in a state court cannot be reviewed by a federal court on *habeas corpus* on the ground of the unconstitutionality of the state law, the redress being by writ of error.[3] But this position is not now maintainable.[4]

§ 982. The petition should state the facts on which the charge

revision of the action of the Circuit Court by which the petitioner was committed, and such revision would necessarily be appellate in its character. This appellate character of the proceeding attaches to a large portion of cases on *habeas corpus*, whether issued by a single judge or by a court. The presence of this feature in the case was no objection to the issue of the writ by the associate justice, and is essential to the jurisdiction of this court. The justice who issued it could undoubtedly have disposed of the case himself, though not, at the time, within his own circuit. A justice of this court can exercise the power of issuing the writ of *habeas corpus* in any part of the United States where he happens to be. But as the case is one of which this court also has jurisdiction, if the justice who issued the writ found the questions involved to be of great moment and difficulty, and could postpone the case here for the consideration of the whole court without injury to the petitioner, we see no good reason why he should not have taken this course, as he did. It had merely the effect of making the application for a discharge one addressed to the court, instead of one addressed to a single justice. This has always been the practice of English judges in cases of great consequence and difficulty, and we do not see why it may not be done here. Under the Habeas Corpus Act, indeed, it was the regular course to take bail and recognize the party to appear in the King's Bench or Assizes; though the judge would discharge absolutely if the case was clearly one of illegal imprisonment. Hab. Corp. Act, § 3; Com. Dig. Hab. Corp. F.; Bac. Abr. Hab. Corp. B. 13; 1 Chitty's Gen. Pract. 685–688. Of course, under our system, no justice will needlessly refer a case to the court when he can decide it satisfactorily to himself, and will not do so in any case in which injury will be thereby incurred by the petitioner. No injury can be complained of in this case, since the petitioner was allowed to go at large on reasonable bail."

[1] Electoral College, in re, 1 Hughes, 571; and cases infra, § 999.

[2] Dorr, ex parte, 3 How. 103; U. S. *v.* Rector, 5 McLean, 174; U. S. *v.* French, 1 Gall. 1.

[3] Ibid. Thus it has been held that a person who has been tried and imprisoned by the courts of his State, for violating a law of the State relating to marriage, cannot be released by a United States court on *habeas corpus*, on the ground that such law violates the Constitution or a law of the United States. U. S. *v.* Kinney, 3 Hughes, 9. But see Reynolds, ex parte, 3 Hughes, 559. Infra, § 995.

[4] See Siebold, ex parte, infra, § 995; In re Wong Yung Qui, supra.

of illegal restraint rests;[1] and, when the object is to attack a particular commitment, should give a copy of such commitment.[2] If the object be to discharge on bail, this object should be stated.[3] The facts of the petition are usually verified by affidavit;[4] though this is not required by the Act of 31 Charles II. In this country the practice varies with local statutes; it being sufficient, when no specific facts are alleged, for a petition in writing, attested by witnesses, to be filed.[5] And in any view an affidavit by the relator is not required when it is shown that he is so coerced as to be unable to make one.[6]

Petition should state facts and be verified by affidavit.

§ 983. It is not necessary that the party imprisoned should sue for the writ in person. The application may be made by husband or wife, parent or child, or by any other appropriate friend or agent.[7] A mere stranger, however, having no natural or legal claim to appear for the prisoner, will not be permitted to intervene.[8] And there may be cases in which counsel may be called upon by the court to make the affidavit.[9]

May be by next friend.

§ 984. The writ is to be personally served and due proof made of service, in order to justify an attachment.[10] But personal service may be waived by acceptance, either express or implied.[11]

Writ to be directed to custodian, and to be served personally.

When the prisoner is under sentence, the writ is to be directed to the officer having him in custody.[12] And generally

[1] Nye, ex parte, 8 Kans. 99; Deny, ex parte, 10 Nev. 212; Allen, ex parte, 12 Nev. 87; though see, as adopting a less stringent rule, White v. State, 1 Sm. & M. 149.

[2] Harrison, in re, 1 Cranch C. C. 159; Klepper, ex parte, 26 Ill. 532; Royster, ex parte, 6 Ark. 28; but see Champion, ex parte, 52 Ill. 311.

[3] Street v. State, 43 Miss. 1.

[4] 1 Ch. C. L. 124; 3 Black. C. 132; People v. Bartnett, 13 Abb. N. Y. Pr. 8; State v. Philpot, Dudley S. C. 46; Gibson v. State, 44 Ala. 17.

[5] Bollman, ex parte, 4 Cranch C. C. 75.

[6] Parker, in re, 5 M. & W. 32.

[7] Daley, in re, 2 F. & F. 258; R. v. Clarke, 1 Burr. 606; Gregory's case, 4 Burr. 1991; Ferrans, in re, 3 Ben. 442; People v. Mercien, 3 Hill (N. Y.), 399 (parent for child); Com. v. Downs, 24 Pick. 227; Com. v. Hammond, 10 Pick. 274; McConologue's case, 107 Mass. 154. See Thompson v. Oglesby, 42 Iowa, 598.

[8] Child, ex parte, 15 C. B. 238; Poole, in re, 2 McArthur, 683; Linda v. Hudson, 1 Cush. 385.

[9] Newton, in re, 16 C. B. 97.

[10] See infra, § 990.

[11] People v. Bradley, 60 Ill. 390.

[12] People v. Heffernan, 38 How. N. Y. Pr. 402.

the custodian is the person to whom the writ should be directed.[1] During the hearing the relator is in charge of the special officer deputed by the court.[2]

Notice must be given to prosecution.

§ 985. Due notice of the issue of the writ and of the hearing must be given, in criminal prosecutions, to the prosecuting officer of the State having jurisdiction of the offence.[3] In matters concerning military service, the notice must be given to the proper military officer.[4]

Writ not granted when relator should be remanded.

§ 986. When it is clear that there is no ground for the discharge, the writ will not be granted. "The ordinary course," says Shaw, C. J., "is for the court to grant a rule *nisi*, in the first instance, to show cause why the writ should not issue. Of course, if sufficient cause is not shown, it will be withheld."[5] But in all cases in which by statute the issue of the writ is obligatory, the order for its issue must be made at once; and it may also be made without a rule to show cause in all cases of urgency.[6] And when the question comes up on a rule *nisi*, the case will be treated by the court as if coming up upon the writ.[7]

[1] Nichols *v.* Cornelius, 7 Ind. 611; Booth, in re, 3 Wis. 1.

[2] Infra, § 1009.

[3] R. *v.* Taylor, 7 D. & R. 622; Smith, ex parte, 3 McLean, 121; People *v.* Pelham, 14 Wend. 48; Lumm *v.* State, 3 Ind. 293.

[4] Gale, ex parte, 3 D. & L. 114.

[5] Sims's case, 7 Cush. 285; citing Blake's case, 2 M. & S. 428; R. *v.* Marsh, Bulstr. 27; Hobhouse's case, 3 B. & Ald. 420. See, to the effect that a writ will not be granted if nugatory, Kearney, ex parte, 7 Wheat. 38; Com. *v.* Robinson, 1 S. & R. 353; Williamson's case, 26 Penn. St. 9; Bethuram *v.* Black, 11 Bush, 628; Campbell, ex parte, 20 Ala. 89; Gregg, in re, 15 Wis. 179; Deny, ex parte, 10 Nev. 212.

"Courts of justice may refuse to grant the writ of *habeas corpus* where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment; but where probable ground is shown that the party is in custody under or by color of authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ of *habeas corpus* then becomes a writ of right, which may not be denied, as it ought to be granted to every man who is unlawfully committed or detained in prison or otherwise restrained of his liberty. Authorities in support of these propositions are unnecessary, as wherever the principles of the common law have been adopted or recognized they are universally acknowledged." Clifford, J., Ex parte Lange, 18 Wall. 163.

[6] Kent, C. J., Stacy, in re, 10 Johns. 328.

[7] Bull, ex parte, 8 Jur. 827; 15 L. J. Q. B. 235.

Relator must be produced immediately in court. But sickness cause for delay.

§ 987. It is the duty of the person to whom the writ is addressed to produce the party imprisoned immediately in court. The time, however, may be enlarged in cases of sickness or other incapacity.[1] In such case the sickness must be specially returned, and verified by the affidavit of a medical attendant or nurse.[2]

Cause of detention must be returned.

§ 988. It is not enough for the respondent to bring the body of the relator into court. The cause of the detention must be returned.[3] If the detention be based on a commitment, a copy of the commitment, if not filed with the petition, must be produced.[4] Whatever facts are necessary to justify the detention must be set forth in the return.[5] But it is enough if the facts are set forth with ordinary certainty.[6]

If body be not produced excuse must not be evasive.

§ 989. If the body of the relator is not produced, on the ground that he is not in the respondent's custody, the return, in order to protect the respondent from an attachment, must be explicit in its denial. If it deny that the relator was in the respondent's control, the denial must be square and direct.[7] It has been held insufficient for the respondent to return, "I had not at the time of receiving this writ, &c., nor have I since had, the body, &c., detained in my custody."[8] "The general form," said Grose, J., "is that the party has not the person in his possession, custody, or power."[9] And it was held by Chancellor Kent that a return, that the relator "is not in my custody," is evasive; it should be, is not in my "possession or power."[10] The return must show that at the time of the notice of the writ the relator was not in the power or custody of the respondent.[11] A return, however, may be amended, after filing, at the discretion of the court.[12] And when ambiguous, it may be explained and supported by affi-

[1] R. v. Clarke, 3 Burr. 1362.

[2] See Bryant, ex parte, 2 Tyler, 269.

[3] See Mowry, in re, 12 Wis. 52.

[4] Randall v. Bridge, 2 Mass. 549.

[5] Yates's case, 4 Johns. 317.

[6] Eden's case, 2 M. & S. 226.

Whether return must be sworn to see Neill, in re, 8 Blatch. 156.

[7] R. v. Winton, 5 T. R. 89.

[8] R. v. Winton, 5 T. R. 89.

[9] See Warman's case, 1 W. Bl. 1204; U. S. v. Davis, 5 Cranch C. C. 622.

[10] Stacy, in re, 10 Johns. 328.

[11] R. v. Wagstaff, Viner's Abr. Hab. Cor. F.; Hurd's Hab. Corp. book ii. c. iii.

[12] R. v. Batchelder, 1 P. & D. 516; Watson's case, 9 A. & E. 731.

davits.[1] But when the return is explicit in denying custody or power of the relator, and is not impugned, the writ should be quashed.[2] And so when the return avers that the relator had been relieved from custody by giving bail.[3]

Writ to be enforced by attachment.

§ 990. In case the party addressed delays obedience to the writ within three days (to persons resident within twenty miles), according to the statute of Charles II., an attachment will, on application, be granted to compel obedience, without issuing an *alias* and a *pluries* writ,[4] on affidavit of service being made.[5] If the service of the attachment is resisted by superior force, the writ will be placed on the files of the court to be served when practicable.[6]

Return may be controverted.

§ 991. Whether a return can be controverted has been much questioned in England. In 1758, the opinions of the judges were given to the House of Lords on the question whether affidavits could be received to contradict such returns; and though the weight of opinion was that this is not, as a rule, admissible, yet, by several of the judges it was conceded that in certain extreme cases, *e. g.* impressments, the court would permit the relator to show that the return was false.[7] Cases are reported, however, in which this permission has been given;[8] and Lord Denman has intimated that an affidavit that the return was false might be the foundation of a motion to quash it.[9]

[1] R. *v.* Roberts, 2 F. & F. 292.

[2] Com. *v.* Kirkbride, 1 Brewst. 541; Com. *v.* Killacky, 3 Brewst. 565.

[3] Territory *v.* Cutler, McCahon, 152.

[4] R. *v.* Winton, 5 T. R. 89; Bosen, ex parte, 2 Ld. Ken. 289; Bank of the United States *v.* Jenkins, 18 Johns. 152; State *v.* Raborg, 2 South. 545; Com. *v.* Reed, 59 Penn. St. 425; People *v.* Bradley, 60 Ill. 390.

[5] State *v.* Raborg, 2 South. 545. Supra, § 984.

That attachment will not be issued, in extradition process, by state judge against federal marshal, see Macdonnell, in re, Davis, J., reported in note to same case, 11 Blatch. 79; cited more fully supra, § 980.

[6] Merryman, ex parte, Taney, 246; Winder, ex parte, 2 Cliff. 89. See Moore, ex parte, 64 N. C. 802; Kerr, ex parte, 64 N. C. 816.

[7] Hurd's Habeas Corpus, 264 *et seq.*; Wilmot's Opinions, 106; 2 How. St. Tr. 1378.

[8] Goldswain's case, 2 W. Black. 1207. See Watson's case, 9 Ad. & E. 731.

[9] Watson's case, ut supra.

So far as concerns the respondent, he will be beyond question permitted to modify and explain his return. Thus it has been held that a federal judge will receive affidavits for the purpose of explaining and enlarging a return made by a state officer who

In this country, while the rule that a record cannot be impugned applies to all cases in which the record of a court of general jurisdiction is produced as the ground of detention, the court, on hearing a writ of *habeas corpus*, when the object is to review the action of a subordinate or police magistrate, will go into the question of guilt or innocence; and will, in like manner, examine as to the grade of guilt when the object is to determine the amount of bail.[1]

The conflict, in other respects, even on the English rule, may be obviated, by applying to returns the familiar distinction that while a record cannot be assailed by parol except in cases where fraud or want of jurisdiction is set up, it may be explained by parol when obscure or incomplete.[2] Hence, when such a record is produced, it is admissible to show that the court had no jurisdiction of the subject matter, or that the proceedings were fraudulent.[3] When the case does not rest on the return, then the court may go into the merits.[4] The distinction between our practice and that of England is this: with us, as has been seen, a commitment by a subordinate police magistrate may be opened

has arrested a federal officer for alleged abuse of power. Jenkins, ex parte, 2 Wall. Jr. 521.

Whether the return may be assailed on other grounds depends on the peculiar exigency of the case. See Smith, ex parte, 3 McLean, 121.

[1] 2 Hawk. P. C. c. 15, s. 79. In Pennsylvania this is allowed by an express proviso to the *habeas corpus* act, which permits, in addition, the amendment of the return, "and also suggestions made against it, that thereby material facts may be ascertained." Under this clause the courts in that State are in the habit of receiving evidence to determine the fact and the degree of guilt, so as either to discharge absolutely, or to discharge on suitable bail. Res. *v.* Gaoler, 2 Yeates, 258; Com. *v.* Ridgway, 2 Ashm. 247; Com. *v.* Carlisle, Bright. R. 36.

For other cases in which the merits of the charge were gone into see infra, §§ 1005–7; and see State *v.* Scott, 30 N. H. 274; Powers, in re, 25 Vt. 261; Com. *v.* Harrison, 11 Mass. 63; People *v.* Cassels, 5 Hill N. Y. 164; People *v.* Martin, 1 Park. C. R. 187; People *v.* Tompkins, 1 Park. C. R. 224; though see People *v.* McLeod, 1 Hill, 377; 3 Hill, 658; People *v.* Richardson, 4 Park. C. R. 656; State *v.* Best, 9 Blackf. 11; Mahone *v.* State, 30 Ala. 49. For other cases see infra, § 1005.

The burden, however, of disproving the allegations of the return is on the relator. Infra, § 1007; Heyward, in re, 1 Sandf. 701, and cases cited 1 Pomeroy's Archbold, 204.

[2] See Whart. on Ev. §§ 980 *et seq.*

[3] Ibid. Supra, § 981; infra, § 994.

[4] People *v.* Martin, 1 Park. C. R. 187; People *v.* Tompkins, Ibid. 224. See State *v.* Scott, 10 Fost. 274.

and the case considered *de novo* by a court of general jurisdiction when hearing the writ; while in England it cannot.[1]

Discharge from defects of process.

§ 992. Arrests, when examined in court on a writ of *habeas corpus*, may be considered in two relations. The first arises when the court sits merely for the purpose of examining the validity of the arrest, and not in exercise of the powers of a justice of the peace. In such cases, if the arrest be on void process, the relator should be discharged.[2] Thus parties against whom no criminal charge is made out, or whom the court on *habeas corpus* has no jurisdiction to arrest *de novo*, have been released from custody under warrants having no seal;[3] and from warrants when the relator is privileged from arrest.[4] But a court, on the hearing of a writ of *habeas corpus*, will not, ordinarily, consider the constitutionality of the law authorizing the arrest. Such questions, when dependent upon a contested interpretation, are to be reserved for the trial.[5]

The second relation in which writs of *habeas corpus* addressed to arresting officers are to be considered is that which arises when the court sits for the purpose not merely of examining the validity of the arrest, but of also determining whether the relator is *primâ facie* guilty of an indictable offence. If the latter turn out on the hearing to be the case, then the relator must be held to answer on the charge of committing such offence, no matter how outrageously oppressive or illegal may have been the process by which he was arrested. The party arresting may have been guilty of such violence or fraud in the arrest as to require that he also should be held to trial for his misconduct. But this does not affect the relator's responsibility. If a probable case of guilt transpire against him at the hearing, he must be held to trial, even though he were actually kidnapped into court, and though the offence proved is not specifically that charged.[6]

[1] Newton, ex parte, 13 Q. B. 716.

[2] Conner *v.* Com. 3 Binn. 38; Com. *v.* Murray, 2 Va. Cas. 504; State *v.* Potter, 1 Dudley, 295. As to what constitutes illegality of arrest see supra, §§ 5 *et seq.* As to privilege from arrest see supra, § 60.

[3] See Bennett, ex parte, 2 Cranch, 612; State *v.* Drake, 36 Me. 366; Lough *v.* Millard, 2 R. I. 436; Tackett *v.* State, 3 Yerg. 392. See, however, Smith, ex parte, 5 Cow. 273.

[4] Dakins, ex parte, 16 C. B. 77. See Eggington, ex parte, 2 E. & B. 707.

[5] Harris, in re, 47 Mo. 164.

[6] Supra, § 27; infra, § 993; R. *v.*

So in case of oppression.

A writ of *habeas corpus* may issue from a superior court to give immediate hearing to a case should there be any undue delay in the action of an inferior court.[1]

Writ may test extradition process.

§ 993. We have already seen that the writ may be issued to test the legality of arrests on extradition process, whether such process come from a sister State or from a foreign State. When the process is from a sister State, under the provision in the federal Constitution, and is regular, a discharge will not be granted, supposing the identity of the party and the genuineness of the record be established.[2] Not only will the court, on hearing the writ, decline to go into the merits, but questions of formal law, connected with the structure of the indictment, will not be considered, this being matter for the courts of the demanding State,[3] though it is otherwise as to material defects in the warrant.[4] Nor will an arrest by state officials, of officers employed in extradition process under the federal Constitution, be permitted; and if such arrest be made, the party arrested will be discharged by a federal court.[5] Nor does the writ lie to admit to bail a person under arrest to be carried into another county or State for trial.[6] But when there is an arrest to await a requisition, and after due time the warrant does not arrive, the prisoner will be discharged.[7]

The writ, also, may be granted to test the validity of process of extradition when the demandant is a foreign sovereign.[8]

Goodall, Say. 129; R. *v.* Marks, 3 East, 157; O'Malia *v.* Wentworth, 65 Me. 129; State *v.* Buzine, 4 Harring. 575; Granice, ex parte, 51 Cal. 375; Jones *v.* Timberlake, 6 Rand. 678; State *v.* Killett, 2 Bailey, 289; Brady *v.* Davis, 9 Ga. 73. For other cases see supra, §§ 27 *et seq.*; infra, § 1005.

[1] Supra, § 70.

[2] Supra, §§ 35, 37 *a*; Smith, ex parte, 3 McLean, 121; McKean, ex parte, 3 Hughes, 263; People *v.* Brady, 56 N. Y. 182; Bristow, in re, 51 How. Pr. 422; Watson, in re, 2 Cal. 59; White, ex parte, 49 Cal. 434; Hibler *v.* State, 43 Tex. 197.

In Robinson *v.* Flanders, 29 Ind. 10, it was held that the question of identity was for the demanding State.

[3] Supra, §§ 35 *et seq.*; Davis's case, 122 Mass. 324; Clark, in re, 9 Wend. 212; Voorhees, in re, 32 N. J. L. 141; State *v.* Buzine, 4 Harring. 572; Manchester, in re, 5 Cal. 237.

[4] Leland, in re, 7 Abb. N. Y. Pr. (N. S.) 64; Rutter, in re, Ibid. 67. Supra, §§ 35 *et seq.*

[5] Bull, in re, 4 Dill. 323; Jenkins, ex parte, 2 Wall. Jr. 521; Titus's case, 8 Ben. 412.

[6] Gorsline, in re, 10 Abb. N. Y. Pr. 282. Supra, § 35 *a*.

[7] Porter *v.* Goodhue, 2 Johns. Ch. 198 (a state requisition).

[8] Atty. Gen. *v.* Kwok-a-Sing, L. R. 5 P. C. 179; and cases cited supra, §§ 38, 58.

That a state court may also intervene in such cases by issuing the writ has not heretofore been questioned;[1] though now, in view of the later rulings that federal jurisdiction in federal process is exclusive, the jurisdiction of the state courts in this relation may be open to serious doubt.[2]

The writ lies for redress under a void sentence.

§ 994. The writ may be made to operate in behalf of a person sentenced by a court without jurisdiction to impose the particular sentence,[3] or detained under a sentence which has expired or is inoperative.[4] In other words, when a sentence is so defective that with it the whole proceeding falls, the prisoner may be released on *habeas corpus;* while if the error lies simply in the mode of expressing the sentence, leaving the conviction *primâ facie* unassailable, then his remedy must be by writ of error or motion for a new trial.[5]

Writ cannot over-

§ 995. It has been already noticed that the rule, that the record of a court of general jurisdiction cannot be collaterally impeached unless on ground of want of jurisdiction

[1] Com. *v.* Hawes, 13 Bush, 697.

[2] See People *v.* Curtis, 50 N. Y. 321; People *v.* Fisk, 45 How. Pr. 296; reported supra, § 980; Lagrave, in re, 45 How. Pr. 301; Com. *v.* Deacon, 10 S. & R. 125. In Adrian *v.* Lagrave, 59 N. Y. 110, it was held that a state court will not intervene to relieve from arrest a party who claims that the extradition process by which he is brought into the State was fraudulently obtained, and does not cover the act for which he is arrested after his arrival in the country.

[3] Robinson *v.* Spearman, 3 B. & C. 493; Callicot, ex parte, 8 Blatch. 89; Lange, ex parte, 18 Wall. 163. In Lange, ex parte, 18 Wall. 163, it was held that where a prisoner shows that he is held under a judgment of a federal court, made without authority of law, the Supreme Court of the United States will, by writ of *habeas corpus* and *certiorari*, look into the record so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner. See this case discussed supra, §§ 492, 913. To the same effect see Page, ex parte, 49 Mo. 291; Murray, ex parte, 43 Cal. 455; Bowen, ex parte, 46 Cal. 112; Roberts, ex parte, 9 Nev. 43. Compare supra, § 981.

[4] Tweed *v.* Liscomb, 60 N. Y. 559; Howard *v.* People, 3 Mich. 207; Pope, ex parte, 49 Mo. 491; Roberts, ex parte, 9 Nev. 43; Underwood, in re, 30 Mich. 502; Perry *v.* State, 41 Tex. 488. In Tweed *v.* Liscomb, 60 N. Y. 559, it was held that the clause in the N. Y. Rev. Stat. 568, § 42, prohibiting the review, under a writ of *habeas corpus*, of the "legality and justice of any process, judgment, decree, or execution," does not preclude the court issuing the writ from inquiring whether the court entering the judgment had the power to give such judgment.

As to discharge from operation of limitation or pardon see infra, § 1006.

[5] U. S. *v.* Reed, U. S. Sup. Ct. 1880, 26 Int. Rev. Rec. 11. See infra, § 996.

haul indictment or judgment.

or fraud applies to the records of such courts when brought up collaterally on a writ of *habeas corpus*. This rule holds in all cases in which the writ is applied for by a party against whom an indictment has been found by a court having jurisdiction. In such case, the question being whether there is probable cause for the prosecution, the indictment (unless impeachable for fraud, or non-identity, or want of jurisdiction) is conclusive proof of such probable cause.[1] *A fortiori* the averments of a sentence of conviction cannot be disputed on a writ of *habeas corpus*, unless under the limitations above given, of fraud, non-identity, or want of jurisdiction.[2]

[1] R. *v.* Bowen, 9 C. & P. 509; McLeod's case, 25 Wend. 483; Semler, in re, 41 Wis. 517; Whitaker, in re, 43 Ala. 323.

[2] Lees, ex parte, E., B. & E. 828; Brenan, in re, 10 Q. B. 492; R. *v.* Mount, L. R. 6 P. C. 283; Parks, ex parte, 93 U. S. 18; Bogart, in re, 2 Sawy. 369; Riley's case, 2 Pick. 172; Com. *v.* Whitney, 10 Pick. 434; Fleming *v.* Clark, 12 Allen, 191; People *v.* McLeod, 1 Hill N. Y. 377; People *v.* McCormack, 4 Park. C. R. 9; Dickinson *v.* Byron, 9 S. & R. 71; Van Hagan, ex parte, 25 Oh. St. 426; Ball, ex parte, 2 Grat. 588; Buddington, in re, 74 N. C. 607; Ray, ex parte, 45 Ala. 15; Sam, ex parte, 51 Ala. 34; Trueman, in re, 44 Mo. 181; Ezell, ex parte, 40 Tex. 451; Murray, ex parte, 43 Cal. 455; Le Bur, ex parte, 49 Cal. 160. Illegality of selection of grand jury cannot be tested on *habeas corpus* after conviction and sentence; State *v.* Fenderson, 28 La. An. 82; nor can irregularities in the trial be so examined. State *v.* Sheriff, 24 Minn. 87.

On the other hand, it has been ruled that where a petition for a writ of *habeas corpus* avers that the petitioners, being colored persons, have been tried for a capital offence before a state court, by a jury entirely composed of white persons, in contravention of U. S. Rev. Stat. § 641, the Circuit Court of the United States will grant the writ commanding the sheriff of the county to produce the bodies of the petitioners before the court, with a statement of the cause of their detention. Ex parte Reynolds, 3 Hughes, 559. See cases supra, § 981.

In Siebold, ex parte, U. S. Sup. Ct. 1880, 10 Cent. L. J. 256, the following points were decided: —

1. The appellate jurisdiction of this court, exercisable by *habeas corpus*, extends to a case of imprisonment upon conviction and sentence in an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment by writ of error or not. 2. The jurisdiction of this court by *habeas corpus*, when not restrained by some special law, extends generally to imprisonment by inferior tribunals of the United States which have no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act. 3. But when the court below has jurisdiction of the cause, and the matter charged

§ 996. What has just been said rests on the general proposition that where a court of record has jurisdiction, its action, though open to revision by appeal or writ of error, cannot be collaterally impeached, unless on proof

Writ cannot collaterally correct errors.

is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error. 4. Where personal liberty is concerned the judgment of an inferior court affecting it is not conclusive, but the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ. 5. Certain judges of election in the city of Baltimore, appointed under state laws, were convicted in the Circuit Court of the United States, under §§ 5515 and 5522 of the Revised Statutes of the United States, for interfering with and resisting the supervisors of election and deputy marshals of the United States in the performance of their duty at an election of representatives to Congress, under §§ 2016, 2017, 2021, 2022, title xxvi. of the Revised Statutes. On this state of facts, it was held that the question of the constitutionality of these laws is good ground for this court to issue a writ of *habeas corpus*, to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional, the prisoner should be discharged. 6. Congress had power by the Constitution to pass the sections referred to: viz., § 5515 of the Revised Statutes, which makes it a penal offence against the United States for any officer of election, at an election held for a representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, &c.; and § 5522, which makes it a penal offence for an officer or other person with or without process to obstruct, hinder, bribe, or interfere with a supervisor of an election, or marshal or deputy marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, &c.; also §§ 2011, 2012, 2016, 2017, 2021, 2022, title xxvi. of the Revised Statutes, which authorize the Circuit Courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such supervisors and deputy marshals; these being the laws provided by Congress in the Enforcement Act of May 31, 1870, and the supplement thereto of February 28, 1871, for supervising the elections of representatives, and for preventing frauds therein. 7. The Circuit Courts have jurisdiction of indictments under these laws, and a conviction and sentence in pursuance thereof is lawful cause of imprisonment, from which this court has no power to relieve on *habeas corpus*. 8. In making regulations for the election of representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legis-

of fraud.[1] No matter how gross, therefore, may be the mistakes of law or fact by a court of record having jurisdiction in a criminal case, its action cannot be reviewed, subject to the limitations

lature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing senators," Congress has a supervisory power over the subject, and may either make new regulations, or add to, alter, or modify the regulations made by the State. 9. In the exercise of such supervisory power Congress may impose new duties on the officers of election, or additional penalties for breach of duty, or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds, and see that the elections are legally and fairly conducted. 10. The exercise of such power can properly cause no collision of regulations or jurisdiction, because the authority of Congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State. This is involved in the power to "make or alter." 11. There is nothing in the relation of the state and national sovereignties to preclude the coöperation of both in the matter of election of representatives. If both were equal in authority over the subject, collisions of jurisdictions might ensue; but the authority of the national government being paramount, collisions can only occur from unfounded jealousy of such authority. 12. Congress has power by the Constitution to vest in the Circuit Courts the appointment of supervisors of elections. It is expressly declared that "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." Whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought not to be lodged in another, the matter is nevertheless left to the discretion of Congress. 13. The provision which authorizes the deputy marshals to keep the peace at the elections is not unconstitutional. The national government has the right to use physical force in any part of the United States, to compel obedience to its laws and to carry into execution the powers conferred upon it by the Constitution. 14. The concurrent jurisdiction of the national government with that of the States, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the Constitution in the District of Columbia, and in those places acquired for the erection of forts, magazines, arsenals, &c. 15. The provisions adopted for compelling the state officers of election to observe the state laws regulating elections of representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are owed to the United States as well as to the State; and their violation is an offence against the United States which Congress may rightfully inhibit and punish. This necessarily follows from the direct interest which the national government has in the due election of its representatives, and from the powers which the Constitution gives to Congress over this particular subject. Field and Clifford, JJ., dissenting.

[1] See Whart. on Ev. §§ 982–91.

above stated, by a writ of *habeas corpus*.[1] Even an excessive sentence, by a competent court, if not actually inoperative, cannot in this way be rectified. The remedy is writ of error to a court with appellate powers.[2] Nor will the writ be used to control the discretion committed to officers of a prison to modify or ameliorate confinement.[3] Even though the cause of detention be an order of court without judgment, this, if the order be by a court having jurisdiction, will not be reviewed even by a superior court by means of *habeas corpus*. Thus where, on an indictment containing several counts, the jury acquitted on some counts but said nothing as to others, it was held in Pennsylvania, by the Supreme Court, that an order of detention by the trial court could not be overhauled by a *habeas corpus* issued by the Supreme Court; but that if an error should occur in the subsequent trial and conviction of the defendant on the counts thus left open, the remedy would be a writ of error.[4] Nor, under the Pennsylvania statute, will the Supreme Court, by writ of *habeas corpus*, grant relief, during the term of a court of quarter sessions, to a person bound over to that term.[5] Nor can the validity of the commissions of *de facto* judges or other officers be thus tried. Thus Chief Justice Chase refused to review, on *habeas corpus*, the sentences of courts of the Confederate States during the late civil war.[6] Nor will the title of a police magistrate be thus examined collaterally.[7] But, as we have seen, where the sentence is one plainly beyond the jurisdiction of the court imposing it, a writ of *habeas corpus* may be issued by a court having general su-

[1] R. *v.* Carlisle, 4 C. & P. 415; Barnes's case, 2 Roll. 157; R. *v.* Elwell, 2 Stra. 794; O'Malia *v.* Wentworth, 65 Me. 129; Kellogg, ex parte, 6 Vt. 509; People *v.* Cavanagh, 2 Park. C. R. 650; People *v.* Nevins, 1 Hill, 154; Com. *v.* Leckey, 1 Watts, 66; Com. *v.* Keeper of Prison, 26 Penn. St. 279; Emanuel *v.* State, 36 Miss. 627; Eaton, in re, 27 Mich. 1; Faust *v.* Judge, &c. 30 Mich. 266; Crandell, in re, 34 Wis. 177; Semler, in re, 41 Wis. 517; Winston, ex parte, 9 Nev. 71; Fisher, ex parte, 6 Nev. 309; Hartman, ex parte, 44 Cal. 32; Oliver, ex parte, 3 Tex. Ap. 345.

[2] Pember's case, 1 Whart. 439; Shaw, ex parte, 7 Oh. St. 81; Lark *v.* State, 55 Ga. 435. See, however, where the sentence is inoperative, supra, § 994.

[3] Com. *v.* Holloway, 42 Penn. St. 446. See Pember's case, 1 Whart. 439.

[4] Com. *v.* Norton, 8 S. & R. 71.

[5] Com. *v.* Sheriff, 7 W. & S. 108.

[6] Griffin's case, Chase's Dec. 364. See Russell *v.* Whiting, 1 Wins. N. C. 463; Call, ex parte, 2 Tex. Ap. 560; Strahl, ex parte, 16 Iowa, 369.

[7] Wakker, in re, 3 Barb. 162.

pervisory jurisdiction (*e. g.* in England the Queen's Bench), to relieve the prisoner. And this holds where a sentence has expired, or is otherwise inoperative.[1]

Military judgments cannot be thus reviewed.

§ 997. The judgment of a court-martial will not be reviewed on a writ of *habeas corpus*;[2] nor will that of a military commission when imposed on a prisoner thereto amenable by law;[3] nor that of a naval court-martial.[4]

Nor summary police convictions.

§ 998. Summary convictions duly ordered by a justice of the peace will in like manner be respected. If he has statutory power so to convict, a court of errors will not review his decision, unless fraud or oppression be alleged.[5]

Nor committals for contempt.

§ 999. A committal for contempt, by a court having authority, cannot ordinarily be vacated by a writ of *habeas corpus* issued from another court.[6] This rule has been applied to commitments by federal courts for contempt when the writ was prayed for from a state court; and this independently of the question whether the federal court had jurisdiction of the principal case.[7] But where an inferior court transcends the statutory limits in a committal for contempt (*e. g.* when the statute limits to thirty days, and the commitment is

[1] Supra, § 994.

[2] Com. *v.* Gamble, 11 S. & R. 93; People *v.* Fullerton, 10 Hun, 17 N. Y. Sup. Ct. 63. See Coulter, in re, 2 Saw. 43; Opinions of Judge Advocates, 201.

[3] See Vallandingham, ex parte, 1 Wall. 243.

[4] Bogart, in re, 2 Saw. 396.

[5] Chancellor Kent, in refusing a writ in a case of summary conviction by a police magistrate, said: "It is not for me to examine into the legality or regularity of the conviction any further than to see that the magistrate had competent jurisdiction to convict and imprison in the given case. . . . . I am only to exercise the power given me by the Habeas Corpus Act, and without that I should rather be inclined to think this court had no common law jurisdiction over the subject matter. The conviction and imprisonment in this case are, *primâ facie*, good and valid in law, and that is sufficient upon this collateral inquiry. They must be held valid, until quashed or reversed in the regular course of appeal, by the appropriate tribunal." Matter of Goodhue, 1 City Hall Rec. 153. As to arrests for vagrancy see supra, § 80.

[6] Clark, ex parte, 2 Q. B. 619; Andrews, ex parte, 4 C. B. 226; Cobbett, in re, 7 Q. B. 187; Carus Wilson, in re, 7 Q. B. 984; Crawford, in re, 13 Q. B. 613; Kearney's case, 13 Abb. N. Y. Pr. 459; People *v.* Cassels, 5 Hill N. Y. 164; Phillips *v.* Welch, 12 Nev. 158.

[7] Williamson's case, 26 Penn. St. 9. See Williamson *v.* Lewis, 39 Penn. St. 9.

for an indefinite period), there may be a reviewal by *habeas corpus*;[1] and so where the commitment is on its face defective.[2] And a federal court may review a state commitment for contempt when clashing with a federal duty.[3]

Court determines question of fact.

§ 1000. The ordinary mode of instituting a prosecution, as we have seen, is an oath by the party injured, or by a competent third party in any way cognizant of the facts, before a magistrate or justice of the peace having jurisdiction. The party charged is then arrested and brought before the magistrate, by whom, after the case is heard, the defendant, if the evidence in the magistrate's opinion shows probable cause, is held to answer to the court having local jurisdiction to try the offence.[4] The defendant is then in custody; *i. e.* either in the custody of the officers of the law conducting him to prison, or of the keeper of the prison, or of his own bail. A writ of *habeas corpus* may then be sued out by the defendant, addressed to the person by whom he is detained, and he is then brought by this person before the court issuing the writ. Supposing the object be, as is assumed in the present section, to determine whether there is sufficient proof to hold the defendant for trial, the court issuing the writ then proceeds to hear the evidence adduced by the prosecution. The case, for this purpose, begins *de novo*. The prosecution is not limited to the evidence produced before the committing magistrate. New documentary proof may be adduced; new witnesses may be called; new specifications of guilt introduced. The question before the court, on such writ, is not whether the magistrate acted with technical exactness, but whether the evidence, as presented to the court, shows that the defendant should be required to answer before a court and jury to a charge of a criminal offence. If this be the case, the defendant will be remanded to custody to answer such charge. It has been sometimes suggested that if there be a conflict of testimony, the court, on hearing the writ, should call a jury to its aid; and such has been the practice under some statutes.[5] But the usual

[1] Dakins, ex parte, 16 Q. B. 77; Shank's case, 15 Abb. N. Y. Pr. N. S. 38; Holman *v.* Mayor, 34 Tex. 668; State *v.* Sauvinet, 24 La. An. 119.

[2] People *v.* Conner, 15 Abb. N. Y. Pr. N. S. 430. See supra, § 981.

[3] Supra, § 981.

[4] See supra, §§ 6 *et seq.*

[5] See Graham *v.* Graham, 1 S. & R. 331; but *contra*, Baker *v.* Gordon, 23 Ind. 20.

course is for the court to act on the facts presented in the same way as would a committing magistrate hearing the case *de novo*. If the facts, on the hearing, exhibit a *primâ facie* case of guilt of any offence of which the court has cognizance, the defendant should be remanded, but otherwise not.[1] And it is proper that the court should call for all the facts requisite for a due understanding of the issue.[2]

Probable cause enough.

§ 1001. When, as has been just said, the question is whether the defendant should be bound over to trial, it is enough that probable cause should be made out against him. That this is the test in hearings before committing magistrates,[3] and in investigations before grand juries,[4] we have already seen; and it would be anomalous to require a higher degree of proof on hearing on *habeas corpus*. The object of the writ, in fact, in most cases falling within the category now before us, is to determine whether the case is one which should go before a grand jury; and the test, therefore, to be applied is whether the grand jury, on the evidence before the court, ought to find the bill. If there is probable cause, in the evidence before the court, that the defendant has committed an indictable offence, then he should be remanded to answer such offence.[5]

Court not bound to exclude on technical grounds.

§ 1002. When the question of probable cause is thus brought before the court, it is not bound to apply to evidence the strict exclusionary rules applied in trials before juries. The proceedings are provisional; the prosecution at least is compelled to present its case on very brief notice; *probability* is the test; it is enough if there is probable proof, though still stronger proof may be attainable, if the latter is not fraudulently withheld; and, in addition, the analogy of chancery practice, in which all testimony is offered to the court for inspection, irrespective of technical objection, may be invoked.[6]

§ 1003. A justice of the peace or other committing magistrate

[1] Infra, § 1001; supra, §§ 71, 361; R. *v.* Carden, L. R. 5 Q. B. D. 1; 1 Crim. Law Mag. 197.

[2] Ibid. Supra, § 565.

[3] Supra, § 71.

[4] Supra, § 361.

[5] Marshall, C. J., in Burr's case, supra, § 55; U. S. *v.* Johns, 4 Dall. 413; Com. *v.* Carlisle, Bright. R. 36; Com. *v.* Megary, 8 Phil. 607.

[6] Heywood, in re, 1 Sandf. 701; State *v.* Lyon, Coxe N. J. 403.

is required in England to take the depositions of witnesses examined before him in criminal prosecutions, and to forward these depositions to the court to whom the case is returned. In New York, and other States, the same practice is prescribed. The writ of *habeas corpus* does not by itself require the return of such depositions, and consequently, in order to obtain them, the court issuing the writ of *habeas corpus* issues at the same time a writ of *certiorari* to the magistrate, so as to obtain possession of all his proceedings. In England, the practice of the court on *habeas corpus* is to read these proceedings as part of the case.[1] In most jurisdictions in the United States, the case is heard *de novo* on the testimony produced by the prosecution.

Remitting evidence by *certiorari*.

§ 1004. In the English courts the practice has been to receive affidavits as part of the case both of relator and respondent.[2] In this country affidavits have also been received,[3] though not when secondary to other proof that might without great inconvenience be obtained.[4]

Affidavits may be received.

§ 1005. For merely formal defects, or misstatements of offence, a revisory court will not discharge on *habeas corpus*. It will permit, as we have seen, the return to be amended; or it will, in the exercise of the powers belonging to justices of the peace, hold the relator over on the charge which the evidence develops.[5]

For merely formal defects or variance, court will not discharge.

[1] Bac. Abr. Certiorari, A.; Hurd's Habeas Corpus, b. ii. c. vi. s. 5; Van Boven's case, 9 Q. B. 676.

[2] Hurd's Habeas Corpus, 307; R. *v.* Delaval, 3 Burr. 1434; 1 W. Black. 412.

[3] Bollman, ex parte, 4 Cranch C. C. 75; Burr's Trial, i. 97; People *v.* Chegaray, 18 Wend. 637; State *v.* Lyon, Coxe N. J. 403.

[4] Ibid. In Burr's case, Marshall, C. J., said: "That a magistrate may commit upon affidavits has been decided in the Supreme Court of the United States, though not without hesitation. The presence of the witnesses to be examined by the committing justice, confronted with the accused, is certainly to be desired; and ought to be obtained, unless considerable inconvenience and difficulty exist in procuring his attendance. An *ex parte* affidavit, shaped, perhaps, by the party pressing the prosecution, will always be viewed with some suspicion, and acted on with some caution; but the court thought it would be going too far to reject it altogether."

[5] Supra, §§ 991–2; Bollman, ex parte, 4 Cranch C. C. 75; Bennett, ex parte, 2 Cranch C. C. 612; U. S. *v.* Johns, 4 Dall. 413; Bank U. S. *v.* Jenkins, 18 Johns. 305; People *v.* Nevins, 1 Hill, 154; Taylor, ex parte, 5 Cow. 12; Com. *v.* Crans, 4 Penn. L J. 459; 2 Clark, 172; Com. *v.* Hickey

§ 1006. The writ may be employed to effect the discharge of a person under sentence to whom a pardon has been addressed, if he is still restrained of his liberty;[1] or is relieved from imprisonment by operation of statutes of limitation.[2] In such case, however, it must appear that the state authorities were in default in not previously instituting the prosecution, or bringing the case to trial.[3] Nor does the writ apply to a person out on bail.[4]

Discharge from pardon, or statute of limitations.

§ 1007. Courts with the revisory jurisdiction of criminal prosecutions have, in most cases, the power of discharge on bail; and in many jurisdictions this is a function which, as to high crimes, can only be exercised by such courts. The local laws in this respect, as existing in different sections of the United States, it is not within our limits to detail. The practice as to bail has been already noticed. But, as a general proposition, the writ lies to determine the grade of bail.[5]

Adjustment of bail.

Whether after an indictment found a writ will be granted to

2 Pars. 317; S. C., 1 Clark, 436; State v. Buzine, 4 Harring. 575; Ring, in re, 28 Cal. 247; Ricard, ex parte, 11 Nev. 287.

[1] See Callicot, in re, 8 Blatch. 89; Greathouse's case, 2 Abb. U. S. 382; People v. Cavanaugh, 2 Park. C. R. 650; Edymoin, in re, 8 How. N. Y. Pr. 478.

[2] State v. Maurignos, T. U. P. Charlton, 24. See supra, § 449.

[3] Clark v. Com. 29 Penn. St. 129; Logan v. State, 2 Brev. 415; Byrd v. State, 2 Miss. 163; Stanley, ex parte, 4 Nev. 113. See supra, §§ 328, 583.

[4] Logan v. State, 1 Treadw. S. C. Const. 493.

[5] Jones v. Kelly, 17 Mass. 116; Whiting v. Putnam, 17 Mass. 175; Com. v. Ridgeway, 2 Ashm. 247; Champion, ex parte, 52 Ala. 311; Finch v. State, 15 Fla. 633; Snowdon v. State, 8 Mo. 483. In Bridewell, ex parte, 56 Miss. 39; aff. Wray, ex parte, 30 Miss. 681, it was held that under a constitutional provision that "excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offences where the proof is evident or the presumption great," there is no prohibition against admitting to bail a defendant charged with a capital crime; but he may be so admitted to bail within the sound discretion of the trial judge. Where, in such case, it was further held, a well founded doubt of guilt is entertained, the proof is not evident, nor the presumption great, and bail should be granted. In such cases the burden is on the relator to show that he is illegally deprived of his liberty, and all available evidence should be produced, even if the hearing should be adjourned. Compare Street's case, 43 Miss. 1. That the burden is on the relator see further Duncan, ex parte, Sup. Ct. Cal. 1879, cited infra; Miller v. State, 43 Tex. 579; Walker, ex parte, 3 Tex. Ap. 668; and compare points stated supra, §§ 76–81.

determine the amount of bail has been much discussed. It has been argued on the one side that the indictment is conclusive as to the amount of bail.[1] On the other hand, it is well replied that indictments are not conclusive as to grade of offence, since the indictment is usually for the major offence, when the major includes a minor, while the guilt may be only that of the minor offence. If the offence is bailable, it is further argued, it is for the court to fix the bail at its discretion.[2] The tests to be applied in the determination of the amount of bail have been already discussed.[3]

[1] Marshall, C. J., 1 Burr's Trial, 310; U. S. *v.* Reese, 3 Wash. C. C. 224; People *v.* Dixon, 4 Park. C. R. 651; People *v.* Tinder, 19 Cal. 539.

[2] State *v.* McNab, 20 N. H. 160; People *v.* Hyler, 2 Park. C. R. 570; Lynde *v.* People, 38 Ill. 497; Bryant, ex parte, 34 Ala. 270; Street *v.* State, 43 Miss. 1; Drury *v.* State, 25 Tex. 45. See supra, §§ 76–81.

[3] Supra, §§ 76 *et seq.*

In Ex parte Duncan, Sup. Ct. Cal. December, 1879, 9 Rep. 343, Wallace, C. J., in delivering the opinion of the court, said: "The sole purpose which should guide the court or judge in fixing the amount of bail, in any case in which bail is allowed, should always be to secure the personal appearance of the accused to answer the charge against him. It is not the intention of the law to punish an accused person by imprisoning him in advance of his trial. Such inhumanity or injustice, as inflicting punishment upon him before his guilt has been ascertained by legal means, is not to be imputed to the system of law under which we live; and the provisions to be found in the American constitutions, establishing the writ of *habeas corpus*, securing to accused persons, imprisoned for felonies less than capital in degree, the absolute right to be admitted to bail, and declaring that such bail should not be excessive, strikingly indicate the extreme jealousy with which the common law guards the personal liberty of the citizen from unwarrantable or unnecessary restraint. But I am unable, after a careful examination of the circumstances surrounding this case, so far as they have been presented to me, to arrive at the conclusion that the amount of bail required of the prisoner is excessive. The able counsel for the prisoner argues that the mere fact that the prisoner is unable to procure the bail demanded of him shows that it is excessive in amount, and should therefore be reduced. But I am unable to assent to that proposition. Undoubtedly the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance, among other circumstances, to be considered in fixing the amount in which it is to be required, but it is not in itself controlling. If the position of counsel were correct, then the fact that the prisoner had no means of his own, and no friends who were able or willing to become sureties for him, even in the smallest sum, would constitute a case of excessive bail, and would entitle him to go at large upon his own recognizance. It is claimed that the amount of bail required is excessive, because disproportionate to the amount which the prisoner is alleged to have obtained as the fruits of his crimes.

Judgment must be either discharge or remander.

§ 1008. The judgment must be either discharge or remander. A conditional judgment that an examining magistrate must either commit the prisoner at once, or fully discharge him, cannot be sustained.[1]

During hearing custody is in court of writ.

§ 1009. The effect of the writ being to place the custody of the relator in the court issuing the writ, it is the duty of that court to see to his safe keeping. This is done by either remanding the relator to the keeper of the prison, if he were there confined, or placing him under the control of the sheriff or marshal of the court.[2]

Writ of error not permissible at common law.

§ 1010. In England the action of a court on a writ of *habeas corpus* cannot be revised on error;[3] and the same rule has been repeatedly sustained in this country.[4] But in cases where irremediable injury may be done by the action of the court below, such action partaking of the nature of a final judgment, there is authority to hold that error lies.[5] And in most States appellate process is in such cases pro-

The authorities generally hold that, if the accused has property obtained by the commission of the crime, the bail should be for a larger amount than the value of such property; otherwise the offender might make the crime itself an instrument for escape. This is rather indicating the minimum amount of bail to be required, than determining that an amount greater than the value of the property obtained would be excessive in the sense forbidden by the Constitution."

[1] People *v.* Donahue, 21 N. Y. Sup. Ct. 133.

[2] R. *v.* Bethel, 5 Mod. 22; Kaine, in re, 14 How. 132. As to the question of general custody see supra, § 984.

[3] 8 Co. R. 121 *b*; R. *v.* Dean, 8 Mod. 27; 2 Bro. P. C. 554.

[4] Wyeth *v.* Richardson, 10 Gray, 240; Yates *v.* People, 6 Johns. 429 (though see *contra*, Yates *v.* People, 6 Johns. 337); Russell *v.* Com. 4 Pen. & W. 82; Clark *v.* Com. 29 Penn. St. 129; Bell *v.* State, 4 Gill, 304; Curley, in re, 34 Iowa, 184; Wade *v.* Judge, 5 Ala. 18; Howe *v.* State, 9 Miss. 690; Mitchell, ex parte, 1 La. An. 413; Coopwood, ex parte, 44 Tex. 467.

[5] Holmes *v.* Jennison, 14 Pet. 540; Wells, ex parte, 18 How. 307; Robinson, ex parte, 6 McLean, 360; Lafonta, ex parte, 2 Robert. La. 495.

In Thompson, ex parte, S. Ct. Ill. 1880, we have the following, as reported in 10 Cent. L. J. 5:—

"A writ of error does not lie to review a judgment on a writ of *habeas corpus*. The 68th section of the Practice Act provides that appeals from all Circuit Courts, and from the Superior Court of Cook County, may be taken to the Supreme Court from all final judgments, decrees, and orders. An appeal is given by statute, but a writ of error is a common law right. Neither an appeal nor writ of error lies to reverse a judgment, decree, or order, unless it is final and conclusive on the parties. Is a judgment on the

vided by statute.[1] That some process of revision should be provided is essential. Otherwise a single judge, by writs of *habeas corpus*, could not only discharge every prisoner in the State, but prevent the service of any judicial process requiring attachment of the person.

How far discharge affects subsequent arrest.

§ 1011. When a court of competent jurisdiction has refused to discharge on *habeas corpus*, a court with concurrent jurisdiction may decline to issue a writ on the same case, unless there be an allegation of new facts.[2] It has also been held that if, after a discharge by one judge, the relator should be rearrested, he should be discharged when brought before another judge with coördinate powers.[3] But a discharge on a writ of *habeas corpus* is no bar, in law, to subsequent proceedings for the same offence.[4] As a matter of courtesy or convenience, a judge may say, "This case has been heard already by a coördinate judge, who has remanded or discharged the relator, and I will not go over the same ground." But should a grand jury find a bill in such case, or

hearing of a writ of *habeas corpus*, rendered by a judge in vacation, or by the Circuit Court when in session, of that conclusive character? In 32 Ill. 446, it was held that it was not, and that error would not lie to review it. In some of the States the courts hold that the writ lies, but in a majority it is held that such a judgment cannot be so reviewed. In several, the writ is given by statute, and so by an act of Congress requiring the Supreme Court of the United States to review the decisions of the inferior tribunals rendering such judgments. But the courts of last resort, in a large number of the States of the Union, hold that a writ of error does not lie to such a judgment, and we think these decisions entitled to the greater weight, as they seem to follow the well recognized rule that such a writ only lies to a final determination by the lower court. As to the practice in Great Britain see 2 Salk. 503; 14 East, 92. See also 5 Gilm. 33; 1 Gilm. 606; 32 Ill. 446. Writ dismissed."

[1] See Macready *v.* Wilcox, 33 Conn. 321; Roth *v.* House of Refuge, 31 Md. 329; Cleveland, ex parte, 36 Ala. 306; Rothschild, ex parte, 2 Tex. Ap. 566. As to practice in error see People *v.* Hessing, 28 Ill. 410. The rule in respect to the federal courts has been elsewhere discussed. Supra, § 57.

[2] Lawrence, ex parte, 5 Binn. 304; Com. *v.* Wetherold, 2 Clark, 476. See Miller *v.* State, 43 Tex. 579.

[3] Ibid. See Da Costa, in re, 1 Parker C. R. 129; Com. *v.* McBride, 2 Brewst. 545.

[4] People *v.* Brady, 56 N. Y. 182; Walker *v.* Martin, 43 Ill. 508; Mitchell, ex parte, 1 La. An. 413. See Eldridge *v.* Fancher, 3 Thomp. & C. 189; People *v.* Fancher, 1 Hun, 27. *Contra*, under Missouri statute, Jilz, ex parte, 64 Mo. 205, where it was held that *autrefois acquit* could be pleaded in such cases.

an information, if an information be proper, be presented, the discharge would be no bar. To constitute such a bar there must be a formal acquittal or conviction of a court having jurisdiction.[1]

[1] Supra, §§ 436 *et seq.*

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