

A

PRACTICAL TREATISE

ON

CRIMINAL PROCEDURE,

WITH

DIRECTIONS AND FORMS.

BY

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PREFACE.

The criminal code of this state was copied mainly from that of Ohio, and the criminal code and general procedure of Kansas appear to be substantially the same as in this state.

The decisions of the Supreme Court of each of the states named, upon points relating to offenses and procedure, have been carefully examined and the cases cited, which cover many points not found elsewhere.

The statutes copied are those of this state. The work is intended to have a wider range, however, than the states named. The great body of the criminal law of each of the states, with perhaps one exception, is copied either in language or purpose from English statutes, many of which are so ancient as to be common law to us.

The whole structure of the criminal law of this country, so far as it relates to offenses and procedure in the trial courts, rests upon and is interwoven with the common law.

Hence the importance of presenting the common law upon a given matter in connection with the statute, in order that the changes effected by the statute may be seen, and only such weight be given to the common law authorities upon the questions presented as they may seem entitled to.

The statute and the common law have generally been placed in juxtaposition, so that the effect of the changes made, if any, may readily be seen.

A common law precedent contains the frame of a good indictment under the statute, provided the offense be charged in statutory words.

The form of the charging part of an indictment at common law, stripped of some of its needless verbiage, has been given

in connection with forms under the statute in nearly all offenses which were indictable at common law.

This has been done for two purposes : first, to enable the pleader to keep in view the proper frame of the charge, and second, in cases where no precedent can be found, to enable him by the aid of the statute properly to charge the offense.

The writer has endeavored to take up the different subjects systematically and to state the law relating to them clearly, concisely and accurately.

The general rules governing extradition, both state and national, have been given, together with a form of application for requisition.

In all the states, so far as the writer has observed, the general rules of criminal procedure relating to grand juries, indictments, joinder of defendants, joinder of offenses, motions and pleas to an indictment and conduct of the trial, are substantially alike.

These and many other matters, which can not here be noticed, have been carefully considered and discussed.

The chapters relating to homicide, violence to persons not resulting in death, larceny and abetting the same, perversion of public justice, motions and issues upon the indictment, trial, new trials, sentences and judgments, are believed to be especially valuable alike to the young practitioner and experienced lawyer.

Every step in a criminal prosecution, from its inception to the termination of the trial, denial of a new trial and sentence, has been indicated and appropriate forms given, together with bills of exceptions and transcript of the proceedings and record.

No prosecution should be instituted unless upon evidence establishing a strong probability of the guilt of the accused. A disregard of this rule is usually a great wrong to the party suspected, and not unfrequently leads to a failure to detect and punish crime, as upon the failure to convict the suspected party all further effort to secure the perpetrator ceases.

The importance of basing all prosecutions upon actual evidence is earnestly presented.

From observation and experience in the examination of cases the writer has learned the importance of entering upon the trial of a criminal case without a preconceived opinion as to the guilt or innocence of the accused, and of a patient, careful examination of all the testimony tending to show his guilt or innocence, and of being governed entirely by the evidence in the case.

The plea of a fair trial, however, is not to be used as a means of facilitating the escape of those whom the proof clearly shows to be guilty; nor after conviction should it be used to give importance to technical errors which have not materially prejudiced the rights of the accused.

The writer has endeavored to point out the proper procedure to secure a fair trial and prevent the committing of material errors during its progress.

The aim has been to make the directions and forms clear and concise and they will be found to cover a wide range of cases.

The author is indebted to Judge M. B. Reese, the former capable and efficient district attorney of the fourth district, who has read the proof and made suggestions which add materially to the value of the work.

S. M.

Fremont, Nebr.,
January 15, 1887.



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A PRACTICAL TREATISE
ON
CRIMINAL PROCEDURE
WITH FORMS.

CHAPTER I.

LIMITATION OF PROSECUTIONS, AND HOW AVAILED OF.

In civil actions, statutes of limitation have been found to conduce to the interests of society in general, and as a means of insuring private justice, as the natural tendency of time is to obscure the direct evidence of title, or payment. The statute is, therefore, now regarded favorably by the courts as a statute of repose. In most instances, however, to be available it must be pleaded. In this the two classes of statutes are essentially different. In civil actions the legislature provides a bar, of which a party may avail himself as a defense. If he fails to do so, however, the court having jurisdiction of the subject-matter and the parties may proceed to render judgment against him.

In criminal cases, where the bar is complete the offense in effect is blotted out, and can not again be called into existence at the option of the state.

As a general rule, the statute applies to all offenses in which it may be invoked, whether committed before or after the passage of the act.¹

In instantaneous crimes, such as killing, arson, etc., the stat-

¹Johnson v. U. S., 3 McLean, 89; U. S. v. Ballard, Id., 469; Adams v. Woods, 2 Cr., 342; U. S. v. White, 5 Cr., C. C., 73; Com. v. Hutchinson, 2 Pars., 453.

ute begins to run from the time of the completion of the offense.¹

In continuous crimes it begins to run from the time the criminal act ceased.²

Within what time Indictment must be found or Information filed.—In this state an indictment for any felony (treason, murder, arson and forgery excepted) must be found within three years next after the offense shall be done or committed; and for any offense below the grade of felony, or any fine or forfeiture under any penal statute, the indictment or information must be found or filed within one year and six months. If the punishment does not exceed a fine of one hundred dollars and imprisonment for three months, proceedings must be instituted within one year.³

Where an indictment or information is quashed, set aside, or the case reversed, the time during the pendency of such proceedings shall not be reckoned within the statute so as to bar a new indictment or information for the same offense.⁴

¹State v. Asbury, 26 Texas, 92.

²Gise v. Com., 81 Penn. St., 428.

³Cr. Code, § 256. At common law there was no general statute of limitations applicable to criminal proceedings, and cases "frequently occurred in which parties were convicted and punished many years after the crime had been forgotten." 2 Hale's P.C., 158; 1 Chitty Cr. L., 160. Indictments for felony were seldom preferred till a year and a day had elapsed, as the law favored the proceeding by appeal, which was required to be brought within that period, and upon which alone, in a case of larceny, a restitution of the goods could be obtained, and the right to a restitution of which would be barred by an acquittal. By statute 3 Hen. VII, Chap. 1, it was enacted that in cases of murder there should be an immediate prosecution, and that even if the accused was acquitted at the suit of the king, he would still be liable to a writ of appeal; and by statute 21 Hen. VIII, Chap. 15, in cases of robbery it was provided that there should be restitution of the goods to the owner from whom they were taken, upon an indictment as well as an appeal. 1 Chitty Cr. L., 160. By statute 7 William III, Chap. 3, it was enacted that no prosecutions shall be had for any of the treasons or misprisions therein mentioned unless the indictment be found in three years. In case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given: 4 Blacks. Com., 306; 1 Chitty Cr. L., 160-161. As to what constituted an appeal and the procedure, see 4 Blacks. Com., 313.

⁴Id.

The statutes of most of the states seem to contain substantially the same provisions; but a somewhat different rule seems to prevail in some, at least, of the circuit courts of the United States.¹

Allegations of fraud on the part of the accused will not suspend the running of the statute. Thus, where an alleged misdemeanor was committed more than two years before the warrant was issued, and the defendant during all that time had been a resident of the state, the prosecution can not evade the bar of the statute by showing that the accused concealed the crime until a short time before the arrest.²

Where a statute limits all prosecutions within fixed periods the time laid in the indictment must, as a rule, be within the time limited.³ And in homicide the death must be laid on a day within a year and a day from the time the wound is alleged to have been inflicted.⁴

But if the statute does not impose an absolute bar, but a bar only in certain cases, the time may be laid outside of the statute and the prosecution prove, without an averment to that effect in the indictment, that the defendant is within the exceptions.⁵

¹ An informal presentment is not enough to take the case out of the statute: *U. S. v. Slacum*, 1 Cr., C. C., 485. Nor will an indictment on which a *nolle* has been entered: *U. S. v. Ballard*, 3 McLean, 469.

² *Com. v. The Sheriff*, 3 Brewster, 394.

³ *R. v. Brown, M. & M.*, 163; *U. S. v. Winslow*, 3 Saw., 337; *State v. Hobbs*, 39 Me., 212; *People v. Gregory*, 30 Mich., 371; *State v. Magrath*, 19 Mo., 678.

⁴ *The statute, how pleaded.* When the bar of the statute is complete the offense can no longer be the subject of prosecution. It is based on the presumption of innocence and is to be liberally construed. It is not a statute of process to be sparingly applied, but one of repose, that so far as the law is concerned effaces the offense and closes the doors of the courts against its prosecution. The rule now generally accepted is, that the accused may prove that the action is barred under the general issue. *Com. v. Ruffner*, 28 Penn. St., 260; *Hatwood v. State*, 18 Ind., 492; *U. S. v. Cook*, 17 Wall., 168; *McLane v. State*, 4 Geo., 335; *State v. Bowling*, 10 Humph., 52; *State v. Hussey*, 7 Iowa, 409; see *People v. Roe*, 5 Parker, 231; *State v. Carpenter*, 74 N. C., 230.

⁵ *U. S. v. Cook*, 17 Wall., 168; — S. C., with valuable note, 12 Am. Law Reg., N. S., 682.

In such case the fact that it appears from the indictment that the offense is barred can not be taken advantage of by motion to quash, demurrer or arrest of judgment, but is a matter of defense and must be shown by the accused.¹

The rule is thus stated in *United States v. Cooke*, heretofore cited: "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense can not be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment, founded upon the statute, must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused."

Notwithstanding these authorities it may be questioned if it must not appear on the face of the indictment that the offense is not barred. The proper course is to state the *time* correctly in the indictment, and then allege the *exception*. But a special averment that the offense was committed within the limitation is unnecessary—in fact is a mere conclusion of law.

Our statute requires the trial to take place not later than the second term after the prosecution is instituted, unless continued at the request of the accused.²

It is said that statutes of limitations, unless their language direct the contrary, are binding only on the sovereignty enacting them and have no extra-territorial force.

¹ *Steele v. Smith*, 1 Barn. & Ald., 99; Arch. Cr. Plead. (13 Ed.), 54. The exception is very clearly pointed out in *United States v. Cook*, 17 Wall., 168, and the cases cited. It is evident that such cases are rare.

² Under the habeas corpus act, 31 Charles II, c. 2, § 7, if any person was committed to prison for treason or felony and was not indicted in the term or sessions ensuing, the court was required to admit him to bail, unless it was shown upon oath that the witness for the prosecution could not be produced at the preceding session. Wharton's Conf. of Laws, § 939.

There is no satisfactory reason given why treason, murder, arson and forgery should be excepted from the operation of the statute, if, as is said in the former metaphor, quoted by Brougham in his works,¹ "Time, 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." The defense of the statute is therefore not to be grudgingly applied, but should be generally dispensed, and to protect the innocent should be extended to all crimes.

Proceedings in error in the Supreme Court must be instituted within one year after the rendition of judgment in the district court.²

¹Ed. of 1872, Vol. 14.

²Kountze v. The State, 8 Neb., 294; *contra*, Blackburn v. The State, 22 O. S., 583.

CHAPTER II

ARREST, ARRAIGNMENT AND EXAMINATION BEFORE MAGISTRATE.

Who May Make an Arrest.—Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer, shall arrest and detain any person found violating any law of the state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained.¹

Any Person not an Officer may, without warrant, arrest any person if a petit larceny or a felony has been committed, and there is reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained.²

Justices of the Peace, Mayors of Cities and Villages, Police Judges, and Probate Judges shall have power to issue process for

¹ Cr. Code. § 283. At common law sheriffs and constables were authorized to make arrests and the common law authority of constables was applicable "to tything men, headboroughs and borsholders;" and watchmen, patrols and bealdes had authority to arrest and detain in prison for examination persons walking in the streets at night whom there were reasonable grounds to suspect of felony, though there was no proof of felony having been committed. 1 Chitty Cr. L., 24.

² Cr. Code. § 284. The common law required private individuals who were present when a felony was committed to arrest the offender, the punishment for an escape through their negligence being fine and imprisonment. And every private person was bound to assist an officer demanding his help in the arrest of one charged with felony, or in suppressing an affray. 1 Chitty Cr. L., 17. In *Phillips v. Trull*, 11 John., 487, it is said all persons whatever who are present when a felony is committed or a dangerous wound given are bound to apprehend the offender. 2 Hawk., P. C., 157. So any person whatever, if an affray be made to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders in order to preserve the peace, but after there is an end of the affray they can not be arrested without a warrant. 2 Inst. 52; Burn's Justice, 92.

the apprehension of any person charged with a criminal offense.¹

Whenever a complaint, in writing and upon oath, signed by the complainant, shall be filed with the magistrate charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest of the person accused, if he shall have reasonable grounds to believe that the offense charged has been committed.²

Security for Costs.

Where the offense charged is a misdemeanor, the magistrate before issuing the warrant may, at his discretion, require the complainant to acknowledge himself responsible for costs in case the complaint should be dismissed.³

Which acknowledgment of security for costs shall be entered on the docket, and the magistrate on dismissal may, if in his opinion the complaint was without probable cause, enter a judgment against such complainant for costs made thereon, and in case said magistrate shall consider said complainant wholly irresponsible, such magistrate may in his discretion refuse to issue any warrant, unless the complainant procure some responsible security to the satisfaction of such magistrate for said costs in case of such dismissal, and said security shall acknowledge himself so bound, and the magistrate shall enter it on his docket.⁴

¹ Cr. Code, § 285.

² Cr. Code, § 286. As Magna Charta declared that no one should be taken or imprisoned but by the lawful judgment of his peers or the law of the land, it was for a time insisted that no one could be deprived of his liberty for any offense until after the finding of an indictment against him by the grand jury, which afforded probable evidence that he was guilty. An exception was early allowed to prevail when a thief was taken with the stolen goods actually in his possession. 1 Chitty Cr. L., 12. The practice of arresting before indictment was gradually assumed and sanctioned, and where there was sufficient cause for the arrest, became necessary for the protection of society.

³ Cr. Code, § 287.

⁴ Cr. Code, § 287. At common law as a general rule the prosecution neither paid nor received costs; and as an indictment, even if carried on by a private individual, was considered on behalf of the public, no costs were payable whatever the result of the prosecution. But by statute 25, Geo. II,

The Warrant shall be Directed to the Sheriff or any Constable of the County, or if the same be issued by an officer of the municipal corporation authorized to issue such warrant, then to the marshal or other police officer of such corporation, and reciting the substance of the accusation, shall command the officer forthwith to take the accused and bring him before the magistrate or court issuing the warrant, or some other magistrate having cognizance of the case, to be dealt with according to law ; and no seal shall be necessary to the validity of the warrant.¹

Warrant Directed to Private Person.—The magistrate issuing any such warrant may make an order thereon, authorizing a person to be named in such warrant to execute the same ; and the person named in such order may execute such warrant anywhere in the state by apprehending and conveying such offender before the magistrate issuing such warrant, or before some other magistrate of the same county ; and all sheriffs, coroners and constables and others, when required, in their respective counties, shall aid and assist in the execution of such warrant.²

Pursuit.—If any person charged as aforesaid with the commission of an offense shall flee from justice, it shall be lawful for the officer in whose hands the warrant for such person has been placed to pursue and arrest such person in any other county in this state, and him to convey before the magistrate issuing the warrant, or any other magistrate having cognizance of the case, of the county where such offense was committed.³

If any Person Charged with an Offense shall Abscond or Remove from the county in which such offense is alleged to have been committed, it shall be lawful for any magistrate of the county

c. 36, § 11, it was enacted that it should be in the power of the court before whom any person was tried and *convicted* for grand or petit larceny or any other felony, at the prayer of the prosecutor, to order the treasurer of the county where the offense was committed to pay his reasonable expenses and for loss of time and trouble. 1 Chitty Cr. L., 825.

¹ Cr. Code, § 288.

² Cr. Code, § 289.

³ Cr. Code, § 290.

in which such person may be found to issue a warrant for the arrest and removal of such person to the county in which the offense is alleged to have been committed, to be there delivered to any magistrate of such county, who shall cause the person so delivered to be dealt with according to law, and the warrant so issued shall have the same force and effect as if issued from the county in which such offense is alleged to have been committed.¹

Any officer or other person having in lawful custody any person accused of an offense, for the purpose of bringing him before the proper magistrate or court, may place and detain such prisoner in any county jail of this state for one night or longer, as the occasion may require, so as to answer the purposes of the arrest and custody.²

In Executing a Warrant for the arrest of a person charged with an offense, or a search warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, *if after notice of his office and purpose, he be refused admittance.* But this section is not intended to authorize any officer executing a search warrant to enter any house or building not described in the warrant.³

Person Arrested must be Taken before Magistrate.—Whenever any person has been arrested under a warrant as provided in the preceding sections, it shall be the duty of the officer making the arrest to take the person so arrested before the proper magistrate, and the warrant by virtue of which the arrest was made, with a proper return indorsed thereon and signed by the officer, shall be delivered to such magistrate.

Where any Offense is Committed in View of any Magistrate he may by verbal direction to any sheriff, or constable, or marshal, or other proper officer, or if no such officer be present, then to any citizen, cause the offender to be arrested and kept in custody for the space of one hour, unless he shall sooner be taken from such custody by virtue of a warrant issued on complaint under oath; but a person so arrested shall not be

¹ Cr. Code, § 291.

² Id., § 292.

³ Id., § 293.

confined in jail nor put upon trial until arrested by virtue of such warrant.

At Common Law a warrant is addressed to the constable or other officer whose name is specified.¹ If it is addressed to a sheriff he may act by deputy, but a constable can not act through a deputy.

To Constitute an Arrest so as to render the accused liable for an attempt to escape, there must be some degree of corporal control.

Thus, if the officer inform the accused that he is arrested, and lock the door.² The officer must notify the accused that he is arrested, and, unless he do so, no amount of physical restraint will constitute an arrest.

There must be Notice.—It is said that where both the official character of the party making the arrest and the charge upon which it is made are shown to the party arrested, notice would be an idle form and is not required, at least without demand.³ The above is quoted with approval by the Supreme Court of Ohio, in the case of *Wolf v. The State*.⁴

Notwithstanding these authorities, the officer should be required to state the capacity in which he is acting, and the charge against the party sought to be arrested. The fact that the defendant knows the official character of the officer does not presuppose that he is informed that such officer is armed with authority to arrest him, nor that he is charged with the commission of an offense. Courts have gone quite far enough when they sustain an officer who in good faith has performed his duty without an unnecessary display of authority or the use of unnecessary force. And ordinarily it will be found that the officer who performs his duty firmly, but in a quiet, unassuming manner, will meet with but little resistance.

There is a Distinction between a Warrant that is Illegal and one that is merely Irregular.—If the warrant is illegal, as where the magistrate had no jurisdiction, or it appears on the face of the

¹ *R. v. Whalley*, 7 C. & P., 245; *Meek v. Pierce*, 19 Wis., 300.

² *Williams v. Jones*, Cas. temp. Hardwicke, 284.

³ 1 Bish. Crim. Prac., §§ 647, 648, 649.

⁴ *Wolf v. State*, 19 O. S., 259, citing *Rex v. Woodmen*, 1 Moody, 334.

warrant that the offense charged does not authorize an arrest, the officer acts at his peril, and is not protected by the warrant. But if it is merely irregular, although that may be ground for setting it aside, yet the officer will be protected. At common law it was unnecessary for an officer to produce the warrant in making an arrest, if he stated the substance thereof to the party arrested, and such is undoubtedly the law now unless the accused demand an inspection of the warrant.

Arrests without Warrant.—An officer may arrest a public offender without a warrant where there are reasonable grounds of suspicion that he has committed a felony or breach of the peace.¹ He may also arrest an offender for an offense committed in his presence; but the better view seems to be that such right is limited to felonies, breaches of the peace, and such misdemeanors as can only be stopped or redressed by an immediate arrest.² Therefore, cruelty to an animal, although a misdemeanor by statute, is not such an offense as will authorize an officer to arrest without warrant.³

Without Apparent Cause.—If an officer arrest without apparent cause, he is a mere wrongdoer, and the party sought to be arrested may use sufficient force to repel the assault. The fact that an officer is clothed with authority to make arrests on certain conditions does not authorize him to disregard those conditions. Neither can an officer who has made an arrest without proper cause, and is resisted, treat this resistance as cause of offense, as in such case the party resisting is not liable therefor.

Mere Suspicion will not Justify an Arrest.—The law does not permit an officer to make an arrest unless there is reasonable ground of suspicion, and the mere conduct of a party when accused of an offense is not probable cause.⁴

Arrest by Private Persons.—Where a felony has actually been committed, and there is reasonable ground of suspicion

¹ *Com. v. Carey*, 12 Cush. 246; *Com. v. McLaughlin*, Id., 615; *Shanley v. Wells*, 71 Ill., 78.

² *Wharton's Cr. Pl. and Pr.*, § 8 and note 4.

³ *Butolph v. Blust*, 5 Lansing, 84.

⁴ *Somerville v. Richards*, 37 Mich., 299.

against some particular individual, he may be arrested by a private person although acting without warrant.¹

This right, however, should be very sparingly exercised and only in cases free from doubt. A private person may also intervene in case of a threatened breach of the peace, and take proper steps to compel order.² But his authority ceases on order being restored.³

1. FORM OF COMPLAINT.⁴

State of———, }
 ——— County. } ss.

The complaint of A B, of said county, made before me, E F, a justice of the peace in and for said county, who being first duly sworn deposes and says, that on the — day of —— 18—, in the county of —— (*describe the offense charged as:*) certain property belonging to affiant, to-wit: one horse

¹ *Adams v. Moore*, 2 Selw. N. P., 934; *Barns v. Erben*, 40 N. Y., 463; *Brooks v. Com.*, 61 Penn. St., 352; *Hawley v. Butler*, 54 Barb., 490.

² *Pond v. The People*, 8 Mich., 150.

³ There are many cases where if the law does not enjoin an arrest without warrant yet it permits it, as where a felony has actually been committed by *some one* and there is reasonable ground to believe that the person arrested committed the offense, the justification in such case would rest on the fact that an offense had actually been committed and that there was reasonable ground for suspecting the party arrested. There is a distinction however whether the felony was committed *in the view* of a private person, or in his absence, and the arrest is afterward attempted in consequence of the suspicion of guilt. In the first case, any one may justify breaking open doors in following the accused, and if he kill him provided he can not otherwise be taken the act is justifiable. But a private person can not justify breaking open doors to apprehend another on probable suspicion of felony. 1 Chitty Cr. L., 17.

No private person can of his own authority arrest another for a mere breach of the peace after it is over; for as an officer can not justify such an arrest without a warrant, the power is not conferred on a private person.

Any person may lawfully lay hold of a lunatic about to do mischief which if committed by a sane person would constitute a criminal offense; so he may restrain any sane person, whom he may see on the point of committing a felony, or doing any act which will manifestly endanger the life of another person, and detain him until it may reasonably be supposed that he has changed his purpose. 1 Chitty Cr. L., 18.

⁴ By turning to the form of indictment or information for any particular offense and copying that part containing the statement of the offense, error will be avoided.

ARREST, ARRAIGNMENT, ETC., BEFORE A MAGISTRATE. 13

of the value of fifty dollars was unlawfully and feloniously taken, stolen and driven away. Affiant further states that C D committed the offense.

A B.

Subscribed in my presence and sworn }
to before me this — day of ——— 18—.

E F, Justice of the Peace.

2. FORM OF ORDINARY WARRANT.

The State of ———, ——— County;

To the sheriff or any constable of said county.

Whereas A B has made complaint in writing and upon oath before me one of the justices of the peace in and for said county, that C D, late of said county, did, on or about the — day of ——— 18—, at the county of ———, (*describes the crime as in the complaint.*)*

You are therefore commanded forthwith to arrest said C D and bring him before me or some other magistrate having cognizance of the case, to be dealt with according to law.

Given under my hand this — day of ——— 18—.

E F, Justice of the Peace.

3. FORM WHERE THE ACCUSED HAS ABSCONDED.

(*Follow the preceding form to the * then add:*) and that C D has absconded (*or removed*) from said county of ——— to ——— county.

You are therefore commanded to pursue and arrest the said C D if found in this state, and convey him before me, or any other magistrate having cognizance of the case in said county of ———, there to be dealt with according to law.

Given, etc.

4. SECURITY FOR COSTS IN CASES OF MISDEMEANOR.

The State of ——— }
v. C D. } ss. Before E F, justice of the peace in and for —
in ——— county.

I hereby acknowledge myself responsible for the costs in this case if the complaint shall be dismissed.

G H.

I hereby approve the above security for costs.

E F, Justice of the Peace.

The magistrate may require the security to justify if he has doubts of his responsibility.

5. AFFIDAVIT OF SECURITY FOR COSTS.

State of _____ }
 _____ County: }

G H, being first duly sworn deposes and says that he is a resident of said county; that he has property in — county, in the state of —, subject to execution over and above all exemption, of the value of \$—.

G H.

Subscribed, etc.

For proceedings where a change of the place of trial is sought, see Practice in Justice Courts (4th Ed.), page 47.

6. SUBPENA FOR WITNESSES.

The State of _____, _____ County.

To the sheriff or any constable of said county:

You are hereby commanded to summon _____, to be and appear before me at my office at — forthwith (*if not forthwith designate the time*), to testify the truth in behalf of the state (*or the defendant*) on the examination of C D, of having committed the offense of —.

Hereof fail not, under the penalty of the law, and have you then and there this writ.

Given under my hand this — day of —, 18—.

E F. Justice of the Peace.

The magistrate, if he see fit, or if requested so to do, may order that the witnesses on both sides shall be examined, each one separate from all the others, and that the witnesses for, may be kept separate from the witnesses against the accused during the examination. This should be extended so as to prevent those who have testified from conferring with those who have not, until after their examination.¹

If, upon the whole examination, it appears that there has been no offense committed, or that there is not probable cause for holding the prisoner to answer the offense, he must be discharged.

¹There are cases, particularly where the several members of an unscrupulous family are to testify, where, in order to arrive at the truth, it is necessary not only to prevent them from being present where the testimony is being taken, but to prevent any one from communicating with them until after they have testified. The court or magistrate, where objection is made, should see that the orders in that regard are fully enforced.

Probable cause is defined by a standard writer as "such a state of facts as to make it a reasonable presumption that their supposed existence was the cause of action." ² Bouvier's Law Dict., 377.

The utmost care should be exercised by the magistrate in the examination of a party accused of an offense. The legal presumption of innocence continues as evidence in his favor until overcome by proof of guilt, and no mere suspicions, however strong, are sufficient to constitute probable cause.

If it appears that an offense has been committed and there is probable cause to believe the prisoner guilty, the magistrate should bind, by recognizance, such witnesses against the accused as he shall deem necessary, to appear and testify before the court having cognizance of the offense, on the first day of the next term thereof, and not depart from such court without leave. If the court is in session they must be recognized to appear forthwith, but no recognizance requiring such witnesses to appear at the next term will be invalid from the fact that the court is in session.

When the magistrate is satisfied that there is reason to believe that any witness will not perform the condition of his own recognizance, he may, when the offense is felony, order him to recognize with sufficient sureties.

Any person may recognize for a married woman or minor to appear as a witness, or the magistrate may take the recognizance of either in a sum not exceeding one hundred dollars, which shall be valid notwithstanding the disability of coverture or minority.¹

If any witness, so required to enter into a recognizance, refuse to comply with such order, the magistrate shall commit him or her to jail until he or she shall comply with such order or be otherwise discharged according to law.

The magistrate should enter his proceedings in their order on his docket, thus :

¹ At common law infants and married women being unable to bind themselves by an obligation were required to procure others to be bound for them. In case of failure the magistrate had authority to commit them to prison. 1 Chitty Cr. L., 91.

7.

The State of ——— }
 v. }
 C D. }

January 1, 18—. On this day A B made complaint in writing and upon oath signed by said complainant, as follows: (*copy complaint*), which is filed as required by law. Before issuing the warrant I required the complainant to acknowledge himself responsible for costs in case the complaint should be dismissed. Thereupon he signed the following, which I approve:

“ I hereby acknowledge myself responsible for costs in this case, if the complaint shall be dismissed.

“ Dated January 1, 18—.

“ A B.”

January 1, 18—. Issued warrant for the said C D and delivered the same to L M, sheriff.

January 3, 18—. Warrant returned indorsed as follows (*copy return*). And the body of said C D in the custody of the sheriff is now before me.

(*If a continuance is granted state on whose motion thus:*)

January 3, 18—. O P, a material witness for the defense, being absent, on motion of the defendant this cause is continued until the 5th instant at 2 o'clock P. M., and therefore I issued a mittimus to — for the commitment of C D to the county jail for safe-keeping. (*Or if the offense is bailable, say, after stating the amount of bail:*) Thereupon the said C. D., with — as surety approved by me, entered into a recognizance for appearance of C D at the time and place of trial.

Issued subpoenas for the following witnesses (*give names*) and delivered the same to —, sheriff.

(*If the defendant fail to appear at the time set for the hearing, say:*

January 5, 18—. 2 o'clock P. M. C D failed to appear at the time set for trial, as required by the conditions of his recognizance, and the same is therefore declared forfeited.)

(*If the accused is examined and required to appear at the next term of the district court the entry may be as follows:*)

January 5, 18—, 2 o'clock P. M. C D appeared and plead not guilty to the complaint. Examination was thereupon had in his presence as to the truth of the complaint, L M and N O being sworn as witnesses on the part of the state, and P Q and S T on the part of the accused. On consideration whereof I find that there is probable cause to believe that C D committed the offense charged in said complaint. He is therefore required by me to enter into a recognizance in the sum of \$ —, with good and sufficient sureties, for his appearance before the district court of — county on the first day of the next term thereof to answer said complaint. Thereupon C D entered into a recognizance with O P as surety, who is approved by me.

I also required —, —, —, —, witnesses, each to enter into a recognizance in the sum of \$100, to appear and testify before said court.

If no offense is shown to have been committed, or there is not probable cause for holding the accused to answer the offense, he must be discharged. The entry may be as follows:

Jan. 5, 18—, 2 o'clock P. M. C D appeared and plead not guilty, whereupon I inquired into the truth of said complaint in the presence of the accused. L M and N O were examined as witnesses on the part of the state, and P Q and S T on the part of the accused, and upon the whole examination I find that there is not probable cause for holding the prisoner to answer the offense. He is therefore discharged, and the complaint dismissed.

8. MITTIMUS IN OFFENSES NOT BAILABLE.

The State of ———, ——— County.

To the keeper of the jail of said county:

Whereas C D has been arrested on a complaint in writing signed and sworn to by A B, for (*here describe the crime and state time, place and circumstances as in complaint*) and has been examined by me, E F, a justice of the peace in and for said county, on said charge,* and has been required by me to be safely kept in the jail of said county, so that his body may be had before the district court of said county on the first day of the next term thereof, to answer such charge.

In the name of the state of ——— I therefore command you to receive said C D into your custody in the jail of said county, there to remain until discharged by due course of law.

Given under my hand this — day of —, 18—.

E F, Justice of the Peace.

9. MITTIMUS IN BAILABLE CASES.

(*Follow the preceding form to the *, then add:*) and required to give bail in the sum of \$——, for his appearance before the district court of said county on the first day of the next term thereof, to answer said charge, † which requisition he has failed to comply with.

In the name of the state of ———, I therefore command you to receive the said C D into your custody in the jail of said county, there to remain until discharged by due course of law.

Given under my hand this — day of —, 18—.

E F, Justice of the Peace.

The magistrate must write on the warrant of commitment the names and residences of the principal witnesses by whom the crime was proved before him.

10. MITTIMUS FOR COMMITMENT OF WITNESS FOR REFUSING TO ENTER INTO A RECOGNIZANCE.

(Follow the preceding form to the †, then add:) I thereupon ordered L M, a witness on the part of the state, to enter into a recognizance in the sum of \$—— (with sufficient sureties) to appear and testify before said court on the first day of its next term thereof, and not depart from said court without leave, which order he has refused to comply with.

In the name of the state of,——, I therefore command you to receive the said L M into your custody in the jail of said county, there to remain until he comply with said order or be discharged by due course of law.

Given, etc.

11. FORM OF RETURN TO MITTIMUS.

Jan. 5, 18—, I committed C D, within named, to the custody of the jailer of — county, and left with him a certified copy of this writ.

G H, Sheriff.

12. FORM OF RECOGNIZANCE.

The State of ——, }
 —— County. }

Be it remembered that on the —— day of ——, 18—, C D and L M, of the county of ——, personally appeared before me, E F, a justice of the peace in and for said county, and acknowledged themselves jointly and severally indebted to the state of —— in the sum of \$——, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following:

The condition of this recognizance is such that if the said C D shall personally appear at the next term of the district court in and for —— county, on the first day of the term thereof,* and abide the judgment of the court, and not depart the court without leave, then this recognizance to be void; otherwise to remain in full force and effect.¹

Taken and acknowledged before me the day and year first above written.

E F, Justice of the Peace.

A Recognizance is not a Bond.—It should not be signed, although signing will not invalidate it. Its authenticity depends upon the magistrate's certificate that the acknowledgment it sets forth was made openly before him by the parties in person.²

¹ If taken in term time it should require the party to appear at some day of the term or forthwith.

² The State v. West, 3 O. S., 510; The State v. Irwin, 10 Neb., 325.

13. RECOGNIZANCE FOR WITNESS.

(Follow the preceding form to the *, then add:) to testify in the case of the state of Nebraska v. ———, and not depart without leave of said court, then this recognizance to be void; otherwise to remain in full force and effect, etc.

If the personal recognizance of the witness is taken, as will generally be the case, the form can readily be changed by using the singular number, as: "N O, etc., acknowledged himself indebted, etc."

14. COMPLAINT FOR SEARCH WARRANT.

State of ———, }
County. } ss.

The complaint of A B of said county, made before me, E F, a justice of the peace in and for said county, who being by me first duly sworn, deposes and says, that * on or about the — day of —, 18—, the following described property of ———, to wit: (*describe the property as accurately as possible*) of the value of \$——, was by some person feloniously taken, stolen and carried away from the premises of ———, in said county. † Affiant further says that he verily believes that said property is now concealed by C D in his dwelling house in which he resides, in ——— county, he knowing said property to have been stolen.

A B.

Subscribed, etc.

(If there is reason to believe that the person who conceals the goods is the thief, proceed as above to the †, then add:) And this affiant has just and reasonable grounds to believe that C D committed the offense charged, and now conceals said property in his dwelling house in which he resides, in the county of ———.

15. EMBEZZLEMENT.

(Follow the preceding form to the *, then add:) one C D, then being over the age of eighteen years, was in the employ of A B as clerk (*agent, servant or officer of corporation, as the case may be*), and while so engaged as clerk of said A B, did fraudulently take and secrete, with the intent to embezzle, without the consent of his employer, certain goods and chattels, to wit (*here describe the goods as accurately as possible*): the property of the said A B, of the value of \$——, said property being then in the possession (*or care*) of said C D, by virtue of said employment. Affiant further states that he verily believes that said goods and chattels are concealed by said C D at (*describe place of concealment*).

16. FORM OF SEARCH WARRANT.

The State of ———, ——— County.

To the sheriff or any constable of said county:

Whereas A B has made complaint in writing and upon oath before me,

E F, a justice of the peace in and for ——— county, that (*describe the offense and the place to be searched as in the complaint, and by whom it is believed the offense was committed.*)

You are therefore commanded, with necessary and proper assistance, to enter, in the day time, the said dwelling house of said C D, situated in said county of ———, and diligently search for said goods and chattels, and if found to seize and bring the same, and also the body of the said C D. forthwith before me, or some other magistrate of said county having cognizance of the cause, to be disposed of and dealt with according to law.

Given under my hand this — day of ———, 18—.

E F, Justice of the Peace.

If the magistrate is satisfied that there is urgent necessity therefor, the warrant may order the searching of such house or place in the night time.

When the warrant is executed by the seizure of the property or things described therein, the same must be safely kept by the magistrate to be used as evidence.

17. FORM OF RETURN.

Jan. 5, 18—, I made diligent search for the goods described in the within warrant, at the place mentioned therein, and have found the following (*here describe in full.*) I now have said goods and chattels and also the body of said C D.

G H, Sheriff.

Fees, *items.*

The House of a Third Person may be broken into if, after demand for admission, the officer stating his official character and the object of the search, is refused admission.

The warrant must be strictly followed. No other building can be entered than the one described therein.¹

Before breaking open boxes or trunks the officer should demand the keys;² but if there is no one in charge of the same of whom to make the demand, it will be waived.

The courts have held that a private individual may, without warrant, in certain cases, break into a house and arrest the offender. Such a rule is more honored in the breach than in the observance; it is not the law in this state, unless when a felony is committed in the view of such person.

¹ State v. Spencer, 38 Me., 30; Jones v. Fletcher, 41 Id., 254; State v. Thompson, 44 Iowa, 399; Reed v. Rice, 2 J. J. Marsh., 44.

² 2 Hale P. C., 157.

CHAPTER III.

TRIAL OF MINOR OFFENSES BEFORE MAGISTRATES.

Jurisdiction.—Magistrates have jurisdiction concurrent with the district court, and co-extensive with their respective counties, in all cases of misdemeanor in which the fine can not exceed one hundred dollars and the imprisonment can not exceed three months, except as otherwise provided by law.¹

Defendant Required to Plead.—In all cases where the magistrate shall have jurisdiction to try and sentence or finally discharge, as described in the preceding section, the charge made against the defendant shall be distinctly read to him, and he shall be required to plead thereto, which plea the magistrate shall enter upon his docket. If the defendant refuse to plead, the magistrate shall enter the fact, with a plea of “not guilty” in his behalf.²

After the Plea of the Defendant has been Entered, if he plead not guilty the defendant or complainant, or the district attorney, if he be present, may demand a jury; but if no jury be demanded the cause may be tried by the magistrate.³

If a Jury is Demanded, the magistrate shall make a list in writing of eighteen inhabitants of the county qualified to serve as jurors in courts of record, from which list the defendant and the district attorney or complainant shall strike out names alternately until each shall have struck out six names, the defendant striking out the first name.⁴

To Strike out Names of Jurors.—In case the defendant or the district attorney or complainant shall neglect to strike out such names, the magistrate shall proceed to strike out the

¹ Cr. Code, § 314.

² Id., § 315.

³ Id., § 316.

⁴ Id., § 317.

names for either or both the parties so neglecting, and the magistrate shall issue a venire, directed to the sheriff or any constable of the county, requiring him to summon the six persons whose names shall remain upon the list to appear before such magistrate at a time and place to be named therein, to serve as jurors for the trial of such cause.¹

If the defendant consent, the cause may be tried before a jury of any number of men more than two and less than six, to be selected from a list of double the number so agreed upon, of qualified inhabitants of the county, as provided in the last preceding section; each party striking out names from the list alternately until the number so agreed upon shall remain, the defendant striking out the first name.²

The venire shall be served personally upon the jurors and returned within the time therein specified. If any of the jurors named in the venire shall fail to attend in pursuance thereof, or if there be any legal objection to any that shall appear, the magistrate shall supply the deficiency by directing the sheriff or constable, or other ministerial officer who may be present and disinterested, to summon any of the bystanders or others who may be competent, and against whom no cause of challenge shall appear, to act as jurors in the cause. The magistrate may compel any delinquent juror to attend by attachment. If the officer to whom the venire for a jury shall have been delivered shall fail to return the same³ as thereby required, or if the jury shall fail to agree and be discharged by the magistrate, a new jury shall be selected and summoned in the same manner, and the same proceedings shall thereupon be had as herein prescribed in respect to the first jury, unless the defendant shall consent to be tried by the magistrate, in which case the magistrate shall proceed to try the case as if no jury had been demanded.⁴

In all trials for misdemeanors before a magistrate, either

¹ Cr. Code, § 318.

² Id., § 319.

³ Id., § 320.

⁴ Id., § 320.

party may challenge jurors for cause, to the same extent as in trials for like offenses in the district court.¹

Whenever the defendant shall be tried under the provisions of this chapter and found guilty, either by the magistrate or jury, or shall enter a plea of guilty, the court shall render judgment thereon, assessing such punishment, either by fine or imprisonment, or both, as the nature of the case may require and the law permit; in such case the defendant shall, in addition to the fine or imprisonment, be adjudged to pay the costs, and to be committed to the county jail until the judgment be complied with.² Whenever the defendant tried under the provisions of this chapter shall be acquitted, he shall be immediately discharged, and if the magistrate or jury trying the case shall state in the finding that the complaint was malicious or without probable cause, the magistrate shall enter judgment against the complainant for all costs that shall have accrued in the proceedings had upon such complaint, and shall commit the complainant to jail until such costs be paid,³ unless he shall execute a bond to the state of Nebraska in double the amount thereof, with security satisfactory to the justice, that he will pay such judgment within thirty days after the date of its rendition.⁴

The defendant shall have the right of appeal from any judgment of a magistrate imposing fine or imprisonment, or both, under this chapter, to the district court of the county, which appeal shall be taken immediately upon the rendition of such judgment and shall stay all further proceedings upon such judgment.⁵

¹ Cr. Code, § 321.

² Notwithstanding this provision, after the expiration of the term of imprisonment if the prisoner is unable to pay the fine and costs he may be discharged. Imprisonment can not be prolonged indefinitely. An execution may issue against the property of the defendant.

³ As heretofore stated the right to imprison for costs in such case, if the complainant has no means to pay them, is very doubtful. If the magistrate has doubt of the ability of the complainant to pay the costs, he should require security before issuing a warrant.

⁴ Cr. Code. § 322.

⁵ *Id.*, § 323. An appeal at common law when spoken of as a criminal prosecution denotes an accusation by one person against another for some heinous

No appeal shall be granted or proceedings stayed unless the appellant shall within twenty-four hours after the rendition of the judgment enter into a recognizance to the state of Nebraska, in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof to answer the complaint against him. The magistrate from whose judgment the appeal is taken shall make return of the proceedings had before him, and shall certify the complaint¹ and warrant together with all recognizances to said district court on or before the first day of the next term thereof, next thereafter to be holden in the county, and he may also require the complainant and witnesses to enter into recognizance with or without security, as he may deem best, to appear at said court, at the time aforesaid and abide the order of said court, and in case of refusal to enter into such recognizance he may enforce the same by imprisonment, if necessary.²

The district court shall hear and determine any cause under this act brought by appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court at any stage of the proceedings shall order a new complaint to be filed therein, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside.³

crime, demanding punishment on account of the particular injury suffered rather than for the offense against the public. This private process for the punishment of public crimes probably had its origin in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offenses. In the Saxon laws, particularly those of King Athelstan, the several weregilds for homicide were established in progressive order from the death of the peasant up to the king himself. 4 Blacks. Comm., 312-313. Appeal, in the sense of a re-trial of the case in the appellate tribunal, is purely statutory and governed by the provisions of the statute authorizing it. The statute is to be liberally construed being in furtherance of justice.

¹ If the original complaint is lost the district court may order a new complaint to be substituted, covering the same offense as shown by the justice's transcript. *Bays v. The State*, 6 Neb., 167.

² Cr. Code, § 324.

³ Cr. Code, § 325.

If upon the trial in the district court the defendant shall be convicted, the court shall assess the punishment and judgment shall be rendered against him accordingly, and for the costs before the magistrate, also for the costs in such court, and that he be committed to the county jail until the judgment be complied with.¹

If, in the progress of any trial before a magistrate under the provisions of this chapter, it shall appear that the defendant ought to be put upon his trial for an offense not cognizable before a magistrate, the magistrate shall immediately stop all further proceedings before him and proceed as in other criminal cases exclusively cognizable before the district court.²

In such case a new complaint must be filed charging the proper offense. *Thompson v. The State*, 6 Neb. 106.

18. VENIRE FOR JURY.

The State of Nebraska, ——— County.

To the sheriff or any constable of said county:

You are hereby commanded to summon ———, ———, ———, ———, ———, ———, to appear before me at my office, in said county, on the — day of ———, A. D. 18—, at — o'clock in the —noon, to serve as jurors in a case pending before me, wherein the state of Nebraska is plaintiff and C. D. is defendant, then and there to be tried. And this they shall in no wise omit. And have you then and there this writ with your doings thereon.

Given under my hand this — day of ———, A. D. 18—.

E F, Justice of the Peace.

19. FORM OF RETURN TO VENIRE.

Jan. 5, 18—. On this day I personally served the within summons on ———, ———, ———, ———, ——— and ———,

Fees, *items*.

G H, Sheriff.

Challenges for Cause may be made to the same extent as in trials for like offenses in the district court.

¹Cr. Code, § 326.

²Cr. Code, § 327.

20. FORM OF OATH TO JUROR WHEN EXAMINED ON HIS VOIR
DIRE.

You do solemnly swear that you will answer truly all questions put to you touching your qualifications to serve as a juror in the case of the State of Nebraska *v.* ——— (*name of accused*), so help you God.

Talesmen may be selected as in civil actions. When all challenges have been made the following oath must be administered to the jury:¹

You shall well and truly try, and true deliverance make between the state of Nebraska and the prisoner at the bar (*giving his name*), so help you God.

After the jury has been impaneled and sworn, the trial shall proceed in the following order:

First: The counsel for the state must state the case of the prosecution, and may briefly state the evidence by which he expects to sustain it.

Second: The defendant or his counsel must then state his defense, and may briefly state the evidence he expects to offer in support of it.²

Third: The state must first produce its evidence; the defendant will then produce his evidence.

Fourth: The state will then be confined to rebutting evidence, unless the court, for good reason, in furtherance of justice, shall permit it to offer evidence in chief.³

Fifth: When the evidence is concluded, unless the case is submitted without argument, the attorney for the state shall commence, the defendant or his attorney follow, and the attorney for the state conclude the argument to the jury.

Whenever in the opinion of the court it is proper for the jury to have a view of the place in which any material fact occurred, it may order them to be conducted in a body, under

¹Cr. Code, § 471.

²In some cases the attorney for the defendant may not desire to state his defense until after the introduction of the evidence on the part of the prosecution. But ordinarily the statutory rule will be followed.

³Although the language would seem to limit the right to offer evidence in chief to the state, there is no doubt that the court, in furtherance of justice, may permit either party to offer such evidence.

the charge of an officer, to the place which shall be shown to them by some person appointed by the court.

While the jury are thus absent, no other person than the sheriff having them in charge and the person appointed to show them the place shall speak to them on any subject connected with the trial.

For form of oath and affirmation of witnesses and interpreter see *post*, chapter on Trial.

When the case is finally submitted to the jury, they shall be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict, or are discharged by the court.

The officer having them in charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon a verdict, unless by order of the court.

When the jury have agreed upon their verdict they must be conducted into court by the officer having them in charge.

Before the verdict is accepted,¹ the jury may be polled at the request of either the prosecuting attorney or the defendant.

26. FORMS OF VERDICT.

The State of Nebraska }
 v. }
 C D. }

We, the jury, duly impaneled and sworn in above entitled cause, find the defendant guilty in manner and form as he is charged in the complaint.

27. FORM OF JUDGMENT.

Now, on this — day of —, 18—, C D being present in court and being asked whether he had anything to say why judgment should not be pronounced against him, answered he had nothing. It is therefore considered by me that said defendant be imprisoned in the jail of — county for the period of three months, and that he pay the costs of prosecution, taxed at \$— (or that he pay a fine of \$— and costs of prosecution, etc.)

¹ That is, before the jury are discharged.

27. FORM OF RECOGNIZANCE FOR AN APPEAL.

The State of Nebraska, }
 _____ County. }

Be it remembered that on the _____ day of _____, 18—, C D and _____, of the county of _____, personally appeared before me, E F, a justice of the peace of said county, and acknowledged themselves jointly and severally indebted to the state of Nebraska in the sum of \$100, to be levied of their goods and chattels, lands and tenements, if default is made in the condition following:

The condition of this recognizance is such that if the said C D shall personally appear before the district court of _____ county, on the first day of the next term thereof, then and there to answer the charge of (*state offense as in complaint*), and to abide the judgment of the court and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and effect.

Taken and acknowledged before me the day and place above written.

E F, Justice of the Peace.

28. FORM OF VERDICT OF NOT GUILTY.

The State of Nebraska }
 v. }
 C D. }

We, the jury, duly impaneled and sworn in the above entitled cause, find the defendant not guilty; (*where there was not probable cause*) and we further find that the complaint in this case was malicious.

F G, Foreman.

29. FORM OF JUDGMENT.

It is therefore considered by me that said defendant be discharged and the complaint dismissed, and as the complaint was without probable cause it is considered by me that said A B pay the costs incurred herein, taxed at \$—.

Where it is clear that the complaint was made without probable cause and the jury or magistrate so find, he should render judgment for costs against the complainant. A party who, without cause, seeks to cast a stain upon the reputation of another, is not entitled to much sympathy if he is taxed with the costs of the proceeding.

The better course, however, is to require the complainant to give security for costs before issuing the warrant.

For forms of docket entries see *ante*, pages 16-17.

POLICE COURTS.

All criminal and *quasi* criminal proceedings arising under the ordinances of the city or village, must be conducted in the name of the state,¹ thus:

The State of _____ }
v. }
C D. }

The procedure is substantially the same as in the trial of misdemeanors. Great care is necessary on the part of a police judge to distinguish between mere misfortune and crime. It is to be feared that this distinction is not observed at all times, and that in many cases sentences are entirely disproportioned to the offense.

¹ *City of Brownville v. Cook*, 4 Neb., 106-7.

CHAPTER IV.

PROCEDURE TO PREVENT CRIMES AND OFFENSES.¹

To Keep the Peace, Complaints.—Whenever any person shall make complaint in writing, upon oath, before any justice of the peace, mayor of any city or incorporated village, police judge, or probate judge, that he² has just cause to fear, and does fear, that another will commit any offense against the person or property of himself, his ward, or child, it shall be the duty of the magistrate before whom such complaint is made to issue a warrant in the name of the state to any constable of the county, commanding him forthwith to arrest the person complained of, and him to take before such magistrate, or any other magistrate, named in this section, of the same county, to answer such complaint.³

When the party complained of shall be brought before the magistrate, he shall be heard in his defense, and all witnesses produced shall be examined upon oath, and if, upon such examination, the magistrate shall be of the opinion that there is just cause for the complaint, he shall order the person complained of to enter into a recognizance, with good and sufficient security, in any sum not less than fifty nor more than one thousand dollars, for his appearance before the district court the first day of the next term thereof, or forthwith, if it be term time of said court; and in the meantime he shall keep the peace and be of good behavior generally, and especially toward the person complaining.⁴

¹ Chapter XXVI of Cr. Code.

² The complaint must be made by the party who deems himself or property in danger unless made in behalf of his minor child. A wife cannot make the complaint in behalf of her husband. *Errickson v. The State*, 10 Neb., 585.

³ Cr. Code, § 267.

⁴ *Id.*, § 268.

In default of such recognizance and security, as provided in the preceding section, the magistrate shall commit the person complained of to the jail of the county, there to remain until discharged by due course of law.¹

But if the magistrate on the examination shall be satisfied that there is no just cause for the complaint, it shall be his duty to discharge the accused and render judgment in the name of the state against the party complaining, for the costs of the prosecution, and the same shall be collected by execution, as in civil cases.²

In case the defendant is recognized or committed, as aforesaid, the magistrate shall require the material witnesses in the case to enter into a recognizance to appear in court, as described in section three hundred and three.³

All recognizances authorized to be taken as aforesaid either in term time or vacation of that court, to which the same may be returnable, shall be delivered or transmitted by the magistrate taking the same to the clerk of such court, without unnecessary delay, and before the commencement of the term of the court next thereafter to be holden, if such recognizance be taken in vacation; but if the same be taken in term time, then it shall be returned forthwith.⁴

Every person who, in the presence of any magistrate specified in the first section, shall make an affray, or threaten to kill or beat another, or to commit any offense against the person or property of another, and every person who in the presence of said officer shall contend with hot and angry words to the disturbance of the peace, may be ordered without process, or any other proof, to give such security as above, specified in this title, and in case of failure or refusal, he may be committed in like manner as above specified.⁵

The district court to which any transcript or recognizance to keep the peace shall be returned, as aforesaid, shall, upon

¹ Cr. Code, § 269.

² Id., § 270.

³ Id., § 271.

⁴ Id., § 272.

⁵ Id., § 273.

the appearance of the parties complaining and complained of, examine the witnesses produced upon oath, and may either discharge the accused from his recognizance or commitment, or may order him to enter into such other and further security as may be just, thereafter to keep the peace and be of good behavior for such term of time as the court may order.¹

For want of such security the court shall commit the accused to the jail of the county, there to remain until such order be complied with or he be otherwise discharged by due course of law ; but in no case shall a person so failing to give security be confined for a period of time exceeding one year.²

Whether such person be held to bail or be committed for want thereof, the court shall in either case render judgment against him for the costs of the prosecution, and award execution therefor.³

When any person shall have been recognized to court to keep the peace as aforesaid, and the complainant shall fail to prosecute his complaint, the party recognized shall be discharged unless good cause to the contrary be shown.⁴

If the district court shall discharge the person accused on examination of the complaint, or because the complainant has failed to appear, said court may in its discretion render judgment against the person complaining for the costs of the prosecution, and award execution therefor.⁵

30. FORM OF COMPLAINT.*

State of _____ }
 _____ County. }

A B makes complaint in writing and upon oath before me, E F, a justice of the peace in and for _____ county, and deposes and says that he has just cause to fear, and does fear, that C D, of said county, will unlawfully

¹ Cr. Code, § 274.

² Id., § 275.

³ Id., § 276.

⁴ Id., § 277.

⁵ Id., § 278.

* A magistrate in drawing a complaint should copy the charge as set forth in the indictment for that offense.

(maliciously and willfully) (state the injury feared according to the threats made by the defendant.)¹

Signed,

A B.

Subscribed, etc.,

If the complaint is fear of injury to a child or ward, add after the statement of the injury feared, "that said (name of child or ward) is the child (or ward) of this affiant."

31. FORM OF WARRANT.

The State ———, ——— County.

To the sheriff or any constable of said county:

Whereas, complaint in writing and upon oath has been made before me, E F, a justice of the peace in and for ——— county, by A B. of said county, that he has just cause to fear and does fear that one C D, late of said county, will (state the threatened injury as in the complaint.)

Therefore, in the name of the state of ———, you are hereby commanded forthwith to arrest the said C D and him take and bring forthwith before me, or some other justice of the peace, the county judge, [or before the police judge of any city or incorporated village] in said county, to answer said complaint, and to show cause why he [or she] should not find security to keep the peace and be of good behavior generally, and especially toward the said A B, and for his appearance before the district court of ——— county, on the first day of the next term thereof.

Given under my hand this ——— day of ——— 18—.

E F, Justice of the Peace.

The warrant is served and returned as other warrants.

32. FORM OF RECOGNIZANCE TO KEEP THE PEACE.

The State of Nebraska, }
 ——— County }

Be it remembered that on the ——— day of ———, 18—, C D and N O of the county of ——— personally appeared before me, E F, a justice of the peace in and for said county, and acknowledged themselves jointly and severally indebted to the state of ——— in the sum of \$1,000, to be levied of their goods and chattels, lands and tenements, if default is made in the following condition.

The condition of this recognizance is such that if the said C D shall personally appear before the district court of ——— county, on the first day of

¹ The person making the complaint may include all the causes to fear the person complained of, to his person, family and property. Conklin v. State, 8 Ind., 458.

the next term thereof (*or forthwith if it be in term time*), to answer to the complaint of A B, that he has just cause to fear and does fear that said C D will (*copy the charge from the complaint*) and abide the order and judgment of said court, and in the meantime that he will keep the peace and be of good behavior generally and especially toward the said A B, then this recognizance to be void; otherwise to remain in full force and effect.

Taken and acknowledged before me this — day of —, 18—.

E F, Justice of the Peace.

If the accused refuses to enter into a recognizance he should be committed to jail.

33. FORM OF MITTIMUS.

The State of —, — County.

To the keeper of the jail of said county:

Whereas C D, of the county aforesaid, has been arrested on the complaint of A B, that he has just cause to fear and does fear that said C D will (*set forth the charge as in the complaint*), and whereas I have examined into the truth of said complaint as required by law, and being of the opinion that there was just cause therefor, I ordered said C D to enter into a recognizance (*with security*) in the sum of \$—, conditioned for his appearance before the district court of — county, on the first day of the next term thereof, to answer said complaint, and in the meantime to keep the peace and be of good behavior toward all men, but particularly said A B, which order he has failed to comply with.

In the name of the state of —, I therefore command you to receive said C D into your custody, in the jail of said county, there to remain until he comply with said order, or be discharged by due course of law.

Given under my hand this — day of —, 18—.

E F, Justice of the Peace.

For form of return see *ante*, page 18.

34. FORM OF MITTIMUS WHERE THE OFFENSE IS COMMITTED IN PRESENCE OF MAGISTRATE.

The State of — — County.

To the keeper of the jail of said county:

Whereas C D, of the county aforesaid, on the — day of —, 18—, in the presence of the undersigned, a justice of the peace in and for said county, did unlawfully (*here state the facts as to the disturbance and the threats*), thereupon I ordered said C D to give security in the sum of \$— for his appearance, to answer for said offense before the district

court of said county on the first day of the next term thereof, and in the meantime to keep the peace, and be of good behavior generally, and especially toward A B, which order he has failed to comply with.

In the name of the state of ———, I therefore command you to receive the said C D into your custody in the jail of said county, there to remain until discharged by due course of law.

Given under my hand this ——— day of ———, 18—.

E F, Justice of the Peace.

If the disturbance arose in court the offense may be described thus :

Said CD in my presence at my office in ——— county, on the ——— day of ——— 18—, and while I was holding court as justice of the peace, in an abusive and threatening manner contended [with F G, saying in an excited and angry manner these words (*copy words used*) to the disturbance of the public peace,¹ etc.

All recognizances must be returned to the clerk of the district court of the proper county. The proceedings must be entered on the docket of the magistrate, see *ante* pages 16–17, and a certified transcript sent to the district court, and an itemized statement of the costs.

Proceedings in the District Court.—The district court, upon the appearance of the party complaining and complained of, must examine the witnesses produced upon oath, and may either discharge the accused or may order him to give other and further security.²

35. DISCHARGE OF DEFENDANT.

The State of ——— }
 v. }
 C D. }

Now on this ——— day of ———, 18—, comes A B, the complainant, and C D, the defendant, as required by the condition of a recognizance entered by

¹ Notwithstanding the broad language used in the statute the right to arrest without warrant for offenses committed in the officer's presence is limited to felonies, breaches of the peace and that class of misdemeanors that can not be stopped or redressed except by immediate arrest. Great care should be taken to see that the power is not abused. The rights of citizens to freedom from arrest should be sacredly guarded unless such arrest is made for cause. *R. v. Spencer*, 3 F. & F., 857; *R. v. Lockley*, 4 Id., 155.

² The question as to just cause to fear relates to the time the proceedings were instituted and not to the time of trial. *State v. Sawyer*, 35 Ind., 80; *State v. Steward*, 48 Id., 46.

said defendant before E F, a justice of the peace of ——— county, and filed in the office of the clerk of this court, and thereupon the cause came on for hearing on the evidence offered by the respective parties, on consideration whereof the court finds that no reasonable grounds existed for filing said complaint.

It is therefore considered that the defendant be discharged and that the costs of this prosecution be paid by A B, and that execution be awarded therefor.

36. ORDER FOR OTHER RECOGNIZANCE.

Title of Cause.

Now, on this——day of——18—, comes A B, complainant, and C D, the defendant, as required by the condition of a recognizance entered into by him before E F, a justice of the peace of ——— county, and filed in the office of the clerk of this court, and thereupon this cause came on for hearing upon the evidence offered by the respective parties, on consideration whereof the court finds that reasonable grounds existed for filing said complaint.

It is therefore considered by me that said C D do forthwith enter into a recognizance in the sum of \$——, with good and sufficient sureties to be of good behavior and keep the peace with all persons, and particularly with A B, the complainant, for the term of ——— years from this date and in default of such recognizance he be committed to the jail of ——— county, there to remain until he comply with this order or otherwise be legally discharged, and that he may pay the costs of prosecution taxed at \$——. (*Give items.*)

37. DISCHARGED ON FAILURE OF COMPLAINING WITNESS TO PROSECUTE.

Title of Cause.

Now, on this —— day of —— 18—, came the defendant, as required by the condition of his recognizance entered into by him before E F, a justice of the peace of —— county, and filed in the office of the clerk of this court, and the complainant failing to appear and prosecute his complaint, it is considered by the court that said C D be, and he hereby is, discharged from his recognizance. It is further considered that the costs of this proceeding taxed at \$——, be paid by said A B.

CHAPTER V.

EXTRADITION.

Under Treaty or Convention with Foreign Governments.—Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If on such hearing he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.¹

¹ Sec. 5270, Rev. Stat. U. S. Sec. 5271 relates to the evidence upon which an original warrant in any foreign country may have been granted, and the mode of its authentication.

Sec. 5272 declares that it shall be lawful for the secretary of state, under his hand and seal, to order the person so committed to be delivered to such person as shall be authorized in the name and on behalf of such foreign gov-

The Course of Procedure is plainly pointed out by the statutes referred to in connection with the treaty, which must be consulted. No state can exercise jurisdiction over the matter.¹

Crimes Against United States.—As the constitution and laws of the United States are the paramount law, the United States may arrest those who have violated such laws if found within the limits of any state, without the intervention of the state authorities.²

Fugitives from any State or Territory.—It will be seen that Sec. 5278 provides for the surrender of fugitives from justice from any state or *territory*. The purpose, no doubt, was to place the territories on an equal footing, in that regard, with the states, as the territories are not mentioned in Sec. 11, Art. 4, of the Constitution of the United States.

For Violation of a State Law.—When extradition is sought for an offense of which the state courts have jurisdiction the request must come from the governor of the state and must be authenticated by the great seal of the state.³

When Sought for an Offense Against the United States the appli-

ernment to be tried for the crime of which such person shall be so accused, etc.

Sec. 5273 provides that where the accused is detained within the United States two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed by the readiest way out of the United States or any state, that upon proper application and notice to the secretary of state, the prisoner may be discharged, etc.

Sec. 5274 continues the right of extradition so long as any treaty to that effect exists with any foreign government and no longer.

Sec. 5275 requires the president to protect any person delivered by a foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, etc.

Sec. 5278 relates to fugitives from justice from any state or territory, and Sec. 5280 provides for the restoration of seamen who have deserted when there are treaty obligations to that effect.

¹ *People v. Curtis*, 50 N. Y. 321.

² Rev. Stat. U. S. § 1014.

³ It is suggested in a circular that the certificate be attached by means of tape or ribbon so that both ends of the tape or ribbon pass completely under the impression of the seal on the paper.

cation is to be made through the attorney-general of the United States or the proper executive department.

All Requests for the Institution of Proceedings are to be addressed to the secretary of state and accompanied by the necessary papers, and must contain the full name of the agent proposed to receive and convey the prisoner to the United States. The evidence required to be used in the foreign state is as follows:

First. If the fugitive escaped after conviction, a copy of the record and judgment, certified under the seal of the court, with the certificate of the judge as to its genuineness, and authenticated under the seal of the proper federal court, or under the seal of the state.

Second. If an indictment has been found, but no trial had, a copy of the indictment with a copy of the warrant, if any was issued, and the return to the same duly authenticated as above.

Third. If no indictment has been found, but criminal proceedings have been instituted and a warrant issued, a copy of the procedure in the case together with a copy of evidence, so far as it can be procured, upon which the warrant issued, and a copy of the warrant, with any return that may have been made thereon. All to be duly certified and authenticated as under the first subdivision. If extradition is sought for several offenses, copies of the several convictions, indictments, informations, etc., duly certified and authenticated, must be forwarded with the request, and should name the several offenses.

All Papers Above Enumerated should be transmitted in duplicate, one copy to be filed in the department and one for the use of the agent.

Copies of Depositions.—In some of the countries with which the United States have treaties the party producing copies of depositions is required to attest, under oath, that they are true copies of the original depositions. The agent, therefore, from a comparison of the copies with the original, should be prepared to make the necessary attestation. Where the original depositions are used such attestation is not necessary.¹

¹ Instructions of department of state July, 1885, and circular concerning the authentication of documents, for copies of which the author is indebted to Hon. Thos. F. Bayard, secretary of state,

Between States.—The Constitution of the United States provides 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.”¹

Who are Fugitives.—The word “fugitive” in law means one who, having committed a crime in one jurisdiction, flees or escapes into another to avoid punishment.² The offense must actually have been committed within the state claiming the alleged offender, and he must be an actual fugitive therefrom;³ therefore, if the accused has not fled from the demanding state he is not a fugitive. That is, if a person commits a crime in a state without being personally present therein, he is not a fugitive and can not be surrendered under the extradition law.⁴

For What Offenses.—It will be observed that the Constitution of the United States provides for a surrender of fugitives charged with “treason, felony or other crime.” The Supreme Court of the United States has held that “every offense made punishable by the law of the state in which it was committed” will authorize the issuing of a requisition.⁵

¹ Art. 4, §§ 11, 12.

² Webster Dict., 548.

³ *Wilcox v. Nolze*, 34 O. S., 520.

⁴ This is illustrated by the case of *Wilcox v. Nolze*, 34 O. S. 520, in which one Nolze was indicted in the city of New York for obtaining, in that city, from the firm of Simpson & Co., twenty-one piano fortes. The governor of New York sent a requisition to the governor of Ohio for Nolze as a fugitive from justice. In pursuance of the requisition the governor of Ohio issued a warrant, under which Nolze was arrested. Nolze thereupon applied for a writ of habeas corpus, and on the hearing, proved that the representations complained of were made in Cleveland, Ohio, and that he had not been in New York for nearly a year prior to the time the representations were made. He was discharged.

⁵ *Kentucky v. Dennison*, 24 How., 66. The soundness of this decision and those following it may be questioned. One Lago was indicted in Kentucky for enticing and assisting a slave to escape from his master, and a requisition was made on the governor of Ohio for the surrender of Lago. The governor refused to surrender him because the act with which he was charged was not an offense under the laws of Ohio, nor did it affect the pub-

Mandamus will not lie.—In *Kentucky v. Dennison*¹ application was made to the Supreme Court of the United States for a mandamus to compel the governor of Ohio to surrender Lago. The mandamus was denied for the reason that no power was delegated to the general government to employ coercive means to compel the executive of a state to act. In other words, a state officer can not be compelled to act officially under a statute of the United States, although he may do so if he chooses. Usually such duties are voluntarily performed.

Arrest of Fugitive.—In most of the states the procedure is regulated by statute, which must be followed. In the absence of statutory provisions three things are required in order to give the governor of the state upon which the demand is made jurisdiction, viz. : first, the alleged fugitive must be demanded by the executive of the state from which he fled ; second, a copy of an indictment found or an affidavit made before a magistrate, charging the fugitive with having committed the crime ; third, such copy of the indictment or affidavit must be certified as authentic by the executive of the demanding state.²

Rules.—In some of the states, at least, in addition to statutes regulating the procedure, the executive has adopted rules for making the application. These seem to be largely based on those adopted by the general government, examples of which are here given.

In Abeyance.—If a prosecution has already been commenced in the asylum state against the fugitive for a violation of the laws of that state, then that state has jurisdiction of his person for that particular purpose and the proceedings may go on until their final determination. But the mere fact that the fugitive has violated the laws of the asylum state, where no

lic safety, nor was it *malum in se*. The governor of the asylum state may well consider that what is not made an offense by the laws of that state and does not affect the public safety, and is not *malum in se*, will not justify a requisition. The authorities on this question are not in harmony.

¹ 24 How., 66.

² See *In re Clark*, 9 Wend., 212.

proceedings have been instituted against him, will not defeat a requisition.¹

A State has no Authority under the constitution and statutes of the United States to deliver fugitives to a foreign government, as the government of the United States has exclusive jurisdiction in such cases.²

Tried for Other Charges.—In a number of cases it has been held that when a fugitive is transferred from one state to another under the provisions of the extradition law, that he is liable in the state to which he has been taken to any prosecution that may be brought against him in such state. These cases lose sight of the fact that the provision of the constitution is in the nature of a treaty between the states, binding upon all courts, both state and national. Therefore, where one charged with crime is taken to the state from which it is claimed he fled and is there tried and acquitted of *that* charge, he should be set at liberty. The fact that the statute requires not only that the offense charged shall be specifically described, but that a copy of the indictment or sworn complaint, duly authenticated, shall be presented to the governor on whom the demand is made, excludes by implication a surrender for any other offense. On principle the same rules would seem to apply as between the United States and foreign governments.³

¹State v. Allen, 2 Humph., 258; *In re Troutman*, 4 Zab., 634. In *Work v. Corrington*, 34 O. S., 64, it was held that when a warrant for the surrender of a fugitive is obtained in a case in which it should not have been issued, the governor may revoke it whether issued by himself or his predecessor. It is said (page 74), "The tribunal which has exclusive jurisdiction to grant and issue process, has, ordinarily, the power to quash or supersede it, when the fact that it is invalid, or was improperly obtained, is made to appear; and there is no reason for holding that this process is an exception to the rule."

²People v. Curtis, 50 N. Y., 321.

³For an able discussion of the rule contended for as applied to the extradition treaty of 1842 between Great Britain and the United States, see *Commonwealth v. Hawes*, 6 Cent. L. J., 350, where it was held that Hawes could not be tried for any other crime than that for which he had been surrendered.

There must be a formal requisition to obtain a technical surrender.¹

No General Authority to Issue Warrants.—As a rule the executive of a state has no general power to issue warrants of arrest, and when he proceeds to issue a warrant his whole authority is derived from the constitution and act of Congress, regulated, perhaps, by the statutes of his own state. Therefore he must keep within his authority or his act will be void.

Habeas Corpus.—A writ of habeas corpus may be issued in a proper case to examine the grounds of imprisonment in this as in other cases of arrest. Thus, the court may inquire: First, whether or not the prisoner is a fugitive. If he is not, the governor had no authority to act in the premises and the prisoner is entitled to his discharge. Second, the warrant must be based on an indictment or affidavit charging the prisoner with the commission of specific offenses in the demanding state. Third, it must appear that the prisoner is the identical person charged with the commission of the offense. In addition to these grounds it may be shown that the indictment or affidavit fails to set forth a crime in the demanding state. But in the absence of proof the fact that the indictment has been found is *prima facie* evidence that the offense was indictable.²

In Ohio applications for requisitions must be made by the prosecuting attorney, except in cases of convicts escaped from the penitentiary.

When the Application is Based on an Indictment the only papers required are the application, copy of the indictment, duly authenticated, and affidavit as to the purpose for which the extradition of the alleged fugitive is desired.

When Based on a Complaint.—The complaint should be made before a justice of the peace, and duplicate copies of the complaint duly certified by him to be true copies of the original instrument on file in his office, and must be accompanied by an affidavit setting forth the details of the commission of the

¹ *Botts v. Williams*, 17 B. Mon. 687.

² See Maxwell Pl. and Pr. under the code (4th Ed.), 756-758.

crime and as to the purpose for which the extradition is sought.

All applications and accompanying papers must be in duplicate and duly certified and authenticated.

In Kansas.—The following rules have been adopted, special attention being called to rules three and four :¹

I. The requisition should be accompanied by certified copies of the indictment or affidavit, and copies of all papers which were presented to the executive authority of the state or territory from whence the requisition came. All papers should be certified by the governor making the requisition, to be authentic.

II. When the requisition is founded upon an affidavit, it is required that the facts constituting the offense be set forth in full, and as particularly as in an indictment, and the official character of the officer taking the affidavit must be shown by proper certificate.

III. That the application is not made for the purpose of collecting a debt, or for any private purpose whatever; and should the requisition be honored, the criminal proceeding shall not be used for any of said objects.

IV. In cases of false pretenses, embezzlement, bastardy, and other similar crimes, it should be stated by the affiant, under oath, that the only object is to punish the criminal, and that they will not use him for the purpose of enforcing a civil remedy.

V. Proof by affidavit is required, satisfying the executive that the alleged criminal is a fugitive from justice, and that the ends of justice require a criminal prosecution for the protection of the public.

VI. If the offense is not of recent occurrence, good reasons must be given for the delay in causing the arrest.

¹ The author is indebted to Gov. Martin, of Kansas, for a copy of the rules in extradition cases, forms, etc.; also to Gov. Foraker, of Ohio, for the same. A copy of the rules in force in Nebraska will be found in *Practice in Justice Courts* (4th Ed.). There is a general complaint that the extradition laws are used almost exclusively to collect debts and not as a means of enforcing the criminal law. The remedy would seem to be the passage of laws imposing a penalty for the abuse of the extradition law for that purpose.

VII. If the crime charged is seduction, the evidence of the female must be corroborated by other evidence.

VIII. If the charge is forgery, an affidavit of the person whose name is alleged to have been forged must be produced, or its absence satisfactorily explained.

IX. Proof under oath is required, that the fugitive required is believed to have taken refuge in the state of Kansas, and the reason why such information is not verified by the person possessing it stated.

X. It should affirmatively appear by the requisition that the offense charged is a crime in violation of the laws of the state or territory invoking the demand.

The practice of parties who desire to get persons within the jurisdiction of the courts of a state, to enable them to prosecute civil remedies, or to collect debts of doubtful validity, or force settlements by the improper use of the criminal laws, under the fraudulent pretense of prosecuting persons for embezzlement, obtaining property under false pretenses, selling mortgaged property to defraud creditors, making fraudulent transfers, etc., has become so prevalent that it has grown into an abuse of the law authorizing the rendition of fugitives from justice:

APPLICATION FOR REQUISITION.¹

(To be made in duplicate.)

Hon. _____

Governor of the state of _____

I respectfully ask that you issue a requisition to the governor of — for the apprehension and rendition of — who stands charged by² — pending in the — court, within and for the county of — with the crime of — committed in — county, but who has, since the commission of said offense, and before an arrest could be made upon process issued by said court, and with a view of avoiding the same, fled from justice of the state of — and is now, as your petitioner verily believes, in the county of — and state of —, and the grounds for such belief are as follows: _____

The ends of justice, in my opinion, require that he be brought back to this state for trial. I herewith present a duly certified copy of the original² — now on file in the office of _____ in said county.

In my opinion the fact — stated in said² — true, and I believe that the

¹This is the form in use in Kansas but it is believed to be applicable in any state.

²Here insert "Complaint," or "Information," as the case may be.

prosecution of said _____ would result in his conviction of the crime charged. I nominate _____ of _____ county, as a proper person to be appointed and commissioned by you as the agent of the state of _____ to receive the said fugitive when he shall be apprehended, and bring him to this state; and deliver him into the custody of the sheriff of said county. I also certify that _____ has no private interest in the proposed arrest. The requisition asked for said fugitive is not sought for the purpose of collecting a debt, or enforcing a civil remedy, or to answer any other private end whatever.

Dated at _____, 18—
The State of _____, _____ county.

I, _____, being duly sworn, on my oath say that the facts stated in the foregoing application are true.

Subscribed and sworn to before me, this _____ day of _____ 18—.

To the Governor :

In my opinion it would be proper for your excellency to issue the requisition asked.

Prosecuting Attorney.

NOTE.—To each copy of this application must be attached a certified copy of the "Complaint," or "Information," and the "Warrant." To each copy of the "Complaint" must be attached a certificate of the county clerk as to the official character of the magistrate.

The following additional rules have been adopted by the governor of Kansas :

1. *The application must invariably be made in duplicate, and have attached to each copy thereof a duly certified copy of the affidavit, complaint or information, and the warrant. No requisition will be issued without a strict compliance with this rule.*

2. If the application is based on affidavit, the affidavit must state the *facts* constituting the offense, and be sworn to before a *magistrate*, who must certify that he is acquainted with the witnesses, and believes their statements to be true.

3. When statements are made on *information* and *belief*, they must be distinctly defined, and the source of information and grounds of belief must be set forth in detail.

4. The official character of the magistrate must be authenticated by the certificate of the county clerk, under his official seal.

5. If the offense is not of recent occurrence, good reasons must be given for the delay in making the application.

6. The purpose in granting requisitions is to aid in the administration of the criminal law. Requisitions will not be granted in any case to assist in the collection of debts, or to enforce a civil remedy. Special care must be taken in preparing papers in cases of false pretenses, embezzlement and similar crimes; and in this class of cases the county attorney must certify that the ends of justice demand a criminal prosecution for the protection of the public.

When a requisition is desired on the executive of Ohio all papers must be in *triplicate*, and when desired on the executive of Missouri it must be based on an indictment or affidavit made before a magistrate.

CHAPTER VI

JOINDER OF DEFENDANTS IN INDICTMENT.

Joint Offense.—When two or more persons join in the commission of an offense they may be jointly indicted for it, or they may be indicted separately. But if the offense is one which, from its nature, can not be participated in by more than one person, such as perjury and the like, there can be no joinder of defendants, because such offenses are in their nature distinct.¹ So if the offense charged was not wholly the joint act of all the defendants, but arose from some particular act or omission of each, the indictment must charge them severally and not jointly;² that is, a joint indictment will not lie because each one separately has committed an offense of like nature, but not the *same offense*.

May be Joined as Principals.—If two or more persons confederate together to break open a store and steal the goods therein, and it is agreed between them that at the time agreed on one of them shall entice the owner away from the store and detain him there while the others break into the store and steal the goods, and the confederates perform their respective parts of the agreement, the person who thus enticed the owner away and detained him may be indicted jointly with the others for the burglary as a principal.³

Who may not be Joined.—Persons holding different offices with separate duties can not be joined in an indictment for a misdemeanor in office.⁴

¹ R. v. Philipps, 2 Str., 921.

² Stephens v. The State, 14 Ohio, 386; Horne v. The State, 37 Ga., 80; U. S. v. Kazinski, 2 Sprague, 7.

³ Breese v. The State, 12 O. S., 146; see also Rex v. Standley, Russ. & Ry. C. C., 305.

⁴ Com. v. Miller, 2 Parsons, 481.

In Conspiracy less than two can not commit the crime; the acquittal of one where but two are indicted extends to both.¹

Principals and Accessories Before the Fact.—An accessory before the fact is one who, being absent at the time of the crime committed, yet procures, counsels, or commands another to commit it.² When it is claimed that the principal goes beyond the terms of solicitation the approved test is “was the event alleged to be the crime to which the accused is charged to be the accessory a probable cause of the act which he counseled.”³

When the act is committed through the agency of a person who has no legal discretion nor a will, as in the case of a child or an insane person, the incitor, though absent when the crime was committed, will not be an accessory but a principal.⁴

Aid, Abet or Procure.—“If any person shall aid, abet, or procure any other person to commit any felony, every person so offending, shall, upon conviction thereof, be imprisoned in the penitentiary for any time between the respective periods for which the principal offenders could be imprisoned for the principal offense, or if such principal offender would on conviction be punishable with death, or be imprisoned for life, then such aider, abettor, or procurer shall be punished with death, or be imprisoned for life, the same as the principal offender would be.”⁵

At common law an accessory can not be put upon his separate trial without his consent until the conviction of the principal.⁶

¹ *Turpin v. The State*, 4 Blackf., 72; *State v. Mainor*, 6 Ired., 340; *State v. Allison*, 3 Yerger, 428.

² 1 Hale's Pl. Cr., 615.

³ 1 Foster & F. Cr. Cas., 242; *Roscoe Cr. Ev.*, 207.

⁴ 1 Hale's Pl. Cr., 618; 1 *Bouvier Law Dict.*, 49. If A let out a wild beast or employ a madman to kill others, whereby B is killed, A is principal in this case, though absent, because the instrument can not be a principal. 1 Hale's P. C., 617.

⁵ Cr. Code, § 1.

⁶ 3 *Greenleaf's Ev.*, § 46, and cases cited in note 1.

But by statute, 7 Geo. 4, Ch. 64, § 9, an accessory before the fact is deemed guilty of a substantive felony, for which he may be indicted and tried, whether the principal has or has not been previously convicted. In *Noland v. The State*,¹ it was held that section 1 of the Criminal Code above quoted made the crime of aiding, abetting and procuring a crime to be committed a substantive, independent offense, for which a conviction could be had without the conviction of the principal offender.

An Accessory is not Ordinarily to be Charged in the Indictment as Principal, but as accessory, and the indictment must set forth the commission of the offense by the principal—that is, the person aiding and abetting must be indicted as *accessory*, and not as principal.

“An Accessory after the Fact is a person who, after full knowledge that a felony has been committed, conceals it from the magistrate, or harbors and protects the person charged with, or found guilty of the crime. Any person found guilty of being an accessory after the fact shall be imprisoned in the jail of the county for any term not exceeding two years, and fined in a sum not exceeding five hundred dollars, in the discretion of the court, to be regulated by the circumstances of the case and the enormity of the crime.”²

A person to be charged as accessory after the fact must be shown to be aware of the guilt of his principal. Blackstone says: “An accessory after the fact may be when a person, knowing a felony to have been committed, receives, relieves, comforts or assists the felon. Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed. In the next place he must relieve, comfort or assist him.”³

When two or more persons are indicted jointly for felony, each person so indicted shall, upon application to the court, be tried separately.⁴ No doubt this rule applies to all offenses;

¹ 19 O., 131.

² Cr. Code, § 2.

³ 4 Blackstone Com., 37.

⁴ Cr. Code, § 465.

and even in cases of misdemeanor when a demand is made for a separate trial the court should grant it. The state may require separate trials as a matter of right.¹

When a Case is Tried Jointly it is the duty of the court to instruct the jury that they must not permit one defendant to suffer prejudice by the defense made by the other.²

A Change of Venue as to one of two persons jointly indicted, granted on his application, necessarily includes a motion and order for a separate trial of the party making the motion and has all the force and effect of an order for that purpose.³

The court has full power on the application of a party indicted jointly with another, upon good cause shown, to order a change of venue as to such party.⁴

38. MOTION FOR CHANGE OF VENUE.

Title of cause.

The defendant, A B, moves the court for a change of the place of trial in this case for the following reasons: First, because a fair and impartial trial can not be had of said cause in — county. Second.

A B, by L S, his attorney.

39. AFFIDAVIT FOR CHANGE OF VENUE.

Title of cause, venue.

A B being first duly sworn, deposes and says that he is a resident of — county, and has resided therein for, — years last past, and is well acquainted with the citizens therein and knows their sentiments in regard to this case and he believes an impartial trial can not be had in said county because of the prejudice of the citizens thereof.

¹ State v. Bradley, 9 Richards, 168; Hawkins v. State, 9 Ala. 137.

² Carr v. Robinson, 1 Gray, 555.

³ Brown v. State, 18 O. S., 496.

⁴ Id.

CHAPTER VII.

JOINDER OF OFFENSES.¹

An Indictment for Larceny may contain also a count for obtaining the same property by false pretenses, or a count for embezzlement thereof, and for receiving or concealing the same property knowing it to have been stolen, and the jury may convict of either offense, and may find all or any of the persons indicted guilty of either of the offenses charged in the indictment.

Several Distinct Offenses may be Joined in different counts of the same indictment, as a general rule, either where they arise out of, and are connected with, the same transaction, or where they are connected with the same subject-matter.²

A count charging two or more persons jointly with burglary, may be joined with a count charging one of them with burglary and the others with aiding and abetting.³

Where the crimes charged are of the same nature but differ only in degree, they may be joined in different counts of the same indictment.⁴

Burglary and Larceny, where each constitutes a part of the

¹ Criminal Code, § 419.

² Bailey v. The State, 4 O. S., 441. In Wilson v. State, 20 Ohio, 29, it is said, "nothing contributes more to the strength and safety of criminal pleadings than brevity. Prolixity tends to the embarrassment of both judge and jury. 'It has been the constant aim of modern legislation,' said Lord Denman in Reg. v. O'Connell, 11 Clark & Fin., 15, to *simplify* criminal charges, nor is any object worthier of attention in framing the code of every civilized country. For my own part I do not like the practice of setting forth more than one distinct offense in the same indictment.'"

³ Methard v. The State, 19 O. S., 363.

⁴ Barton v. The State, 18 Ohio, 221.

same transaction, may both be charged in the same count, and the defendant may be found guilty of the larceny only.¹

It is proper to charge in one indictment the forgery of a paper and the uttering of it as genuine.²

An indictment which charged the defendant with keeping and controlling a building where intoxicating liquors were sold in violation of law and "where gambling, fighting, drunkenness, and breaches of the peace" were permitted by him, does not charge two distinct offenses.³

An indictment which charges the commission of an offense which in its nature includes several inferior offenses is not for such reason multifarious.⁴

A single count in an indictment may allege all the circumstances necessary to constitute two different crimes, where the offense described is a complicated one.⁵

Prosecution Must Elect.—If an indictment charges two or more offenses, arising out of different and distinct transactions, the prosecuting attorney may be required to elect on which charge he will proceed.⁶ And if it appears from the testimony during the trial that the offenses are distinct the prosecution will be compelled before verdict to elect that on which it relies.⁷

¹ *State v. Brandon*, 7 Kas., 106; *State v. Hayden*, 45 Iowa, 12.

² *State v. McPherson*, 9 Iowa, 53; *State v. Nichols*, 38 Id., 110.

³ *State v. Dean*, 44 Iowa, 648.

⁴ *State v. Gorham*, 55 N. H., 152.

⁵ *Id.*

⁶ *Bailey v. The State*, 4 O. S., 442.

⁷ *R. v. Trueman*, 8 C. & P., 727; *State v. Nelson*, 29 Me., 329; *Com. v. Hills*, 10 Cush., 539; *Com. v. Sullivan*, 104 Mass., 552. A distinction is to be observed between the offense itself and the means by which it was committed. Thus, in case of murder it may be charged in separate counts of the indictment that the murder was committed by shooting, stabbing, drowning, etc. This is permitted in order to anticipate any possible variance in the proof. But only one offense is charged—the murder of the person named, and if the proof shows the accused to be guilty of committing the act in any of the ways named it will be the jury's duty to convict. A statute which would dispense with a statement in the indictment of the particular means by which the death of the deceased was caused would tend to simplify the procedure and promote the ends of justice.

The general rule may be stated thus: That in offenses of a high grade but a single issue will be permitted to go to the jury, and the court will require the prosecution to elect, except in those cases where the offenses are so blended that it is for the jury to determine which count, if any, the evidence applies to,¹ as in cases of murder to determine the degree of the crime.

Indictments under Statutes.—An indictment under a statute prohibiting certain acts, as the sale of spirituous liquors, to-wit, whisky, brandy, rum, gin, etc., in less quantities than one quart without license, may include all violations of the statute at one time, although the accused then sold all the prohibited liquors named. *State v. Whittier*, 3 Ala., 102.

Where the Offense Consists of Many Acts, all the acts may be alleged in one count in the indictment, as in case of assault, battery and false imprisonment; while in themselves separately considered they are distinct offenses, yet collectively they constitute but one offense. *Francisco v. State*, 4 Zab., 30-32.

In Regard to a Series of Minor Offenses there are numerous cases which hold that separate counts may be made to cover a series of closely consecutive offenses. It is said that this joinder is for the benefit of the defendant, to save him from the accumulation of costs which otherwise might have a crushing effect. The effect of the trial of *distinct* offenses in the same indictment is in many cases to confuse the jury and defeat the ends of justice.

¹ *Bainbridge v. The State*, 30 O. S., 264; *State v. Smith*, 22 Vt., 74; *State v. Croteau*, 23 Id., 14; *Kane v. The People*, 8 Wend., 203.

CHAPTER VIII.

THE GRAND JURY.

The statute points out the mode of selecting the grand jury, which need not be referred to here. Assuming that the grand jury was lawfully selected and summoned they should be *required* to appear and serve.

Mere pressure of business should not be received as an excuse, and the better course is to require all those chosen to serve, except in case of sickness of themselves or families. Where jurors are excused and it is necessary to select talesmen, the sheriff should select intelligent, fair-minded, disinterested men.

Court Should Interrogate Jurors.—Before the jurors are sworn the court should interrogate them as to their qualifications, and if it should appear that any one summoned is not an elector in that county he should be excused. So, too, if it should appear that a juror was subject to any bodily infirmity amounting to a disability or is otherwise disqualified he should be excused.¹

Want of Qualifications of Grand Juror.—The grand jury must be composed of persons possessing the qualifications prescribed by the statute, and a want of qualifications can not be

¹ At common law grand jurors were required to be good and lawful men. If any juror was disqualified he was liable to be challenged by the person before the bill was presented; or if it was discovered after the finding the defendant could plead these facts in avoidance. In 1st Chitty Cr. L., 308, it is said: "It is clear that a defendant before issue joined may plead the objection in avoidance, but if he take no exception before his trial it seems doubtful how far he can take advantage of it except it can be verified by the records of the court in which the indictment is depending."

waived. The court, being satisfied as to the qualifications of the jurors, will appoint a foreman. The foreman will then take the following oath :

“Saving yourself and fellow jurors, you, as foreman of this grand inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge or otherwise come to your knowledge, touching the present service. The counsel of the state, your own, and your fellows’, you shall keep secret unless called on in a court of justice to make disclosures. You shall present no person through malice, hatred, or ill-will, nor shall you leave any person unrepresented, through fear, favor or affection, or for any reward or hope thereof; but in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding.”

Thereupon the following oath or affirmation shall be administered to the other grand jurors:

“The same oath which A B, your foreman, hath now taken before you on his part, you, and each of you, shall well and truly observe and keep, on your respective parts.”

The grand jury, after being sworn, shall be charged as to their duty by the judge, who shall call their attention particularly to the obligation of secrecy which their oaths impose, and to such offenses as he is by law required to specially charge.

After the charge of the court, the grand jury shall retire with the officer appointed to attend to them, and shall proceed to inquire of and present all offenses committed within the limits of the county in and for which they were impaneled and sworn.

I desire to call attention to the charge of Judge Field, of the United States Supreme Court, as a correct statement of the duties of a grand jury. “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 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 offense, another and a different offense 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 offense against the laws of the United States, or of facts which tend to show that such an offense 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 can not 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; 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." Charge to the Grand Jury, 2 Sawyer, 667-70.

And in regard to the degree of proof required to find an indictment, the following from the same charge is a clear and correct statement of the law: "You will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or guilt of the accused, and, more, if in the course of your inquiries you have reason to believe that there is other evidence, not presented to you, within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. Formerly it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment you must be convinced, so far as the evidence before you goes, that the accused is guilty; in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury."

The Clerk is Required to Make out Two Lists, on which he shall enter the names of all persons who appear, by the returns of the magistrates, to have been either committed or bailed for an offense during the vacation of such court, the name of the magistrate who committed or bailed, and distinguishing whether such person was committed or bailed; one of these lists shall be delivered by the judge to the foreman of the grand jury, and the other, together with all the transcripts and other documents returned by the magistrates, shall be delivered to the prosecuting attorney.

Challenges of Grand Jurors.—A grand jury is not limited in its investigation to cases where the accused has been examined before a magistrate and bound over to answer the action of a grand jury. A party therefore may be indicted without knowing that an accusation has been made against him or an opportunity given to challenge any of the jurors for cause. Objections to the mode of selecting or impaneling a jury which do not relate to the competency of individual jurors may be made by a plea in abatement, or if the defect appears on the face of the record, by a motion to quash.

Who may Challenge.—Any one bound over to abide the action of the grand jury or against whom a prosecution is threatened may challenge for cause.¹

The court may permit an *amicus curiæ* to suggest the disqualifications of the juror or a defect in impaneling the jury. *Com. v. Smith*, 9 Mass., 107.

The Causes of Challenge.—It is good cause of challenge to a juror that he has formed and expressed an opinion that a party accused of an offense whose case will probably be presented to the jury, is guilty.²

All challenges for cause must be made before the jury is sworn, unless circumstances were such as to prevent the party from exercising them.

In a few instances courts have refused to set aside a grand juror even where he originated a prosecution against a person for a crime.³ These decisions grew out of a misconception of the powers and duties of grand jurors. A grand juror acts judicially in determining whether there is sufficient evidence before the jury to warrant it in finding an indictment. It is therefore contrary to the analogies of our law to permit the prosecutor also to act in a judicial capacity in determining whether an indictment shall be found.

The Grand Jury Should be a Fair and Impartial Body of Men.—No one who has formed or expressed an opinion that a party accused of crime is guilty, should be permitted to sit in that case. In nothing is the state so much interested as in protecting the rights and liberties of its citizens, and it must not

¹ *People v. Horton*, 4 Park. C. R., 222; *Hudson v. State*, 1 Blackf., 317; *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 *Tucker's Case*, 8 Mass., 286; *State v. Clarissa*, 11 Ala., 57; *State v. Hughes*, 1 Ala., 655.

² *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; *contra*, see *Musick v. People*, 40 Ill., 268; *State v. Clarissa*, 11 Ala., 57. This seems to have been denied in a few instances. *Musick v. The People*, 40 Ill., 268; *State v. Clarissa*, 11 Ala., 57.

³ *Com. v. Tucker*, 8 Mass., 286; *Baldwin Case*, 2 Taylor, 473.

permit the grand jury to be used as a means to forward the interest or gratify the animosity of any one.

It has been held that it was no ground of challenge to a grand juror that he belonged to an association whose object was to detect crime.¹ But this may be doubted. Before any witness can be permitted to testify an oath or affirmation must be administered to him truly to testify to such matters and things as may be lawfully inquired of him before said jury, which oath or affirmation may be administered either by the foreman, or by the clerk of the court.

FORM OF OATH OF WITNESS BEFORE GRAND JURY.

You do solemnly swear that you will truly testify to all such matters and things as may be lawfully inquired of you before the grand jury, so help you God.

FORM OF AFFIRMATION OF WITNESS BEFORE GRAND JURY.

You do solemnly and sincerely affirm that you will truly testify to all such matters and things as may be lawfully inquired of you before the grand jury. And this you do under the pains and penalties of perjury.

OATH OF INTERPRETER.

You do solemnly swear that you will faithfully and correctly interpret between the grand jury, district attorney, and the witness now being examined, so help you God.

Subpœnas for Witnesses.—Whenever required by the grand jury, or prosecuting attorney, the clerk of the court will issue subpœnas for witnesses.

FORM OF SUBPœNA FOR WITNESSES.

The State of ———, ——— County.

To A B, C D, E F and G H:

You are hereby commanded to appear and testify as witnesses before the grand jury of ——— county, at ——— on the ——— day of ———, 18—. Hereof fail not under the penalty of the law.

¹ Musick v. The People, 40 Ill., 268.

In witness whereof I have hereunto set my hand and affixed the seal of the District Court of said county this _____ day of _____ 18—.

S T, Clerk.

FORM OF RETURN OF OFFICER.

On this — day of — 18—, I served this subpoena on the within named _____ by (*state the mode of service as —, by reading the same to him, or each of them, or by leaving a certified copy of the same at the usual place of residence of A B, or the usual place of residence of either of them,*) G H, not found in _____ county.

If a witness refuse to answer questions the facts, including the question, should be stated in writing to the court, together with the reasons of the witness for refusing to answer. The court will then determine whether the question is one proper for the witness to answer. If the matter sought to be elicited would tend to make the witness criminally liable, or expose him to public ignominy, he can not be compelled to answer; but a mere civil liability is no excuse.

NOTICE OF REFUSAL OF WITNESS TO ANSWER QUESTIONS.

_____, MAY 1, 18—.

To S M, Judge of the District Court of _____ County:

The grand jury of _____ county respectfully state that one G H, a witness testifying before us, refuses to answer the following question put to him by the foreman of the jury, to wit: (*State in full.*) The excuse of said G H for said refusal is that said question would render him criminally liable.

L M, Foreman of Grand Jury.

If the court determine that the witness is bound to answer, and he persists in his refusal, he shall be brought before the court and proceeded against in the same manner as for a contempt.

Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court must be notified of the accusation against him, and have a reasonable time to make his defense.

Must be in Writing and Sworn to.—Where a witness is charged with refusal to answer a question an information under oath

charging the offense must be filed in court. The information may be made by any one knowing the facts and should state the question which the witness refuses to answer. A warrant will then be issued as in a civil case. See Maxw. Pl. and Pr. (4 Ed.), 514.

ORDER OF COURT IN PROCEEDINGS FOR CONTEMPT.

Now on this — day of — 18—, came the district attorney of — and filed an information under oath charging one — — a witness before the grand jury of said county, with refusing to answer the following question before said jury, to-wit: (*State in full.*) And the said —, being present in court and said information being read to him, stated that he was ready for trial: thereupon the cause came on for hearing, and it appearing to the court that said witness has no legal or valid excuse for refusing to answer said question, it is therefore considered that a fine of \$— be imposed upon said — for said contempt, and that he be imprisoned in the county jail of — county until he submit to answer said question, or be otherwise lawfully discharged. It is further ordered that a warrant issue accordingly.

RETURN OF VENIRE.

Sept. 1, 18—. The venire for a grand jury of — county heretofore issued was this day duly returned by the sheriff with the following indorsement thereon to-wit: (*Copy in full.*) And now at — o'clock — m. on said day, said jurors were called in open court and all appeared in answer thereto except C D and E F; and it satisfactorily appearing to the court that C D is unable to attend as a grand juror at this term by reason of sickness in his family, he is therefore excused, and the sheriff is directed to summon a talesman in his place. And it is further ordered that a rule be entered against E F, returnable — — requiring him to show cause why he should not be punished as for contempt. (*The entries that follow are merely a record of each step in the proceedings.*)

For other objections to the grand jury see Plea of Abatement, etc.

In Case of the Sickness, Death, Discharge or Non-attendance of a Juror, after the jury has been impaneled, the court may cause another to be selected in his stead. The court has no authority to make the selection but will direct the sheriff to do so.

At Least Twelve of the Grand Jurors Must Concur in Finding an Indictment.—When an indictment is found the foreman must indorse on it the words "A true bill," and subscribe his name

thereto as foreman. He must also indorse on the indictment the names of all the witnesses upon which it was found. This will not prevent the state from calling other witnesses in the case, but no continuance should be granted on behalf of the state on account of the absence of any witness whose name is not on the indictment.¹

Indictments found by the jury will be presented by the foreman to the court. The usual course is for the jury to go into court in a body and through their foreman present the indictment.

No juror or officer of the court before an indictment is filed and the case docketed, should disclose the facts that an indictment has been found, nor will any juror be permitted to state or testify in what manner he or other members of the jury voted or expressed an opinion on any matter before them.

The jury must visit the jail and report its condition at least once during each term.

¹ But see *Stevens v. State*, 19 Neb. 647.

CHAPTER IX.

THE INDICTMENT.

An Indictment is “a Written Accusation against one or more persons of a crime or misdemeanor preferred to, and presented upon oath or affirmation, by a grand jury legally convoked.”¹

Requisites of Indictment at Common Law.—Indictments must have a precise and sufficient certainty. By statute 1, Henry V, c. 5, all indictments must set forth the christian name, surname, and addition of the state, and degree, mystery, town or place, and the county of the offender, and all this to identify his *person*. The time and place are also to be ascertained by naming the day and the township in which the act was committed, though a mistake in these points is in general not held to be material, provided the time be laid previous to the finding of the indictment, and the place be within the jurisdiction of the court; unless where the place is laid not merely as venue but as a part of the description of the fact. But sometimes the time may be very material, where there is any limitation in point of time assigned for the prosecution of offenders.²

“In case of murder the time of the death must be laid within a year and a day after the mortal stroke was given. The offense must be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offense, that no other words, however synonymous they may seem, are capable of doing it. Thus in treason the facts must be laid to be done “treasonably and against his allegiance.” * * In indictments for murder

¹ 4 Blackstone's Com., 302.

² Id., 307.

it is necessary to say that the party indicted "murdered," not "killed."¹

"In all indictments for felonies the adverbs 'feloniously' '*felonice*' must be used, and for burglary, 'burglariously' and all these to ascertain the intent."

It will be seen that the statute does not materially change the common law. In order to draw an indictment properly a knowledge of the rules of pleading at common law is requisite.²

The essential requisites of a valid indictment are:

First. That the indictment be presented to some court having jurisdiction of the offense stated therein. *Second.* That it appear to have been found by the grand jury of the proper county or district. *Third.* That the indictment be found a true bill, and signed by the foreman of the grand jury. *Fourth.* That it be framed with sufficient certainty; for this purpose the charge must contain a certain description of the crime or misdemeanor of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation.³

The Caption of an indictment is said to be no part thereof, but merely an explanatory prefix.⁴ Its object is merely to state the name of the court, the time and place where it was held, and the jury finding the same. These particulars are principally for use in an appellate court.⁵ The object is to show that the court had jurisdiction. That is, that it was a court known to the law and having jurisdiction of the offense and that it was held at a time and place authorized by law.

At the commencement of each count of an indictment it should be alleged that it was found by the grand jury of that particular county or district, on their oaths or affirmations.

The Defendant's Name Should be Stated Correctly in the Indict-

¹ 4 Blackstone's Com., 306-7.

² The criminal code presents no rule to the contrary, or is silent, and we must resort to common law rules to determine its sufficiency.

³ 1 Bouvier, Law Dict., 700, and cases cited.

⁴ Wharton's Cr. Pl. and P., § 91.

⁵ Reeves v. The State, 20 Ala., 33; State v. Cowley, 39 Me., 78; U. S. v. Thompson, 6 McLean, 56.

ment.—If the surname be omitted in the presenting portion of the indictment it is fatal. Some person is to be charged with the offense, and as the presumption is that every one has a name, it must be set out in the indictment, if known to the grand jury. A blank in either the christian name or surname, unless followed by a statement that the name is unknown, is ground for a motion to quash.¹ The surname may be such as the defendant is usually known by, and in case of doubt as to his real name the second may be added thus: William Jones, otherwise called Samuel Helper—and it has been held that proof of either name is sufficient.² If a person is indicted by a wrong name he may plead the same in abatement, when the proper name may be inserted in the indictment and the trial proceed. And under the statute a mistake in either the christian name or surname is not ground for an acquittal of the defendant, unless the court shall find that such variance is material to the merits of the case or prejudicial to the defendant.³

Where the Name of the Defendant is Unknown he may be described in the indictment as a person whose name is unknown to the jurors. The defendant should be pointed out in some way in the indictment in order to determine against whom the indictment was found.⁴ The common law mode of description would seem to be appropriate in such cases. A party whose name is known to the grand jurors should not be indicted as unknown. The test would seem to be, is there enough in the indictment from which it can be determined who the party indicted is; if so it will be sufficient. The name of the prisoner needs no proof unless he pleads in abatement.

Names of Parties Injured and Third Persons should be stated correctly when known. Thus in the case of *Mead v. The State*,⁵ one Mead was indicted for the murder of Elisha Davidson, and on the trial the evidence tended to prove a murder com-

¹ *State v. McGregor*, 41 N. H., 407; *Gardner v. The State*, 4 Ind., 632; *Prell v. McDonald*, 7 Kans., 426.

² *State v. Graham*, 15 Rich., 310.

³ See *Lasure v. The State*, 19 O. S., 43.

⁴ *R. v. — R. R.*, 489.

⁵ 26 O. S., 505.

mitted by the prisoner upon Elijah B. Davidson. The court below held that this was not a fatal variance ; but the Supreme Court reversed the judgment upon the ground that it was for the jury to determine whether the variance was a mere mistake in the name or a mistake as to the *person*.

The name of a corporation when given must be the corporate name. And in case of larceny of its goods it must be alleged and proved that it was duly incorporated.¹ But it seems to be sufficient to prove that it is a corporation *de facto*.² Evidence that the defendant had beaten "Catherine Swails" will not support an indictment for beating "Ratherine Swails." So an indictment for beating "Caroline F. Grubbs" is not sustained by proof of beating "Mrs. Grubbs."³ And where an indictment stated the partnership name of the partners owning the house burglarized, and the property therein, and identified the firm by naming the individuals composing it, proof that the property belonged to the firm, without proof of the christian names of the members of the firm, will not sustain the indictment.⁴

Greenleaf thus states the rule: "As it is required in indictments that the names of the persons injured, and of all others whose existence is legally essential to the charge, be set forth, if known, it is of course material that they be precisely proved as laid. Thus the name of the legal owner, general or special, of the goods stolen or intended to be stolen, must be alleged and proved."

Allegation of Time.—Time and place must be alleged as to every material fact in an indictment. At common law it was necessary to allege as to the place of the commission of the offense, besides the county, some particular portion of the county, so that those living in that vicinity might be supposed to have knowledge of the matter to be inquired into.⁵ This

¹ *State v. Mead*, 27 Vt., 722; *Cohen v. The People*, 5 Parker, Cr. R., 330; *Wallace v. The People*, 63 Ill., 451; *People v. Schwartz*, 32 Cal., 160.

² *State v. Rhodes*, 2 Ind., 321.

³ *Mc Laughlin v. The State*, 52 Ind., 476.

⁴ *Doan v. The State*, 26 Ind., 495; 3 Greenleaf, Ev. § 22.

⁵ 3 Greenleaf, Ev., § 22.

⁶ 2 Hawk. C., 22.

rule has since been changed by statute and it is now sufficient to allege the county as the place where the offense is committed.¹

In this country it is generally sufficient to lay the place of the commission of the offense in the county or district from which the grand jury is drawn. There must be an allegation, however, that the offense was committed in the county. It is not enough to say that the offense was committed in some particular town without also naming the county.² The reason is that it does not appear on the face of the indictment that the offense was committed within the jurisdiction of the court. But if the proper county is named in the commencement of the indictment it will be sufficient thereafter to state the place as the county aforesaid.

Where there are *Several Counts* in an indictment, in the first of which the *time* and *place* are specifically stated, it is sufficient to allege in the subsequent counts that the offense therein described was *then* and *there* committed.³

Transitory Offenses.—In general on the trial of offenses which are not in their nature local, it is sufficient to prove that the offense was committed in the county, and a mistake in the particular place in which the offense is laid is not material.⁴

But where the offense is in its nature *local*, such as burglary, arson, etc., the place must be correctly stated in the indictment and proved as laid.⁵ And where the place is stated by way of *local description* and not as mere venue, it must be proved as laid although it need not have been stated.⁶ Thus in the case of *Moore v. The State*, in an indictment for selling spirituous liquors to be drunk where sold, it was alleged that the sale took place at the grocery of M. in the township of F., and the only proof was of a sale at the grocery of M. in the township of G., it was held that the variance between the allegation and the proof was fatal to the prosecution. But where it

¹ Statute 6, Geo. IV, 14 and 15 Vict.

² *Com. v. Barnard*, 6 Gray, 488.

³ *Fisk v. The State*, 9 Neb. 62; *Evans v. The State*, 24 O. S., 208.

⁴ *Roscoe's Cr. Ev.*, 110, and cases cited; *Moore v. The State*, 12 O. S., 389.

⁵ *Moore v. The State*, 12 O. S., 389; *People v. State*, 5 Hill, 401.

⁶ *Moore v. The State*, 12 O. S., 387; *State v. Crogan*, 8 Iowa, 523.

is doubtful whether the place is stated as a matter of local description or mere venue it will be held to be venue.¹

If a County is Divided after the commission of an offense and that part of the county in which the offense was committed is created into a new county, it has jurisdiction of the offense.²

Where an offense shall be committed on a county line, the trial may be in either county divided by such line, and when any offense shall be committed against the person of another, and the person committing the offense shall be in one county and the person receiving the injury shall be in another county, the trial may be had in either of said counties.³

Sec. 11, Art. I, of the Constitution, which provides that the accused shall be entitled to "a speedy public trial by an impartial jury of the *county* or *district* in which the offense is alleged to have been committed," probably modifies section 424 so as to require all trials to take place in the county where the offense was committed.⁴

In the Federal Courts, where crimes have been committed on the high seas, the place for the trial of the offense under the act of April 30, 1790, is to be "in the district where the offender is apprehended, or into which he may be first brought."

The Allegation of the Time of Committing an Offense is not material except when it enters into the nature of the offense, provided it is within the time limited by law for the prosecution of that particular offense.

It should be stated with certainty. It must not be an impossible date, such as a date after the indictment is found, and such defect is bad even after verdict.⁵

Continuando.—In cases of continuous nuisance, and other cases of like character, it should be alleged that the offense was committed on a day named, and on divers other days between that time and another day to be named, but it is not

¹ 3 Stark. on Ev., 157.

² State v. Jones, 4 Holst., 357; Searcy v. The State, 4 Tex., 450; State v. Jackson, 39 Me., 291.

³ Cr. Code, § 424.

⁴ Olive v. The State, 11 Neb., 1.

⁵ Com. v. Doble, 110 Mass., 103.

good pleading to lay the offense *between* two days specified. When the time has been stated definitely, it may afterward be referred to by the words *then* and *there*.

The time of the death in homicide must be stated to have taken place on a day named within a year and a day from the time the stroke was given.

In case of perjury, the time at which the party is alleged to have sworn falsely is a part of the offense, and variance in the day is fatal.¹

So the dates of written instruments when necessarily set out must be stated correctly.

An indictment for an offense committed on Sunday, the doing of which on that day is the gist of the offense, must allege that the act was committed on Sunday or Sabbath.²

Statement of the Offense.—As a rule all the special facts necessary to constitute the offense must be set forth in the indictment; thus in a prosecution for perjury it is necessary to set out the oath alleged to be false in order to see whether the court had authority to administer it.³ So in cases of murder or manslaughter it is necessary to allege that death ensued from the act of the accused.⁴

The statute provides that “in any indictment for falsely making, printing, photographing, uttering, disposing of or putting off any instrument, it shall be sufficient to set forth the purport and value thereof.”⁵

“In any indictment for engraving or making the whole or any part of an instrument, matter or thing, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter or thing shall have been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter or thing shall have been made or printed, it shall be sufficient to de-

¹ *Freman v. Jacob*, 4 Camp., 209; *Pope v. Foster*, 4 Term R., 590; *Woodford v. Ashley*, 11 East, 508.

² *Frazier v. The State*, 5 Mo., 536; *Megowan v. Com.*, 2 Metc. (Ky.), 3.

³ *Cro. Eliz.*, 137; *Rex v. Horne*, 2 Cowp., 683.

⁴ *State v. Wimberly*, 3 McCord, 191.

⁵ Cr. Code, § 414.

scribe such instrument, matter or thing, by any name or designation by which the same may be usually known.”

“That in all other cases, whenever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known or by the purport thereof.”

FORM OF INDICTMENT.

State of _____ }¹
_____ County. }

Of the [October] term of the [district] court of — county, in the year of our Lord one thousand eight hundred and eighty-six. The grand jurors² duly impaneled and sworn in and for said county of — in the name and by the authority of the state of —³ upon their oaths present, [that A B, on the — day of — in the year of our Lord one thousand eight hundred and eighty-six in said county of —]⁴ * (*Here set out a statement of the offense*)† contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of —.

W P M, prosecuting attorney.

If it is desirable to add other counts proceed thus: 2d. And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the state of — do further present (*as in the preceding, according to the facts*).

Caption at Common Law.—Many of the indictments found in the inferior courts of limited jurisdiction in England are re-

¹In many cases the letters ss are added after the name thus:

State of Nebraska, }
Dodge County. } ss. These letters are said to mean to wit, and are not necessary. U. S. v. Grush, 5 Mason, 290. That they are of no use will readily be conceded and they should be omitted.

²In some of the states the statute prescribes the form of commencement as: “The grand jurors chosen, selected and sworn in and for the county of — in the name and by the authority of the people of the State of Illinois present.” Rev. Stat. 1845, ch. 30, § 162.

³Follow the constitutional or statutory provision regarding the *name* in which prosecutions are to be carried on, as the “People of the State of Illinois,” “The State of Nebraska,” etc.

⁴The words in brackets may be omitted when set forth in the statement of the offense.

moved to the Q. B. for trial. Blackstone, 4 Comm. 265, says of the Court of King's Bench, "On the crown side or crown office it takes cognizance of all criminal causes from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar or at *nisi prius*, by a jury of the county out of which the indictment is brought." Hence the indictment was accompanied with a formal history of the proceedings, describing the court before which the indictment was found, the jurors by whom found, and the time and place where it was found. This history was termed a schedule, and was annexed to the indictment, and both were sent to the crown office. This history was called the caption and was entered of record immediately before the indictment. The caption therefore first appeared as a matter of record in the superior court.¹

The Usual Commencement given by Archbold is as follows:

¹Stark. Cr. P., 2d Ed., 233; 1 Bish. Cr. Pro., § 656. This probably explains the lack of uniformity in the captions from the various counties, examples of which are given in 4 Chitty's Cr. Law, 189, 198. Thus, "Middlesex: Be it remembered that at the general (or general quarter) session of the peace of our sovereign lord the King, of the county of Middlesex, holden in and for the county of Middlesex, at the new session house on Clerkenwell Green, in the same county, on Monday the — day of — in the thirty-fifth year of the reign of our sovereign lord, George the third, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, before William Mainwarring, William Bleamrie, Edmund Pebys, William Hyde, esquires, justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, by the oath of E F G H, (names of all the grand jurors) twelve jurors, good and lawful men of the county aforesaid, now here sworn and charged to enquire for our said lord the King, for the body of the same county. it is presented in manner and form as followeth, that is to say, Middlesex. The jurors," (*here follows the indictment.*)

"City of Carlisle, to wit: Be it remembered that at the general quarter sessions of the peace of our sovereign lord the King, holden at the guild hall, in and for the city of Carlisle, on, etc., in the — year of the reign, before CR, esquire, mayor, and WM, esquire, recorder justices of our said lord the King, assigned to keep the peace," etc,

“Yorkshire court. The jurors of our lady the Queen upon their oath present.” Then follows the matter of the indictment. If there are two or more counts to the indictment proceed thus: “And the jurors aforesaid upon their oaths aforesaid do further present,”¹ etc.

Where an indictment commenced “The jurors of our lady the Queen,” it was held to be sufficient.²

Conclusion.—Indictments for offenses against a statute or statutes conclude against the form of the statute or statutes in such case made and provided, etc.

This is said to be material to be observed; for where *contra formam statuti* is omitted, if the offense is punishable by statute no judgment can be given; but otherwise, if the offense is punishable at common law.³

In states where this provision of the common law has not been modified or changed, every indictment on a statute must conclude, “against the form of the statute in such case made and provided,” or similar words.⁴

Formerly nice distinctions were taken by the common law courts as to cases where the conclusion should be *contra formam statuti* and where *statutorum*.⁵ In Nebraska the omis-

¹ Archbold, Cr. Pl. & Prac., 476. Where the case is tried in the court in which the indictment is found, an indictment that merely set forth that “The grand jurors of — county upon their oaths present,” as a commencement should be sustained. In this country a court that has authority to impanel a grand jury and try cases involving life or liberty necessarily has common law powers, and all presumptions are in favor of its judgments. The conflict in the decisions in this country as to the proper commencement of indictments seems to have arisen from the attempt to follow English precedents, while we have no courts possessing the original jurisdiction of the Q. B.—that of requiring an indictment to be certified to it before trial.

² Broom v. Regina, 12 Straws, J. P., 628.

³ 1 Archbold, Cr. Pl. & Prac., 93.

⁴ 1 Chitty, Cr. Law, 290. It is said: “But whenever the offense is entirely created by statute and did not exist at common law, it is always necessary to conclude the indictments, information or presentment ‘contrary to the form of the statute in such case made and provided;’ and if this clause be omitted the proceeding is altogether bad and no judgment can be given against the defendant.”

⁵ 1 Archbold, Cr. P. & P., 93. The provision is now repealed. Id.

sion of the words will not affect the validity of the indictment.¹

Time and Place, How Alleged in the Second Count, etc.—Where the first count in the indictment sets out the time and place correctly, an allegation in a subsequent count that the defendant *then* and *there* committed the acts complained of, has been held to be a sufficient allegation of time and place.² If, however, the first count should be quashed, a question might arise as to the right to refer to it for any purpose whatever, except, perhaps, to identify the offense. The better practice therefore is to state the time and place in each count.

Indorsement by Prosecuting Attorney.—No indorsement was necessary at common law, and in the absence of a statute requiring it, such indorsement, though usual, is unnecessary. The validity of the indictment proceeds from the action of the grand jury in returning it indorsed with the words: "A true bill," signed by the foreman in his official capacity.³

The statutes of some of the states require the prosecuting officer to sign the indictment in his official capacity. When this is required an officer *pro tem* may sign, and in the absence of proof his appointment will be presumed.⁴

¹ Cr. Code, § 412.

² *Evans v. State*, 24 O. S., 208; *Fisk v. State*, 9 Neb., 62. The rule is thus stated by Chitty, Vol. I. 250: "And though every count should appear upon the face of it to charge the defendant with a distinct offense, yet one count may refer to matter in any other count so as to avoid unnecessary repetitions; as for instance to describe the defendant as '*the said, etc.*;' and though the first count should be defective or rejected by the grand jury, this circumstance will not vitiate the residue."

³ *State v. Murphy*, 47 Mo., 274; *Com. v. Stone*, 105 Mass., 469; 1 *Bish. Cr. Proc.*, § 702.

⁴ *Heacock v. State*, 42 Ind., 393; *Jackson v. State*, 4 Kas., 150; *Reynolds v. State*, 11 Tex., 120; *Isham v. State*, 1 Sneed, 111.

CHAPTER X.

INFORMATIONS.

Informations.—Proceedings by information were permissible at common law in cases of misdemeanor but were not in cases of felony.¹ Within the last thirty years a number of the states have passed laws which provide for the prosecution of all offenses by information unless the judge directs the calling of a grand jury. The statutes of the several states must be consulted to ascertain what is required. Mr. Pomeroy, in the 8th edition of Archbold's Cr. Pl. and Prac., 209-210, has presented a synopsis of the decisions relating to the subject.

In Nebraska no grand jury is required unless the judge before the opening of the term so order. All informations are required to be filed during term, in the court having jurisdiction of the offense specified therein, by the prosecuting attorney as informant. He is required to subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same, and at such time before the trial as the court may by rule or otherwise prescribe, he is required to indorse thereon the names of any other witnesses that may then be known to him.²

All informations are to be verified by the oath of the prosecuting attorney, complainant or some other person, and the offenses therein are to be stated with the same fullness and precision in matters of substance as in an indictment. The same joinder of offenses may be made as in an indictment.

¹ Chitty, Cr. Law, 166. "Informations in the King's Bench can be filed for misdemeanors only, as no man can be put on his trial for a capital offense or for suspicion of treason without the accusation against him being found sufficient by twelve of his countrymen."

² The evident intention of the legislature was, that the names of all witnesses to be called by the state should be indorsed on the information before trial.

Must be a Preliminary Examination.—No information can be filed against any person for any offense until such person shall have had a preliminary examination before a justice of the peace or examining magistrate, unless such person shall waive his right to an examination.

Fugitives from Justice.—An information may be filed without such examination against fugitives from justice.¹

FORM OF COMMENCEMENT AND CONCLUSION OF INFORMATION.²

The State of — }
 — County. }

Of the [October] term of the [district] court of — county in the year of our Lord one thousand eight hundred and eighty-six, J W D, prosecuting attorney for said county of —, in the name and by the authority, and on behalf of the state of —, information makes that [A B, on the — day of — in the year of our Lord one thousand eight hundred and eighty-six, in said

¹ Comp. St. of 1885, 855-856. The practical working of the statute so far as the writer's information extends is, that the laws are equally as well enforced as under the grand jury system, while but few cases are prosecuted unless there is at least a probability of the party's guilt. Consequently the expenses for criminal prosecutions in many if not all the counties is materially reduced.

² In charging statutory offenses, except in those cases where the statute simply designates and does not describe or name the constituent elements of the offense, as a general proposition it is sufficient to allege such offense in an information in the words of the statute. *State v. Barnett*, 3 Kan., 250; *State v. White*, 14 Kan., 540; *Kansas Cr. Code*, § 108; *State v. Johnson*, 26 Iowa, 407; *State v. Foster*, 30 Kan., 365. In *State v. Beverlin*, 30 Kan., 611, an information in these words was sustained: "That on the 29th day of May, 1882, one A J B, in the county of Chase and state of Kansas then and there being, then and there with a deadly weapon, to wit: a pitchfork, did with said deadly weapon commit an assault and battery upon the person of J M, with the unlawful and felonious intent then and there to kill, maim and wound the said J M." It is said that while the words of the statute are not used, other words equivalent thereto are employed. To the same effect. *Whitman v. State*, 17 Neb., 224.

Under the Constitution of Kansas no warrant can be issued to seize any person but on probable cause supported by oath or affirmation; therefore, a complaint or information filed in the district court, charging the defendant with an offense and verified on nothing but hearsay and belief, is not sufficient to authorize the issuance of a warrant for the arrest of the party therein charged. *State v. Gleason*, 32 Kan., 245. See also authorities cited in the opinion and note.

county] * (*here insert the offense charged as in an indictment, then add*) †
 contrary to the form of the statute in such case made and provided, and
 against the peace and dignity of the state of —.

J W D, Prosecuting Attorney.

State of — }
 — County. }

I, J W D, do solemnly swear that I am [prosecuting attorney] in and for
 said county, and that the allegations and charges in the foregoing informa-
 tion are true, as I believe.

J W D. [Prosecuting Attorney.]

Subscribed in my presence and sworn to before me this — day of —, 18—.

E W K, Clerk of [District] Court.

* The words in brackets may be omitted when they are set forth in the
 statement of the offense.

CHAPTER XL

ASSAULT AND ASSAULT AND BATTERY.

An Assault is Defined to be an Inchoate Violence to the Person of Another, with the present means of carrying the intent into effect.

“If any person shall unlawfully assault or threaten (another) in a menacing manner, or shall unlawfully strike or wound another, the person so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars, or imprisoned in the jail of the county not exceeding three months, or both, in the discretion of the court, and shall, moreover, be liable to the suit of the party injured.”¹

Assault is a comprehensive word that in law includes many offenses, such as a simple assault, assault and battery, assault with intent to commit murder, rape, robbery, larceny, etc.

The offense may be charged against two or more jointly, and one may be charged with the actual commission of the offense and the other as present abetting him. It may be averred in the indictment that both committed the act but the better course is to state the facts.

The charge may be that the assault was on one or more persons as the facts may be. Where the assault is charged to have been committed on more than one person it was held in an early case in Iowa that the proof must cover the whole charge.² There is doubt about the correctness of this decision, and in Massachusetts it has been held that in the charge of an assault on two the party may be found guilty although the proof shows an assault on but one.

¹ Cr. Code, § 17.

² State v. McClintock, 8 Iowa, 203.

INDICTMENTS FOR ASSAULT AND BATTERY.¹*Assault and Threatening.*

unlawfully did assault in a menacing manner and threaten to strike and wound one E F, then and there being.

Assault.

in and upon one E F then and there being did unlawfully make an assault.

Assault and Battery.

in and upon one E F, did then and there unlawfully make an assault and him, the said E F, unlawfully² did strike and wound.

As heretofore stated assault and battery constitute but one offense, the battery being the culmination of the assault.

Assault and Battery at Common Law.³

[“with force and arms, at the parish aforesaid] in the county aforesaid, in and upon one J H, [“in the peace of God and our said lord the king]”⁴ then and there being, did make an assault, and him, the said J H, then and there did beat, bruise, wound and ill-treat, so that his life was nearly despaired of, and other wrongs to the said J H then and there did, to the great damage of the said J H.

The words “by force and arms” anciently “*vi et armis*” were by the common law necessary in indictments for offenses

¹The commencement and conclusion of an indictment are given on page 71 to which reference is made. To save space they will be omitted from the forms hereafter given; also the commencement, conclusion and oath to an information by a public officer are given on pages 76-77 and for the reasons above given will not be repeated.

²The word “unlawfully” occurs in Sec. 17 of the Cr. Code before the word “assault” and also before the word “strike.” The allegation was unnecessary at common law.

³The caption to an indictment at common law will be found on page 72, and the commencement and conclusion on pages 72-73. These will not be repeated but only the portion of the indictment charging the offense given. The common law forms are those used by Chitty, which being prepared before many material changes had been made by statute in criminal procedure may be regarded as reliable.

⁴The words included in brackets will be omitted from the common law forms following. The words “force and arms” are held to be unnecessary. *State v. Elliott*, 7 Black, 280.

⁵The words “In the peace of God and the King,” although usually employed in common law indictments, charging violence, were unnecessary. 1 Bish. Cr. Pro., § 502; *Heydon's case*, 4 Co., 41.

⁶The words in brackets will be omitted from the common law forms following.

which amounted to an actual disturbance of the peace, or consisted in any way of acts of violence; but it seems to be the better opinion that they were never necessary where the offense consisted of a cheat, non-feasance, or a mere consequential injury.¹

By "the statute, 27 Henry VIII, c. 8, reciting that several indictments had been deemed void for want of these words when, in fact, no such weapons had been employed, enacted that the words '*vi et armis videlicet cum baculis cultellis arcibus et sagittis*' should not of necessity be put into any indictment. Upon the construction of the statute great doubts were entertained whether the whole of the terms were intended to be abolished in all indictments, or whether the words following the *videlicet* were alone included. Many indictments for trespasses and other wrongs accompanied by actual violence were held to be insufficient for want of the words, 'with force and arms,' and on the other hand the court has frequently refused to quash the proceedings where they have been omitted; and the last seems to be the better opinion, for otherwise the terms of the statute would be destitute of meaning. It seems to be generally conceded that where there are any other words implying force, as in an indictment for rescue the word 'rescued,' the omission of the words *vi et armis* is sufficiently supplied."² In Nebraska, and a number of other states, the statute practically declares the words unnecessary; but no doubt this was the rule at common law. 1 Bishop, Cr. Pro., § 502; *State v. Duncan*, 6 Ire., 236; *Taylor v. State*, 6 Humph., 285; *State v. Temple*, 3 Fairf., (Me.) 214; *Rice v. State*, 3 Heisk., 215.

Mere Threats do not Constitute an Assault.—There must be proof of actual violence.³ In other words, an assault is an attempt with unlawful force to strike or wound the person of another with the apparent ability to immediately carry the attempt into effect. Thus, for a person to shake his fist or a

¹ 1 Chitty, Cr. Law, 240.

² 1 Chitty, Cr. Law, 240-241.

³ 2 Greenleaf, Ev., § 82; *Smith v. State*, 39 Mis., 521; *Warren v. State*, 33 Tex., 517.

whip in another's face in anger ;¹ to ride or run after another in a threatening and hostile manner with a weapon.² An apparent attempt to ride over a person is an assault.³ The pointing of a loaded pistol at another, if within range, is an assault, and the same is true if it is not loaded if the person aimed at is not aware of the fact.⁴ In the last case cited it is said: "Without such security society loses much of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, can not be enjoyed without the sense of perfect security."

The Intention.—The essence of an assault is the intention to do harm, and the question of intention is one of fact for the jury.⁵

A Battery.—Every battery includes an assault.⁶ Blackstone says: "By battery, which is the unlawful beating of another, the least touching of another's person willfully or in anger is a battery; for the law can not draw a distinction between the different degrees of violence and therefore totally prohibits the first and lowest stage of it, every man's person being sacred and no other having a right to meddle with it in any or the slightest manner." To beat includes every act of touching another in an angry, rude or insolent manner, as angrily pushing or jostling him out of the way.⁷ The injury may be effected by causing a dog to bite or by throwing a lighted squib into a crowd, and the squib being tossed from hand to hand at last hits a person in the face.⁸ In such case the person who first threw the squib is liable.⁹

Intent.—There must always be an intent to commit the injury; therefore an injury caused by accident in which the actor was free from fault is no battery.

Self Defense.—If a person is attacked he may oppose violence

¹ *People v. Yslas*, 27 Cal., 630.

² *Mortin v. Shoppe*, 3 C. & P.; 373.

³ *State v. Sims*, 3 Strob., 137.

⁴ *Beach v. Hancock*, 27 N. H., 223.

⁵ 2 *Greenleaf's Ev.*, § 83, and cases cited.

⁶ *Co. Lit.*, 253.

⁷ *Barb. Cr. Law*, 228; *Cole v. Turner*, 6 Mod., 149.

⁸ *Scott v. Shepherd*, 2 W. Blacks., 892.

⁹ *Id.*

to violence to the extent that the force thus used shall not be greater than the occasion requires. He must not, however, use greater force than is necessary for his protection or he can not justify the degree of violence used.¹ In *Dole v. Erskine*,² it is said "up to the time that the excess is used the party assaulted is in the right. Until he exceeds the bounds of self defense he has committed no breach of the peace, and has done no act for which he is liable, while his assailant, up to that time, is in the wrong, and is liable for his illegal acts."

In Justification it may be shown that the act was done to suppress a riot, prevent the commission of a felony, prevent a breach of the peace, to defend the person of one's wife, parent, child, master, servant or the possession of one's lands, house or goods. In all these cases, however, the party is to use no more force than is necessary to prevent the impending³ violence.

Possession of Property.—No force is to be used to defend the possession of property until the trespasser has been notified to desist or to depart, except where there was a violent entry or taking by him, or the like.⁴ That is, if the entry was lawful, as if a person is invited into a private house he must be requested to leave before force to eject him can be justified.⁵

A Parent in a reasonable manner may correct his child, a master his apprentice and a school teacher his scholar, or one having the care of an imbecile or insane person may restrain him by force.⁶

¹ In *Elliott v. Brown*, 2 Wend., 499, it is said, "although Elliott might have committed the first assault, yet if Brown used more violence than was necessary in his own defense, he became a trespasser." In *Cockroff v. Smith*, Salk. 642, Holt, Ch. J., says, "for every assault he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea (*son assault demesne*) was that he struck in his own defense."

² 35 N. H., 503-510.

³ *People v. Gulick*, Hill & Denio, 229; 3 Greenleaf, Ev., § 65.

⁴ *Russell on Cr.*, 757; 3 Greenleaf, Ev., § 65.

⁵ *Adams v. Freeman*, 12 John., 408.

⁶ 3 Greenleaf, Ev., § 63, and cases cited. Some doubt has been expressed as to the right of a school teacher to inflict corporal punishment; but the weight of authority seems to sustain the right if reasonably exercised. *State v. Pendergrass*, 2 Dev. & Battle, 365; *Com. v. Randall*, 4 Gray, 36.

CHAPTER XII.

OFFENSES AGAINST MARRIAGE AND CHASTITY.

Bigamy.—If any married person, having a husband or wife living, shall marry any other person, every person so offending shall be imprisoned in the penitentiary not more than seven nor less than one year. But nothing contained in this section shall be construed to extend to any person whose husband or wife shall be continually and willfully absent for the space of five years together and unheard from next before the time of such marriage.¹

BIGAMY UNDER THE STATUTE.

That E F on the — day of —, 18—, in the year of our Lord one thousand eight hundred and —, at — in the state of —, did marry one G H, and her, the said G H, then had for his wife; and that the said E F being so married to the said G H as aforesaid, afterward and during the life of the said G H, his wife, (who had not been continually and willfully absent from said E F and unheard from by him for five years next before said — day of —, 18—,²) did on the — day of —, 18—, in the county of — and state of —, feloniously marry one I J, the said G H, his former wife, being then alive.

BIGAMY AT COMMON LAW.

That Elizabeth — on the — day of —, 18—, in the year of our Lord one thousand eight hundred and —, at —, by the name of Elizabeth C, did marry one A J H, and him, the said A J H, then and there had for her husband, and the said Elizabeth being married and the wife of the said A J H, afterward, to wit: on the — day of —, 18—, at — in the county of —, feloniously did marry and take to husband one E F, the said A J H, her former husband, being then alive.

¹ If the second marriage was solemnized out of the state, cohabitation after such second marriage in the county and state in which the indictment was found must be alleged and proved; also that such second marriage was unlawful where it took place. *State v. Palmer*, 18 Vt., 570; *Rex v. Fraser*, 2 M. C. C., 407; *People v. Lambert*, 5 Mich., 349.

² In *Staglein v. State*, 17 O. S., 453, it was held that averment was not necessary and that it was a matter of defense. If so the common law form is sufficient.

Evidence.—An examination of the cases will show a considerable conflict as to the proof of the first marriage. In New York it has been held that the confessions of the party were not sufficient *per se* to prove the first marriage, hence an actual marriage must be established.¹ And the same rule prevails in Massachusetts;² also in Connecticut³ and in Kentucky.⁴ In Alabama, Georgia and Maine such evidence is admissible.⁵ In Pennsylvania it is held in substance that confession and acknowledgment are admissible to prove the former marriage; but that such confessions derive their force from the time, manner and circumstances under which they were made, and that they may exhibit the most conclusive or the weakest testimony that could be offered.⁶ The same rule was adopted in Ohio,⁷ and in South Carolina and Virginia.⁸

The earlier cases in England holding such confessions not admissible seem to have been overruled, and it is now held that the first marriage may be proved by the admissions of the prisoner; and that it is for the jury to determine whether in fact he was legally married according to the law of the country where the marriage was solemnized.⁹

The Failure to Procure a License to Marry, where such license is required, will not invalidate the marriage. Marriage, being a civil contract flowing from the natural law, must be taken as lawful until some enactment which annuls it can be produced and proved by those who deny its lawfulness.¹⁰ Hence unless

¹ *People v. Humphrey*, 7 Johns., 314; *Fenton v. Reed*, 4 Id., 51; *Clayton v. Wardell*, 4 Comst., 230.

² *Com. v. Littlejohn*, 15 Mass., 163.

³ *State v. Roswell*, 6 Conn., 446.

⁴ *Kibby v. Rucker*, 1 A. K. Marsh., 290.

⁵ *Cameron v. State*, 14 Ala., 546; *Cook v. State*, 11 Ga., 53; *State v. Hodskins*, 19 Me., 155.

⁶ *Forney v. Hallacher*, 8 S. & R., 159; *Com. v. Murtagh*, 1 Ashm., 572.

⁷ *Wolverton v. State*, 16 Ohio, 173. It is said: "Were courts to reject proof of confession when the time, manner and circumstances under which it was made were such as tended to weaken or destroy its force, they would be substituting in fact their own judgment for that of the jury."

⁸ *State v. Britton*, 4 McCord, 255; *Warner v. Com.*, 2 Virg. Cas., 95.

⁹ *Regina v. Simmonsto*, 47 Eng. E. C. L., 164. See also *Stanglein v. State*, 17 O. S., 453.

¹⁰ *Queen v. Millis*, 10 Cl. & Fin., 655.

the statute contains express words of nullity the marriage will be valid.¹ The statute requiring license is a mere precautionary measure intended to prevent improvident marriages; and should not be so construed as to affect the legality of a marriage which has been consummated in the full belief of at least one of the parties that it was valid.

Marriage under the Age of Legal Consent.—By statute in Nebraska and a number of other states the male, at the time of marriage, must be of the age of eighteen years, or upward, and the female of the age of sixteen years, or upward.² Also, that in case of marriage solemnized when either of the parties were under the age of legal consent, if they separate during such non-age and do not cohabit together afterward the marriage is voidable.³ There is also a provision which authorizes the parent or guardian, entitled to the custody of the minor under the age of legal consent, to file a bill to annul the marriage.⁴ Where such statutes exist a divorce must be procured before the parties can marry again.⁵ The marriage is voidable, not void.

A **Certificate of Marriage** is admissible in evidence against the accused even though it does not show on its face that the person who signed the same was authorized to perform the marriage ceremony.⁶

Marriage may be Proved by an Eye Witness and if followed by cohabitation its validity will be presumed. The wife is a competent witness.⁷

A **Marriage Valid Where Contracted** should be held valid everywhere, and the court should admit all relevant testimony offered tending to prove or disprove such marriage. It must

¹ Carmichael v. State, 12 O. S., 553.

² Sec. 2, Chap. 52, Comp. St.

³ Sec. 2, Chap. 25, Comp. St.

⁴ Sec. 33, C. 25, Comp. St.

⁵ The case of Shaffer v. State, 20 Ohio, 1, is based entirely on the absence of a statute requiring a divorce. Judge Ranney, who delivered the opinion of the court, held that as at common law such a marriage was invalid unless confirmed by cohabitation when the parties arrived at the age of legal consent, that the common law was in force in Ohio in that regard.

⁶ Moore's case, 9 Leigh, 639.

⁷ Lord v. State, 17 Neb., 526.

not be forgotten that material changes have been made in the law of evidence either by statute or the more liberal construction of the courts, within the last thirty years, and many of the decisions prior to that time are not applicable at present.

Defenses.—In England, where the former husband or wife is continuously and willfully absent for the space of seven years together, and unheard from next before the time of the second marriage, the party marrying again will not be guilty of bigamy.¹ A similar statute is found in many of the states. In most of them, however, the period fixed is five years. To be available the party marrying again must possess no knowledge that the former husband or wife was alive.² It may also be shown that the first marriage was void for some of the causes so declared by statute,³ or that the parties were legally divorced; but a divorce procured from the first after the second marriage is no defense.⁴

Marriages Between Parents and Children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, aunts and nephews, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations.⁵

Persons Within the Degrees of Consanguinity within which marriages are declared by the preceding section to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall be liable to indictment and upon conviction be punished by imprisonment in the penitentiary not exceeding ten years.⁶

INCEST BY STEPSON WITH STEPMOTHER.

That E F and G H, on the — day of —, in the year of our Lord, one thousand eight hundred and —, in said county, willfully and feloniously did have sexual intercourse together, he, the said E F, then and there being the

¹ St. 9 Geo. IV, c. 31.

² *Valleau v. Valleau*, 6 Paige, 207; *Kenley v. Kenley*, 2 Yeates, 207.

³ *Madison's case*, 1 H. P. C., 693; *Conant v. Griffin*, 48, Ill., 410; *Shafher v. State*, 20 Ohio, 1.

⁴ *Baker v. People*, 2 Hill, 325.

⁵ Cr. Code, § 202.

⁶ *Id.*, § 203.

stepson of her, the said G H, and she, the said G H, then and there being the stepmother of the said E F, the said E F and G H then and there having full knowledge of their said relationship.

INCEST BY STEPFATHER AND STEPDAUGHTER.¹

That A B and C D on the — day of — in the year of our Lord, one thousand eight hundred and —, in said county, willfully and feloniously did have sexual intercourse together, he, the said A B, then and there being the stepfather of her the said C D, and she, the said C D, then and there being the stepdaughter of the said A B, and the said A B and C D then and there having full knowledge of their said relationship.

Cohabitation of Father and Daughter.—If a father shall rudely and licentiously cohabit with his own daughter, the father shall, on conviction, be punished by imprisonment in the penitentiary for a term not exceeding twenty years.²

INDICTMENT FOR INCEST OF FATHER WITH DAUGHTER.

That E F, on the — day of — in the year of our Lord one thousand eight hundred and —, in said county, feloniously, rudely and licentiously did cohabit with one L S, then and there being the daughter of him, the said E F, as he, the said E F, then and there well knew.³

Incest Defined.—Bouvier defines incest as the carnal copulation of a man and a woman related to each other in any of the degrees within which marriage is prohibited by law.⁴ Where a different definition is not given by statute, it is sexual intercourse either under the form of marriage or without it, of persons within the degrees of consanguinity or affinity who are prohibited from intermarrying.⁵

Incest at Common Law.—Incest was not punishable at common law, therefore we have no precedents of common law indictments. It was an offense against the ecclesiastical laws, but practically seems to have been unrestrained. Blackstone in speaking of incest and willful adultery says, "And these

¹ These forms can readily be varied to apply to any case of incest.

² Cr. Code, § 204; R. S. of Ill., 376, § 157.

³ See *Lawrence v. State*, 19 Neb.; *Bergen v. People*, 17 Ill., 426. While the statute does not require an allegation that the father knew of the relationship existing between himself and daughter yet such an allegation is proper.

⁴ 1 Bouv. Law Dict., 695; Bish. M. & D., 214-221.

⁵ Bish. Statutory Cr., § 727.

offenses have been ever since left to the feeble coercion of the spiritual court according to the rules of the common law; a law which has treated the offense of incontinence, nay even adultery itself, with a great degree of tenderness and lenity."¹

The Procedure Being Entirely Statutory the statute must be consulted in drawing an indictment and in the introduction of testimony to sustain the charge. Under section 204 of the Criminal Code an indictment which charges that the offense was committed upon the person of B, the said B then and there being the daughter, of him, the said A, was held to charge the relationship between the parties sufficiently.² This no doubt was placed upon the ground that the statute did not require an allegation of knowledge on the part of the father.

Other cases, however, seem to require an allegation of such knowledge.³ And where the guilt of both parties is essential to that of either, such knowledge on the part of both must be alleged.⁴ This, however, is unnecessary where one may be found guilty without the other. In such case an averment of the knowledge of the accused is sufficient.⁵ Incest is a joint offense.⁶

Continuando.—Under an indictment for incest between a brother and sister, it was alleged that "from about the first day of November, 1865, * * * "and from said time continuously until about the 9th day of September, 1876," *

* * the parties named, "did have sexual intercourse together," etc. It was held that the indictment charged a series of offenses committed within the period specified, and that it was bad for duplicity.⁷

A Single Act of sexual intercourse where under the statute it constitutes an offense, is all that is required.⁸ This rule, how-

¹ 4 Com., 64-65.

² *Bergen v. People*, 17 Ill., 426.

³ *Williams v. State*, 2 Carter, 439.

⁴ *Baumer v. State*, 49 Ind., 544.

⁵ *Bishop's Stat., Cr.*, 733.

⁶ *Eaumer v. State*, 1 Hawley's Cr. R., 354.

⁷ *Barnhouse v. State*, 31 O. S., 39.

⁸ *Id.* The indictment should have charged the commission of the offense at some period within the statute of limitations; the prosecutor could then

ever, must not be applied to offences where a *continuando* would be proper.

Evidence.—Admissions of the father that the person he had sexual intercourse with was his daughter, are competent as evidence.¹ So where the accused had been guilty of sexual intercourse with a young woman whom he had previously held out as his daughter, and with whose mother he had lived as his wife, the charge of incest was held to be proved.² But such admissions are to be received with great caution, and unless corroborated by circumstances are not sufficient to convict, particularly if the accused should testify on his own behalf and deny the charge.

The Relationship of the Parties may be proved by the admissions of the accused,³ or by reputation.⁴

The New York statute seems to include only cases in which the sexual intercourse is by mutual consent.⁵

Impeaching.—In a late case in Indiana where proof was offered showing admissions of the prosecutrix that she was pregnant by another than her father, and that her character for virtue and chastity was bad, the court held that these questions were not in issue, and that the evidence was properly excluded.⁶

Indecent Exposure of Person, etc.—If any person of the age of fourteen years and upward shall willfully make an indecent exposure of his or her person in any street, lane, alley, or other place, in any city, town, village or county, or shall utter, speak or use any obscene or lascivious language or words in the presence or hearing of any female, the person so offending shall be fined in any sum not exceeding five dollars, or be imprisoned in the cell or dungeon of the jail of the county not exceeding ten days, or both, at the discretion of the court.⁷

have chosen any one act of criminal intercourse charged in the indictment or information, but having elected, he would be confined in the proof to that. *People v. Jenness*, 5 Mich., 327; *People v. Clark*, 33 Id., 112.

¹ *Bergen v. People*, 17 Ill., 426; *People v. Harriden*, 1 Park. Cr. R., 344.

² *Com. v. Bruce*, 6 Penn. L. J., 236.

³ *People v. Jenness*, 5 Mich., 305; *Morgan v. State*, 11 Ala., 289.

⁴ *Bish. on Stat. Cr.*, § 736.

⁵ *People v. Harriden*, 1 Park. Cr. Rep., 344.

⁶ *Kidwell v. State*, 3 Hawley's Cr. R., 236.

⁷ *Cr. Code*, § 205.

INDICTMENT FOR INDECENT EXPOSURE.¹

That E F, on the — day of —, one thousand eight hundred and —, being then fourteen years of age and upward, in a public street in the city of — in said county, did willfully and unlawfully make an indecent exposure of his person in the presence of divers persons, both male and female, and unlawfully and willfully did exhibit his private parts in their presence.

INDICTMENT AT COMMON LAW FOR INDECENT EXPOSURE OF PERSON.

That J B, on the — day of —, in the year of our Lord one thousand eight hundred and —, and in said county, being a person of most wicked, lewd, lascivious, depraved and abandoned mind and disposition, and wholly lost to all sense of decency, morality and religion, and intending as much as in him lay, to vitiate and corrupt the morals of his majesty's liege subjects and to stir up and excite in their minds filthy, lewd and unchaste desires and inclinations, unlawfully, wickedly, deliberately and willfully did expose and exhibit his private parts, in a most indecent posture, situation and practice, to divers of the liege subjects, both male and female, of, etc., with intent to vitiate and corrupt the morals of said subjects, and to stir up and excite in their minds filthy, lewd and unchaste desires and inclinations, etc.

Obscene Books, etc.—If any person shall hereafter bring, or cause to be brought or imported into this state for sale, or shall sell or offer to sell any obscene book, pamphlet, print, picture or engraving, every such person shall be fined in a sum not less than twenty-five dollars nor more than fifty dollars.²

INDICTMENT FOR SELLING OR OFFERING TO SELL OBSCENE BOOKS, ETC.

That J B, on the — day of — in the year of our Lord one thousand eight hundred and — at — in said county, did willfully and unlawfully offer for sale to divers persons a book [pamphlet, print, picture or engraving] entitled — which contains among other things certain lewd, bawdy and obscene prints³ (*state according to the facts.*)

Evidence.—Bishop in his valuable work on criminal evidence,⁴ well remarks that the common law fully and practically cherishes the public morals. Hence it punishes, in theory at

¹ Although a form of the charge is here given, such cases should be brought before a justice of the peace; yet there may be cases where an indictment or information would be the proper remedy.

² Cr. Code, § 206.

³ Forms are given at length in Chitty, Cr. Law, Vol. 2.

⁴ Vol. 1, Sec. 379.

least, as a crime, every act which seems calculated to impair them. Therefore it made the publishing of obscene writings, prints and pictures, the use of obscene language in public, the indecent public exposure of the person, the keeping of houses of ill fame, etc., subject to indictment.

Indecent exposure must be willful and in the presence of some female. If a man should expose his person in the full view of certain dwelling houses and near enough to be seen by the inmates, no doubt he would be liable.¹ But a place to void urine out of sight, except to those who enter it, is not within the prohibition of the statute.² But little information can be gained from the conflicting common law decisions.

But little difficulty will be found in the construction of the statute if it is applied only to cases where there has been an actual and deliberate violation of the law.

Seduction Under Promise of Marriage.—Any person over the age of eighteen, who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity under the age of eighteen years, shall be deemed guilty of seduction, and upon conviction shall be imprisoned in the penitentiary not more than five years, or be imprisoned in the county jail not exceeding six months; but in such case the evidence of the female must be corroborated to the extent required as to the principal witness in cases of perjury.³

INDICTMENT FOR SEDUCTION UNDER PROMISE OF MARRIAGE.

That C D, on or about the — day of — in the year of our Lord one thousand eight hundred and —, in said county, being then and there a male person over the age of eighteen years, viz: of the age of — years, under a promise of marriage then made by him, the said C D to one F J, did unlawfully and purposely have illicit carnal intercourse with said F J, she, the said F J, then being an unmarried female of good repute for chastity, and under the age of eighteen years, viz., of the age of — years, as the said C D then and there well knew.

Evidence.—The common law provided no punishment for

¹ *Rex v. Thallman*, 1 Leigh & C., 326.

² *Reg. v. Orchard*, 20 Eng. Com. Law and Eq., 598.

³ Cr. Code, § 207.

seduction under promise of marriage. A statute of this kind exists in a number of the states differing somewhat in the exact words used, but substantially alike. The protection of the statute extends to all females under the age of eighteen years whose reputation for chastity is good.¹ In the case cited it is said: "It is the reputation and age of the female, and not her previous conduct, that bring her under the protection of the statute." The defendant will not therefore be permitted to prove specific acts of illicit intercourse with other persons, but must attack her character, if at all, by proof of her reputation.

The questions presented aside from the intercourse and the ages of the respective parties are: 1st, Was the promise of marriage the inducement—that is, was it in consequence of the promise of marriage that the girl submitted? 2d, Was she of good repute for chastity? If the questions are answered in the affirmative, the case would seem to be made out.² In *State v. Gates*,³ the court held the indictment insufficient, because it did not show that the woman was of chaste character previous to and down to the time of the alleged seduction. In *State v. Curran*,⁴ it is said, "We believe the authorities concur that seduction is generally made out by a train of circumstances among which may be enumerated courtship, or continued attention for a length of time. Courtship affords not simply the opportunity, but the very means of persuasion by which seduction is effected."⁵

Adultery.—If any married woman shall hereafter commit adultery, or desert her husband and live and cohabit with another man in a state of adultery, she shall, upon conviction thereof, be imprisoned in the jail of the county not exceeding one year; and if any married man shall hereafter commit adultery, or desert his wife and cohabit and live with another woman in a state of adultery, or if any married man living

¹ *Bowers v. State*, 29 O. S., 542.

² *Kenyon v. People*, 26 N. Y., 203; *Boyce v. People*, 55 N. Y., 644.

³ 27 Minn., 52.

⁴ 51 Iowa, 112.

⁵ *Stevenson v. Belknap*, 6 Iowa, 103; *State v. Clark*, 1 Hawley, Am. Cr. R., 660, and note.

with his wife shall keep any other woman and wantonly cohabit with her in a state of adultery, or if any unmarried man shall live and cohabit with a married woman in a state of adultery, every person so offending shall be fined in any sum not exceeding two hundred dollars, and be imprisoned in the jail of the county not exceeding one year.¹

MARRIED WOMAN DESERTING HER HUSBAND AND LIVING IN ADULTERY.

That C D, on the — day of — in the year of our Lord one thousand eight hundred and — being then and there married to and the lawful wife of one E F, did then and there unlawfully desert her said husband, E F, and from that day continuously until the — day of — in the year of our Lord one thousand eight hundred and — in said county, did unlawfully live and cohabit with one G H, in a state of adultery, said G H being a man other than her husband, and said C D then and there during all of said time being a married woman, the wife of said E F, and her said husband during all of said time being alive.

MARRIED MAN DESERTING HIS WIFE AND LIVING IN ADULTERY.

That E F, on the — day of —, in the year of our Lord one thousand eight hundred and —, being then and there married to, and the lawful husband of one C D, did then and there unlawfully desert his said wife, C D, and from that day continuously until the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, did unlawfully live and cohabit with one I J in a state of adultery, said I J being a woman other than C D, his said wife, and the said E F then and there, during all of said time, being a married man, the husband of said C D, and his said wife during all of said time being alive.

MARRIED MAN LIVING WITH HIS WIFE, KEEPING AND COHABITING WITH ANOTHER WOMAN.

That E F, on the — day of —, in the year of our Lord one thousand eight hundred and —, being then and there married to, and the lawful husband of one C D, and then and there living with said C D, his lawful wife, and in said county, from the — day of —, to the — day of — in the year of our Lord one thousand eight hundred and —, did unlawfully keep one S J, a woman other than his said wife, and wantonly cohabit with said S J in a state of adultery.

¹Cr. Code, § 238.

UNMARRIED MAN LIVING WITH MARRIED WOMAN.

That E F, on the — day of — in the year of our Lord, one thousand eight hundred and — being then and there an unmarried man, did then and there in said county from the date aforesaid to the — day of — in the year of our Lord one thousand eight hundred and — unlawfully and continuously live and cohabit in a state of adultery with one G H, a married woman, she, the said G H, then and there being during all of said time married to, and the lawful wife of one K D, who was then alive.

Adultery was not Indictable at Common Law.—It was punishable, however, in the ecclesiastical courts, and was cause for a divorce from bed and board. The word, therefore, had been defined by the courts, and had acquired a legal meaning.¹ In the civil law, adultery was defined to be the “carnal knowledge of another man’s wife.” Webster defines adultery to be “the violation of the marriage bed; the unfaithfulness of any married person to the marriage bed; the voluntary sexual intercourse of a married person to one of the opposite sex.”

It will be seen that under the statute of Nebraska adultery may be committed by a married woman, who shall desert her husband and live and cohabit with another man; by a married man who shall commit adultery or shall desert his wife and live and cohabit with another woman in a state of adultery; by a married man living with his wife who shall keep any other woman, and wantonly cohabit with her in a state of adultery; or by an unmarried man who shall live and cohabit with a married woman in a state of adultery. In all of these cases but one it is the living and cohabiting together in a state of adultery that constitutes the offense.

Evidence.—Adultery can not be proved by hearsay and rumor in the neighborhood where it existed.² Nor by the wife’s suspicions and jealousy.³ Where the adultery is charged in the indictment to have been committed in one county, proof is not admissible showing it to have been committed with the same woman in another county, and that the defendant spoke

¹ See Bish. Mur. & Div., § 703.

² Belcher v. State, 8 Humph., 63.

³ State v. Crowley, 13 Ala., 172.

of the woman as his wife, and admitted that he had lived in the county where the indictment was found.¹

A charge of living in open and notorious adultery is not sustained by proof of occasional intercourse.² Proof of acts which were committed eighteen months after the indictment was found and in no way connected with the prior acts are not admissible in evidence.³ See also fornication.

Corroborating Proof.—Where there is testimony introduced tending to prove adultery, proof of other instances of undue familiarity between the defendant and the same woman, which occurred not long before the adulterous act proved, are admissible in corroboration.⁴

Fornication.—If any unmarried persons shall live and cohabit together in a state of fornication, such persons so offending shall each be fined in any sum not exceeding one hundred dollars and be imprisoned in the county jail not exceeding six months.⁵

FORNICATION.

That C D and E F, on the — day of —, in the year of our Lord, one thousand eight hundred and —, and from that time continuously until the — day of — in the same year in said county, the said C D then and there being an unmarried man and the said E F then and there being an unmarried woman, unlawfully did live and cohabit together in a state of fornication.

Joinder of Defendants.—Both participants should be joined in the indictment; but where the proceeding is against but one it is sufficient,⁶ and where both are joined and but one arrested he may be tried.⁷

Evidence.—To constitute the offense the parties must live together openly and notoriously in the same dwelling.⁸ A

¹ *Com. v. Horton*, 2 Gray, 354.

² *Wright v. State*, 5 Blackf., 358.

³ *State v. Crowley*, 13 Ala., 172.

⁴ *Com. v. Merriam*, 14 Pick., 518; *State v. Wallace*, 9 N. H., 515; *Com. v. Morris*, 1 Cush., 391.

⁵ *Cr. Code*, § 209; *State v. Marvin*, 35 N. H., 22.

⁶ *Wasden v. State*, 18 Ga., 265; *Bish. Stat. Cr.*, § 708.

⁷ *State v. Lyerly*, 7 Jones, 158; *Bish. St. Cr.*, § 708.

⁸ *Searls v. People*, 13 Ill., 597; *Miner v. People*, 58 Id., 60.

single act of sexual intercourse is not sufficient to constitute the offense.¹ Nor are occasional visits in private sufficient.² Nor if the living together is continued but a single day.³ The living must be together in the same habitation.⁴ It need not be continuous, however, as where a married man visited a woman who resided half a mile from his residence once a week for several months, and each time remained all night with her.⁵

Leasing Building for Brothel.—Every house or building situated in this state, used and occupied as a house of ill-fame, or for the purposes of prostitution, shall be held and deemed a public nuisance, and any person owning or having the control of, as guardian, lessee, or otherwise, such house or building, and knowingly leasing or subletting the same, in whole or in part, for the purpose of keeping therein a house of ill-fame, or knowingly permitting the same to be used and occupied for such purpose, or using or occupying the same for such purpose, shall, for every offense, be fined in any sum not exceeding one hundred dollars, or imprisoned not less than thirty days, or more than six months, or both, at the discretion of the court.⁶

LEASING A BUILDING FOR A BROTHEL.

That C D, on or about the — day of —, in the year of our Lord, one thousand eight hundred and —, being then and there the owner of a certain building in said county, then and there unlawfully and knowingly did lease said building to one E F for the purpose of keeping therein a house of ill-fame and place for the practice of prostitution and lewdness.

KEEPING A BROTHEL.

That C D, on or about the — day of — in the year of our Lord one thousand eight hundred and —, being then and there the owner of a certain building in said county, then and there unlawfully and knowingly did

¹ *Id.* *McLeland v. State*, 25 Ga., 477.

² *Bish. St. Cr.*, § 697, and cases cited.

³ *Id.*

⁴ *Quartemas v. State*, 48 Ala., 269.

⁵ *Collins v. State*, 14 Ala., 608.

⁶ *Cr. Code*, § 210.

use and occupy said building for the purpose of keeping therein a house of ill-fame, and place for the practice of prostitution and lewdness, and did then and there on said day, and divers other days, permit evil disposed persons, men and women prostitutes, to resort there and commit whoredom and fornication.

Pleading.—The names of the persons frequenting the house, need not be stated.¹ In some of the authorities it is said that the offense is local, and must be described as committed in a particular town;² but in the absence of a statute requiring such description, there would seem to be no necessity for such statement.³ All that is required is that the offense shall appear to have been committed in the county in which the indictment is found.

An averment that the defendant unlawfully kept and maintained a house of ill-fame, resorted to for purposes of prostitution and lewdness, is sufficient without stating that the house was resorted to by men as well as women.⁴ Where it is alleged that the house is in a particular town or place the proof must correspond with the allegation.⁵

Evidence.—It may be shown that the women kept by the accused were common prostitutes, or so reputed,⁶ that persons of bad reputation, male and female, black and white, frequented the house day and night,⁷ and evidence that notoriously reputed prostitutes and libertines were in the habit of frequenting the house during the time charged in the indictment is received.⁸

Particular Instances of illicit intercourse need not be shown, although such evidence may be given.⁹ It has been held that evidence that the neighbors generally complained of the disturbance was inadmissible, and that conversations of persons

¹ 2 Bish. Cr. Pro., § 107; *State v. Patterson*, 7 Ired., 70.

² *State v. Nixon*, 18 Vt., 70; *Norris v. State*, 3 Greene, 513.

³ *Zumhoff v. State*, 4 Greene, 513; 2 Bish. Cr. Pro., § 111.

⁴ *State v. Homer*, 40 Me., 438; *Com. v. Ashley*, 2 Gray, 356.

⁵ *State v. Crogan*, 8 Iowa, 523.

⁶ *Harwood v. People*, 26 N. Y., 192.

⁷ *Clementine v. State*, 14 Mo., 112.

⁸ 2 Bishop Cr. Pro., § 116.

⁹ *U. S. v. Stevens*, 4 Cranch, C.C., 341; *O'Brien v. People*, 28 Mich., 213.

coming out of the house not in the presence of the keeper were inadmissible, being hearsay.¹ But if testimony was introduced tending to show the character of the inmates and the people that frequented the house, such testimony would seem to be admissible in corroboration.

It is no Defense that the neighborhood has not been disturbed, or that no indecency or disorderly conduct was visible from the exterior of the house.²

Inducing Illicit Intercourse.—If any person or persons shall induce, decoy, entice, hire, engage, employ, or compel any female under eighteen years of age; or if any person or persons shall cause by compulsion or otherwise, any female over eighteen years of age, against her will, to have illicit intercourse with any person other than the person so inducing, decoying, enticing, hiring, engaging, employing, or causing such female to have such illicit intercourse; or if any person or persons shall knowingly permit or allow any other person to have illicit intercourse with any female of good repute for chastity, at the house, residence, or upon the premises owned or controlled by such person or persons, the person or persons so offending shall be imprisoned in the penitentiary for not more than five years.³

INDUCING ILLICIT INTERCOURSE.

That A B on the — day of — in the year of our Lord one thousand eight hundred and — in said county, then and there willfully and unlawfully did induce one C D by (*state acts of inducement*) to have illicit intercourse with one E F, she, the said C D, then and there being a female under the age of eighteen years, viz.: of the age of — years, as the said A B then and there well knew.

CAUSING ILLICIT INTERCOURSE WITH WOMAN OVER EIGHTEEN YEARS.

That A B on the — day of — in the year of our Lord one thousand eight hundred — in said county, then and there unlawfully and willfully,

¹ Com. v. Harwood, 4 Gray, 41; Com. v. Stewart, 1 S. & R., 342.

² 2 Rej. v. Rice, 1 L. R. C. C. 21; Com. v. Gannett, 1 Allen, 7.

³ Cr. Code, § 212.

did compel one C D, by (*state by what means*) to have illicit intercourse with one E F, against the will of the said C D, as said A B then and there well knew, she, the said C D, being then and there over eighteen years of age, to wit — years.

Evidence.—To sustain the charge, it is necessary to prove, first, the representation or other inducements made to the woman by the accused; and second, that in consequence of the means so used by him, the prisoner procured the woman to have carnal intercourse with the man mentioned in the indictment; and also in the one case that she was under eighteen years of age, and in the other, that the intercourse was against her will.¹

¹ See 1 Archbold, Cr. Pl. & Prac., 304.

CHAPTER XIII.

BREAKING AND ENTERING BUILDINGS.

Burglary.—If any person shall, in the night season, willfully, maliciously and forcibly break and enter into any dwelling house, kitchen, smoke house, shop, office, store house, mill, pottery, factory, water craft, school house, church or meeting house, barn or stable, ware house, malt house, still house, railroad car factory, station house or railroad car, with intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony, every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more than ten nor less than one year.¹

Maliciously Entering Building.—If any person shall willfully and maliciously, either in the day time or night season, enter any dwelling house, kitchen, shop, store, ware house, malt house, still house, mill, factory, pottery, water craft, school house, church or meeting house, smoke house, barn or stable, and shall attempt to kill, disfigure or maim any person, rob, stab, commit a rape, or arson; every person so offending shall be imprisoned in the penitentiary not more than ten years nor less than one year.²

Possession of Burglar's Tools.—If any person shall be found having upon him or her, any picklock, crow, key, bit, or other instrument or tools with intent feloniously to break and enter into any dwelling house, store, ware house, shop or other building containing valuable property, he or she shall be deemed a vagrant, and punished by a confinement in the penitentiary for a term not exceeding two years.³

¹ Cr. Code, § 48.

² Cr. Code, § 49.

³ Id., § 53.

Entering Building in Night Season Armed, etc.—If any person shall, in the night season, unlawfully break open and enter any mansion house, shop, store, ship, boat, or any other water craft, in which any person shall reside or dwell, and shall commit, or attempt to commit, any personal violence or abuse, or shall be so armed with any dangerous weapon as to indicate a violent intention, the person so offending shall be fined in any sum not exceeding three hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county not exceeding thirty days, at the discretion of the court.¹

Entering Dwelling in Day Time, etc.²—If any person shall, in the day time, unlawfully break open and enter any mansion house, shop, store, ship, boat, or any other water craft, in which any person shall or may dwell or reside, and shall commit, or attempt to commit, any personal abuse, force or violence, he or she so offending shall be fined in any sum not exceeding one hundred dollars, and be imprisoned in the jail of the county not exceeding twenty days, at the discretion of the court.³

If any person shall willfully and maliciously, in the day time, break and enter any dwelling house, kitchen, shop, store, ware house, malt house, still house, mill, factory, pottery, water craft, school house, church or meeting house, smoke house, barn, stable, railroad depot, car factory, station house, or railroad car, with intent to steal, every person so offending shall be fined in any sum not exceeding three hundred dollars, and be imprisoned in the county jail not exceeding sixty days, at the discretion of the court.⁴

BREAKING AND ENTERING IN NIGHT SEASON WITH INTENT TO STEAL, ETC.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, about the hour of [ten] in the night season of the same

¹ Cr. Code, § 51.

² The intent to commit the offenses charged must be clearly proved, as well as the breaking and entering into the building, etc.

³ Cr. Code, § 52.

⁴ Id., § 53.

day, in said county, into a certain [dwelling house] of C D situate therein, feloniously, burglariously,¹ [willfully, maliciously and forcibly²] did break and enter with intent then and there and thereby feloniously and burglariously to steal, take and carry away the goods of said C D, then and there being in said [dwelling house].

BREAKING, ENTERING AND STEALING IN NIGHT SEASON.³

(*Follow the preceding form to the end, then add,*) and the said A B then and there being in said dwelling house [one ladies' watch and chain] of the value of [two hundred dollars] the property of C D, then and there being found in said dwelling house, feloniously and burglariously did steal, take and carry away.

BREAKING AND ENTERING IN WITH INTENT TO MURDER OR RAVISH.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, about the hour of — [in the night season] of the same day, in said county, into a certain [dwelling house] of C D, situate therein, feloniously, burglariously, willfully, maliciously and forcibly did break and enter with intent then and there, one C D, then and there being unlawfully, purposely, feloniously, burglariously and of deliberate and premeditated malice, him, the said C D, to kill and murder.

BREAKING AND ENTERING IN THE DAY TIME AND ATTEMPTING TO COMMIT VIOLENCE.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in the day time of said day, in said county, into a certain [dwelling house] of C D, there situate, in which [dwelling house] said C D

¹ At common law every indictment for burglary must contain the word "burglariously," and "feloniously" must be introduced in every indictment for felony. And these words are so essential that if the word *feloniously* be omitted in an indictment for stealing a horse it will be only trespass. 1 Chitty Cr. L., 242; 4 Co., 39, 40; 2 Hail, P. C., 172, 184; 2 Arch. Cr. P. and Pl., 264. The statute has not changed the common law in that regard.

² These words are used in the statute, otherwise it is believed they would be unnecessary.

³ The addition of the statement that a larceny was actually committed does not make the indictment bad for duplicity; the larceny is a part of the same transaction. *Com. v. Hope*, 22 Pick., 1; *Stoops v. Com.*, 7 Serg. & R., 491; *State v. Brady*, 14 Vt., 353.

did then and there dwell and reside, feloniously, burglariously, willfully, purposely, maliciously and forcibly did break and enter, and then and there, in and upon one C D in said dwelling house, unlawfully, feloniously and burglariously did make an assault and him, the said C D, then and there being, did attempt to cut, shoot, wound and maim.

AT COMMON LAW, INTENT TO STEAL AND ACTUAL THEFT.

That A B on the — day of — in the year of our Lord one thousand eight hundred and —, about the hour of one in the night of the same day, with force and arms, at the parish of — aforesaid, in the county aforesaid, the dwelling house of A J there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of said A J, in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away, and then and there with force and arms one silver tankard of the value of £5, (*here set out the articles stolen as in larceny.*) of the goods and chattels of the said A J, in the same dwelling house, then and there being found, then and there feloniously and burglariously did steal, take and carry away.¹

The words “broke and entered” must both be inserted as both of them are essential to constitute the offense.²

Intention.—The charge is not complete without an averment of a felonious intention, or the actual commission of a substantive felony.³ An intent to commit a trespass is not sufficient, although a felony might be its probable consequence; therefore the intent must be properly charged.⁴ The intent also must be correctly stated, because if it is alleged that the defendant intended to commit one species of felony and the proof shows that he intended another, the indictment will be vicious.⁵

¹ The above is the form recommended by Sir Nathan Hale, in order to convict the defendant of larceny in case it should appear that the felony was not complete of burglary with intent to steal. See 2 Chitty, Cr. Law, 864.

At common law the offense must be laid to have been committed in a dwelling house, and an allegation that the offense was committed in a house was not sufficient. 2 Chitty, Cr. Law, 1095; 1 Hale, P. C., 550; where a church was broken into it was proper to describe it as the parish church: 2 Chitty, Cr. Law, 1095.

² Chitty, Cr. L., 1098.

³ Id.; 1 Hale, P. C., 559; 2 Leach, 717.

⁴ 2 Chitty's Cr. Law, 1098; 1 Hale, P. C., 561; 3 Inst., 65.

⁵ 1 Hale, P. C., 561; 2 Chitty's Cr. L., 1098.

Burglary at Common Law.—It was essential to the offense that it be committed in the night.¹ To constitute a burglary, there must be both a breaking and an entry; the older as well as the modern writers agree that both are requisite.²

The Breaking Must be Actual and not arising from a mere legal construction.³ An entry by an open door or window is not burglarious, though it would make a party a trespasser if unaccompanied by a felonious design.⁴

The Force, however, does not imply a demolition of any part of the walls, or even manual violence; for if a thief descends through a chimney, which can not be further inclosed, this will amount to burglary.⁵ It is immaterial by what kind of violence the breaking is effected. The opening of a casement, breaking a window, picking the lock off the door by a false key, putting back the lock of a door, bolt or fastening, unlatching a door which is only latched, bending aside nails, or otherwise unloosing fastenings.⁶ But if one lawfully in the house break open a chest or trunk he may be guilty of larceny, but not burglary.⁷

The Name of the Owner of the house must be stated with reasonable certainty.⁸ At common law a number of nice distinctions were made as to the ownership to be proved, which had the effect in many cases to secure an acquittal where the evidence was conclusive as to the guilt of the accused.

The Actual Occupant, lawfully in possession of the building and having the exclusive use and control of the premises, no doubt is the proper party in whom to allege ownership. The

¹ It is essential to the offense that it should be committed in the night, and the only question is what time will be so considered for this purpose. Anciently, the day was accounted to begin from sun-rising and to end at sun-setting; but it is now agreed that if there be sufficient remains of daylight to discern the features of a man's face, no breaking can be burglarious. 3 Inst., 63; Hale, P. C., 550; 2 Leach, 710; 2 Chitty, Cr. L., 1092. This, however, does not extend to moonlight.

² 1 Hale, P. C., 551; 3 Inst., 64; 2 Chitty, Cr. L., 1092.

³ 1 Hale, P. C., 551.

⁴ 3 Inst. 64; 2 Chitty's Cr. L., 1093.

⁵ 1 Hale, P. C., 552; 4 Blacks. Comm., 226; 2 Chitty, Cr. L., 1093.

⁶ 1 Hale, P. C., 552; 2 Chitty's Cr. L., 1093.

⁷ 2 Chitty, Cr. L., 1094; Fost., C. C., 108-9.

⁸ 2 Chitty, Cr. L., 1096.

object is to describe the place where the offense was committed, not to determine the ownership of the property. Ownership as against the burglar means any possession which is rightful.¹ Therefore, under a statute making it an offense to break into a store room, it was held that a room occupied as a news depot, in which papers, pamphlets and the like are kept for sale, and communicating by a doorway with another room used as an outer hall or entrance to the building, was a store room, and the property of the person occupying it and having its exclusive use and control.²

Owner or Joint Owner can not be Guilty of.—One of two partners can not be guilty of burglary or larceny in respect to a house and goods of which the ownership and possession are in both partners, in the absence of a statute so declaring.³

The Intent to Commit the Felony Charged in the indictment is an essential ingredient in burglary, without which it would be merely trespass. In general the intent may be inferred from what the accused actually does after he breaks into the building. This, however, like other presumptions, may be rebutted and the actual intent proved.⁴ It is not sufficient to allege that the accused broke and entered "with intent to commit a felony," but the particular felony intended must be alleged.⁵ If the pleader is in doubt as to what particular felony was intended, an eminent law writer contends that he may charge in one count all the probable felonies intended and that proof may be offered to sustain any one of them.⁶ There is great force in this argument as the several intents form but a part of the same transaction; still the writer is not aware of any cases sustaining this view. At common law the

¹ 2 Bish. Cr. Pro., § 137.

² *Bauer v. State*, 25 O. S., 70; *Markham v. State*, 25 Ga., 52. In *People v. Van Blaricum*, 2 Johns., 105, it is said: "If one be indicted for burning the dwelling house of another, it is sufficient if it be in fact" the dwelling house of such person. The court will not inquire into the tenure or interest which such person has in the house burned. It is enough that it was his actual dwelling at the time.

³ *Alfele v. Wright*, 17 O. S., 238.

⁴ *Arch. Cr. Pl. & Prac.*, 340.

⁵ 2 Bish. Cr. Pro., § 142.

⁶ 2 Bish. Cr. Pro., § 150.

pleader, if in doubt as to what specific felony was designed, charged the intention differently in distinct counts in order to correspond with the evidence, and this was held to be the proper course.¹

Time, Place, Manner and Intent are four things to be considered in burglary.²

Intent to Steal must be of Property; therefore in the absence of a statute by which a dog is made the subject of larceny, an indictment which charges the defendant with breaking and entering a stable in the night season with intent to steal a dog is not a good indictment for burglary.³ In the case cited it is well said, "It will be time enough for the courts to say that a dog is the subject of larceny when the law-making power of the state has so declared." Constructive crimes are odious and dangerous.⁴ In an indictment for burglary with intent to steal goods and chattels it is not necessary to allege what specific goods were intended to be stolen.⁵

¹ 2 East, P. C., 515; 2 Chitty, Cr. L., 1098.

² 4 Blacks. Comm., 224.

³ State v. Lynus, 26 O. S., 400.

⁴ Findlay v. Bear, 8 S. & R., 571.

⁵ Spencer v. State, 13 Ohio, 401. It is said, (page 405,) "If it was necessary to specify with certainty the particular goods and chattels which the burglar designs to steal, when the felonious breaking and entry is made with such guilty intention but he is arrested in his progress before a larceny is actually committed, it appears to us the great object of this statute would be in a great measure defeated."

CHAPTER XIV.

BURNING BUILDINGS AND OTHER PROPERTY.

Arson.—If any person shall willfully and maliciously burn or cause to be burned, any dwelling house, kitchen, smoke house, shop, barn, stable, store house, ware house, malt house, still house, mill, or pottery, the property of any other person; or, any buildings, the property of any other person, of the value of fifty dollars, or containing property of the value of fifty dollars; or any church, meeting house, court house, work house, school house, jail, or other public building; or any ship, boat or other water craft, of the value of fifty dollars; or any bridge of the value of fifty dollars, erected across any of the waters within this state, every person so offending shall be deemed guilty of arson, and shall be imprisoned in the penitentiary not more than twenty years, nor less than one year.¹

Attempt.—If any person shall willfully and maliciously set fire to any of the buildings or other property described in the foregoing section, with intent to burn or destroy the same, every person so offending shall be imprisoned in the penitentiary and kept at hard labor not more than seven years nor less than one year.²

Insured Property.—Every person who shall willfully and maliciously burn or cause to be burned any dwelling house, kitchen, smoke house, shop, office, barn, stable, store house, ware house, still house, mill, pottery, or any other building of the value of fifty dollars; or any ship, boat, or other water craft, of the value of fifty dollars; or any goods, wares, merchandise, or other chattels of the value of fifty dollars which shall be at the same time the property of such person, and

¹ Cr. Code, § 54.

² Cr. Code, § 55.

insured against loss or damage by fire, with intent to prejudice such insurer; every person so offending shall be deemed guilty of arson, and shall be imprisoned in the penitentiary not more than twenty years, nor less than one year.

Property of Another Person.—If any person shall willfully, maliciously and unlawfully attempt to burn or cause to be burned any dwelling house, kitchen, smoke house, shop, barn, stable, store house, ware house, malt house, mill or pottery, the property of any other person of the value of fifty dollars; or any church, meeting house, court house, work house, school house, jail or other public building; or any ship, boat or other water craft, of the value of fifty dollars; or any bridge of the value of fifty dollars, erected across any of the waters within this state; or if any person shall willfully, maliciously or unlawfully attempt to set fire to any of the buildings or other property described herein, with intent to burn or destroy the same, by igniting or trying to set fire to or ignite the same, or any material or anything therein or any combustible material or thing without the same and nearly adjoining thereto, though the same, or part thereof be not fired or burned; every person so offending shall be fined in any sum not exceeding three hundred dollars, or imprisoned in the county jail for a term not exceeding four months, or both, at the discretion of the court.¹

Penitentiary.—Any person who shall willfully, maliciously and unlawfully attempt to ignite, set fire to, or burn the Nebraska penitentiary, or any shop, store house or building within the closed walls of the said penitentiary, by the means and in the manner described in the next preceding section, shall be imprisoned in the penitentiary not more than three years nor less than one year.²

Setting Fire to Hay, etc., of the Value of \$35.—If any person shall willfully or maliciously set fire to or burn, or cause to be burned, any barrack or stack of hay, wheat, rye, oats, barley, flax, hemp or fodder, or grain of any kind, or any corn crib, or place wherein corn may be deposited, or any fence, boards, planks, scantling, rails, tan-bark, or timber, the property of

¹ Cr. Code, § 56.

² Cr. Code, § 57.

another, and of the value of thirty-five dollars or upward; every person so offending shall be imprisoned in the penitentiary not more than three years nor less than one year.¹

Of Less Value than \$35.—If any person shall willfully or maliciously commit any of the offenses enumerated in the next preceding section, but the injury or damage therefrom shall be of a less value than thirty-five dollars, every person so offending shall be fined in any sum not exceeding one hundred dollars nor less than five dollars, or be imprisoned in the county jail not exceeding thirty days, or both, at the discretion of court.²

Setting Fire to Woods, Prairies, etc.—If any person or persons shall willfully or intentionally, or negligently and carelessly, set on fire, or cause to be set on fire, any woods, prairies or other grounds whatsoever, in any part of this state, it shall be deemed a misdemeanor, and every person so offending shall be punished by a fine of not less than five dollars nor more than one hundred dollars, and by imprisonment in the county jail for not less than one month nor more than six months; provided, that this section shall not extend to any person who shall set on fire, or cause to be set on fire, any woods or prairies adjoining his or her farm, plantation, field or inclosure for the necessary preservation thereof from accident by fire between the first day of March and the last of November, by giving to his or her neighbors two days' notice of such intention; provided, also, that this section shall not be construed to take away any civil remedy which any person may be entitled to for injury which may be done or received in consequence thereof.³

FOR SETTING FIRE TO AND BURNING A DWELLING HOUSE, ETC.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, willfully, maliciously and feloniously,⁴ did then and there set fire to and burn one dwelling house there situate, the property of C D, of the value of fifty dollars and more.

¹ Cr. Code, § 60.

² Cr. Code, § 61.

³ Cr. Code, § 62.

⁴ The words "feloniously, willfully and maliciously," are necessary. 3 Greenleaf, Ev., § 51, 2 East, P. C., 1033; 1 Hawk., P. C., c. 39, § 5; Rex v. Reader, 4 C. & P., 245.

ATTEMPTING TO SET FIRE TO BUILDING, ETC.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, willfully, maliciously and feloniously then and there did set fire to the dwelling house of one C D, there situate, of the value of fifty dollars, and more, with the intent then and there, and thereby unlawfully and maliciously, to burn and destroy said building.

AT COMMON LAW FOR WILLFULLY BURNING THE HOUSE OF ANOTHER.

That J M, on the — day of — in the year of our Lord one thousand eight hundred and — in the parish of — in the county of — a certain house of one W C, there situate, feloniously, willfully and maliciously did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, willfully and maliciously did burn and consume.

OWNER BURNING INSURED PROPERTY WITH INTENT TO RECOVER.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, a certain [store] there situate of the value of two thousand dollars, the property of said A B, feloniously, willfully and maliciously, did set fire to, burn and consume, with intent then and there and thereby unlawfully and feloniously to prejudice and defraud the [Insurance Co.] which said company on the application of said A B, prior to that time, had issued and delivered to said A B a policy of insurance on said store for the sum of one thousand dollars, which policy at the date aforesaid was in full force and effect.

BURNING STACK OF HAY, GRAIN, ETC.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, a certain [stack of hay] there situate, the property of one C D, of the value of thirty-five dollars and upward, to wit, of the value of —, did unlawfully, willfully and maliciously then and there set fire to, burn and consume.

MALICIOUSLY SETTING FIRE TO WOODS AND PRAIRIES.

That A B, on the — day of — in the year of our Lord one thousand

eight hundred and — in said county, certain woods (*or prairies*) there situate, the property of C D, unlawfully, willfully and maliciously did then and there set on fire, said woods (*or prairies*) being then and there covered with a large quantity of dry combustible materials, to the great damage of the said C D.

Evidence.—At common law four things must be proved to establish the charge: first, that the offense was committed on a dwelling house; second, that it was the house of the person named as the owner; third, that it was burned, and fourth, that this was done with felonious intent.¹

The Burning by the Occupant of his own house does not constitute the crime although it is a great misdemeanor if it be so near other houses as to place them in danger.²

Who is Owner.—The house must be that of another. This refers to the lawful possession which confers a property while it exists and not to the legal title or entire interest.³ It is the injury to the rights of present possession at the time of the burning which constitutes the offense.⁴ The reason is, arson is a crime against the security of a dwelling house as such, and not against the building as property; the proper course, therefore, is to allege and prove that the house burned was that of the person residing therein without reference to the questions of title.⁵

Therefore, if the lessee or mortgagor burn the house in his own possession it is not arson.⁶

But where a defendant is only entitled to dower out of a dwelling house let to other parties, or a reversioner who maliciously burns a house of which his tenant has possession, the person so offending will be guilty of arson.⁷ So a pauper suf-

¹ 3 Greenleaf, Ev., § 51.

² Id., § 53.

³ 2 Chitty, Cr. Law, 1106; 3 Greenleaf, Ev., § 54.

⁴ Id.

⁵ State v. Toole, 29 Com., 342; 3 Greenleaf, Ev., § 55 and note.

⁶ 2 Chitty, Cr. L., 1106; 3 Greenleaf, Ev., § 54. This was so at common law but under the statute it is probable that the lessee or mortgagee in possession who should burn the property would be liable for the offense.

⁷ Id.

fered by the overseers to remain in a house for which he pays no rent, may be guilty notwithstanding his possession.¹

Ownership—How Described under the Statute.—The property may be described as belonging to the person in the actual possession thereof although he be only the tenant, or it may be described as that of the person having the title or fee.² In the case cited it is said (pages 302–3), “We think upon sound reason and undoubted principles of law, derived from analogies as well as the language of the statute, it is sufficient to aver the property to be that of the general owner, as well as to aver it to be the property of the special owner or tenant. And there being no legal or reasonable objection to so comprehensive a rule, we think that considerations of public convenience and a furtherance of the ends of justice recommend its adoption; and especially so, inasmuch as no contrary rule has ever, to our knowledge, been adopted in the courts of this state.” There is great force in this reasoning and it certainly would subserve the ends of justice to permit the ownership to be alleged in either the general or specific owner.

Dwelling House in the common law comprehends not only the mansion itself but “the outset also, as barn, stable, cow house, sheep house, dairy house, mill house, and the like parcel of the mansion house.”³ It will be seen that the statute has considerably increased the descriptions of buildings which may be the subject of arson.

Description of Building.—A building was originally erected for, and during many years was used as a still house. During the same time there was operated therein a small pair of buhrs for chopping corn, both for distilling and for customers. Afterward, but before the commission of the offense charged, the distilling machinery was taken out and the building dismantled and abandoned as a still house, although it continued to be used as a mill for chopping feed. An indictment charging the defendant with breaking, etc., into a still house, was held not sustained.⁴

¹ 2 Chitty, Cr. Law, 1106.

² Allen v. State, 10 O. S., 287.

³ 3 Inst. 67; 2 Chitty, Cr. L., 1105.

⁴ Thalls v. State, 21 O. S., 233.

It may be questioned whether the case cited is sustained by the weight of authority, and the rule stated, in *People v. Van Blarcum*,¹ where the defendant was indicted and convicted of arson in burning the county court house and jail, which were described in the indictment as the dwelling house of John Forbes, who was the jailer, and who, by permission of the sheriff, lived with his family in a part of the building and under the roof with the court house and jail; it was held to be sufficient that in fact it was the dwelling house of such person. So where the indictment charged the burning of an *outhouse*, and it was proved that for some purposes it was used as a part of the house, it was held that there was no variance;² and where the charge was that the building burned was "called a barn," proof that the structure, though but an outbuilding, and used only for sheltering cattle, was in fact known as and called a barn by people in the vicinity, was sufficient.³

There Must be Proof of the Actual Burning of the building. It is not necessary that the entire building should be set on fire, or that any part of it should be entirely consumed; for if once a part of it is on fire, though it should go out without any effort to extinguish it, the crime will be complete.

If no part of the building is burned it is not arson, either by statute or common law,⁴ although an indictment for an attempt would probably lie.

Felonious Intent must be proved. This allegation will not be supported by proof of mere negligence or mischance; nor by proof of doing some other unlawful act without malice, as if one in shooting with a gun at the poultry of another, or in violation of the game laws, or the like, should set fire to the building.

But if the intent was felonious, and the party intended to steal the poultry, he will be criminally liable for all the con-

¹ 2 Johns., 105.

² *Rex v. North*, 2 East, P. C., 1021.

³ *State v. Smith*, 28 Iowa, 565.

⁴ 3 Greenleaf, Ev., § 55; 2 Chitty, Cr. L., 1104.

⁵ 3 Inst., 66; 4 Blacks. Com., 222.

sequences.¹ To constitute the offense, however, it is not necessary that the burning should correspond with the original intent of the party, as if a man intends to burn one house and by accident the flames destroy another instead of the one intended, he will be guilty of maliciously burning the latter.² So if one set fire to a rick or stack, the fire from which is liable to consume a barn and does so, the party is liable for burning the barn.³

Burning Insured Property.—As the offense can be committed—the defrauding of the insurance company only where a valid policy of insurance had been issued and was then in full force and effect, it would seem to be necessary to prove the validity of the policy unless in some way such proof is waived.

¹3 Greenleaf, Ev., § 56; 1 Hale, P. C., 569; 2 Chitty, Cr. L., 1104.

²2 Chitty, Cr. L., 1104; 3 Greenleaf, Ev., § 56.

³Martin v. State, 28 Ala., 71.

CHAPTER XV.

EMBEZZLEMENT.

If any Clerk, Agent, Attorney-at-Law, or Servant, of any private person or any copartnership, except apprentices and persons within the age of eighteen, or if any officer, attorney-at-law, agent, clerk or servant of any incorporated company or joint stock company shall embezzle or convert to his own use, or fraudulently take or make away with, or secrete with intent to embezzle or fraudulently convert to his own use, without the assent of his or her employer or employers, or the owner or the owners thereof, any money, goods, rights in action or other valuable security or effect, whatever, belonging to any other person, body politic or corporate, which shall come into his or her possession or care by virtue of such employment, or if any officer elected or appointed to any office of public trust in the state, or if any executor, administrator or guardian or assignee for the benefit of creditors, shall embezzle or convert to his or her own use, any money, property, rights in action, or other valuable security or effects whatever, belonging to any individual or company or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, executor, administrator, guardian or assignee, every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken or secreted, or of the value of any sum of money payable or due upon any right in action so embezzled, every embezzlement of any evidence of debt negotiable by delivery only, and actually executed by the master or employer of any such clerk, agent, officer, attorney-at-law or servant, but not delivered or issued as a valid instru-

ment, shall be deemed an offense within the meaning of this section.¹

That if any Clerk, Apprentice or Servant, whether bound or hired, to whom any money, bank bill or note, or goods or chattels, shall be intrusted or delivered by his or her master or mistress, shall withdraw himself or herself from his or her master or mistress, and go away with the said money, bank bill or note, or goods or chattels, or any part thereof, with intent to steal the same, and defraud his or her master or mistress thereof, contrary to the trust and confidence in him or her reposed by his or her said master or mistress, shall embezzle the said money, bank bill or note, goods or chattels, or any part thereof, or otherwise shall convert the same to his or her own use with like purpose to steal the same, every such person so offending shall be deemed guilty of larceny, and be punished accordingly.

That if any Bailee of any money, bank bill or note, goods or chattels, shall convert the same to his or her own use with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and on conviction thereof shall be punished accordingly.²

That if any Lodger shall take away with intent to steal, embezzle or purloin, any bedding, furniture, goods or chattels which he or she is to use in or with his or her lodging, he or she shall be deemed guilty of larceny, and on conviction shall be punished accordingly.³

Every Person who shall buy or in any way receive any money, goods, rights in action, or any valuable security or effects whatever, knowing the same to have been embezzled, taken or secreted contrary to the provisions of the last section, shall be punished in the same manner and to the same extent as therein prescribed upon conviction of a servant for such embezzlement.⁴

If any Carrier or other person to whom any goods, money,

¹ Cr. Code, § 121.

² Id., § 121b.

³ Id., § 121c.

⁴ Id. § 122.

rights in action, or any valuable personal property or effects shall have been delivered to be transported or carried for hire; or if any person employed in such transportation or carrying shall, without assent of his employer, take, embezzle or convert to his own use such goods, moneys, rights in action, property or effects, or any part of them, and before delivery of such article at the place or to the person entitled to receive them; or if any inn-keeper shall embezzle or convert to his own use or fraudulently take, make away with, or secrete with intent to embezzle or fraudulently convert to his own use, without the consent of his guest, any money, bank notes, jewelry, articles of gold or silver manufacture, precious stones or bullion delivered to such inn-keeper by his guest for safe custody, every such person shall be punished in the manner prescribed by law for feloniously stealing property of the value of the article or articles so embezzled, taken or secreted.¹

If any Officer or other person charged with the collection, receipt, safe keeping, transfer or disbursement of the public money or any part thereof, belonging to the state or any county or precinct, organized city or village, or school district in this state, shall convert to his own use or to the use of any other person or persons, body corporate, association, or party whatever, in any way whatever, or shall use by way of investment in any kind of security, stock, loan, property, land, or merchandise, or in any other manner or form whatever, or shall loan with or without interest, to any company, corporation, association or individual, any portion of the public money, or any other funds, property, bonds, securities, assets or effects of any kind received, controlled or held by him for safe keeping, transfer or disbursement, or in any other way or manner, or for any other purpose; or, if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall be thus converted, used, invested, loaned or paid out, as aforesaid, which is hereby declared to be a high crime, and

¹ Cr. Code, § 123.

such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled, as aforesaid; which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds, property, bonds or securities, assets or effects of any kind, aforesaid, have been so embezzled; and in all cases such fine so operating as a judgment shall only be released or entered as satisfied by the party in interest, as aforesaid. Any failure or refusal to pay over the public money or any part thereof, by any officer or other person charged with the collection, receipt, transfer, disbursement or safe keeping of the public money, or any part thereof, whether belonging to the state or to any county or precinct or school district, or organized city or incorporated village in this state, or any other public money, whatever; or any failure to account to or to make settlement within a reasonable time after a notice so to do with any proper and legal authority, of the official accounts of such officer or person, shall be held and taken as *prima facie* evidence of such embezzlement, and the refusal of any such officer or person, whether in or out of office, to pay any draft, order or warrant which may be drawn upon them by the proper officer for any public money in his hands, no matter in what capacity the same may have been received or may be held by him, or any refusal by any person or public officer, named in this act, to pay over to his successor any public moneys or securities promptly on the legal requirement of any authorized officer of the state or county, shall be taken on the trial of any indictment against such officer or person for embezzlement, as *prima facie* evidence of such embezzlement.¹

By Bank Officers.—Every president, director, cashier, teller, clerk, or agent of any banking company, who shall embezzle, abstract or willfully misapply any of the moneys, funds or

¹ Cr. Code, § 124.

credits of such company, or shall, without authority from the directors, issue or put in circulation any of the notes of such company, or shall, without such authority, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or shall make any false entry on any book, report or statement of the company, with an intent in either case to injure or defraud such company, or to injure or defraud any other company, body corporate or politic, or any other individual person, or to deceive any officer or agent appointed to inspect the affairs of any banking company in the state, shall be confined in the penitentiary not less than one year nor more than ten years.¹

EMBEZZLEMENT BY AGENT, CLERK, SERVANT OR EMPLOYE OF PRIVATE PERSON.

That A B on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, being the [agent] of C D, a private person, and he, the said A B, then and there not being a person within the age of eighteen years and not an apprentice, did, by virtue of such employment as agent of said C D as aforesaid, then and there receive and take into his possession certain [goods, chattels, money, etc.,] (*state the facts*), of the value of —, the property of C D, his principal, and did then and there fraudulently, unlawfully and feloniously convert to his own use, and embezzle² said property without the assent of said C D, his principal.

EMBEZZLEMENT BY OFFICER, AGENT, CLERK, ETC., OF CORPORATION, OF MONEY OR GOODS OF THIRD PARTY.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, being the [agent] of (*name of corporation*), and he, the said A B, then and there not being a person within the age of eighteen years, and not being an apprentice, did by virtue of such employment as agent of said (*name of corporation*), then and there receive and take into his possession certain [goods, etc.,] of the value of

¹ Cr. Code, § 135.

² Bishop, in his valuable work on Cr., Proc., Vol. 2, § 316-318, says in effect, that in charging the offense, the English courts and generally the American, require the indictment to allege the statutory elements of the offense; and that it is unnecessary to allege the commission of larceny as that is a conclusion of law resulting from the embezzlement.

—, the property of E F, and did then and there fraudulently, unlawfully and feloniously convert to his own use and embezzle said property without the assent of said E F, the owner thereof, and without the assent of (*name of corporation*), his employer.

BY PUBLIC OFFICER CONVERTING PUBLIC MONEYS.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, being the (*state official position, as treasurer of — county —*), and as such officer being intrusted with the collection, safe-keeping, disbursement and transfer of the public moneys belonging to said county, and by virtue of his position as such treasurer said A B, did receive and hold the public money of said county, and while said money was so held by him he did, then and there, fraudulently, unlawfully and feloniously convert to his own use and embezzle the sum of ten thousand dollars of said public money, the property of said county.

EMBEZZLEMENT BY CARRIER OF GOODS.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, being a carrier, did then and there receive from one C D, and take into his possession as such carrier, the following goods and chattels (*describe*) of the value of — dollars, the property of said C D, to be by said A B carried and transported for him and delivered to one E F in said county, said E F being then and there authorized to receive the same, and the said A B having received said goods as such carrier afterward, on the day aforesaid, and while he held said goods as such carrier, then and there unlawfully, fraudulently and feloniously did convert said goods to his own use and embezzle the same without the assent of said C D or E F, and has wholly failed to deliver said goods to said E F or any other person for him.

EMBEZZLEMENT BY BANK OFFICERS.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, was the [*cashier*] of (*name of bank*) and as such cashier was intrusted by said bank with the safe-keeping, control and disbursement of the moneys belonging to the same; that while said A B was cashier as aforesaid, to wit, on the day and year above set forth, then and there, fraudulently, unlawfully and feloniously, certain bank bills, the property of said bank, of the value of —, in his possession as such cashier, did then and there convert to his own use and embezzle, with intent to injure and defraud said bank, and without the assent of the same.

EMBEZZLEMENT OF SERVANT UNDER STATUTE 21 H. VIII, c. 7.¹

That E B, on the — day of — in the year of our Lord one thousand eight hundred and — then being a servant of and to one A B, and not an apprentice or a person within the age of eighteen years, he, the said A B, did then and there upon confidence and trust, deliver to said E B, his said servant, one gold watch of the value of twenty pounds, of the goods and chattels of him, the said A B, safely to keep the same to the use of him, the said A B, and that he, the said E B, after the said delivery, and whilst he was such servant as aforesaid, to wit, on the aforesaid day, did feloniously withdraw himself from said A B, his said master, and feloniously did go away with the same gold watch with the intent to steal the same and defraud the said A B, his said master, thereof, contrary to the trust and confidence in him, the said E B, put by the said A B, his said master.

EMBEZZLEMENT OF LETTER CARRIER OF LETTER CONTAINING MONEY.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — was a letter carrier duly employed in carrying letters and packets from the post office situate on — street in the city of — in said county, to a certain other street called *South* street, in said city and county, and on the day aforesaid, at the post office in said city, one certain letter there lately before sent by W C, by the post from S, in the county of B, and directed to C Q, of South street in said city of — then containing therein a certain bank bill or note duly issued by the (*name of bank*) the property of said C Q, and of the value of — which said letter came into the hands of said A B, as such letter carrier, to be by him delivered to said C Q, and having said letter in his possession as such carrier, unlawfully, fraudulently and feloniously, did open and secrete said letter, and take and convert said bank bill to his own use, and embezzle the same without the assent of said C Q, or of said W C.

Not Embezzlement.—At common law it was not larceny in any servant to run away with his master's goods committed to him to keep, but by statute 21 Hen. VIII, c. 7, it was provided that if any servant embezzles his master's goods to the value

¹ This statute no doubt is a part of the common law. Kent says: "It (the common law) has been assumed by the courts of justice or declared by statute with like modifications in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation and in amendment of the law, constitute a part of the common law of the country." 1 Com., 473.

of forty shillings, he shall be guilty of felony, except apprentices and servants under eighteen years of age. But at common law, if the party did not have the possession, but only the care and oversight of the property, as the butler the plate, or the shepherd the sheep, and the like, the embezzling of them was felony.¹ In one case there was a trust, in the other not.

Embezzlement is defined by Webster "the act of fraudulently appropriating to one's own use what is intrusted to one's care and management; as the embezzlement by a clerk of his employer's money, or public funds by the public officer having them in charge."

"Embezzlement differs from larceny in this, that the latter implies a wrongful taking from another's possession; but embezzlement denotes a wrongful appropriation of what is already in the wrongdoer's possession.

Servant.—Under the statute similar to the one copied in the text it has been held that a person employed at a monthly salary, who in the discharge of his duties is subject to the immediate direction and control of his employer, is, in an indictment for embezzlement, properly described as a servant.²

Money Received at Different Times.—The fact that the money alleged to have been embezzled by the accused was received in several sums, at different times, and from different persons, is no ground for requiring the prosecution to elect on which sum it will rely.³

Venue.—In England it has been held that embezzlement being in effect larceny, the venue may be laid in the county where the property was received by the accused, or it may be laid in the county where he committed an act of embezzlement.⁴

¹ Blacks. Com., 221.

² Gravatt v. State, 25 O. S., 162.

³ Id. It is said (page 168) "the money, it is true, was received at different times from different persons. But the collection of the several sums by the plaintiff was lawful and in due course of his employment. The evidence did not show a distinct and independent conversion of each sum but the conversion of both sums as one transaction."

⁴ Rex v. Taylor, 3 B. & P., 596. In a note to 2 Chitty, Criminal L., 983, it is said: "The venue may be laid in the county where the prisoner denied having received the money, though there is no other proof

Evidence.—First. It must be proved that the accused was the clerk, servant, agent, bailee, carrier, inn-keeper, officer charged with the safekeeping of public money, or president, director, cashier, teller, etc., of a banking company. Second. That the thing embezzled came into the party's hand in the ordinary course of his duty. If it did not come in the ordinary course but by virtue of special directions from the master was received as his, then the party will be liable for the misappropriation.¹ Third. That the party converted the property to his own use.

Generally it has been held that the fraudulent conversion by a defendant of money paid to him under a mistake, was not embezzlement.² In other cases, however, it has been held to be larceny.

that he spent it there, or converted it there to his own use. 1 East, P. C., Addenda, 24. It seems indeed to have been thought by some of the judges that in such a case he might be indicted either in the county where he received the money to the use of his master, or in that in which he denied the possession. But this could only be done where the design to embezzle can be shown to have preceded the receipt of the property; for how otherwise can any crime be charged in a jurisdiction where the defendant only performed the duty with which he was intrusted." The safe course would seem to be to charge the offense to have been committed in the county in which the money or property was received unless it can be shown it was taken into another county and there embezzled, in which case the offense should be laid in the latter county.

¹ 1 Bish. Cr. L., § 296.

² Com. v. Hays, 14 Gray, 62.

CHAPTER XVI.

EXTORTION BY OFFICERS, OMISSION OF DUTY, ETC.

If any judge, justice, sheriff, coroner, constable, jailer, or other officer of this state, either judicial or ministerial, shall knowingly ask, demand or receive any fee or reward to execute or do his duty, other than is or shall be allowed by the laws of this state, every person so offending shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the jail of the county not exceeding ten days, or both, at the discretion of the court.¹

Extortion signifies in an enlarged sense any oppression under color of right. In a stricter sense it signifies the taking of money by any officer by color of his office; either where none is due, or not so much due, or when it is not yet due.²

Indictment.—Where nothing is due the officer that fact must be alleged in the indictment, and if the charge was excessive, the amount of the excess must be stated.³

It is sufficient to allege that the officer was duly elected to the office, etc., naming it, and that he accepted the trust and

¹ Cr. Code, § 157. At common law an indictment lies against a judge for taking a fee for his judgment, an officer for receiving more than the usual fee, a ferryman who demands more than is due him by prescription, or a sheriff who refuses to execute process until his fees are paid. Where a statute annexes a fee to an office it will be extortion to take more than it specifies. 2 Inst., 210. But stated and known fees allowed by courts of justice to their own officers are legal and may be demanded. Co. Lit., 368 b. The indictment must state the sum which the defendant received and it will not be sufficient to allege that he did receive a gift or reward without specifying its value: 4 Burr., 2471; 2 Leach, 794; though it is not necessary to have the exact value alleged in the indictment. 2 Chitty's Cr. L., 295, note.

² Com. v. Bagley, 7 Pick., 279; People v. Whaley, 6 Cow., 663.

³ State v. Cogswell, 3 Blackf., 55; Halsey v. State, 1 South., N. J., 323.

was acting as such officer.¹ The indictment should state the office under color of which the defendant acted, the amount of fees legally due to him and the amount which he actually demanded and received.² Chitty states the rule to be that "where nothing at all was due that fact ought to be averred, and where anything was due the sum which might have been lawfully taken must be expressed."³

AGAINST A COURT BAILIFF.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, was a bailiff of the — court of said county, and under color and pretense of being said bailiff did then and there knowingly and unlawfully exact and receive from one C D the sum of — dollars of the value of — dollars, under color and pretense of not taking said C D to prison after he had arrested him, the said C D, by virtue of a warrant issued by — to answer an indictment for an assault upon E F, found in said court at the — term thereof, whereas in fact no such fee was due said C D.

AGAINST A SHERIFF.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, then and still being the sheriff thereof, did arrest and take into his custody one C D, by virtue and under color of a warrant issued by E F, Esq., a justice of the peace of said county, to take and bring before said E F or some other justice of said county, the body of said C D, to answer the charges made in a complaint under oath against him made by G H, charging said C D with (*state offense*); and the said C D, so being in custody aforesaid to answer said complaint, he, the said A B, knowingly, unlawfully, fraudulently and injuriously did then and there obtain of said C D the sum of — dollars, money of the said C D, upon the color and pretense that he, the said A B, would procure and get said warrant discharged by one of said justices without any proceedings being had before any justice of the peace of said county, whereas in fact no such fees were due said A B, and he did not procure the discharge of said warrant.

BY JUSTICE OF THE PEACE.

That A B, on the — day of — in the year of our Lord one thousand

¹ Edge v. Com., 7 Barr. 275.

² State v. Brown, 12 Minn., 490; Com. v. Mackin, 9 Phila., 593.

³ 2 Chitty, Cr. L., 296, note.

eight hundred and — in said county, being then and there a justice of the peace of — in the county aforesaid, duly elected and qualified, did then and there knowingly, unlawfully, fraudulently and injuriously, demand and receive of one C D the sum of — dollars to perform a certain duty pertaining to his, the said A B's said office, to wit: the discharge of an attachment on the personal property of said C D, in an action then pending before said A B, as a justice of the peace, wherein E F was plaintiff and said C D defendant; whereas in fact the said A B was entitled by law to take and receive only the sum of — cents for discharging said attachment; and by reason of which said A B has knowingly, extorsively, willfully and corruptly taken and received the sum of — in excess of the fees allowed by law to perform his said duty as a justice of the peace.

Omission of Duty—Malfeasance.—Any magistrate, clerk of the court, sheriff, constable, or other officer mentioned in chapter fifty of the code, who shall neglect or refuse to perform any duty required of such officer by any provision of said section fifty, or any clerk, sheriff, coroner, constable, county commissioner, justice of the peace, recorder, county surveyor, prosecuting or district attorney, or any ministerial officer, who shall be guilty of any palpable omission of duty, or who shall willfully or corruptly be guilty of malfeasance or partiality in the discharge of his official duties, shall be fined in a sum not exceeding two hundred dollars, and the court shall have power to add to the judgment that any officer so convicted shall be removed from office.¹

AGAINST JUSTICE OF THE PEACE FOR REFUSAL TO PERFORM A DUTY.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, then and there being a justice of the peace, therein duly elected and qualified, in a certain action then pending and undetermined before him, wherein C D was plaintiff and E F was de-

¹Cr. Code, § 180. At common law an indictment lies against all subordinate officers for neglect and misconduct in the discharge of their official duties. Thus a constable may be indicted for refusing to pursue a felon upon hue and cry on notice, Cro., Eliz., 654, an overseer for refusing to join with his colleagues in making a poor's rate, 1 Stra., 101, and for not obeying an order of the justices, 1 T. R., 316, as well as any other persons for disobedience to such order, and where the duty is thrown on a body consisting of several persons, each is individually liable for his own misdeeds or omissions. 2 Chitty, Cr. L., 257.

fendant, before the commencement of and at the time and place appointed for the trial of said cause, the said A B willfully, unlawfully and corruptly refused then and there to issue a subpoena for one G H, a material witness for said E F, residing in said county, although said E F then and there tendered said A B the full amount of his fees for the same, and thereby said C D was unable to procure the attendance of said witness at said trial to his damage.¹

AGAINST SHERIFF OR CONSTABLE FOR NEGLECTING TO EXECUTE PROCESS.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and —, was sheriff of — county, and did then and there receive an execution in due form, issued out of the [district] court of — county, on a judgment rendered in said court in an action wherein E F was plaintiff and G H defendant, and upon which there was due at the date of said execution the sum of — dollars, and commanding him that of the goods and chattels and for want thereof of the lands and tenements of said G H, he make the amount of said execution; yet, although said G H had sufficient real estate in said county not exempt and liable to be levied upon under said execution to satisfy said debt, the said A B then and there did not and would not execute said execution, and did not and has not collected said debt, but willfully and unlawfully refuses so to do.

¹ Justices of the peace have been held liable to prosecution for willfully and corruptly refusing to issue a subpoena, *Jones v. People*, 2 Scam., 477; for admitting a prisoner to bail in a case not authorized by statute, *Rex v. Clark*, 2 Stra., 1216; for refusing bail or to take a particular person, *Rex v. Jones*, 1 Wils., 7; for refusing to administer an oath to a defendant for the purpose of obtaining a discontinuance of the case, *People v. Brooks*, 1 Denio, 457; and against a sheriff or constable for willfully making a false return to process which it was their duty to execute, *Tibbals v. State*, 5 Wis., 596.

CHAPTER XVII.

FALSE PRETENSES—FRAUD.¹

If any Person by False Pretenses shall obtain from any other person any money, goods, merchandise or effects whatever, with intent to cheat and defraud such person of the same, or shall sell, lease or transfer any void or pretended patent right, or certificate of stock in a pretended corporation, and take the promissory note or other valuable thing of such purchaser, or shall fraudulently make and transfer any bond, bill, deed of sale, gift, grant or other conveyance to defeat his creditors of their just demands; if the value of the property or promissory note, fraudulently obtained or conveyed, as aforesaid, shall be thirty-five dollars or upward, such person so offending shall be imprisoned in the penitentiary not more than five years nor less than a year; but if the value of the property be less than thirty-five dollars, the person so offending shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the jail of the county not exceeding thirty days, and be liable to the party injured in the amount of the damages sustained.²

What is Requisite.—The making a false pretense does not constitute a case within the statute ; but money or goods or

¹ The particular pretenses complained of must be set out in the indictment for the purpose of enabling the court to determine whether or not they constitute an offense, and to apprise the accused of the charge he is required to meet. A charge that the property was obtained by false pretenses is not sufficient. 2 Bish. Cr. Proc., § 165.

² Cr. Code. § 125. The cases in which fraud was indictable at common law were confined to the use of false weights and measures, the selling of goods with counterfeit marks, playing with false dice, and frauds affecting the course of justice and immediately affecting the interests of the public. 2 Chitty, Cr. L., 995.

merchandise or effects must have been thereby obtained from another person, and these acts must have been done with the intent to cheat and defraud such person.¹

The pretense or pretenses relied upon must relate to a past event, or an existing fact; any representation or assurance in relation to a future transaction, however false and fraudulent it may be, is not, within the meaning of the statute, a false pretense which lays the foundation for a criminal prosecution.²

Venue.—Where a party by false pretenses contained in a letter sent by mail procures the owner of goods to deliver them to a designated common carrier in one county consigned to the writer in another county, the offense of obtaining goods by false pretenses is complete in the former county and the offense must be prosecuted therein.³

Loan of Money Procured by.—Where a contract for the loan of money is induced by the fraud and false pretenses of the borrower, and the lender in performance of the contract delivers to him certain bank bills without any expectation that the same bills will be returned in payment, the borrower is guilty of obtaining money by false pretenses, but is not guilty of larceny.⁴

¹ *Schleisinger v. State*, 11 O. S., 659.

² *Dillingham v. State*, 5 O. S., 284. Statutes of the various states relating to this subject are based largely upon the act of 30 Geo. II, c. 30, some of them being almost literal transcripts thereof.

³ *Norris v. State*, 25 O. S., 217. But where a verbal order was given to a traveling salesman of the seller who resided in a different county from the buyer, it was held that the venue must be laid in the county where the representations were made. *Ex parte Parker*, 11 Neb., 309.

⁴ *Kellogg v. State*, 26 O. S., 15. The first English statute on this subject was 33 Hen. VIII, which did not apply to verbal representations. This defect was supplied by the act of 30 Geo. II, c. 24; but both of these acts were confined to money, goods and chattels, and did not, at least in words, extend to securities and choses in action; the act of 52 Geo. III, c. 64, was thereupon passed, which includes bonds, bills of exchange, bank bills, all securities and orders for the payment of money, or the transfer of goods, or any valuable thing, whatsoever.

Under these statutes it has been held that several persons may be jointly indicted; and where the pretense was conveyed by words spoken by one defendant in the presence of others in concert with whom he was acting, all of them may be joined. 2 Chitty, Cr. Law, 998.

FOR OBTAINING GOODS UNDER FALSE PRETENSES.¹

That A B on the — day of — in the year of our Lord one thousand eight hundred and — in said county, intending unlawfully and fraudulently to cheat and defraud one C D, then and there did falsely, knowingly, designedly and unlawfully pretend to the said C D, that one E F was a merchant in good standing and great wealth, who wanted to purchase dry goods and groceries to the amount of — dollars and have them shipped to — where said E F resided; that relying upon said false representations of said A B said C D then and there sold to E F dry goods and groceries of the value of — dollars and delivered the same to E F; that said representations of said A B were wholly false and said E F then and there was not of great wealth and not in good standing but was insolvent and unable to pay his debts and possessed no property whatever, as said A B well knew, and who then and there made said representations with the intent to cheat and defraud said C D.

False Personation.—If any person shall falsely personate another, before any court of record or judge thereof, or before any justice of the peace, clerk of either the Supreme Court or other court, or any other officer of this state, who is, or may hereafter be, authorized to take the acknowledgment of deeds, powers or warrants of attorney, or to grant marriage licenses, with intent to defraud any person, body politic or corporate, any person so offending shall be imprisoned in the penitentiary not exceeding six years.²

FOR FALSELY PERSONATING ANOTHER BEFORE A COURT.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in the — court of said county, in a certain cause then pending in said court, in said county, wherein the state of — was plaintiff and C D defendant, unlawfully, falsely and feloniously, and without the privity or consent of G H, did in said court, in the name of G H, acknowledge a certain recognizance in said cause with intent in so doing to defraud the state of —, and then and there falsely, unlawfully and feloniously did personate the said G H with intent to defraud said state.

Selling Land without Title.—If any person or persons shall

¹ It is sufficient after stating the circumstances of the deceit to aver " by means of which said false pretenses the defendant unlawfully, knowingly, and designedly obtained from the party the goods with the intent to cheat him of the same, and afterward negative the truth of the pretenses. 2 Chitty, Cr. L., 1002.

² Cr. Code, § 126.

knowingly sell or convey any tract of land without having a title to the same, either in law or equity, by descent, devise, or evidence by a written contract or deed of conveyance, with intent to defraud the purchaser, or other person, every person so offending shall be imprisoned in the penitentiary not more than seven years, nor less than one year.¹

SELLING LAND WITHOUT TITLE WITH INTENT TO DEFAUD.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, did knowingly, unlawfully and fraudulently sell and convey to C D the (*description of land*), without having title to said land, either in law or equity, by descent, devise, or by written contract or deed of conveyance, with intent then and there and thereby to defraud the said C D, the purchaser thereof.

Frauds by Agents.—Every factor or agent who shall deposit any merchandise, intrusted or consigned to him, or any document so possessed or intrusted aforesaid, as security for any money borrowed, or negotiable instrument received by such factor or agent, and shall apply or dispose of the same to his own use, contrary to good faith and with the intent to defraud the true owner, and every factor or agent who shall sell any merchandise or other property intrusted or consigned to him in the like manner and with the like fraudulent intent, and every other person who shall knowingly connive with or aid, or assist any such factor or agent in any such fraudulent deposit or sale, shall be imprisoned in the penitentiary not exceeding three years, nor less than one year.²

FACTOR SELLING THE GOODS OF HIS PRINCIPAL.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, being then and there the factor and agent of one C D, of —, being in possession of certain goods and chattels, to wit: (*describe*) of the value of — dollars, the property of C D, and which said goods were intrusted and consigned by said C D to said A B for the purpose (*state purpose*) did then and there fraudulently, unlawfully and feloniously [sell] said goods to one E F for the sum of — dollars, and

¹ Cr. Code, § 127.

² Id., § 128.

applied the same to his own use with intent thereby to defraud said C D the owner of said goods, contrary to good faith*.

BEING A PARTY TO A FRAUDULENT SALE, ETC.

Follow the preceding form to the * then say: and the said F F, well knowing that said sale of said goods by A B was fraudulent and without authority from C D, the true owner thereof, and made with intent to defraud said C D, did then and there knowingly, fraudulently, unlawfully and feloniously purchase said goods of said A B with the intent to defraud said C D, the owner of said goods, contrary to good faith.

Frauds of Consignors.—If the owner of any merchandise or other person in whose name any merchandise shall be shipped or delivered to the keeper of any warehouse, or other factor or agent, to be shipped, shall, after the advancement to him or them of any money, or the giving to him or them of any negotiable security, by the consignee or consignees of such merchandise, without the consent of such consignee or consignees being therefor first had and obtained, make any disposition of such merchandise, different from and inconsistent with that agreed upon between such owner or other person aforesaid, and all other persons conniving with him or them for the purpose of deceiving, defrauding or injuring the said consignee, shall be imprisoned in the penitentiary not more than three nor less than one year; provided, however, that no person shall be subject to prosecution under this section who shall, before disposing of such merchandise, pay, or offer to pay, the consignee or consignees the full amount of any advancement made thereon.¹

FRAUDULENT TRANSFER BY CONSIGNOR.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, did deliver to one C D, a keeper of a warehouse therein, certain goods, to wit: (*describe*) the property of A B, of the value of — dollars and then and there did consign said goods to one E F of — and did thereupon receive from said E F the sum of — dollars as an advancement upon said goods, and under the promise of said A B that they should be shipped to said E F, but afterward, to wit, on the — day of — of the same year, in said county, said A B, without the consent

¹ Cr. Code, § 129.

of said E F being therefor first had and obtained, and without paying or offering to pay to said E F the sum of ——— dollars so advanced on said goods, did fraudulently, willfully, unlawfully and feloniously make another disposition of said goods different from and inconsistent with that agreed upon with said E F as aforesaid, to wit: (*state what disposition was made*) for the purpose and with the intent to defraud and injure the said E F.

Fraudulent Bills of Lading, Receipt, etc.—If any person shall execute and deliver, or shall cause or procure to be executed and delivered to any person, any false or fictitious bill of lading, receipt, schedule, invoice, or other written instrument, to the purport and effect that any goods, wares, merchandise, live stock or other property usually transported by carriers, had been or were held, delivered, received, placed, or deposited on board of any steamboat, or water craft, navigating the waters in or bordering upon the state of Nebraska, or at the freight office, depot, station or other place designated or used by any railroad company or other carrier. for the reception of any such property so usually transported by carriers, when such goods, wares, merchandise, live stock or other property were not held, or had not in good faith been delivered, received, or deposited on board of such steamboat or other water craft, or at such freight office, depot, station, or other place so designated or used by any common carrier for the reception of such property, when such bill of lading, receipt, invoice, schedule, or other written instrument was made and delivered according to the purport and effect of such bill of lading, receipt, invoice, schedule, or other written instrument, with the intent to deceive, defraud or injure any person or corporation; or if any person shall attempt to indorse, assign, transfer or put off any false or fictitious bill of lading, receipt, invoice, schedule, or other written instrument, knowing the same to be false, fraudulent or fictitious, the person so offending shall be imprisoned in the penitentiary not exceeding four years nor less than one year.¹

EXECUTING AND DELIVERING A FALSE BILL OF LADING.

That A B, on the ——— day of ——— in the year of our Lord one thousand eight hundred and ——— in said county, fraudulently, unlawfully and felo-

¹ Cr. Code, § 180.

niously did execute and deliver to one C D a certain false and fictitious bill of lading, to the purport and effect that certain goods, to wit: (*give particular description*) the property of C D, of the value of — dollars, had then and there been delivered to and received on board of the steamboat — then navigating the — river, one of the waters bordering upon the state of —, when in fact such goods nor any part thereof had been delivered to or received on board of said steamboat by said C D, or any other person, and said bill of lading was wholly false and fictitious, and was then and there executed and delivered by said A B, according to the purport and effect thereof, with the intent to deceive and defraud one E F (*or some person to the jurors or affiant unknown*).

FALSE RAILWAY RECEIPT, ETC.¹

That A B, on — the day of — in the year of our Lord one thousand eight hundred and — in said county, fraudulently, unlawfully and feloniously did execute and deliver to one C D, a certain false and fictitious receipt and instrument in writing, to the purport and effect that the (*name of corporation*) of which he claimed to be the [agent] at S, in said county, had then and there received at S, aforesaid, certain goods, to wit: (*set out as in receipt*) the property of C D, of the value of — dollars, to be transported to — on the line of said railroad, when in fact no such goods nor any part thereof had been delivered to or received by said railroad company, from C D, or any other person; and said receipt was wholly false and fictitious, and was then and there executed and delivered by said A B, according to the purport and effect thereof, with the intent to deceive and defraud one E F (*or some person to the jurors [or affiant] unknown*).

Fraudulent Warehouse Receipts.—If any person shall execute and deliver, or cause or procure to be executed and delivered to any other person, any false and fictitious warehouse receipt, acknowledgment or other instrument of writing, to the purport and effect that such person, or any other person or persons, copartnership, firm, body politic or corporate, which he or she represents, or pretends to represent, held or had received in store, or held or had received in any warehouse, or any other place, or held or had received into possession, custody or control of such person or persons, copartnership, firm or body politic, any goods, wares or merchandise when such goods, wares or merchandise were

¹The statute does not restrict the liability to the actual agent, the language being, "if any person shall execute and deliver, or shall cause or procure to be executed and delivered to any person any false receipt, etc., with the intent to deceive, defraud or injure any person," etc.

not held, and had not been received in good faith according to the purport and effect of such warehouse receipt, acknowledgment or instrument in writing, with intent to defraud, deceive or injure any person whomsoever; or if any person shall indorse, assign, transfer or deliver, or shall attempt to indorse, transfer or deliver to any other person any such false and fictitious warehouse receipt, acknowledgment or instrument in writing, knowing the same to be false, fraudulent or fictitious, such person shall be punished by imprisonment in the penitentiary not more than three years nor less than one year.¹

FALSE WAREHOUSE RECEIPT.

- That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, did knowingly, fraudulently, unlawfully and feloniously execute and deliver to C D, a certain warehouse receipt to the purport and effect that said A B had then and there received into his warehouse in said county the following goods and chattels, the property of said C D of the value of — dollars, to wit: [one thousand bushels of wheat] when in fact said A B had not received said goods and chattels or any part thereof from said C D, or any other person, according to the purport and effect of said warehouse receipt, and said receipt was wholly false and fictitious, and was then and there executed and delivered by said A B according to the purport and effect thereof, with the intent thereby to deceive and defraud one E F,* (or some person to the jurors [or affiant] unknown).

ASSIGNMENT OF FALSE RAILWAY RECEIPT, ETC.

Follow the preceding form to the * then say: and afterward on the — day of —, in the same year, in said county, said C D knowingly, unlawfully, fraudulently and feloniously, did indorse his name upon said warehouse receipt and deliver the same to one G H, with the intent thereby to defraud him, he, the said C D, then and there well knowing that said receipt was false and fictitious.

Fraudulent Assignment or Incumbrance by Warehousemen.—If any person or persons, or the agent of any person or persons, having in his possession, custody or control, any goods, wares, or merchandise, by virtue of any genuine instrument of writing of the purport or effect of any such instrument of writing as is mentioned in either of the last two preceding sections,

¹ Cr. Code, § 131.

shall without authority, and with the intent to injure or defraud the rightful owner thereof, sell, assign, transfer, or incumber such goods, wares, merchandise or any part thereof, to the value of fifty dollars or upward, or shall in any way convert the same to his own use, or if the consignor or consignors, or the agent of such consignor or consignors of any goods, wares or merchandise, not being the absolute owner thereof, and not having authority to stop, countermand or change the consignment thereof, or not having authority to sell or incumber the same during transit, shall, after the shipment thereof on board any water craft, or after the deposit thereof in or upon a vehicle for land carriage, in any way stop, countermand or change the consignment thereof, or shall sell, dispose of or incumber such goods, wares or merchandise, during their transit or after their delivery, or shall in any way convert the same or any part thereof to his or her own use, to the value of fifty dollars and upward, so that the rightful owner shall sustain a loss thereby of the value of fifty dollars or upward, the person so offending with intent as aforesaid shall be imprisoned in the penitentiary for a term not less than one, nor more than four years.¹

FRAUDULENT ASSIGNMENT OR INCUMBRANCE BY WAREHOUSE-MEN.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and —, in said county, having then and there in his possession certain goods of C D, to wit: (*describe them*) of the value of [fifty dollars or upward] by virtue of a genuine warehouse receipt executed by one G H, of the purport and effect that the said G H had before that time, to wit, on the — day of — in the same year, received into his custody and possession, in a warehouse situate in —, the goods and chattels above described, for consignment, transportation and delivery to said C D, at —, and the said A B in said county on the — day of — in said year, then and there having in his possession and control said goods by virtue of said genuine warehouse receipt, knowingly, fraudulently, unlawfully and feloniously did convert said goods to his own use to the amount of fifty dollars and upward, without authority from or the consent of said C D and with the intent to injure the owner of said goods, by reason whereof the said C D, the rightful owner thereof, did sustain a loss thereby of fifty dollars and upward.

¹ Cr. Code, § 132.

Railway Agent Knowingly Diverting Freight.—Any railway company whose agent or agents shall knowingly divert, or permit to be diverted, any freights that may come under his or their control, from the railroad or railroads over which the same may have been ordered to be conveyed as aforesaid, shall forfeit and pay to the railroad company or companies from which such freights have been so diverted, three times the amount received for transporting such freights, and such agent or agents shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days, or both, at the discretion of the court. Provided, that the provisions of this act shall in no way interfere with any lawful obligations heretofore entered into by any railroad company.¹

**AGAINST RAILWAY AGENT FOR KNOWINGLY DIVERTING
FREIGHT.**

That A B on the — day of —, in the year of our Lord one thousand eight hundred and —, being the agent of the (*name of railway*), at —, in said county, did then and there as such agent, receive from — railway company certain goods, to wit: (*describe*) the property of C D, of the value of — dollars, to be carried for him by the (*name of corporation*), and delivered to one E F, at — on the line of said last named railway: and said A B received said goods under the promise and direction to transmit the same as above set forth, but in violation of his duty in that regard said A B knowingly and willfully and contrary to the orders of said C D, diverted said goods from the — railway over which he was directed by said C D to send the same, and caused said goods to be sent by and transmitted over the (*name of railway*.)

Fraudulent Partner.—Every partner who shall be guilty of any fraud in the affairs of the partnership, shall be civilly liable to the party injured to the extent of his damage, and shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months.²

FRAUD BY MEMBER OF FIRM UPON HIS COPARTNER.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, was a legal partner in the firm of

¹ Cr. Code, § 133.

² Cr. Code, § 134.

A B & Co., engaged in the hardware business at ———, in said county, the partners in said business being A B & C D; that at the date aforesaid in said county said A B fraudulently and unlawfully and without the knowledge and consent of his copartner, C D, did cause to be removed from said business partnership goods belonging to said firm of the value of ——— dollars, and appropriated the same to his own use, with the intent thereby to cheat and defraud said C D, his copartner.

False Weights, etc.—Any person or persons who shall knowingly and willfully sell, or direct or permit any person or persons in his or their employ to sell any commodity or article of merchandise and make or give any false or short weight or measure, or any person or persons owning or keeping or having charge of any scales or steelyards for the purpose of weighing live stock, hay, grain, coal or other articles, who shall knowingly and willfully report any false or untrue weight, whereby any other person or persons may be defrauded or injured, such person or persons shall be fined in any sum not exceeding fifty dollars, or be imprisoned in the jail of the county not exceeding thirty days, or both, at the discretion of the court, and also be answerable to the party defrauded or injured in double damages.¹

SHORT WEIGHT OR MEASURE.²

That A B, on the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, in said county,³ did fraudulently and willfully sell to C D ten tons of Lehigh nut coal for the sum of ——— dollars per ton, but said A B willfully, knowingly and fraudulently weighed and delivered to said C D but nine tons of said coal, as and for the quantity of ten tons so purchased by said C D, and thereby did give a false and short weight of said coal of one ton, to the damage of and with the intent to cheat and defraud said C D.

The form given in 2 Chitty's Cr. L., 1000, omitting some of the unnecessary verbiage, is given below.

INDICTMENT—FALSE WEIGHTS AND MEASURES AT COMMON LAW.

That J H, on, etc., and from thence until the taking of this inquisition.

¹ Cr. Code, § 136.

² Where the offense is clearly proved and it is shown that the giving of short weight or measure was willful and deliberate, the court will be justified ordinarily in inflicting the full penalty of the law.

³ The name of the purchaser should be given. An allegation of selling "to divers persons" is not sufficient. 2 Bish. Cr. Proc., § 159; State v. Woodson, 5 Humph., 55.

did use and exercise the trade and business of a shop-keeper, and during that time did, in the buying and selling by weight of divers goods, wares and merchandise, to wit—at —, etc., as aforesaid; and that the said J H, contriving and fraudulently intending to cheat and defraud the subjects, etc., whilst he used and exercised his said trade and business, to wit, on said day, and divers other days and times between that day and the taking of this inquisition, at — aforesaid, did knowingly, willfully and publicly keep a certain shop there wherein he, the said J H, did so as aforesaid carry on his said trade, a certain false pair of scales for the weighing of goods, wares and merchandise by him sold in the way of his said trade, which said scales were then and there by artful and deceitful ways and means so made and constructed as to cause the goods, wares and merchandise weighed therein and sold thereby to appear of greater weight than the real and true weight by one eighth part of such apparent weight, and that the said J H, then and there knowing said scales to be false did knowingly, willfully and fraudulently sell and utter to one G H, certain goods in the way of his said trade, to wit, a large quantity of flour weighed in and by said false scales, as and for fifty pounds weight of flour, whereas in truth and in fact the weight of said flour, so sold as aforesaid, was short and deficient of the said weight of fifty pounds by one eighth part of the said weight of fifty pounds, to wit, — pounds, to the great damage of the said G H.¹

Articles Packed in Casks and Boxes to be Weighed and Marked.
—Any person, agent or clerk, who shall put up, or shall order or procure any other person to put up or pack, sugar, rice, tobacco, soap, starch, candles, cheese, or any goods or articles sold by weight, packed in kegs, barrels, tierces, casks, boxes, hogsheads, or any case whatever, shall in every instance first weigh the entire box or cask, or whatever it may be, and plainly cut or mark upon the head, or most convenient part thereof, the exact number and fractions of pounds it weighs, and when packed or filled shall again ascertain the whole weight, and place the same immediately above the cut or marked tare weights, and subtract the one from the other, showing the net weight of the contents, which calculation

¹ The necessity for alleging the keeping and using of false weights at common law in an indictment of this kind grew out of the decisions on that question, the result of which were that if a person should sell by false weights, though only to one person, the offense was indictable; if, however, without false weights, he sold to divers persons a less quantity than he professed to sell, he was not liable. 2 Arch., Cr. L., (Pom. Ed.) 1416; 2 East P. C., c. 18, § 3, p. 820; 2 Chitty, Cr. L., 559. In other words, the offense was in the keeping and using of false weights—not cheating by short weight. The form of the indictment, however, is instructive as showing what allegations are necessary under the statute.

shall not be obliterated while the bulk remains unbroken; and said articles until the bulk is broken shall be sold by the net weight. Provided, however, that nothing in this section shall be so construed as to release any party from the liability of allowing the actual tare at the time of the sale on all kegs, barrels, tierces, casks, boxes, hogsheads, or cases containing articles which by their nature are liable to change the original tare.¹

Manufacturer's Mark, Stamp, etc., not to be Changed.—Any brand, mark or stamp, put upon any keg, barrel, box, cask, hogshead or case by the manufacturer, indicating the articles, its quality, quantity, or the manufacturer's name or either of them, shall be considered the manufacturer's certified brand, stamp, or mark, and shall be put thereon in such manner as to be identified by the manufacturer, or his authorized agent, which shall be subject to no erasure or obliteration; neither shall such box-lids, keg, barrel, hogshead, tierce or cask-heads be transferred from one to the other for the purpose of taking advantage of said brands, stamps or marks, to sell an inferior article, or re-packing take place, putting an inferior article into a superior branded keg, barrel, cask, hogshead, box or case, to accomplish the same design or to mark or re-mark anything containing pound bulk, so as to hide from view the original manufacturer's mark, stamp or brand.²

Penalty for Violation of two Preceding Sections.—Any person directly or indirectly transgressing any of the provisions enumerated in the two preceding sections, shall in all cases pay to the party aggrieved double in value of the difference between the actual quantity contained in such keg, barrel, cask, tierce, box, hogshead, or in whatever the same may be contained, and the net quantity or weight for which the same may have been sold; and for the first offense be subject to a fine not less than twenty nor more than sixty dollars, or imprisonment in the county jail not less than thirty days nor more than sixty days; and for the second and every subsequent offense he shall be subject to a fine of not less

¹ Cr. Code, § 137.

² Cr. Code, § 138.

than fifty nor more than one hundred dollars, or imprisonment in the county jail not less than thirty nor more than ninety days.¹

MARKING FALSE WEIGHT ON A BOX OR BARREL.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and —, in said county, did willfully, unlawfully and fraudulently put up and pack in certain tierces rice to be sold as merchandise and by the tierce, yet the said A B did not at any time cut or mark or cause to be cut or marked upon said tierces the exact number and fractions of pounds which each of said tierces then and there weighed, nor when he had filled said tierces with rice did he ascertain the whole weight of each tierce, and place the same immediately above the cut or marked tare weights; but then and there fraudulently, willfully and unlawfully did mark upon each tierce — pounds as the actual tare weight of each of said tierces, and — pounds as the actual number of pounds of rice in such tierce, when in fact the actual tare weight of each of said tierces, was — pounds, and the actual amount of rice contained therein — pounds, making a difference in pounds of rice in favor of said A B, on each tierce of — pounds, with the intent thereby to cheat and defraud the purchaser.

RE-PACKING GOODS—INFERIOR ARTICLE.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, did willfully, fraudulently, and unlawfully re-pack one hundred pounds of inferior tobacco, known as — tobacco, of the value of — per pound, in a box containing a brand as follows: (*copy brand*) and marked — tobacco, which last named article was then and there worth — per pound, for the purpose and with the intent of taking advantage of said superior brand on said box, and fraudulently to sell said inferior tobacco as the superior article known as — tobacco for a greatly increased price, with the intent to cheat and defraud the purchaser.

Adulterating Liquors.—If any person shall put into any barrel, cask or other vessel having the private stamp, brand, wrapper, label or trade mark usually affixed by any maker of wine from grapes grown within the state of Nebraska, adulterated liquors, for the purpose of deceiving any person by the sale thereof, or if any person or persons shall knowingly manufacture, vend or give away, or direct or permit any person or persons

¹Cr. Code, § 139.

in his or their employ to manufacture, vend or give away any malt, spirituous liquors or other compound, any of which shall be adulterated with poisonous ingredients, such as strychnine, strontia, sugar of lead or other poisonous substances, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding three months, or both, at the discretion of the court. An analysis made by a practical chemist shall be deemed competent in all cases arising under this section.¹

KNOWINGLY VENDING ADULTERATED LIQUOR.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, did knowingly and unlawfully vend to one C D a certain compound called "port wine" being a fraudulently adulterated liquor which contained strychnine [strontia and sugar of lead], the said A B then and there well knowing that said liquor was so adulterated.

Frauds upon Life Insurance Companies.—If any person or persons shall obtain, cause to be obtained, or attempt to obtain from any life or accident insurance company any sum of money, or any policy of life or accident insurance, issued by any company in the state, by falsely or fraudulently representing the person or persons insured as dead, or shall cause any person or persons to be insured under an assumed name, and shall falsely represent the fictitious person or persons so insured as dead, and shall thereby obtain, cause to be obtained, or attempt to obtain from such company the amount of such insurance, and shall falsely obtain, cause to be obtained or attempt to obtain from any such life or accident insurance company any sum of money upon any life or accident policy of such company, by means of false and fraudulent written representations or affidavits, falsely representing that the person whose life was insured was dead, or that the person insured against accident was injured, every person so offending, if

¹Cr. Code, § 140.

the sum so obtained, attempted or caused to be obtained, shall be equal to or exceed the sum of thirty-five dollars, shall be punished by imprisonment in the penitentiary not exceeding fifteen years; and if the sum so obtained, attempted or caused to be obtained, shall be less than thirty-five dollars, shall be fined in any sum not more than five hundred dollars, or be imprisoned in the jail of the proper county not exceeding six months, or both, at the discretion of the court.¹

OBTAINING MONEY ON LIFE INSURANCE POLICY, ETC., BY FALSE REPRESENTATIONS.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, obtained for the benefit of C D a policy of insurance in the (*name of company*), a company organized under the laws of [Nebraska], upon his life, for the sum of — dollars, said policy to continue in force until —; that on the — day of —, in the same year, in said county, and while said policy was in full force, said C D, by false and fraudulent written representations (*or affidavits*) made to said insurance company, falsely and fraudulently represented to said company that said A B was dead, and thereby then and there did falsely, fraudulently and unlawfully obtain from said company on said policy of insurance the sum of — dollars, when in fact said A B was not then dead, as the said C D then and there well knew.

Unlawfully Issuing Bank Bills, etc.—If any person shall subscribe or become a member of, or be in any way interested in any association or company for the purpose of issuing or putting in circulation any bill, check, ticket, certificate of deposit, promissory note, receipt or other paper of any bank, to circulate as money in this state, without being authorized to do so under the laws of this state, or of the United States, he shall be punished by imprisonment in the penitentiary not more than one year, and by a fine of not more than one thousand dollars.²

UNLAWFULLY ISSUING BANK BILLS, ETC.³

That A B, on the — day of —, in the year of our Lord one thousand

¹ Cr. Code, § 141.

² Cr. Code, § 142.

³ If any person, number of persons, or corporation in this state, without special leave from the legislative assembly, or authority from the United

eight hundred and —, in said county, unlawfully and fraudulently caused to be issued and put in circulation as money by paying out the same to one C D, a certain bank bill of the bank of —, of which said A B is a stockholder, and [cashier], said bank or A B not being authorized to issue said bills as money either under the laws of —, or of the United States.

Fraud in Contracts for County Buildings, etc.— Any county commissioners, or persons employed by them, whose duty it shall be to superintend in whole or in part the erection of any court house, jail, infirmary, or bridge, or the addition to, alteration or improvement of the same, or the making of the plans, description and specifications of the labor to be performed and materials to be furnished, and the estimates of the cost thereof, or the estimates of the amount of labor done and materials furnished from time to time under and in accordance with the terms and conditions of the contract to be made, who shall in the performance of such duty knowingly permit the work to be done in any other mode or manner than is prescribed in such plans, descriptions and specifications, unless the same shall be done with the approval and consent of the officers to whom the plans, drawings, representations, bills of material and specifications of work and estimates of the cost thereof in detail and in the aggregate are required to be submitted for approval, or with material different from that required by such bills of material, unless done with the consent and approval of said officers as aforesaid, or shall knowingly make false estimates of the labor done and material furnished in the quantity or price thereof, shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars and shall be imprisoned in the county jail not less than three nor more than six months, and be liable to the county in which such

States, shall remit or alter any bill of credit, make, sign, draw, or indorse any bond, promissory note or writing, bill of exchange or order, to be used as a circulating medium, as, or in lieu of money, or other currency, every such person or persons, or members of such corporation assenting to such proceedings, being thereof duly convicted, shall pay a fine not exceeding three hundred dollars, or be imprisoned not exceeding one year. Cr. Code § 143. It will be seen that § 143, except as to the punishment, is substantially the same as § 142.

misdeemeanor may be committed for double the amount such county shall be damaged by reason thereof.¹

FOR FRAUD IN CONTRACT FOR COUNTY BUILDINGS, ETC.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and —, and from thence continuously until the — day of — in the same year, in said county, was the person employed by the board of county commissioners of the county of — to superintend, and did superintend the construction of a brick court house erected by said board for county court house, at — in the county aforesaid, according to certain plans, descriptions and specifications theretofore adopted by said board, by which said A B had the supervision of all the material used in said building; that according to said plans, descriptions and specifications all the brick used in said court house were to be made of good clay, well burned and of the best quality, whereas, in fact the brick used in the erection of said court house were not made of the best clay, or well burned, or of the best quality, but were made of an inferior clay, insufficiently burned and inferior quality, as said A B then and there well knew, whereby said — county has sustained great damage.

In general the essential allegations in an indictment for false pretenses are that the accused made certain representations to another party, which are to be set out, and that thereby he obtained from such party certain property, which must be described and the value stated and that the representations were false. In other words there are three elements in the charge. 1st, the false pretenses. 2d, that by reason thereof the accused obtained from the party to whom the pretenses were made property of a certain value. 3d, that the representations were false. Let the pleader charge the offense in the words of the statute, and if the offense is made a felony by statute allege that the act was "feloniously" done, Under some of the sections the word "knowingly" is used, and where it is necessary to constitute the offense it must be set out in the indictment. Where property is obtained under representations which were in fact false it is usually reasonable to suppose that the accused in making them was aware of that fact.

¹ Cr. Code, § 144.

CHAPTER XVIII.

FORGERY—COUNTERFEITING.

If any person shall falsely make, alter, forge, counterfeit, print or photograph any record, or other authentic matter of a public nature, or any license or certificate authorized by the laws of this State; or any charter, letters patent, deed, lease, writing obligatory, will, testament, annuity, bond, covenant, bank bill or note, check, draft, bill of exchange, contract or promissory note for the payment of money or other property; or any note, bond, coupons, stamps, postage or fractional currency, or any security issued under authority of any act or acts of the Congress of the United States; or of any acceptance of a bill of exchange; or the number of any principal sum of any accountable receipt for any note; or any order or any warrant or request for the payment of money, or the delivery of goods and chattels of any kind; or any acquittance or receipt, either for money or goods; or any acquittance, release, or discharge of any debt, account, action, suit, demand, or other thing, real or personal; or any plat, draft or survey of land; or any transfer or assurance of money, stock, goods, chattels, or other property whatever; or any letter of attorney, or any other power to receive money, or to receive and transfer stock or annuities; or to let, lease, dispose of, alien, or convey any goods or chattels, lands or tenements, or other estate, real or personal; or any bills drawn by the auditor of public accounts, for the payment of money at the treasury; or any check, ticket, order, or pass purporting to have been issued by any railroad company, or by any officer or officers thereof, or by any street railroad company, or owner, or by any toll bridge company or owner, or any private stamp, brand, wrapper, label or trade mark, usually affixed by any mechanic, manufacturer, druggist, merchant or tradesman,

to or upon the goods, wares, merchandise, preparation or mixture of such mechanic, manufacturer, druggist, merchant or tradesman; or the seal of any public officer or office authorized or established in pursuance of the laws of this state, or of the United States, with intent to damage or defraud any person or persons, body politic or corporate, or any military body organized under the laws of this state; or shall utter or publish as true and genuine, or cause to be uttered or published as true and genuine, or shall have in his possession with intent to utter and publish as true and genuine, any of the above named false, uttered, forged, counterfeited, falsely printed or photographed matter, above specified and described, knowing the same to be false, uttered, forged, counterfeited, falsely printed or photographed, with intent to prejudice, damage or defraud any person or persons, body politic or corporate; every person so offending shall be imprisoned in the penitentiary for any space of time not exceeding twenty years, nor less than one year, and pay a fine not exceeding five hundred dollars.¹

An indictment for Forgery must not only allege the false making or alteration of a writing specified in the statute with intent to defraud some named person or body corporate, but it must also appear on the face of the indictment that the fabricated writing, either of itself or in connection with the extrinsic facts averred, is such that if genuine it would be valid in the law to prejudice the rights of the parties.²

In Charging Forgery it must be shown on the face of the indictment, by proper averments, that the instrument alleged to be forged is of the particular kind prohibited by the statute upon which the indictment is founded.³

¹ Cr. Code, § 145.

² Cr. Code, § 45; *Clarke v. State*, 8 O. S., 690; in *Rood v. State*, 5 Neb., 177. It is said "the doctrine can not be maintained upon principle or law that an instrument absolutely void on its face, and which could work no injury to the person for whom it was obtained, can legally be made the subject of forgery if not genuine." *Barnum v. State*, 15 Ohio, 717.

³ *Bynam v. State*, 17 O. S., 143. In *People v. Stearns*, 21 Wend., 409 *et seq.*, will be found an elaborate opinion by Judge Cowen. It is said (page 413): "The indictment must show the forgery of an instrument which on

Intent to Prejudice, damage or defraud is an essential ingredient in the crime of forgery, and must therefore be charged in the body of the indictment in a direct and positive manner, and a mere statement at the conclusion of the indictment by way of legal deduction or inference from the facts previously found is insufficient.¹

Joinder.—A count for forgery and for uttering the same instrument may be joined.²

At Common Law forgery seems to have been regarded only as a species of fraud, and was therefore often intermingled with false personating and other means of defrauding; the offense was a mere misdemeanor, punishable like other misdemeanors at the discretion of the court. In Ward's case,³ a distinction was marked between forgery and fraud: that the last must actually take effect before an offense was committed, while the first was complete if the intent to defraud was manifest, although no one was actually injured.⁴

The English statutes, from which our own were largely borrowed, making forgery a felony, need not be referred to here.

As to What Constitutes Forgery may be considered under three heads: 1st, what false marking is sufficient; 2d, the intent of the party; and 3d, to what extent the instruments forged must appear to be genuine. 1st Blackstone defines forgery to be "the fraudulent making or alteration of a writing to the prejudice of another man's right."⁵

being described appears on its face naturally calculated to work some effect on property; or if it be not complete for that purpose some extrinsic matter must be shown whereby the court may judicially see its tendency.

¹ Drake v. State, 19 O. S., 211.

² Bish., Cr. Proc., § 442; Bishop intimates that they be joined in one count, but the safe course is to frame a count for each separate offense. In State v. Morton, 27 Vt. 310. it was held that there was no duplicity in alleging that the accused forged and caused to be forged, and aided and assisted in forging the instrument set out in the indictment.

³ 2 Lord Raymond, 1461.

⁴ 2 Chitty, Cr. L., 1022.

⁵ 4 Com., 247. It is to be feared that the courts have sometimes lost sight of what constitutes the offense of forgery, as in the case of People v. Peacock, 6 Cow., 72, where a person of the same name as the real consignee of a cargo of coal signed his own name on the permit, and obtained an ad-

Forgery may be committed by any writing which, if genuine, would form the basis of another man's liability or evidence of his right; as an order for goods, a receipt, a letter recommending the person named therein as a man of property.¹ It is not necessary that the entire instrument should be fictitious. A fraudulent erasure, insertion or alteration on any *material* part of a genuine instrument, by which another may be defrauded, constitutes the offense.²

2d. *The Intent.*—The intent to defraud is the very essence of forgery. It is not necessary that any person be actually defrauded, or that the party should intend to defraud any particular person, if the necessary consequences of his act would be to defraud some person. But to constitute the offense there must be a possibility of some person being defrauded by the forgery.³

vance of money thereon. It is pretty clear that the offense, although a serious one, was not forgery; a different decision was had in *Rex v. Webb*, 3 Brod. & Bing., 228, where there were two persons of the same name, but of different descriptions and addresses, and a bill was directed to one with his proper address, and accepted by the other with the addition of his own address; it was held not to be forgery. The nature of the offense will be more readily understood if one keep in view its origin, viz., a species of false pretenses or fraud; and it was not until the national debt of Great Britain became so extensive as to have for its share a large portion of the moneyed interest of that nation that it was found necessary to pass stringent laws for the punishment of this offense. 2 Chitty, Cr. L., 1023. Hence the offense, being in its nature a cheat or false pretense, there are three essential elements to be pleaded and proved, viz.: 1st, a writing apparently valid; 2d, a fraudulent intent on the part of the defendant, and 3d, that the writing is false.

¹ 3 Greenleaf, Ev., § 103.

² 1 Hale's P. C., 683-685; *State v. Lee*, 32 Kas. 360.

³ 3 Greenlf., Ev., § 103 and note. In 1 Hale's P. C., 638 it is said: "If A makes a deed of feoffment to B, and afterward makes a deed of feoffment to C, with an antedate before the other feoffment, this was a forgery within the statute. 1 H. 5. Cap. 3."

"But note, it is not the bare antedating of a deed that makes a forgery, for the most assurances, especially bargains and sales for recoveries, leases for years to enable a release would be forgeries; but that which makes it forgery in the former case is the intent to avoid his own feoffment; and the words of the statute are, *to the intent that the estate of another person should be disturbed*; so the intent is to be joined in case of forgery."

The mere imitation of another person's handwriting, the alteration of a written instrument or the assumption of a name where no one can be injured thereby does not constitute the offense.¹

Where the offense is charged to have been to defraud the bank purporting to have issued the notes, it must be shown that such bank exists in fact as a bank — a real body capable of being defrauded.²

Evidence of Intent.—In some cases, however, the law will conclusively presume fraud although none was intended; as if a person knowingly should procure the discounting of a forged note, intending to pay it at maturity, and actually does pay the same.³ So if a debtor should forge the creditor's name to obtain the means to pay the debt.⁴ But if a party alters an instrument payable to himself by reducing the amount of the debt it will not be forgery, unless the circumstances show a benefit to himself, as by shortening the time of payment or an injury to the debtor.⁵

The question of intent is one for the jury to find from the evidence; but it may be presumed where the proof clearly shows that the instrument is false and that it was made and put in circulation by the accused.⁶ Even if the signature is that of the accused the circumstances may be such as to show the instrument was signed by the directions of the promisor and in his presence, or by his agent in his name and afterward ratified.⁷

¹ 4 Bl. (Cooley's Ed.), 247, note.

² *People v. Peabody*, 25 Wend., 472.

³ *R. v. Vaughn*, 8 Car. & P., 276; *R. v. Cooke*, Id., 586.

⁴ *Perdue v. State*, 2 Humph., 494.

⁵ 1 Hawk., P. C., 264.

⁶ *State v. Haynes*, 6 Coldw., 550; *Shinn v. State*, 57 Ind., 144.

⁷ That eminent and fair-minded jurist, Sir Matthew Hale, in 1 P. C. says: "If A forges a deed and B tells C that the deed is forged, and yet C publisheth it, it was resolved to be within the statute in Gresham's case, p. 38 Eliz. Cam. Stellata. But it seems to me though such a relation may be evidence of fact to prove his knowledge, yet it is not conclusive, though perhaps the deed be forged, for possibly there might be circumstances of fact, that might make the person relating it or his relation not credible, so that the *knowing* must upon the whole matter be left to the jury upon the cir-

3d. **The Instrument Forged must Appear to be Genuine.**—That is, it must appear on the face of the instrument to so closely resemble the instrument described as to be calculated to deceive persons of ordinary observation, although it might not deceive experts or persons having more than ordinary knowledge of the subject.¹ If the instrument does not appear to be valid on its face the defect can not be cured by proving the representation of the accused at the time he uttered it as valid,² such as a will not having the requisite number of witnesses, or a fabricated bank bill not signed. A mere mistake in spelling the name, however, and the like, will make no difference if the instrument signed was intended to be and might be taken as true by ordinary persons.³ A writing which shows on its face that the name of principal was signed by an *agent* will not lay the foundation for a prosecution for forgery, even if the agent had no authority to sign the same. The reason is, the signature does not purport to be that of the principal.

FORGERY OF PROMISSORY NOTE.⁴

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, unlawfully and feloniously did falsely make, forge and counterfeit a certain promissory note in the words and figures following—

St. Louis, Mo., Sept. 1, 1886.

Six months after date, for value received, I promise to pay A B, or order, the sum of one thousand dollars, with interest.

\$1,000.

C D.

with intent to defraud.

cumstances of the case, and therefore the case of Gresham, being in the star chamber, where the lords were judges of the fact upon the evidence, is no authority in this case.

¹ 3 Greenleaf, Ev., § 105, and cases cited.

² *Id.*

³ *Id.*

⁴ Where the statute provided that "every person who should *falsely* make, destroy, etc., any record, it was held that an allegation that the defendant did unlawfully and feloniously destroy, etc., was not objectionable because the word *falsely* was omitted. *State v. Dark*, 8 Blackf., 526. The safe course, however, is to use the language of the statute.

Instrument must be Set Forth.—It is essentially necessary in an indictment for forgery that the instrument alleged to be forged should be set forth in words and figures, though there be no technical form of words for expressing that it is so set forth. East, Cr. L., 975. The object is to enable the court to determine whether or not the instrument is what it is alleged to be and whether it is within the statute. *Gobe v. State*, 1 Eng. (Ark.), 519; *Dana v. State*, 2 O. S., 91.

JOINDER OF COUNTS FOR MAKING AND UTTERING A FORGED INSTRUMENT.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, having a bill of exchange in his possession of the tenor and effect, as follows—

NEW YORK, January 1st, 1886.

Value received, pay to A B or order, one thousand dollars in sixty days after sight.

To E F, Chicago, Ill.

C D.

The said A B, on the — day of —, in the year aforesaid, in said county, did unlawfully, feloniously and falsely make, forge and counterfeit an acceptance by said E F written on the face of said bill of exchange as follows: "Accepted, E F," with intent then and there and thereby to defraud.

SECOND COUNT.—And the jurors aforesaid, upon their oaths aforesaid, do further present that the said A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, having in his custody and possession a certain false, forged and counterfeit bill of exchange for the payment of money, which is in the words and figures following (*copy instrument and acceptance*), did knowingly and feloniously utter and publish the same as true and genuine, with the intent then and there unlawfully to defraud.¹

FORGERY OF TRANSFER OF STOCK.²

That one W H, of —, was possessed of and entitled to a certain interest and share, to wit, two hundred and fifty dollars interest and share of and in certain annuities transferable at the bank of —, etc.; that J H G,

¹The form here given is substantially that found in 2 Chitty, Cr. L., 1052-1053, under which Gade was convicted.

²Where the charge is for uttering the forged or counterfeit writing, it must be alleged that the party had *knowledge* of the false character of the instrument.

well knowing the premises, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and knowingly act and assist in the false making, forging and counterfeiting a transfer of said \$250 interest and share of and in said annuities, so as aforesaid transferable at the bank of —, with the name W H thereto subscribed, purporting to have been signed by said W H, and to be a transfer of the said \$250 interest and share of and in the said annuities, so as aforesaid transferable at the bank of —, from the said W H to one W W. of the stock exchange, the tenor of which said forged and counterfeited instrument is as followeth; that is to say (*here set forth the transfer verbatim*), with intent to defraud the — bank.¹

FOR FORGING AND UTTERING A BANK BILL.²

That J B, etc., in said county, unlawfully and feloniously did falsely make, forge and counterfeit a certain bank bill, the tenor of which said false, forged and counterfeit bank bill is as follows, that is to say, (*the bill is to be set out accurately in each count*) with intent to defraud.

Second Count.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said J B, on the — day of —, etc., in said county, did feloniously dispose of and pass a certain false, forged and counterfeited bank bill, the tenor of which said last mentioned false, forged and counterfeited bank bill is as follows, that is to say (*set out the bill as in the first count*), with intent to defraud, he, the said J B, at the time of so disposing of and passing the said last mentioned false, forged and counterfeit bank bill, then and there well knowing such last mentioned bill to be false, forged and counterfeited.

FIRST COUNT, FOR ALTERING A BANK BILL BY CHANGING FIVE TO FIFTY—SECOND COUNT, FOR KNOWINGLY DISPOSING OF THE BILL.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and —, in said county, having in his possession a certain bank bill in the words and figures following (*here copy verbatim the*

¹ Where the effect of the forgery, if successful, would be to defraud some particular person, he should be named as in this case. If, however, the effect will not necessarily defraud a particular person, but will defraud some one, a general allegation of intent to defraud is sufficient.

² The forms here given are substantially those found in 2 Chitty's Cr. L., 1048-1049, which he states had been approved by the ablest lawyers of the day, and had then been in use almost half a century.

original bill), he, the said A B, then and there unlawfully and feloniously did alter said bank bill, by then and there falsely obliterating the letters *ve* before printed in the word *five* in said bank bill, and also the letters *ve* in white letters on a black ground on the lower edge of said bank bill, and by then and there falsely making, forging and counterfeiting upon said bank bill, in the place of the first mentioned letters *ve* before printed in said word *five* in said bank bill, the letters *fty*, and also by then and there falsely making, forging and counterfeiting upon said bank bill, in the place of the said letters *ve* before printed in said word *five*, in white letters on a black ground on the lower edge of the said bank bill, the letters *fty*, by reason of which obliteration and defacement of said bill, and of the falsely making, forging and counterfeiting of the letters *fty* in place of the letters *ve* as above set forth, said bill did import and signify fifty; which said altered bill is in the words and figures following (*here insert a correct copy of bill as altered*), with intent to defraud.

Second Count.

And the jurors, etc., do further present that A B, on the — day of —, etc., in said county, having in his custody and possession a certain altered bank bill, marked B, 65, with the name of J B thereunto subscribed, purporting to bear date at — the — day of — 1886, and to have been signed by J B, as cashier of said bank of —, for the payment of fifty dollars to W S, or bearer, on demand, which said last mentioned bank bill is as follows: (*copy the bill as altered*) he, said A B, afterward, to wit, on the — day of — in the same year, in said county, knowingly and feloniously did dispose of and pass the said last mentioned bank bill as and for a true and good bank bill, he, the said A B, at the time of disposing of and passing the same, well knowing said bank bill to be altered with intent to defraud.¹

Possession of Dies, etc.—If any person shall have in his possession any die or dies, plate or plates, brand or brands, engraving, imprint, printed labels, wrappers, or any other

¹ Both of the preceding forms are in substance from 2 Chitty, Cr. L., 1051, 1052.

GUILTY KNOWLEDGE.—To convict a party of the offense of uttering a forged instrument, guilty knowledge on his part must be shown. To establish this fact proof is admissible to show that about the same time the accused had uttered or attempted to utter other forged instruments of the same description, or that he had other similar forged instruments, or the means of manufacturing them in his possession. 3 Greenlf. Ev. § 111. But where it is sought to establish guilty knowledge by other forged instruments found in the possession of the accused, there must be strict proof that such instruments are forgeries; and the evidence must be confined to the fact of the prisoner having uttered such forged instruments, and to his conduct at the time of uttering them. *Id.*

instrument, thing or means whatever, with intent therewith or thereby to falsely make, forge or counterfeit any matter specified in the last preceding section (145), or to cause or enable the same to be done; or shall have in his possession any such falsely made, forged or counterfeited matter, whether the same be completely or only partly executed, for the purpose of bartering, selling or disposing thereof, knowing the same to be falsely made, forged or counterfeited, with intent thereby to prejudice, damage, or defraud any person or persons, body politic or corporate; every person so offending shall be imprisoned in the penitentiary not less than six months nor more than ten years and pay a fine not exceeding one thousand dollars.¹

POSSESSING DIES FOR COUNTERFEIT COIN.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and —, in said county, knowingly and feloniously did have in his possession, and then and there did secretly² keep, certain dies for the purpose of coining false and counterfeit coins of the United States of the denomination of one dollar, in the likeness and similitude of the genuine coins of silver of [the United States] of the denomination of one dollar, each which last named coins of silver were currently passing in the state of — as money.

UTTERING COUNTERFEIT COIN.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, unlawfully and feloniously did tender, put off and pass to one C D one piece of false and counterfeit coin, resembling and intended to resemble and pass for a gold coin of the United States called an eagle, the said A B, at the time he so tendered and passed said piece of false and counterfeit coin, well knowing the same to be false and counterfeit, with intent to defraud

COUNTERFEITING MANUFACTURER'S BRAND OR MARK.

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, willfully, knowingly and unlawfully

¹ Cr. Code, § 146.

² In *Sasser v. State*, 19 Ohio, 484, it was held that the offense under the statute was complete where the person knowingly has such a plate in his possession and secretly keeps it.

did forge and counterfeit the private stamp and trade mark of one C D, a manufacturer, and by him said C D affixed to certain goods, wares and merchandise then manufactured by him, to wit: (*give name of articles*) the following is a copy of said stamp and brand (*copy in full*), which said false counterfeit stamp and said trade mark of C D, said A B then and there did unlawfully, knowingly and willfully affix upon certain goods, wares and merchandise not manufactured by said C D, to wit: (*describe articles*) with intent then and there and thereby to pass the said goods, wares and merchandise to which said false stamp and counterfeit brand were affixed as the goods, wares and merchandise of said C D, with intent then and there and thereby to cheat and defraud.

POSSESSION OF COUNTERFEIT COIN FOR THE PURPOSE OF BARTER OR SALE.¹

That A B, on the — day of —, etc., in said county, did unlawfully and willfully have in his possession certain false, forged and counterfeit coins for the purpose of bartering, selling and disposing of the same, to wit, one hundred pieces of false, feigned and counterfeit coins of copper, brass and other inferior metals of the likeness and similitude of the good legal gold coins of the [United States] called eagles, and said A B was then and there detected with said false, forged and counterfeit coins unlawfully in his possession for said purposes, he, the said A B, then and there well knowing that said coins so possessed by him were false, forged and counterfeit.

Fictitious Bank, etc.—If any person shall sell, barter or in any manner dispose of any false, forged or counterfeited bank note or notes, or shall barter, sell, or in any manner dispose of any counterfeit bank note or notes, the same not being filled up, or the signatures thereto forged or affixed, whether by single bill or by sheets; or shall sell, barter, or in any manner dispose of any bank note or notes, the same being filled up but having the signatures of persons not officers of the bank from which such note or notes purport to have been issued, or having the names of fictitious persons thereto; or if any person shall be detected with any such spurious bank note or notes in his possession for the purpose of selling, bartering or disposing of the same, or if any person shall make, alter, pub-

¹At common law the word "traitorously" was material in an indictment for counterfeiting the coin. This was occasioned by the statute 25 Edw. III, which declared that counterfeiting or bringing false money into the realm was treason. 2 Chitty, Cr. L., 103. The punishment in treason in relation to the coin was always to be drawn and hanged. 1 Hale's P. C., 351.

lish, pass or put in circulation any note or notes, bill or bills purporting to be the note or notes, bill or bills of a bank company or association which never did in fact exist; such person or persons, knowing at the time of publishing, passing or putting in circulation any such note or notes, bill or bills, that the bank company or association purporting to have issued the same never did exist; every person so offending shall be imprisoned in the penitentiary not more than fifteen years nor less than one year, and pay a fine not exceeding five hundred dollars.¹

PASSING BILL ON FICTITIOUS BANK.²

That A B, on the — day of —, in the year of our Lord one thousand eight hundred and —, in said county, fraudulently and feloniously did utter, publish and pass to one C D a certain fictitious bill, for the payment of money purporting to have been issued by the (*name of bank*), when in fact there was not then nor ever had been any such bank in existence, as said A B at the time he passed said bill well knew. The following is a copy of said bill (*give accurate copy of bill*), and said A B then and there well knew that said bill was fictitious and he thereby intended to cheat and defraud said C. D.

Engraving Plate for Counterfeit Bills, etc.—If any person shall engrave any plate for striking or printing any false or counterfeit bank notes knowing it to be designed for that purpose, or shall knowingly have in his possession and secretly keep any plate for the purpose aforesaid; and if any person shall engrave, cut, indent or cause any piece or pieces of brass, copper or any other metal for striking or printing or altering any of the writing, printing or figures of any bank note

¹ Cr. Code, § 147.

² If a person sign a name wholly fictitious to an instrument, with the intent thereby to defraud, it is forgery. *Rex v. Bolland*, 1 Leach C. C. (4 Ed.), 88; *Rex v. Taylor*, Id., 214; 2 Russ. on Crimes, 331-340. So if the party pass bills on a fictitious bank. Cr. Code, § 147. An indictment for selling counterfeit bank bills need not charge that the sale was for a consideration, or to the injury of any one, or that the notes were indorsed. *Hess v. State*, 5 Ohio, 6. In *Van Valkenburg v. State*, 11 Ohio, it was held by a divided court that proof of uttering and publishing counterfeit bank notes would not sustain an indictment for selling and bartering such notes. The correctness of the decision is doubtful.

or notes, bill or bills, knowing them to be designed for that purpose; or shall knowingly have in his possession and secretly keep the same for the purpose aforesaid, every person so offending shall be imprisoned in the penitentiary not more than fifteen years nor less than one year.¹

Counterfeit Mark on Goods.—Any person who shall vend or keep for sale any goods, merchandise, mixture or preparation upon which any forged or counterfeit stamps, brands, imprints, wrappers, labels, or trade marks be placed or affixed, and intended to represent the said goods, merchandise, mixture or preparation of any person or persons, knowing the same to be counterfeit, shall be punished by a fine not exceeding one hundred dollars.²

VENDING ARTICLES ON WHICH ARE FORGED OR COUNTERFEIT LABELS.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and —, in said county, did unlawfully and knowingly vend and sell to one C D, for the price of one dollar, one bottle of Ayer's Cherry Pectoral, as and for said Ayer's Cherry Pectoral, and which bottle had thereon a false, forged and counterfeited label in imitation of and purporting to be the label of Ayer's Cherry Pectoral, an article manufactured by J. C. Ayer & Co., which label is as follows: (*copy accurately*) and was false and counterfeit, as said A B then and there well knew, the contents of said bottle not being Ayer's Cherry Pectoral.

Counterfeiting—Altering Coins.—If any person shall counterfeit any of the coins of gold, silver or copper currently passing in this state, or shall alter, or put off counterfeit coin or coins, knowing them to be such, or shall make any instrument for counterfeiting any of the coins aforesaid, knowing the purpose for which such instrument was made, or shall knowingly have in his possession and secretly keep any instrument for the purpose of counterfeiting any of the coins aforesaid; every person so offending shall be imprisoned in the penitentiary not more than fifteen years nor less than one year, and pay a fine of not less than one hundred nor greater than three hundred dollars.³

¹ Cr. Code, § 148.

² Id., § 149.

³ Id., § 150.

ALTERING COINS.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, fraudulently and feloniously did alter and abstract, from the inner parts of a gold coin of the United States called an eagle, one fifth part of the gold of which said coin was composed, with the intent then and there to pass said coin as of standard weight and cause it to circulate as money.

Gilding Coin.—If any person shall gild any of the silver coins currently passing in this state, or shall gild any other metal having the likeness and similitude of any of the coins currently passing in this state, so as to give it the appearance of any of the gold coins of the United States, or any other gold coins currently passing in the state, with intent to injure or defraud, or if any person shall pass, or put in circulation, any such false or gilded money, knowing that it is not genuine, the person so offending shall be imprisoned in the penitentiary not more than five years nor less than one year.¹

The statute in relation to gilding coin seems to have been passed out of a superabundance of caution. That gilding an inferior substance to make it pass for gold or silver is counterfeiting, is unquestioned, and no statute on that special subject would seem to be necessary.

FOR GILDING OR COLORING COIN, ETC.

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, fraudulently and feloniously, one nickel five cent piece of the current coin of the United States then and there did gild with materials which produced the color of gold, with intent thereby to make said five cent piece resemble and pass for the current coin of the United States called a quarter eagle, with the intent to defraud.

If any Person shall Attempt to Pass any base or counterfeit coin or coins, knowing them to be such, or shall attempt to pass any false, forged and counterfeited bank note or notes, knowing them to be such, every person so offending shall be imprisoned in the penitentiary not more than five years nor less than one year, and pay a fine not exceeding five hundred dollars nor less than one hundred dollars.²

¹ Cr. Code, § 151.

² Id., § 152.

ATTEMPT TO PASS COUNTERFEIT MONEY.¹

That A B, on the — day of — in the year of our Lord one thousand eight hundred and — in said county, unlawfully and knowingly, did attempt to pass to C D a certain false, forged and counterfeited bank bill, as a genuine bank bill, given for the payment of the sum of fifty dollars, with the intent then and there and thereby to defraud said C D. Said bill was of the purport and value as follows: (*copy bill*) he, the said A B, then and there well knowing, when he attempted to pass said bill to said C D, that it was false, forged and counterfeited.

Spurious Coin.—If any person shall sell, barter, or in any manner dispose of any false, forged or counterfeit coin made in the likeness and similitude of any of the gold, silver, copper or nickel coin or coins currently passing in this state, or if any person shall be detected with any such false, forged or counterfeit coin or coins in his possession, for the purpose of selling, bartering or disposing of the same, knowing the same to be false, forged or counterfeit, every person so offending shall be imprisoned in the penitentiary not more than ten years nor less than one year, and pay a fine not exceeding one hundred dollars.²

Having Spurious Coin, etc.—If any person shall be detected with any false, forged, base or counterfeit coin or coins made in the similitude of any gold, silver, copper or nickel coin or coins currently passing in this state, in his or her possession, for the purpose of altering and publishing the same as true and genuine, knowing the same to be false, forged, base or counterfeit, every such person shall be imprisoned in the penitentiary not more than ten years nor less than one year.³

¹ In *Bevington v. State*, 2 O. S., 161, it was held, under an act similar to the one quoted, that the statute does not provide for the punishment of the mere intention to pass counterfeit money without any act or movement toward it.

Proof of the mailing of a letter containing a forged instrument, directed to a party at another place, is sufficient proof of an attempt to pass it. *People v. Rathbun*, 21 Wend., 509; *Rex v. Williams*, 2 Camp., 507. The staking of counterfeit money in gambling has been held to be an attempt to pass it. *State v. Beeler*, 1 Brev., 482. In *People v. Rathbun*, *supra*, will be found an exhaustive review of the authorities up to the year 1839, although some of the conclusions reached would not be accepted as law at the present time. *Riggins v. State*, 4 Kas. 173.

² Cr. Code, § 153.

³ *Id.*, § 154.

Tenor—Purport.—The word “tenor” imports an exact copy. The word “purport” means no more than the substance of the instrument. Chitty says the recital of the instrument is usually prefaced by the words “to the tenor following” which imports an exact copy; but the words “as follows” are sufficient; they *intend* the same and profess the same exactness.¹

The Purport Clause is used to designate the name of the forged instrument as purporting to be a promissory note, etc. The statutory name of the instrument must be correctly given so that it may appear that the instrument forged is of the particular kind prohibited by statute.² And if the pleader gives the instrument its statutory name he must do so correctly, and a mistake in this regard will be fatal, as if a bill of exchange be described as a promissory note.³ It is probable, however, that the statutory name of the instrument need not be given where it is apparent on the face of the indictment that the offense is within the statute.⁴

The instrument alleged to be forged should be set out in the indictment in the exact words and figures if in the possession of the state.⁵ If not so set out the cause for the omission must be stated.⁶

Evidence.—The instrument said to be forged or counterfeit must be produced at the trial, if in existence and it can be obtained.⁷ But it may be shown that it has been destroyed by the accused, or secreted by him, or is in his possession.⁸ If, however, the instrument is proved to be in the possession of the accused, or to have been destroyed by him without the fault of the prosecuting officer, it is no bar to the prosecution although it will in many cases make it difficult to prove the crime;⁹ as where the accused was in possession of a forged

¹ 3 Chitty, Cr. Law, 1040; *Dana v. State*, 2 O. S., 93.

² 1 Stark. Cr. Pl., 2nd Ed., 104.

³ Arch. Cr. Pl. & Prac., 357.

⁴ 2 Bish. Cr. Proc., § 414.

⁵ 2 Arch. Cr. Pl. & Prac., 801.

⁶ *People v. Badgley*, 16 Wend., 53.

⁷ *Com. v. Hutchinson*, 1 Mass., 7; *U. S. v. Britton*, 2 Mason, 464.

⁸ *State v. Potts*, 4 Halst., 26; *Rex v. Hunter*, 3 Car. & P., 59.

⁹ 3 Greenleaf, Ev., § 107.

deed which he refused to produce, it was held that secondary evidence of its contents might be resorted to.¹ But before secondary evidence can be given of the contents of a paper in the possession of the accused, he must be served with notice to produce it unless it has been made to appear that he has destroyed it.² If the destruction of the instrument is not clearly proved, but is denied by the accused, he must be served with notice to produce it before evidence of its contents can be given.³

The writing offered in evidence must agree in all essential particulars with the copy set out in the indictment.⁴ A material variance is fatal.

Comparison of Signatures.—Upon this question there is as yet a want of harmony in the decisions of the various courts. At common law this comparison may be made with such writings as have been given in evidence, but not others,⁵ unless to prove an ancient writing.⁶ In a number of cases, however, the common law rule has been relaxed, and experts permitted to testify upon actual comparison of hands; and this in our view is the better rule.⁷ But a witness who is not an expert, and who has no knowledge either of the handwriting or signature of the party, is not competent to give such an opinion from a comparison of hands. Where a written instrument, known to be genuine, is admitted in evidence, it may be submitted to the jury to institute a comparison of and determine whether or not the signature in controversy is genuine or not.⁸ In many cases it requires a careful, patient examination of all the facts and circumstances bearing upon the question, to enable the court and jury to decide, but with both par-

¹ 3 Greenleaf, Ev., § 107.

² Id.

³ Id. and note.

⁴ 3 Greenleaf, Ev., § 108.

⁵ Id.; Moore v. U. S., 91 U. S., 270.

⁶ Moody v. Rowell, 17 Pick., 490; Hicks v. Person, 19 Ohio, 426; Woodman v. Dana, 52 Me., 9.

⁷ Bank v. Lierman, 5 Neb., 247.

⁸ 1 Greenleaf, Ev., § 558; Com. v. Mason, 105 Mass., 163; Brobston v. Cahill, 64 Ill., 356.

ties testifying in the case a correct conclusion should be the result.

What does not Constitute Forgery.—It is not forgery for a party to sign the name of another as A B per C D, because, if the agent was invested with authority to sign the instrument, the act is that of the principal; and if he did not possess such power, it is not a false making of the instrument, but a false assumption of power.¹ An instrument void on its face can not be the subject of forgery. The instrument must be such as in law may be the means of effecting a fraud.²

¹Rex v. Parish, 8 Car. & P., 94; Reg. v. White, 2 Car. & P., 404.

²People v. Cady, 6 Hill, 490.

CHAPTER XIX.

GAMING.

Gaming.—If any person shall play at any game whatever, for any sum of money or other property of any value, or shall make any bet or wager for any sum of money or other property of value, every such person shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not more than three months; Provided, further, that if any person shall lose any money or property of any value at any game whatsoever, or on any bet or wager, such person may recover the money or property so lost, [of] either or all of the other persons playing at the game at which said money or property was lost, or from the person or persons with whom said bet or wager was had.¹

Gaming Table.—If any person or persons shall keep or exhibit for gain any gaming table (except billiard tables), or bank, or any gaming device, or machine of any kind or description, under any denomination or name whatsoever; or if any person or persons shall keep or exhibit any billiard table for the purpose of betting and gambling, or shall allow the same to be used for such purpose, the person or persons so offending shall each be fined in any sum not less than fifty nor more than one hundred dollars, at the discretion of the court, for every such offense, and shall, moreover, find security for his or their good behavior for the period of one year in the sum of one hundred dollars.²

Gaming in Private Houses, etc.—If any person or persons

¹ Cr. Code, § 214.

² Cr. Code, § 215. A party convicted under this section may be required to enter into bonds for his good behavior for one year. Such persons are regarded as dangerous to the welfare of society.

shall suffer any game or games, whatsoever, to be played for gain, upon or by means of any gaming device or machine, of any denomination or name, in his or their house, or any out-house, booth, arbor or erection of which he, she or they have the care or possession, the person or persons so offending shall each pay a fine of not less than fifty nor more than one hundred dollars.¹

Gaming in House of Public Resort.—If any keeper or keepers of any tavern, ordinary, or other house of public resort, shall suffer any game or games whatsoever, except games of athletic exercises, to be played at or within such tavern, ordinary, or house of public resort, or in any out-house, building, or erection appendant thereto, every such keeper or keepers shall pay a fine of not less than fifty, nor more than one hundred dollars.²

Room, etc., Kept for Gambling.—If any person shall keep a room, building, arbor, booth, shed, or tenement, canal boat or other water craft, to be used or occupied for gambling, or if any person being the owner of any room, building, arbor, booth, shed, or tenement, canal boat or other water craft, shall rent the same to be used or occupied for gambling, the person so offending shall be fined in any sum not less than thirty nor more than one hundred dollars, or be imprisoned in the county jail not less than ten nor more than thirty days, or both, at the discretion of the court; and if the owner of any room, building, arbor, booth, shed, or tenement, canal boat or other water craft, used for gambling, winning, betting, or gaining money or other property, shall know that any gaming booth, shed or tenement, canal boat or water craft, for gambling, winning, betting or gaining money or other property, and shall not forthwith cause complaint to be made against [the] person so keeping such room, building, arbor, booth, shed, or tenement, canal boat or other water craft, he shall be taken, held and considered to have knowingly permitted the same to be used and occupied for gambling.³

Gambling for a Livelihood.—If any person shall keep or ex-

¹ Cr. Code, § 216.

² Id., § 217.

³ Id., § 218.

hibit any gaming table, establishment, device or apparatus to win or gain money, or other property of value, or shall aid or assist, or permit others to do the same, or if any person shall engage in gambling for a livelihood or shall be without any fixed residence, and in the habit and practice of gambling, he shall be deemed and taken to be a common gambler, and shall be imprisoned in the county jail not less than one nor more than three months, and be fined in any sum not exceeding one hundred dollars.¹

Inducing Minor to Gamble.—If any person shall by any device or pretense entice or tempt or prevail upon, or cause any minor to engage with such person, or any other person or persons, in any game whatsoever for any sum of money or property of value, or shall make any bet or wager with such minor, or shall cause it be done upon the result of any game, every such person shall be fined in any sum not less than fifty dollars nor more than one hundred dollars, or be imprisoned in the county jail not less than one month nor more than three months.²

Nine-Pin Alley—Inhibition.—If any keeper of a public house, or retailer of spirituous liquors in this state shall establish, keep or permit to be kept upon his or their lots or premises, any ball or nine-pin alley, or shall in whole or in part be interested in any ball or nine-pin alley upon the premises of another, he or they shall pay a fine of not less than ten nor more than one hundred dollars; and this section shall be construed to extend to any alley denominated a nine-pin alley, whether such alley is used for playing therein a greater or less number than nine pins.³

Minor in Billiard Hall.—If any owner or keeper of a billiard saloon, or any owner or keeper of a billiard table, at any grocery or other public place, shall permit or suffer any minor under the age of eighteen years, to play at any game of billiards in such grocery, saloon or public place, or upon such billiard table, or to remain or be upon the premises so occupied by him as such billiard saloon, or in which shall be such

¹ Cr. Code, § 219.

² Id., § 220.

³ Id., § 221.

billiard table as aforesaid, every such person or persons shall forfeit and pay a fine of twenty dollars for the first offense, and fifty dollars for each and every succeeding offense.¹

Betting on the Result of an Election.—If any person shall make any bet or wager upon the event of any election held or to be held under the laws of this state, or shall make any bet or wager upon the election of any person to any office, post or situation which by the constitution or laws of this state is made elective, or shall make any bet or wager upon the election of the president or vice-president of the United States, or upon the election of electors of president or vice-president of the United States, each person so offending shall be fined in any sum not less than five dollars nor more than one hundred dollars. Provided, that the amount of said fine shall in all cases in which the amount hazarded by said bet is between five dollars and one hundred dollars, be equal to the amount so hazarded by said bet.²

Lottery.—If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, any lottery or scheme of chance of any kind or description, by whatever name, style or title the same may be denominated or known, or if any person shall by such ways and means expose or set to sale any house or houses, lands or real estate, or any goods or chattels, cash or written evidences of debt, or certificates of claims or any thing or things of value whatever; every person so offending shall be fined in any sum not exceeding five hundred dollars at the discretion of the court.³

Selling Lottery Tickets.—If any person or persons shall vend, sell, barter or dispose of any lottery ticket or tickets, order or orders, device or devices of any kind, for or representing any number of shares, or any interest in any lottery or scheme of chance, or shall open, or establish as owner or otherwise, any lottery or scheme of chance in this state, or shall be in any wise concerned in any lottery or scheme of chance in this state, or shall be in anywise concerned in any lottery or scheme of chance, by acting as owner or agent, in this state,

¹ Cr. Code, § 222.

² Id., § 223.

³ Id., § 224.

for or on behalf of any lottery or scheme of chance to be drawn, paid or carried on, either out of or within the state, every such person shall be fined in any sum not exceeding five hundred dollars, or be imprisoned not exceeding six months, or both, at the discretion of the court.¹

Advertising Lottery Scheme.—If any person shall by printing, writing, or in any other way publish an account of any lottery or scheme of chance of any kind or description to be carried on, held or drawn in the state of Nebraska, by whatever name, style or title the same may be denominated or known, stating when and where the same is to be drawn, or the prizes therein, or any of them, or the price of a ticket, or show therein, or where any ticket may be obtained, or in any aiding or assisting in the same, or in anywise giving publicity to such lottery or scheme of chance shall be subjected to a fine not exceeding one hundred dollars at the discretion of the court.²

PLAYING AT GAME FOR MONEY OR PROPERTY.³

That A B, on, etc., in said county, did unlawfully play with one C D⁴ at a game called —, for money, to wit: the sum of — dollars.

¹ Cr. Code, § 225.

² Cr. Code, § 226.

³ At common law the playing at cards, dice, etc., when practiced as an amusement simply, was not unlawful nor punishable. But any person guilty of cheating by playing with false cards, dice, etc., was liable to indictment, and upon conviction to be fined and imprisoned. Bac. Abr., title Gaming; 2 Roll. Abr., 78. Common gaming houses, however, were held to be nuisances. 2 Arch. Pl. & Prac., 1788.

The evils of playing for stakes in friendly games evidently were very great and led to the enactment of the statute, 18 Geo. II, C. 34, to prevent excessive and deceitful gaming. Section 8 of this act prohibited the winning of more than £10 at a sitting. For a statement of the offense under this section, Chitty, Vol. 2, 679, has the following: "did play with dice at a certain game called backgammon, with one C D, and that the said A B then and there, etc., by playing at the said game with said C D, as aforesaid, did at one time and sitting unlawfully win of the said C D above the sum of ten pounds at the said game, to wit: the sum of — pounds," etc.

⁴ In a number of cases it has been held that it was unnecessary to state with whom the accused played or with whom he bet. *State v. Prescott*, 33

KEEPING GAMING TABLE.

That A B, on, etc., and on divers other days between that day and the finding of this bill [or of making this complaint], in said county, unlawfully did keep for gain a certain gaming device called —— for the purpose of wagering articles of value thereon.

EXHIBITING GAMING DEVICE FOR GAIN.

That A B, on, etc., and on divers other days between that day and the finding of this bill [or of the making of this complaint], in said county, unlawfully did exhibit for gain¹ a gaming device, to wit: a billiard table for the purpose of betting and gambling thereon.

GAMING AT PRIVATE HOUSES.²

That A B, on, etc., in said county, did unlawfully suffer a certain game, to wit: —— to be played for gain, to wit: the sum of —— dollars by means of a gaming device, viz.: a pack of cards by C D and E F, at the house and residence of said A B.

GAMING AT PUBLIC HOUSE.³

That A B, on, etc., in said county, was the keeper of a certain tavern therein, which tavern then and there was a house of public resort, and on the

N. H., 212; *Green v. People*, 21 Ill., 125; *Orr v. State*, 18 Ark., 540; *State v. Dole*, 3 Blackf., 294; *Dormer v. State*, 2 Carter, 308. On principle, however, it would seem that the person with whom the accused was playing should be stated; *Warren v. State*, 18 Ark., 195; *Davis v. State*, 22 Ga., 101; *Groner v. State*, 6 Fla., 39. The amount played for need not be stated. *Warren v. State*, 18 Ark., 195; *State v. McBride*, 8 Humph., 66. Nor is it necessary to state the name of the game. *Green v. People*, 21 Ill., 125; *State v. Dole*, 3 Blackf., 294. The offense consists in playing any game for money or property. *State v. Hardin*, 1 Kas., 474.

¹To authorize a conviction under section 215 of the criminal code it must be alleged that such devices were kept for *gain*. *Davis v. State*, 19 O. S., 270. The statute imposes a penalty upon any person who keeps or exhibits any gaming device for the purpose of gambling therewith. It should receive a reasonable construction, one that will give full effect to its provisions, and, if possible, carry them into effect.

²In *Davis v. State*, 7 Ohio, 205, it was held that the indictment should in cases of this kind set out the names of the parties whom the accused permitted to play, or if their names were unknown so allege, and it should be stated that they played for money or other valuable things.

³The words "for a wager," which are in the Ohio statute from which that of Nebraska was copied, are omitted in the code of the latter state. These words probably are implied, unless from the danger of gambling at a

day aforesaid said A B then and there, knowingly, willfully and unlawfully did suffer and permit C D and E F, at and within said tavern, to play a certain unlawful¹ game called poker [for a wager of money,] said game not being a game of athletic exercise.

KEEPING GAMBLING ROOM, ETC.²

That A B, on, etc., and on divers other days,³ between that day and the finding of this bill, being then and there the owner of a certain room in said county, did then and there unlawfully keep said room to be used for gambling, and did then and there unlawfully procure idle and unprincipled persons to game together in said room, and play at cards for money.

RENTING A ROOM AFTERWARD USED FOR GAMBLING WITHOUT MAKING COMPLAINT.

That A B, on, etc., was the owner of a certain room known as (*describe accurately*) in said county; did then and there lease and rent said room to one C D; that afterward, to wit, on the — day of — in the year, etc. and during the existence of said lease, the said C D did unlawfully use said room for gambling by (*state by what means*); that on or about the — day of — in the year of our Lord one thousand eight hundred and — said

place of public resort it was intended to prohibit all games except of athletic exercise at such places.

The prohibition against playing is general, except games of athletic exercises. The names of the persons suffered to gamble on the premises should be stated, or a reason given for not stating them. *Davis v. State*, 7 Ohio, 204; *Sowle v. State*, 11 Ind., 492; *State v. Stevens*, Id., 514.

¹ "A certain unlawful game with cards" is sufficient to describe the game. *Green v. People*, 21 Ill., 125. In stating the offense in the indictment a description in the language of the statute is sufficient. *State v. Bougher*, 3 Blackf., 307. The amount lost or won need not be stated; nor is it necessary to state who was the winner or loser. *State v. McBride*, 8 Humph. 66; *Montee v. Com.*, 3 J. J. Marsh, 132. But it is not sufficient to state that a valuable thing was played for. It should be described. *Anthony v. State*, 4 Humph., 83. This, however, is doubtful, where the language of the statute is general as "for gain."

² Where the language of the statute is "whoever keeps a common gaming house," etc., an allegation in the indictment that the defendant on, etc., of, etc., unlawfully did keep a common gaming house, is sufficient. It is sufficient to set out the offense in the language of the statute. *Rex v. Taylor*, 3 B & C., 502; *Com. v. Pray*, 13 Pick., 359; *State v. Kesslering*, 12 Mo., 565; *State v. Price*, 12 Gill & J., 260.

³ The offense should be laid with a *continuando*, as a single act of gaming does not constitute the offense. *Buck v. State*, 1 O. S., 61.

A B was informed and knew that gambling was being carried on by said C D in said room, yet he did not forthwith cause complaint to be made against said C D, nor has he yet caused said complaint to be made, and by force of the statute he is guilty of knowingly and willfully permitting said room to be used for gambling.

GAMBLING FOR A LIVELIHOOD.

That A B, on, etc., and for a long time next prior thereto, in said county, did then and there unlawfully engage in gambling for a livelihood, and was then and there a common gambler.¹

COMMON GAMBLER, KEEPER OF GAMING HOUSE.

That A B, on, etc., and on divers other days between that day and the finding of this bill in said county, unlawfully did keep a gaming table [device or other apparatus] to win and gain money.

EXHIBITING GAMBLING DEVICE TO WIN MONEY.²

That A B, on, etc., in said county, did then and there have in his possession and control a certain gambling device known as — used and employed in gaming, and did then and there unlawfully exhibit the same to C D, E F, and G H, and divers other persons to the jurors [or affiant] unknown, to win and gain money.

INDUCING MINOR TO GAMBLE.

That A B, on, etc., in said county, unlawfully by the gaming device known as — did then and thereby induce and entice one C D, a minor under eighteen years of age, to wit, of the age of — years, to play at a certain game called — for money, to wit, the sum of — dollars, he, the said A B, then and there well knowing that said C D was a minor under eighteen years of age.³

MINOR IN BILLIARD HALL OR SALOON.

That A B, on, etc., in said county, being the keeper of a place of public resort called a billiard hall and saloon, in which were certain billiard tables kept by said A B for the use of persons frequenting said hall, did then and

¹ These allegations seem to be sufficient under the statute.

² It is unnecessary to allege that any game was played with the apparatus. If a party exhibits gambling apparatus for the purpose of gambling, he is liable. *State v. Thomas*, 50 Ind., 292; *Carpenter v. State*, 14 Id., 109.

³ It is probable that the defendant's want of knowledge that the minor was under eighteen years of age would be no defense. It is not a question of good faith but of fact.

there unlawfully [knowingly and willfully]¹ suffer and permit C D. a minor under the age of eighteen years, to wit, — years of age, to remain and be at a billiard table, in and upon the premises so occupied by said A B as such billiard hall and saloon, for the space of — hours.

KEEPER OF PUBLIC HOUSE, ETC. KEEPING NINE-PIN ALLEY.

That A B, on, etc., in said county, being then and there the keeper of a public house in — in said county, unlawfully did then and there establish and keep upon his lots and premises pertaining to said public house in said — a nine-pin alley, for the purpose, then and there, of permitting the same to be used by the public for playing nine pins.

BETTING ON ELECTIONS.

That A B, on, etc., in said county, unlawfully made a bet and wager of the sum of — dollars with C D, that E F would be elected to the office of governor of the state of —, at an election to be held on the — day of November, in the year aforesaid, [said election being lawfully held at said date and the office of governor being elective under the laws of the state.]²

PROMOTING LOTTERIES.³

That A B, on, etc., in said county, unlawfully and publicly, as owner thereof, did set on foot, open, carry on and promote a lottery [for the sum

¹Probably unnecessary. If the offense charged is for permitting the minor to play billiards, so aver.

²These allegations when applied to officers of the state and United States at least are conclusions of law and may be omitted, as the court takes judicial notice of what offices are elective and the dates of general elections.

³The name of the lottery need not be stated. *Com. v. Clapp*, 5 Pick., 41; *Com. v. Hooper*, *Id.*, 42; *Com. v. Horton*, 2 Gray, 69. In general it is sufficient to charge the offense in the words of the statute. In *Com. v. Clapp*, 5 Pick., 41, the indictment was for advertising lottery tickets, the charge being that the defendant did advertise in a certain newspaper, etc., "lottery tickets and parts of lottery tickets for sale in lotteries not authorized by the laws of the commonwealth," and after conviction this was held sufficient. In *Com. v. Hooper*, 5 Pick., 42, it was held that it was unnecessary to allege by name, or prove on the trial, what kind of lottery tickets the defendant advertised, and in *Com. v. Johnson*, *Thatcher's Cr. Cas.*, 284, it was held not to be necessary to give the name of the lottery, nor to set forth the tenor of the ticket. In that case it was alleged that the ticket was kept and retained by the purchaser "so that the jurors can not set forth its tenor and substance." In *State v. Follet*, 6 N. H., 53, the charge was that the defendant sold a quarter ticket in a certain lottery without giving any description whatever of either the ticket or lottery, and it was held sufficient. *People v. Taylor*, 3 Denio, 94.

of — dollars in money, with intent then and there to make the drawing and disposal of said money dependent upon chance by numbers.]¹

SELLING LOTTERY TICKETS.²

That A B, on, etc., in said county, unlawfully then and there did vend and dispose of, to various persons to the grand jurors [or this affiant] unknown — tickets for — shares in a lottery called The Grand Scheme.

PUBLISHING SCHEME OF CHANCE.³

That A B, on, etc., in said county, unlawfully, by printing in the — a newspaper printed and published in said county, did publish an account of a lottery and scheme of chance called (*give name*), which publication contained a statement of the amount of the prizes for distribution, the place where and the time when the prizes were to be drawn, the price of tickets, and the places where they could be obtained, which said publication is as follows: (*If not too lengthy, copy in full.*)

¹ The words in brackets are probably unnecessary the offense being complete by the opening of and promoting a lottery.

² The ticket need not be particularly described, nor is it necessary to set out a copy of it. It is sufficient to describe it in the words of the statute—a "lottery ticket." *Dunn v. People*, 40 Ill., 466, Com. Thatcher Cr. Cas., 234; *Freleigh v. State*, 8 Mo., 606. In Missouri the words "lottery tickets" need not be used, the words "device in the nature of a lottery" being sufficient. *State v. Kennon*, 21 Mo., 262.

The word lottery in its popular signification means the distribution of prizes by chance. •*Dunn v. People*. 40 Ill., 467; *Governor v. Art. U.*, 7 N. Y., 239. In *People v. Payne*, 3 Denio, 83, it is said that an indictment for selling lottery tickets must describe the lottery as one set on foot for the purpose of disposing of property. This construction is based solely on the language of the statute which prohibited a lottery "for the purpose of exposing, setting to sale, or disposing of, any houses, lands, tenements or real estate, or any money, goods or things in action." But in the absence of such statutory provisions it would seem to be sufficient to charge the offense in the language of the statute.

³ A person who places a sign board at his place of business, giving notice of lottery tickets for sale there, is thereby guilty of violating the statute against advertising such tickets. *Com. v. Hooper*, 5 Pick., 42. A person who sell a chance in a lottery, and retains in his own hands the ticket, is nevertheless guilty of selling a ticket. *Com. v. Pollard*, Thatcher, Cr. Cas., 230. An annual distribution, among the members of an art union, by lot, is a lottery. *Governors of Alms, etc., v. Art U.*, 7 N. Y. 239. The fact that there are no blanks will not render a scheme of chance valid and legal. It is a lottery. *Dunn v. People*, 40 Ill., 463; *Wooden v. Shotwell*, 4 Zab., 789.

CHAPTER XX.

HOMICIDE.

Homicide, or the killing of any human being, is of three kinds, justifiable, excusable and felonious. The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing.¹

Justifiable Homicide, such as is owing to some unavoidable necessity, without any will, intention or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame.²

Excusable Homicide is of two sorts, either *per infortunium*, by misadventure, or *se defendo*, upon the principle of self preservation.

Felonious Homicide is the killing of a human being of any age or sex without justification or excuse.³

The name murder [as a crime] was anciently applied only to the secret killing of another, which the word *moerda* signifies in the Teutonic language.⁴

Murder is thus defined by Coke: "When a person of sound memory and discretion unlawfully killeth any reasonable creature, in being and under the king's peace, with malice aforethought, either expressed or implied."⁵

The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which life may be destroyed.

At common law there were two degrees of felonious

¹ 4 Blac. Com., 177.

² Id., 178.

³ Id., 188.

⁴ Id., 195.

⁵ Inst., 47; 4 Bla. Com., 198.

homicide, viz.: Murder and manslaughter. The statute has added another degree, or rather classified the offense of willful murder into two degrees, in the first of which deliberate and premeditated malice, unless in the perpetration or attempt to perpetrate certain offenses named, is a necessary ingredient; and the second, where the murder is committed purposely and maliciously, but without premeditation and deliberation.

Murder in the First Degree.—If any person shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or if any person by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof shall suffer death.¹

Second Degree.—If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and on conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life, in the discretion of the court.²

Manslaughter.—If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter, and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years, nor less than one year.³

Physician or other Persons Administering Drugs, etc.—Any physician or other person, who shall administer or advise to be administered to any pregnant woman, with a vitalized embryo or fœtus, at any stage of utero gestation, any medicine, drug, or substance whatever, or who shall use or employ, or devise to be used or employed, any instrument or other means, with intent thereby to destroy such vitalized embryo or fœtus, unless

¹ Cr. Code, § 8.

² Cr. Code, § 4.

³ Id., § 5.

the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall in case of the death of such vitalized embryo or foetus, or mother in consequence thereof, be imprisoned in the penitentiary not less than one nor more than ten years.¹

The Intent to Kill was not necessary to be alleged to constitute murder at common law, but it is made so by the statute of Nebraska and a number of other states; hence, in those states, the precedents of indictments at common law are not sufficient to charge the crime of murder.² It is essential to the sufficiency of an indictment for murder in the first degree under the statute that it contain a direct and specific averment of the purpose or intention to kill, or intention to inflict a mortal wound, in the description of the crime.³

Who Incapable of Committing.—An Infant within the age of seven years is presumed to be incapable of committing crime. During the interval between seven and fourteen years the infant is supposed to be destitute of criminal design; but this presumption diminishes as the age increases, and even during

¹ Cr. Code, § 6.

² Fouts v. State, 8 O. S., 98; Kain v. State, Id., 306.

³ Fouts v. State, 8 O. S., 98. In the opinion of the majority of the court will be found an able review of the changes made by the statute. The court say (page 110): "It is conceded that a purpose or design to kill is not an essential ingredient in murder at common law. The crime at common law consists in the unlawful killing of a human being under the king's peace," with malice prepense or aforethought, either express or implied by law. 1 Russ on Cr., 482. * * By this malice, it is said, is meant not simply a special malevolence to the individual slain, but a wicked, depraved and malignant spirit, a heart regardless of social duty and deliberately bent on mischief. It is held that there is express malice where one person kills another with a sedate and deliberate mind, and formed design to take life; and that where a person not intending to take life, but designing to inflict a grievous bodily harm, or while perpetrating some other and collateral felony or misdemeanor kills another, there *malice is implied* by law from the deliberate cruel act, or the depravity and criminal inclination of the perpetrator at the time. But in England murder is not classified into degrees, but every murder is of the same grade and subject to the same penalty whether the malice be express or implied. State v. Kearley, 26 Kas., 77.

this interval of youth may be repelled by positive evidence of vicious intention.¹

Insanity is another cause which may render a person incapable of committing crime, and where it amounts to a total perversion of the intellectual faculties is an excuse for any crime which may be committed under its influence.² This will be further considered under the head of defenses.

There must be an Actual Killing to constitute murder. It is not necessary, however, that death should be caused by direct violence; it is sufficient if the act done apparently endangers life and eventually proves fatal.³

The death of the party alleged to have been murdered must be proved. This involves two principal facts: First, that the person is dead, and second, that he died from the injuries alleged to have been received.⁴ The *corpus delicti*, or

¹ 1 Hale, P. C., 26. "An infant under the age of fourteen years and above the age of twelve years is not *prima facie* presumed to be *doli capax* and therefore regularly, for a capital offense committed under fourteen years of age, he is not to be committed or have judgment as a felon, but may be found not guilty. But, though *prima facie* and in common presumption this be true, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil at the time he committed the offense, he may be convicted."

² 2 Chitty, Cr. L., 125.

³ 2 Chitty, Cr. L., 125; 1 Hale, P. C., 428. "If a man give another a stroke, which, it may be, is not in itself so mortal but that with good care he might be cured, yet if he die of the wound within a year and a day, it is homicide or murder, as the case is, and so it hath been always ruled. But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines, the party dies, if it can clearly appear that this medicine and not the wound was the cause of death, it seems it is not homicide, but then that must clearly appear and certainly be so.

But if a man receives a wound which is not in itself mortal, but either for want of helpful applications or neglect thereof it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of his death, yet it was the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*. Denman v. State, 15 Neb., 188.

⁴ 3 Greenleaf, Ev., § 131.

fact that a murder has been committed, must be satisfactorily proved before there can be a conviction for murder, although there was evidence of conduct of the accused from which guilt might be inferred. The fact of death, however, need not be proved by direct evidence, it being sufficient if it is established by circumstances so strong as to be conclusive.¹ The rule that the body must be found dead is adhered to with great strictness in the English courts² and has much to commend it.

Corpus Delicti.—To warrant a conviction of murder or manslaughter there should be direct proof either of the death, as by the finding and identification of the body, or of criminal violence sufficient to produce death, and exercised in such a way as to account for the disappearance of the body.³ It must be borne in mind that the *corpus delicti* in murder consists of two ingredients—death as the result, and the criminal acts of another as the means. In *Starke on Evidence* it is said: “The accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by an inspection of the body—a rule warranted by melancholy experience of the conviction and execution of supposed offenders, charged with the murder of persons who survived their alleged murderers.”⁴

Cause of Death.—The death and identity of the body being proved, it is necessary to show that the death of the deceased was caused by the unlawful act of another.⁵

¹ 3 Greenl. Ev., § 131.

² 1 Phillips, Ev., (4 Am Ed.) 711. In 2 Hale’s P. C., 290, it is said: “I would never convict any person of murder or manslaughter, unless the fact was proved to be done, or at least the body found dead, for the sake of two cases; one mentioned in my Lord Coke’s P. C. Cap., 104, page 232, a Warwickshire case; another that happened in my remembrance in Staffordshire, where A was long missing, and upon strong presumption B was supposed to have murdered him, and to have consumed him to ashes in an oven that he should not be found. Whereupon B was indicted of murder, and convicted and executed, and within one year after A returned, being indeed sent beyond the sea by B, against his will; and so though B justly deserved death, yet he was really not guilty of that offense for which he suffered.

³ *Ruloff v. The People*, 18 N. Y., 179; *People v. Bennett*, 49 Id., 137.

⁴ 4th London Ed., 862-3.

⁵ 3 Greenleaf, Ev., § 134. The dialogue of Maule, J., with the prisoner’s

If the wound inflicted by the accused caused the death, it will, in a proper case, justify a conviction although the person injured would have recovered had he received proper treatment.¹ Where, however, the wound was not in its nature mortal, and it is clearly made to appear that the maltreatment of the wound, or the medicine administered to the injured party, or his own misconduct, and not the wound itself, was the sole cause of death, the accused can not be convicted of murder.² But where the injury and maltreatment jointly cause the death the party committing the injury may be convicted of murder.³

And if the deceased was sick with an apparently mortal disease, and his death was hastened by injuries maliciously inflicted by the accused, he may, in a proper case, be convicted of murder, because the person committing the injury can not apportion the wrong.⁴

Confessions Alone are not sufficient to establish the *corpus delicti*. There must be other proof that a crime has actually been committed, and the confession should only be used for the purpose of connecting the defendant with the offense.⁵

counsel, in *Reg. v. Burton*, Dears., 282-4, in which it is claimed that the court overruled the prior decisions as to proof of the *corpus delicti*, can scarcely be considered more than a *dictum* and is not entitled to much weight.

¹ 1 Hawk., P. C., 93; *Com. v. McPike*, 3 Cush., 181; *Com. v. Green*, 1 Ashm., 289.

² 3 Greenleaf, Ev., § 139.

³ *State v. Morphy*, 33 Iowa, 276; *Com. v. Hackett*, 2 Allen, 136.

⁴ 3 Greenleaf, Ev., § 139; 1 Hale, P. C., 428; 1 Russ. on Cr., 505-6; *Rex v. Martin*, 5 C. & P., 128; *Com. v. Fox*, 7 Gray, 585.

⁵ *Dodge v. People*, 4 Neb., 231; *Stringfellow v. State*, 26 Miss., 157; *People v. Hennessey*, 15 Wend., 147; 1 Greenleaf, Ev., § 217; *Bergen v. People*, 17 Ill., 426. In 1 Phil., Ev., (4 Am. Ed.), 532, where, after referring to other cases of conviction on a mere confession, attention is called to the great distrust entertained by the courts of confessions which are not judicial. In one case where a horse was stolen and two men returned with him bringing the prisoner, who confessed to the owner that he was the thief, neither of the persons bringing him in, however, being sworn, the court directed an acquittal, but said it would have been otherwise had the prisoner stated confirmatory circumstances which had been proved. A naked confession, however, unattended with circumstances tending to show guilt, is insufficient. The prisoner might have been misunderstood, or his

The proof of the *corpus delicti* necessarily must be governed by the circumstances of each case, but should at least show that a crime had actually been committed by some one, as that A has been killed, a horse belonging to B has been stolen, certain goods belonging to C have been taken, etc. The fact that an offense has actually been committed by some one, can, where such is the case, be shown by evidence *aliunde*. This being done, the confession of the person, voluntarily made and unobjectionable, is admissible to connect him with the offense, to show that he committed it.¹

The Mode of Killing.—The manner in which the death was effected is not material. All that is required is that it be established that the deceased died of the injury inflicted by the accused, as its usual, natural and probable effect.² The particular nature of the injury is set forth in the indictment, and thus frequently requires the cause of death to be set forth in several distinct counts, to meet the varying phases of the proof. It is sufficient if the proof of both agree substantially with the charge, as, if the allegation be of stabbing with a dagger, proof may be introduced of any other sharp instrument.³

confession perverted, distorted, or he might have been operated upon. The least mistake or misunderstanding might prove fatal. A confession from its very nature is a very doubtful species of evidence, which in any case must be received with caution, and the courts, which go against the necessity of corroborating proof, yet require that the *corpus delicti* be proved by other evidence in order to render the confession operative. Thus, in larceny, other proof must be given of the stealing of the goods, and in murder of the death. *State v. Guild*, 5 Halst., 185.

¹ The cases are collected in the valuable notes to 1 Phil., Ev., (4 Am. Ed.) 524, where instances are cited of persons who have confessed themselves guilty of crimes of which they were innocent, and of innocent persons resting under the suspicion of crimes in a manner affording a strong presumption of guilt. See Harrison's case cited, 1 Lea, C. C., 264. See, also, as to confessions, *Mary Smith's case*, 2 How., St. Tr., 1049; 4 How., St. Tr. 817; 6 How., St. Tr. 647; *Case of the Devon Witches*, tried by Lord Hale, 8 Id., 1017.

² 3 Greenleaf, Ev., § 140.

³ An indictment for murder or manslaughter hath these certainties and requisites to be added to it more than other indictments, for it must not only be *felonice*, and ascertain the time of the act done, but must also de-

Where a woman left a new born child in an orchard, covered only with leaves, in which situation it was killed by a kite, and where parish officers removed a child from parish to parish till it died of want, they were adjudged guilty of murder.¹ So if a prisoner die by neglect or cruelty of the jailer, the party offending may be found guilty.² But the charge of death by exposure is not sustained by proof that it was hastened merely.³ And if the charge is that the death was occasioned by two joint concurring causes, as starving and beating, both must be proved.⁴ An assault with the hands and feet upon a person too feeble to resist, and there was reason to believe such an attack would hasten her death, has been held sufficient to warrant a conviction for murder.⁵ And where a shipmaster knowingly and maliciously compelled a sick sailor to go aloft while he was so weak that he could not comply without danger of death, or great bodily injury, and the seaman fell from the mast and was killed, it was held to be murder in the master.⁶

A Year and a Day.—There is no statute in Nebraska declaring that in case of murder the time of the death must be laid within a year and a day from the time the mortal stroke was given, but such is the common law and no doubt it has the force of a statute. It is necessary, therefore, in charging the commission of the offense, to state the time when the

clear how and with what it was done. And yet, if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as *poisoning* or *strangling*, it doth not maintain the indictment upon evidence. 2 Co. Inst., 319, Co. P. C., p. 48.

If A and B are indicted for murder, and it is laid that A gave the stroke, and B was present aiding and abetting, yet if it falls out upon evidence that B gave the stroke, and A was present aiding and abetting, it maintains the indictment. 2 Hale, P. C., 185.

¹ 2 Chitt. Cr. L., 726; 1 Hale, P. C., 431.

² 2 Chitt. Cr. L., 726; Fost., C. C., 321.

³ 3 Greenleaf, Ev., § 141; Stockdale's case, 2 Lewin, C. C., 220.

⁴ Id.

⁵ Com. v. Fox, 7 Gray, 585.

⁶ United States v. Freeman, 4 Mason, 505. The writer doubts whether the offense in some of the cases stated was murder. Malice is necessary to constitute the offense of murder, which element is wanting in some of the cases.

mortal stroke was given, and also the time of the death.¹ This may be done by stating, according to the fact, either that the deceased died instantly of the wound, or that he languished to a day specified and then died.² It is not sufficient to lay the offense between two specified days, or about a certain day.³

Where the death is occasioned by actual violence, the word "struck" should be inserted, and when the death is occasioned by a wound, it should be stated to have been mortal; and it has been held that the want of this term can not be supplied by an allegation that the deceased died in consequence of the wounds he received.⁴

The Length and Depth of the Wound also should be stated, that it may appear to have been an adequate cause of death; but this is not necessary, where a man is shot through the body with a bullet, or run through with a sword, as then it will suffice to say, that the defendant struck the deceased in a certain part of the body, and gave him then and there a mortal wound, penetrating through the body, because this is evidently of such depth as to prove fatal.⁵

Where Death is Caused by a Wound or Stroke, it is necessary to state the part of the body to which the violence was applied. It is sufficient, however, to state that the wound was given on the neck, breast, stomach or even the body.⁶

¹ 2 Hale, P. C., 179; 2 Chitt. Cr. L., 736.

² 2 Chitt. Cr. L., 735.

³ Id.

⁴ 2 Chitt. Cr. L., 735. It must be alleged in the indictment that the wound was mortal. 2 Bish. Cr. Proc., § 525; 1 Hale, P. C., 136; Rex v. Ladd, 1 Leach, 98; State v. Conley, 39 Ms., 78.

⁵ 2 Chitt. Cr. L., 734.

⁶ Id., 735. "It is absolutely essential to state that the party murdered died of the injury received; and, therefore, it has been held that an indictment setting forth the means of strangling, and then averring *qua suffocatione obiit* instead of *de qua suffocatione* was erroneous. 1 Rol. Rep. 137. Where the death was caused by several poisons, bruises and wounds, it may be stated that the death arose from them all, or that the deceased died of the first and would otherwise have died of the second, and that in case he had survived these the third would have been fatal." 2 Chitt. Cr. L. 736. The proper course would seem to be to charge that the death was the result of all the causes stated.

Time and Place.—At common law the place as well as the time must be stated, to the allegation both of the injury and the death, in order that it may appear that the charge is cognizable by the tribunal before which it is preferred.¹

But where there are several counts in the indictment, in the first of which time and place are specifically stated, it is sufficient, under the statute, to allege in the subsequent counts that the offense therein described was *then* and *there* committed.²

Name of Deceased.—The Christian and surname of the deceased, when known, must be correctly stated. If not known that fact should be alleged. The name by which the deceased was commonly known is sufficient, whether he be described by the initials or his full Christian name,³ and in California it has been held that an error in the middle name was immaterial.⁴ Where the person killed had no name, as in case of an infant murdered at its birth, it should be alleged that it was not named. It is not sufficient to say “not baptized” because it may have a name without being baptized.⁵ The name, when stated, must be proved as alleged.⁶

Wounds on Different Days.—Where an offense is or may be constituted of various acts which took place on different days, the statement of the offense must ordinarily allege more days than one, as in averring the day of the stroke and the death. While, however, both acts must be so alleged they may be charged as having taken place on the same day.⁷

Weapon.—The indictment or information must state the means by which life was destroyed; therefore, if a weapon was used the name of the weapon must be given, unless it is alleged that it is unknown to the grand jury [or affiant]. If, however, the homicide is described in a way that required no

¹ 2 Chitt. Cr. L., 737.

² *Fisk v. State*, 9 Neb., 62; *Evans v. State*, 24 O. S., 208; 2 Bish. Cr. Pro., § 535.

³ *Vandermark v. People*, 47 Ill., 122; *People v. Freeland*, 6 Cal., 96; *State v. Angel*, 7 Ired., 27.

⁴ *People v. Freeland*, 6 Cal., 96.

⁵ 2 Bish. Cr. Pro., § 510.

⁶ *Id.*, § 511.

⁷ 1 Bish. Cr. Pro., § 392; *Com. v. Stafford*, 12 Cush., 619.

weapon, none need be mentioned.¹ The length and thickness of the stick, when that was the weapon used, is sometimes stated but need not be.² It is not necessary to state the value of the weapon used.³ At common law the price of the instrument was usually stated or else it was averred that it was of no value, because it was forfeited as a deodand to the crown. But the statement was not absolutely essential.⁴ There being no forfeiture in this country the allegation is unnecessary.

MURDER IN THE FIRST DEGREE BY SHOOTING WITH A PISTOL.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely and feloniously, and of his deliberate and premeditated malice, did make an assault, with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice to kill and murder, and that the said A B, a certain pistol then and there charged with gunpowder and one leaden bullet, which the said pistol he, the said A B, in his right hand then and there had and held, then and there unlawfully, purposely and of his deliberate and premeditated malice did discharge and shoot off, to, at, against and upon the said C D; and that the said A B, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid by the said A B discharged and shot off, as aforesaid, then and there unlawfully, purposely and of his deliberate and premeditated malice, did strike, penetrate and wound, with the intent aforesaid, thereby, then and there giving to the said C D, in and upon the right side of the body of him, the said C D, then and there with the bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by force of the gunpowder aforesaid, by the said A B in and upon the right side of the body of him, the said C D, one mortal wound, of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said C D, instantly died, and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said A B him, the said C D, unlawfully, purposely and of his deliberate and premeditated malice did kill and murder.⁵

MURDER IN THE FIRST DEGREE BY SHOOTING WITH A RIFLE, WHERE THE PERSON SHOT LANGUISHED SEVERAL DAYS.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely and feloniously, and of his deliberate and premeditated

¹ 2 Bish. Cr. Pro., 514.

² 2 Chitty, Cr. L., 734; Jackson v. People, 18 Ill., 270.

³ 1 Arch. Cr. Pl. & Pro., 886.

⁴ 2 Hall, P. C., 185.

⁵ The above is the substance of the form in 2 Chit. Cr. L., 751, using the statutory words, "purposely and of deliberate and premeditated malice."

malice, did make an assault, with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice to kill and murder, and that the said A B, a certain rifle then and there charged with gunpowder and one leaden bullet, which, the said rifle, he, the said A B, in both of his hands then and there had and held, then and there unlawfully, purposely and of his deliberate and premeditated malice, did discharge and shoot off at, against and upon the neck of the said C D, and that he, the said A B, with the leaden bullet aforesaid, out of the rifle aforesaid, then and there by force of the gunpowder aforesaid, by the said A B discharged and shot off as aforesaid, then and there unlawfully, purposely and of his deliberate and premeditated malice, did strike, penetrate and wound, with the intent aforesaid, thereby, then and there giving to the said C D, in and upon the neck of him, the said C D, then and there, with the bullet aforesaid, so as aforesaid discharged and shot out of the rifle aforesaid, by force of the gunpowder aforesaid, by the said A B, in and upon the neck of him, the said C D, one mortal wound of the depth of four inches, and of the breadth of half an inch; of which said mortal wound he, the said C D, on and from the said — day of —, in the year aforesaid, until the — day of —, in the same year, in said county, did languish and languishing did live, on which said — day of — in the aforesaid year, he, the said C D, in said county, of the mortal wound aforesaid died: [and so the grand jurors aforesaid, on their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, purposely and of his deliberate and premeditated malice did kill and murder].¹

MURDER IN THE FIRST DEGREE FROM STRIKING WITH AN AXE.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely and feloniously, and of his deliberate and premeditated malice, did make an assault with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice, to kill and murder, and the said A B, with a certain axe made of iron and steel which he, the said A B, then and there had and held in both his hands, him, the said C D, in and upon the head of him, the said

¹ In *Smith v. State*, 4 Nebraska, it was held that an indictment setting forth all the essential ingredients of the crime of murder, and all necessary allegations that the defendant committed it, was not bad by reason of the omission of the usual conclusion, "and the jurors aforesaid, on their oaths aforesaid, do say, etc., did kill and murder." In *Anderson v. State*, 5 Pike, the Supreme Court of Arkansas held this allegation to be merely formal and unnecessary to a good indictment. The court say that it is merely a repetition and conclusion of law from the facts previously stated. In *Hagan v. State*, 10 O. S., 459, the court say, "the allegation purports to be and is nothing more than an argumentative statement of the legal results of the facts previously stated," and where it was inserted could not supply allegations omitted in the charging part of the indictment.

Fouts v. State, 8 O. S., 98.

C D, then and there unlawfully, willfully, feloniously, purposely, and of his deliberate and premeditated malice, did strike, thrust and penetrate and wound with the intent aforesaid, thereby, then and there, giving to the said C D with the axe aforesaid, in and upon the head of him, the said C D, one mortal wound of the length of six inches and of the depth of four inches, of which said mortal wound, he, the said C D, then and there instantly died; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, feloniously, purposely and of deliberate and premeditated malice, did kill and murder.

IN THE FIRST DEGREE BY CUTTING WITH A KNIFE.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, willfully, feloniously, and of his deliberate and premeditated malice, did make an assault with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice to kill and murder, and that he, the said A B, with a certain knife which he, the said A B, in his right hand then and there had and held, him, the said C D, in and upon the right side of body of him, the said C D, then and there unlawfully, willfully, feloniously, purposely and of his deliberate and premeditated malice, did strike, cut and thrust with the intent aforesaid, thereby, then and there, giving to the said C D then and there with the knife aforesaid, in and upon the right side of the body of him, the said C D, one mortal wound of the length of three inches and of the depth of six inches, of which said mortal wound, he, the said C D, instantly died; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, purposely and of deliberate and premeditated malice did kill and murder.

IN THE FIRST DEGREE BY CASTING A STONE.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely and feloniously, and of deliberate and premeditated malice, did make an assault with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice to kill and murder, and that he, the said A B, with a certain stone which he, the said A B, in his right hand then and there had and held, in and upon the right side of the head of him, the said C D, then and there unlawfully, willfully, feloniously, purposely and of deliberate and premeditated malice, did strike, penetrate and wound, thereby, then and there, by the casting and throwing of the stone aforesaid, with the intent aforesaid, in and upon the

In *State v. Jackson*, 27 Kans., 581, it was held that where an information for murder in the first degree describes the killing, and clearly alleges that the killing was done willfully, unlawfully and feloniously, and with deliberation, premeditation and malice aforethought, it is sufficient, especially after verdict.

head of said C D, giving to him, the said C D, one mortal wound of the length of two inches and of the depth of one inch, of which said mortal wound the said C D then and there instantly died; and so the grand jurors aforesaid upon their oaths aforesaid, do say that the said A B him, the said C D, in the manner aforesaid, unlawfully, purposely, and of deliberate and premeditated malice, did kill and murder.

IN THE FIRST DEGREE BY BEATING WITH FISTS AND KICKING—LANGUISHING.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice, did make an assault with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice to kill and murder, and that he, the said A B, then and there unlawfully, purposely, feloniously, and of his deliberate and premeditated malice, did strike, beat and kick the said C D, with his hands and feet, in and upon the head, breast, back, belly, sides and other parts of the body of him, the said C D, and did then and there unlawfully, purposely, and of his deliberate and premeditated malice, cast and throw the said C D down onto and upon the ground, with great force and violence, with the intent aforesaid, thereby, then and there, giving to the said C D then and there, as well by the beating, striking and kicking of him, the said C D, in manner and form as aforesaid, as by the casting and throwing of him, the said C D, down as aforesaid, several mortal strokes, wounds and bruises, in and upon the head, breast, back, belly, sides, and other parts of the body of him, the said C D, to wit: one mortal wound on the body of him, the said C D, of the length of five inches and of the depth of two inches (*state other bruises and wounds in the same way*) of which said mortal strokes, bruises and wounds, he, the said C D, from the said — day of — in the year aforesaid, until the — day of — in the year aforesaid, in said county, did languish and languishing did live, on which said — day of — in the year aforesaid, he, the said C D, of the aforesaid mortal wounds, died; and so the grand jurors aforesaid, on their oaths aforesaid, do say that the said A B, him the said C D, in the manner aforesaid, unlawfully, purposely, and of deliberate and premeditated malice did kill and murder.

IN THE FIRST DEGREE, BEATING WITH A STICK.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice did make an assault with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice to kill and murder, and that he, the said A B, with a certain stick which he, the said A B, then and there had and held in his right hand, the said C D, in and upon the head of him, the said C D, then and there unlawfully, purposely, feloniously, and of his deliberate and premeditated malice did strike and

wound, with the intent aforesaid, thereby, then and there, with the stick aforesaid, by the stroke aforesaid, in the manner aforesaid, in and upon the head of him, the said C D; giving to him, the said C D, one mortal wound of the length of three inches and of the depth of half an inch, of which said mortal wound the said C D then and there instantly died; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, did kill and murder.

IN THE FIRST DEGREE, BY SHOOTING WITH CARBINE, AGAINST PRINCIPAL AND ACCESSORY BEFORE THE FACT.

That A B and C D, on, etc., in said county, in and upon one E F, then and there being, unlawfully, willfully, feloniously, purposely, and of their deliberate and premeditated malice, did make an assault with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice, to kill and murder, and that the said A B, a certain gun called a carbine, then and there charged with gunpowder and one leaden bullet, which said gun, he, the said A B, in both his hands then and there had and held, at and against the said E F, then and there unlawfully, purposely, and of his deliberate and premeditated malice did shoot off and discharge, and that the said A B with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded to, at, and against the said E F as aforesaid, did then and there unlawfully, feloniously, purposely, and of deliberate and premeditated malice, strike, penetrate and wound the said E F, in and upon the right side of the head of him, the said E F, with the intent aforesaid, thereby, then and there, giving to him, the said E F, in and upon the right side of the head of him, the said E F, with the bullet aforesaid, by means of the shooting off and discharging the gun so loaded to, at, and against the said E F, and by such striking, penetrating and wounding, the said E F, as aforesaid, one mortal wound in and through the head of him, the said E F, of which mortal wound the said E F did then and there instantly die; and that the said C D then and there unlawfully, feloniously, purposely, and of his deliberate and premeditated malice was present, aiding, abetting, comforting, procuring, assisting and maintaining the said A B in the felony and murder aforesaid, in manner and form to do and commit, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B and C D, him, the said E F, in the manner aforesaid, unlawfully, purposely, and of deliberate and premeditated malice, did kill and murder.

IN THE FIRST DEGREE FOR WILLFULLY RIDING OVER A PERSON WITH A HORSE.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely and of his deliberate and premeditated malice,

did make an assault with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice to kill and murder, and that the said A B, then and there riding upon a certain horse, the said horse in and upon the said C D then and there unlawfully, purposely and of his deliberate and premeditated malice did ride and force, and him, the said C D, with the horse aforesaid, then and there unlawfully, feloniously, purposely and of his deliberate and premeditated malice, by such riding and forcing, did throw to the ground, with the intent aforesaid, by means whereof the said horse, with his hind feet, him, the said C D, so thrown to and upon the ground as aforesaid, in and upon the back part of the head of him, the said C D, did then and there strike and kick, thereby, then and there, giving to him, the said C D, upon the back part of the head of him, the said C D, one mortal wound, fracture and contusion, of which said mortal wound, fracture and contusion, he, the said C D, then and there instantly died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, feloniously, purposely and of deliberate and premeditated malice, did kill and murder.

IN THE FIRST DEGREE FOR CAUSING DEATH BY STRANGLING.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely and of deliberate and premeditated malice did make an assault with the intent him, the said C D, unlawfully, purposely and of deliberate and premeditated malice to kill and murder, and that the said A B, a certain cord about the neck of said C D, then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice did put and fasten, and that the said A B, with the cord aforesaid, by him so about the neck of the said C D put and fastened, then and there, him, the said C D, unlawfully, feloniously, purposely and of deliberate and premeditated malice did choke and strangle, with the intent, him, the said C D, then and there purposely and of his deliberate and premeditated malice, to kill and murder, of which said choking and strangling he, the said C D, then and there instantly died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, feloniously, purposely and of deliberate and premeditated malice did kill and murder.

IN THE FIRST DEGREE, FOR THROWING AN INFANT IN A PRIVY VAULT.

That A B, on, etc., in said county, in and upon one C D, a female child then and there being unlawfully, purposely, and of his deliberate and premeditated malice did make an assault, and that the said A B, with both his hands, the said female child, C D, into a certain privy vault there situate,

wherein was a great quantity of human excrements and other filth, in a liquid form and of great depth, then and there unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, did cast and throw said female child, C D, into the excrement and filth of said privy vault, with the intent then and there, her, the said C D, unlawfully, purposely, and of deliberate and premeditated malice, to kill and murder; of which excrement and filth the said C D was then and there choked and suffocated, of which choking and suffocation, the said C D then and there died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, her, the said C D, in the manner aforesaid, unlawfully, purposely and of deliberate and premeditated malice, did kill and murder.

Where an information alleged that one H, on August 11, 1882, at and within the county of C, with a deadly weapon, to wit. a large knife or dirk, which he, the said H, then and there held in his hand, and then and there did strike at and upon the body of one B, and did then and there willfully, deliberately, premeditatedly, and with malice aforethought, cut and stab the said B in the abdomen, thereby inflicting upon the body of the said B one certain mortal wound, whereof he, the said B, then and there died, wherefore it is hereby charged that the said H, on August 11, 1882, at and within the county of C and State of Kansas, did willfully, feloniously, deliberately and premeditatedly, kill and murder the said B, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Kansas, it was held sufficient, as against a motion in arrest of judgment, to sustain a conviction of murder in the second degree.¹

IN THE FIRST DEGREE FOR DROWNING ANOTHER.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely and of his deliberate and premeditated malice, did make an assault, and that the said A B, then and there, unlawfully, purposely and of his deliberate and premeditated malice did take the said C D

¹ *State v. Harp*, 31 Kas., 496. It is said: "We are not to set aside the information for any surplusage, or any other defect or imperfection which did not tend to prejudice the substantial rights of the defendant upon the merits. If the offense charged in the information is stated with such a degree of certainty that the court would pronounce judgment upon conviction, according to the right of the case, we are not now to interfere. *Crim. Code*, §§ 109, 110. Nor ought we, at this stage of the case, to give such a narrow and technical construction to the language used in the information as to release the defendant, if the facts therein stated, in their ordinary acceptance, constitute murder in the second degree." See also *State v. Stackhouse*, 24 Kas., 445; *State v. O'Kane*, 23 Kas., 244; *State v. Potter*, 15 Kas., 302; *State v. Bowen*, 16 Kas., 475.

into both hands of him, the said A B, and did then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice, cast; throw and push the said C D into a certain pond there situate, wherein there was a great quantity of water, with the intent, then and there, him, the said C D, unlawfully, feloniously, purposely and of deliberate and premeditated malice to kill and murder; by means of which said casting, throwing and pushing in the pond aforesaid by the said A B, in form aforesaid, the said C D, in the pond aforesaid, with the water aforesaid, was then and there choked, suffocated and drowned, of which said choking, suffocating and drowning the said C D then and there instantly died; and so the jurors aforesaid upon their oaths aforesaid do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, purposely and of deliberate and premeditated malice did kill and murder.

IN THE FIRST DEGREE BY FORCING ANOTHER TO DRINK SPIRITS TO EXCESS.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, purposely and of deliberate and premeditated malice did make an assault, and that the said A B, then and there unlawfully, willfully, feloniously, purposely, and of deliberate and premeditated malice, did compel and force him, the said C D, then and there, against his will to take, drink and swallow down a great quantity, to wit: three half pints of distilled spirituous liquor, commonly called whisky, with the intent of him, said A B, then and there, him, the said C D, unlawfully, feloniously, purposely and of his deliberate and premeditated malice to kill and murder, and that the said C D by the compulsion and force aforesaid of him, the said A B, then and there against his will and resistance did take, drink and swallow down a great quantity of spirituous liquor called whisky, in manner and form aforesaid by the compulsion and force aforesaid and against the will of him, the said C D, whereby he, the said C D, then and there became suffocated and choked, and thereof, then and there, instantly died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, purposely and of deliberate and premeditated malice did kill and murder.

An Indictment for Murder in the First Degree, where it does not charge that the killing was done by means of poison, or by lying in wait, or in the perpetration or attempt to perpetrate any felony, must charge that the killing was done deliberately and premeditatedly, in order to make the same a good indictment for murder in the first degree.¹

¹ State v. Brown, 21 Kas., 38. It is said (p. 48), "The deliberation and premeditation charged in the indictment do not go to the killing, but

IN THE FIRST DEGREE FOR CAUSING DEATH BY DURESS OF
IMPRISONMENT.

That A B, on, etc., in said county, for a long time prior to said time was the warden of the penitentiary of —, and having charge of said prison and a large number of prisoners therein, and in and upon one C D, a prisoner then and there being, unlawfully, purposely and of deliberate and premeditated malice did make an assault, and that he, the said A B, then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice and without the consent of said C D, a prisoner as aforesaid, took him, the said C D, by force and against his will, to a certain room within said prison, and then and there, in said room, in said prison, unlawfully, feloniously, purposely and of deliberate and premeditated malice, conveyed and led, and him, the said C D, and in said room, for a long time, to-wit: for the space of two months then next following, unlawfully, feloniously, purposely and of his deliberate and premeditated malice did imprison therein and detain, and him, the said C D, then and there, for all the time last mentioned, in that room, without fire, without covering, and without any utensil whatever, was forced by said A B to remain and be, with the intent of A B, then and there him, the said C D, unlawfully, feloniously, purposely and of his deliberate and premeditated malice to kill and murder, and that said C D, during the imprisonment and detaining of said C D in said room, to wit, on the — day of —, in said year, by reason of the duress of the same imprisonment, became mortally sick, and thereby from that time until the — day of —, in the same year, languished; on which said day last named, the said C D, by duress of imprisonment and detaining aforesaid in the room aforesaid, in said county, of said mortal sickness, died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, purposely and of deliberate and premeditated malice, did kill and murder.¹

merely go to the acts which finally and eventually resulted in producing death; stripping the indictment of everything except that which might be supposed to charge deliberation and premeditation, and changing it so as to make it an indictment against one defendant alone for killing one of the Bledsloes with one pistol; and it would read substantially as follows: The defendant deliberately and premeditatedly, with a pistol charged with gunpowder and six leaden balls, which pistol he in his right hand held, of deliberate and premeditated malice did shoot against the body of Bledsloe; and thereby gave to Bledsloe one mortal wound, of which mortal wound Bledsloe died; and the defendant, him, the said Bledsloe, in the manner and by the means aforesaid, unlawfully, feloniously, willfully, wickedly, purposely, maliciously and with malice aforethought, did kill and murder." This was held insufficient as a charge of murder in the first degree.

¹ The above is the substance of the indictment against Huggins and Barnes. 2 *Ld. Raymond*, 1574.

IN THE FIRST DEGREE, FOR CAUSING THE DEATH OF ANOTHER
BY POISONING.

That A B, on, etc., in said county, unlawfully and feloniously contriving and intending, him, the said C D, to deprive of his life, and kill and murder, purposely and of deliberate and premeditated malice a large quantity of a certain deadly poison called white arsenic, to wit, one half ounce, did mix and mingle in a certain quantity of tea, which he, the said C D, then and there intended and was about to drink, the said A B then and there well knowing that the said tea with which he, the said A B, did so mix and mingle said poison as aforesaid, was then and there prepared for the use of the said C D, and then and there well knowing that said white arsenic was a deadly poison; and that the said C D, on the day and year aforesaid, did take, drink and swallow down into his body said poison so mixed with said tea; the said C D at the time of drinking said tea and poison, not knowing that there was white arsenic, or any other poisonous substance, mixed and mingled with said tea, which poison was so mixed and mingled with said tea by said A B, with the intent of him, the said A B, then and there, him, the said C D, unlawfully, feloniously, purposely and of deliberate and premeditated malice to kill and murder; and by reason of said poison so mixed with said tea by said A B as aforesaid, and drank and swallowed by the said C D, he, the said C D, became mortally sick and distempered in his body, and of said mortal sickness from the — day of — in said year, until the — day of — in the year aforesaid, in said county, said C D did languish and languishing did live, on which said — day of — in the year aforesaid, in said county, he, the said C D, of the poison aforesaid so taken, drank and swallowed down as aforesaid, and of the mortal sickness and distemper thereby occasioned, did die; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, purposely and of deliberate and premeditated malice, did kill and murder.

MURDER OF NEW BORN CHILD BY ABANDONMENT.

That A B, on, etc., in said county, was delivered of a male child, not named, of which she then and there had the custody, and afterward on the — day of — in the same year, in said county, in and upon said male child, said A B unlawfully, feloniously, purposely, and of her deliberate and premeditated malice did make an assault, and did then and there unlawfully, feloniously, purposely, and of deliberate and premeditated malice, place, leave and abandon said male child in a marsh away from any human being or habitation, in a wholly destitute, naked and unprotected condition, with the intent then and there of said A B, him, the said male child, unlawfully, feloniously, purposely, and of deliberate and premeditated malice to kill and murder; by reason of the abandonment aforesaid and of the want of needful food and sustenance, and of due and proper care and attention, said

male child then and there languished in mortal weakness for the space of one half day, and then and there for the causes aforesaid died; and so the jurors aforesaid, upon their oaths aforesaid, do say, that said A B, him, the said male child, in the manner aforesaid, unlawfully, feloniously, purposely and of deliberate and premeditated malice did kill and murder.

ABORTION, DESTRUCTION OF VITALIZED FŒTUS.

That A B, on, etc., in said county, in and upon one C D, then and there being, she, the said C D, then and there being pregnant with a vitalized embryo, did unlawfully, willfully and maliciously make an assault, and that the said A B unlawfully and willfully did use and employ in and upon the body and womb of the said C D, mother of the said vitalized embryo, certain instruments, to wit: one piece of wire, with the intent unlawfully and willfully to destroy said vitalized embryo, the same not being necessary to preserve the life of the said C D, the mother, and not having been advised by two physicians to be necessary for that purpose; by the means aforesaid so used by said A B the death of said vitalized embryo was thereby unlawfully produced,¹ and so, etc.

MURDER OF MOTHER BY PRODUCING ABORTION.

That A B on, etc., in said county, in and upon one C D, then and there being, she, the said C D, then and there being pregnant with a vitalized embryo, did unlawfully, willfully and maliciously make an assault, and that the said A B unlawfully and willfully did use and employ in and upon the body and womb of the said C D, the mother of the said vitalized embryo, certain instruments to wit: (*state what, if known, if not so state*) with the intent then and there unlawfully to kill and destroy said vitalized embryo, the same not being necessary to preserve the life of said C D, the mother, and not having been advised by two physicians to be necessary for that purpose, and thereby inflicted on the womb and other internal parts of the said C D certain mortal wounds and bruises, of which mortal bruises and wounds said C D * then and there instantly died, and so, etc.²

¹ The above is the substance of the indictment in *People v. Jackson*, 3 Hill, 92, under a statute similar to section 6 of the Criminal Code of Nebraska. In that case it was held that when the crime proved is of the same generic character with that charged, a conviction for an inferior grade of the offense may be had. Such no doubt is the rule.

² If the party did not die instantly follow the preceding form to the * then say, did then and there languish, and languishing did live until the — day of —, in the same year, on which said — day of —, in the year aforesaid, she, the said C D, in said county, of said mortal wounds and bruises died, and so, etc.

COUNTS FOR MURDER IN THE FIRST AND SECOND DEGREES BY
STRIKING WITH A PITCHFORK.

That A B, on, etc., in said county, in and upon one C D, then and there being, did unlawfully, feloniously, purposely and of deliberate and premeditated malice make an assault, and with a certain pitchfork which he, the said A B, in both his hands then and there had and held, him, the said C D, unlawfully, feloniously, purposely and of deliberate and premeditated malice, with the intent him, the said C D, then and there, purposely and of deliberate and premeditated malice to kill and murder, did strike, penetrate, cut and wound, thereby, then and there, purposely and of his deliberate and premeditated malice, giving in and upon the belly of him, the said C D, one mortal wound of the length of one inch and depth of six inches, of which mortal wound the said C D then and there instantly died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, purposely and of deliberate and premeditated malice did kill and murder.

SECOND COUNT.

And the jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the state of —, do further present that A B, on, etc., in said county, in and upon the said belly of one C D, then and there being, purposely, unlawfully and maliciously, but without deliberation and premeditation, did make an assault, and with a certain pitchfork which he, the said A B, in both his hands then and there had and held, and with the intent him, the said C D, then and there purposely and maliciously to kill and murder, him, the said C D, did strike, penetrate and beat, thereby unlawfully, purposely and feloniously giving to him, the said C D, by the striking, penetrating and beating aforesaid with said pitchfork, in and upon the belly of him, the said C D, one mortal wound of the length of one inch and the depth of six inches; of which said mortal wound the said C D then and there instantly died; and so the jurors aforesaid upon their oaths aforesaid do say that the said A B, him, the said C D, in manner as aforesaid, unlawfully, purposely and maliciously, but without deliberation and premeditation, did kill and murder.

MANSLAUGHTER COMMITTED BY NEGLIGENCE.

That A B, on, etc., in said county, in and upon the public highway, in and upon one C D, then and there being, did make an assault, and a certain wagon then and there drawn by two horses, which he, the said A B, was then and there driving in and along the said highway, in and against the said C D, unlawfully and maliciously did force and drive, and him, the said C D, did then and there throw to and upon the ground, and did then and there unlawfully and maliciously force and drive one of the wheels of said wagon against and upon and over the head of him, the said C D, then lying upon the ground, and thereby then and there did give to the said C D, in and

upon his head, one mortal fracture and contusion, of which said C D then and there instantly died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in manner aforesaid, unlawfully and maliciously did kill and slay.¹

NEGLECT OF WIFE BY HUSBAND.

That A B, on, etc., in said county, being then and there the husband of one C D, and living and cohabiting as husband and wife with the said C D, in said county, and whose duty it was to provide for her, his said wife, necessary food, clothing and protection from the inclemency of the weather, and having then and there the necessary means to provide the same, and she, the said C D, being sick, destitute and entirely dependent on said A B, her husband, for her support, yet he, the said A B, well knowing the wants and necessities of his said wife, and having the means then and there to provide for, supply and relieve the same, negligently, unlawfully and feloniously refused and neglected to provide her, the said C D, with necessary food and clothing and protection from the inclemency of the weather, by reason of which the health of his said wife was greatly impaired and injured, and afterward, to wit, on the day next succeeding the day first named, and on every day thereafter, until the — day of —, in the same year, said A B then and there unlawfully, willfully and feloniously did refuse and neglect to provide necessary food, clothing and protection from the inclemency of the weather for his said wife, C D, although during all of that time he had sufficient means to provide the same, and the said C D having no means of support and being too weak and feeble to go abroad, by reason whereof said

¹ The above is the substance of the form in 2 Chitty, Cr. L., 783. An indictment for manslaughter drawn after approved common law precedents is good under the statute. *Sutcliffe v. State*, 18 Ohio, 469.

Manslaughter is defined by Blackstone as "the unlawful killing of another without malice either express or implied, which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act; * and hence it follows that in manslaughter there are no accessories before the fact; because it is done without premeditation as to the first or voluntary branch. If upon a sudden quarrel two persons fight and one of them kills the other, this is manslaughter; and so it is if they upon occasion go out and fight in a field, for this is one continued act of passion, and the law pays that regard to human frailty as not to put a hasty and deliberate act upon the same footing with regard to guilt, etc. * *

"The second branch, or involuntary manslaughter, differs also from homicide, excusable by misadventure in this: that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one" * * as "where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection." 4 Com. 191-192.

C D then and there all the days aforesaid, then, and until the — day of — in the same year, sickened and languished with a mortal sickness so as aforesaid caused and produced by said neglect of the said A B, until on the day last mentioned, in said county, she, the said C D, then and there of said mortal sickness died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, her, the said C D, then and there unlawfully and feloniously did kill and slay.

MANSLAUGHTER UPON A SUDDEN QUARREL.¹

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully and feloniously did make an assault, and then and there upon a sudden quarrel, him, the said C D, unlawfully did kill and slay; and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A B, him, the said C D, in manner aforesaid, unlawfully and feloniously did kill and slay.²

MURDER IN THE FIRST DEGREE, IN AN ATTEMPT TO COMMIT RAPE.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, violently and feloniously did make an assault then and there, attempting and intending her, the said C D, a female over the age of — years, feloniously, violently and against her will to ravish and carnally know, and did then and there, while so attempting and intending to ravish said C D, and in carrying out said intent and attempt, unlawfully and feloniously, with his private member, did penetrate the womb of said C D, and other internal portions of her body, thereby inflicting in and upon the womb, private parts and body of said C D certain mortal wounds, contusions and injuries with the purpose and intent to kill and murder said C D; by reason of which said mortal wounds said C D, on and from the — day of — in the year aforesaid, until the — day of — in the same year, in said county, did languish and languishing did live, on which said day of — in the year aforesaid in said county, said C D, of the mortal wounds, contusions and injuries aforesaid died; and so the jurors aforesaid, upon their oaths aforesaid do say, that the said A B, her, the said C D, in the manner aforesaid, unlawfully, feloniously, and of deliberate and premeditated malice did kill and murder.

¹ In framing the statute defining manslaughter, the legislature adopted the substance of the common law definition. *Sutcliffe v. State*, 18 Ohio, 469. Malice is not a *necessary* ingredient of manslaughter, but its presence does not render the act less criminal. *Nichols v. State*, 8 O. S., 435.

² In *Hagan v. State*, 10 O. S., 460, it was held that under the statute a jury might find a party guilty of aiding and abetting to commit manslaughter.

Where Several Persons Agree Together to Rob Another, and for that purpose arm themselves with deadly weapons, and meet at the house of the person to be robbed, and to carry out their unlawful design one is left outside ready to aid and assist, while the others enter and commit the crime agreed on, all are guilty of robbery as principals.¹

Where Murder is Committed.—If those inside of the house, while attempting to consummate the robbery and in furtherance of the conspiracy, purposely kill the person they are intending to rob, while he is resisting such attempts, and such killing is the natural and probable consequence of the common purpose, the person outside, who is aiding and assisting, is equally guilty as the one striking the fatal blow, though he did not, previous to such attempt, agree to or assent to such killing.²

IN THE FIRST DEGREE IN AN ATTEMPT TO COMMIT ROBBERY.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, violently and feloniously did make an assault, with intent then and there by force and violence and putting him, the said C D, in bodily fear, to take from his person, and against the will of said C D, one gold watch of the value of ninety dollars, of the goods and chattels of him, the said C D, and thereby, then and there did attempt and intend to rob said C D of said property, and to steal and carry the same away; that then and there, while so attempting and intending to rob said C D of said property, and to steal and carry the same away, the said A B, a certain pistol then and there loaded with gunpowder and one leaden bullet, which said pistol he, the said A B, in his right hand then and there had and held unlawfully, feloniously and purposely, and while engaged in said attempt to perpetrate a robbery upon said C D, at and against the said C D, then and there unlawfully, willfully and feloniously did shoot off and discharge, with the intent, then and there, him, the said C D, unlawfully and purposely to kill and murder, and that he, said A B, with the leaden bullet aforesaid, by means of the shooting off and discharging of the said pistol so loaded to, at and against the said C D as aforesaid, did then and there, purposely and of deliberate and premeditated malice, and while engaged in an

¹ Stephens v. State, 42 O. S., 150.

² Stephens v. State, 42 O. S., 150. In the opinion of the court (p. 153) it is said: "If several are associated together to commit a robbery, and one of them, while all are engaged in the common design, intentionally kills the person they are intending to rob, *in furtherance of the common purpose*, all are equally guilty, though the others had not previously consented to the killing, where such killing was done in the execution of the common purpose, and was a natural and probable result of the attempt to rob."

attempt to perpetrate a robbery, strike, penetrate and wound, with the intent him, the said C D, unlawfully and purposely to kill and murder, thereby, then and there giving to him, the said C D, in and upon the head of him, the said C D, giving to him, the said C D, then and there with the leaden bullet aforesaid, by means of shooting off and discharging said pistol so loaded to, at and against the said C D, and by such striking, penetrating and wounding the said C D, one mortal wound in and through the head of him, the said C D, of which mortal wound the said C D did then and there instantly die, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, feloniously, purposely and of deliberate and premeditated malice did kill and murder.¹

IN THE FIRST DEGREE IN AN ATTEMPT TO COMMIT BURGLARY.

That A B, on, etc., in said county, in the night season of the same day, to wit: about the hour of eleven at night, into a certain house of C D there situate, unlawfully, maliciously, forcibly, burglariously and feloniously did break and enter with intent then and there and thereby the personal goods and chattels of said C D, in the said dwelling house then and there being, feloniously and burglariously to steal, take and carry away; that then and there, while so attempting and intending burglariously to steal and carry away said property of said C D, the said A B a certain pistol, then and there loaded with gunpowder and one leaden bullet, which said pistol he, the said A B, in his right hand then and there had and held, unlawfully, feloniously and purposely and while engaged in said attempt to perpetrate a burglary in the dwelling house of said C D as aforesaid, at and against the said C D, then and there unlawfully, willfully and feloniously did shoot off and discharge against the body of said C D, with the intent then and there, him, the said C D, unlawfully to kill and murder; and that the said A B with the leaden bullet aforesaid, by means of the shooting off and discharging of the said pistol so loaded, to, at and against the body of the said C D as aforesaid, did then and there and of deliberate and premeditated malice, and while engaged in an attempt to perpetrate a burglary, strike, penetrate and wound the said C D, in and upon the body of the said C D, giving to him, the said C D, then and there, with the leaden bullet aforesaid, by means of the shooting off and discharging said pistol, so loaded, to, at and against the said C D, and by such striking, penetrating and wounding the said C D, one mortal wound in and through the body of him, the said C D, of which mortal wound the said C D then and there instantly died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said A B, him, the said C D, in the manner aforesaid, unlawfully, feloniously, purposely and of deliberate and premeditated malice did kill and murder.²

¹ The word "personal property" may include bills of exchange, promissory notes and other choses in action. *Turner v. State*, 1 O. S., 425.

² Precedents of indictments for murder while attempting to commit rape, robbery, burglary and arson, are not numerous. In some of them it seems to be considered that the words "deliberate and premeditated malice,"

IN THE FIRST DEGREE WHILE THE SLAYER IS ATTEMPTING TO
COMMIT ARSON.

That A B, on, etc., in said county, unlawfully, maliciously and feloniously, a certain dwelling house there situate, of the value of — dollars, the property of one C D, did then and there attempt to set on fire, by then and there igniting a quantity of paper saturated with coal oil, near certain barrels of spirits of turpentine within said building, with the intent said dwelling house of C D to burn and destroy, and then and there, while unlawfully, maliciously and feloniously so attempting and intending to burn and destroy said dwelling house, the said A B, a certain pistol then and there loaded with gunpowder and one leaden bullet, which said pistol he, the said A B, then and there in his right hand had and held, unlawfully, feloniously and purposely, and while engaged in said attempt to perpetrate arson by burning said dwelling house, at and against the neck of the said C D, then and there, unlawfully, willfully and feloniously did shoot off and discharge, with the intent, then and there, him, the said C D, unlawfully and purposely to kill and murder; and that he, the said A B, with the leaden bullet aforesaid, by means of the shooting off and discharging of the said pistol so loaded to, at and against the neck of the said C D as aforesaid, did then and there, unlawfully and purposely, and while engaged in an attempt to perpetrate arson, strike, penetrate and wound the said C D, then and there, in and upon the neck of him, the said C D, giving to him, the said C D, then and there, with the leaden bullet aforesaid, by means of the shooting off and discharging said pistol so loaded to, at and against the neck of the said C D, and by such striking, penetrating and wounding the said C D, one mortal wound of the length of half an inch and depth of four inches, of which said mortal wound the said C D then and there instantly died; and so the jurors aforesaid, on their oaths aforesaid, do say, that the said A B, him, the said C D, in the manner aforesaid, unlawfully, feloniously, purposely and of deliberate and premeditated malice did kill and murder.¹

were unnecessary, the killing being committed while the slayer was in the commission of a felonious act. The punishment, however, is restricted to four offenses, and in three of these the fact that the party was armed would *prima facie* show that he intended murder if necessary; while in rape the act being deliberate and no doubt premeditated, the party committing the offense will be liable as a murderer if death results. It would seem proper in all these cases to charge the intent unlawfully to kill and murder.

¹ The intent or purpose to kill must in all cases be averred in the indictment and be proved on the trial, otherwise there can be no conviction of murder in the *first* degree, even in cases where the accusation is the attempt to perpetrate a rape, arson, robbery or burglary, or in the administering of poison. In Ohio the intent is a question of fact for the jury. *Fouts v. State*, 8 O. S., 112; *Robbins v. State*, Id., 168; *Kain v. State*, Id.,

Circumstantial Evidence.—Evidence which is not direct and positive is called circumstantial. It is that species of evidence which is applied to the principal fact indirectly, or by means of other facts from which the principal fact may be inferred. As applied to evidence a circumstance is a minor or other fact.

The distinction between direct and circumstantial evidence is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial, as, in case of homicide, that the witness saw the accused kill the deceased. If, however, there is no direct proof of the commission of the offense resort may be had to proof of circumstances, or a body of facts of so conclusive a character as to establish the principal fact beyond a reasonable doubt.¹ To justify a conviction on circumstantial evidence each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence; as in a case of homicide, tried before Lord Eldon, where the testimony tended to show that the accused was near the place where the murder was committed at the time, and raising a strong suspicion that he was the person who fired the pistol but fell short of fastening the charge upon the accused. The surgeon had stated in his testimony that the pistol had been fired near the person of the deceased because the body was blackened and the wad found in the wound. The judge then inquired if he had preserved the wad. He said he had but had not examined it. On being requested to do so he unrolled it carefully and on examination it was found to consist of

306. This rule, no doubt, will be adopted by states which, like Nebraska, have copied substantially the Ohio Criminal Code.

¹ In *Horback v. Miller*, 4 Neb., 44. Judge Gantt very clearly states the rule as follows: "This presumption, however, must rest upon facts proved, for when the main fact in respect of the subject-matter in controversy can not be proved by direct testimony, such fact is arrived at by the proof of other facts so associated with the fact in question that the relation of cause and effect lead to a satisfactory and certain conclusion. Therefore presumptive evidence consists in the proof of minor or other facts, incident to or usually connected with the fact sought to be proved, which, taken together, inferentially establish or prove the fact in question to a reasonable degree of certainty."

paper constituting a part of a printed ballad, and the corresponding part of the same ballad was found in the pocket of the accused.¹ Here, although there was little doubt that the accused fired the pistol, it was not absolutely conclusive that he had loaded and wadded it himself; he might have picked up the piece of paper in the street. If, however, by another witness it was proved that the accused purchased the ballad in question of him, and by another that he sold the pistol to the accused, these circumstances, from independent sources, would add greatly to the weight of the proof establishing the guilt of the accused.²

Evidence Required to Prove Each Circumstance.—The several circumstances or facts from which the principal fact is to be inferred must be proved by competent evidence, and by the same weight and force of evidence as if each one were the main fact in issue.³ The chain can not be stronger than its weakest link. Therefore it is essential that each fact or circumstance necessary to establish the charge be proved beyond a reasonable doubt. There is reason to believe that at times this important requirement of the law has been disregarded, and that strong suspicion has been allowed to take the place of testimony—the jury being swayed by public sentiment.

The Facts Proved must be Consistent with Each Other and with the Main Fact Sought to be Proved.—When a fact has occurred with a series of circumstances preceding, accompanying and following it, we know that all of these must have been consistent with each other, otherwise the fact would not have been possible. If, therefore, any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstances upon which the inference depends, and however plausible or apparently conclusive the other circumstances may be, the charge must fail; as where it is clearly proved that the accused was elsewhere at the time the offense is alleged to have been committed.⁴

¹ Shaw, Ch. J., in *Com. v. Webster*, 5 Cush., 315.

² *Id.*, 317.

³ *Id.*, 5 Cush., 317-318.

⁴ *Id.*, 318-319.

The Circumstances when Taken Together must Exclude every other Hypothesis.—It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. To establish guilt the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should, to a moral certainty, exclude every other hypothesis. The evidence must establish the *corpus delicti* as it is termed, or the offense committed as charged; and, in case of homicide, must not only prove the death by violence, but must, to a reasonable extent exclude the hypothesis of suicide, and a death by the act of any other person.¹

The Rule as Stated by Alderson, B.—In a case where the evidence was entirely circumstantial, Alderson, B., instructed the jury that to justify a verdict of guilty they must be satisfied not only that those circumstances were consistent with the accused having committed the act, but that they must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person. He then pointed out to the jury the tendency of the human mind to supply, by slight evidence or conjecture, some of the facts necessary to establish guilt, overlooking the fact that a single circumstance inconsistent with such conclusion may be sufficient to destroy the hypothesis of guilt.²

Weight of Circumstantial Evidence.—It is said that circumstantial evidence is often the most convincing; that it is difficult to

¹ *Com. v. Webster*, 5 Cushing, 319-320. In the valuable charge of Chief Justice Shaw in this case, the rules as to circumstantial evidence are very fully stated, and the jury duly cautioned as to the necessity of basing their verdict on circumstances proved to the same degree of certainty as though each fact was itself to establish the guilt of the accused.

² *Hodges' case*, 2 Lewin, C. C. 227. "What circumstances will amount to proof can never be a matter of general definition. The legal test is the sufficiency of the evidence to satisfy the conscience and understanding of the jury. On the one hand absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt. Even direct and positive testimony does not afford grounds of belief of a higher and superior nature." 3 Stark. Ev., 514.

fabricate the links in the chain of circumstances so that they may appear consistent with each other and thereby preserve the semblance of truth.¹ This to some extent is no doubt true, but the weight to be given to circumstantial evidence must depend to a great extent on the nature of the circumstances and the amount of corroborative testimony. Circumstances of every kind must be proved by human testimony, and although the circumstances themselves may not lie, the witnesses in detailing them may, or may be mistaken. Or even if the facts are true an unwarranted inference may be drawn from them.²

Suicide or Accident.—To establish the fact that the deceased came to his death by the unlawful act of another person, the possibility of reasonably accounting for the fact of death by suicide or accident, or by any natural cause, must be shown not to exist by the circumstances proved. It is only where no other hypothesis will account for all the facts and explain all the conditions of the case that it can safely be inferred that the death was caused by intentional injury. While suicide or accident may, from various causes, be falsely suggested as the cause of death, in many cases, yet as death is of frequent occurrence from such causes neither the court nor jury have the right to assume that such suggestion is false. In other words, the burden of the proof of guilt is upon the state. All presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. It is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the con-

¹ *State v. Turner*, Wright, (O.), 20-28.

² *Wills*, Cir. Ev., 29-30. In *Rex v. Patch* (*Wills*, Cir. Ev., 32), McDonald B., said, "Where circumstances connect themselves closely with each other, when they form a large and strong body so as to carry conviction to the minds of a jury, it MAY BE proof of a more satisfactory sort than that which is direct. In some lamentable instances it has been known that a short story has been got by heart by two or three witnesses; they have been consistent with themselves, they have been consistent with each other, swearing positively to a fact, which fact has turned out afterward not to be true."

trary; but the evidence must establish the truth of the fact to a reasonable and moral certainty.¹

A Chain of Circumstances.—In *People v. How*,² one Church was called out of bed between one and two o'clock, A. M., December 30, 1823, by a person who called at his house on the pretense that he had a letter to deliver. As Church opened the door he was shot dead. None of the inmates of Church's house were able to identify the murderer. The circumstances by which it was sought to identify the prisoner as the person who committed the murder were the following: First, not long before he had frequently complained that Church had defrauded him; second, he had used threats against Church to a number of people, and on one occasion had threatened to take his life; third, he had endeavored to employ another to assist him in killing Church; fourth, he had threatened to shoot Church; fifth, he was seen lurking near the residence of Church a few evenings before the murder with his rifle and endeavoring to conceal it; sixth, he left the village of Angelica the evening before the murder in time to have gone to Church's residence and committed the murder; seventh, he had something under his coat which had the appearance of a rifle; eighth, his suspicious conduct on the evening before the murder; ninth, the horse which he had ridden on the night of the murder was found next morning to be wet with sweat; tenth, his false statements; eleventh, the bullet with which Church

¹ *Com. v. Webster*, 5 Cush., 295-320. "In frequent instances attempts have been made, by those who have really been guilty of murder, to perpetrate it in such a way as to induce a belief that the party was *felo de se*. It is well for the security of society that such an attempt seldom succeeds, so difficult is it to substitute artifice and fiction for nature and truth. Where the circumstances are natural and real and have not been counterfeited with a view to evidence, they must necessarily correspond and agree with each other, for they did really so co-exist; and therefore if any one circumstance which is essential to the case attempted to be established be wholly inconsistent and irreconcilable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential can not be true. 2 Stark. on Ev., 519-521.

² *Wheeler*, 2 Cr. Cas., 412.

was shot was found to match with one in the prisoner's rifle-box; twelfth, the horse-hair and lint found adhering to the rifle; thirteenth, the patch and tow wadding which corresponded with that in the prisoner's house. Upon these circumstances the prisoner was convicted, and afterward confessed his guilt and was executed.

Attempts to Suppress Evidence.—To suggest false and deceptive explanations, and to cast suspicion without cause on other persons, tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. This consideration, however, must not be pressed too urgently, because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. Such was the case mentioned by Lord Hale in *Pleas of the Crown*, of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as the niece. The deception was discovered, and he was found guilty of murder and executed, although the re-appearance of the niece, whom he had sent abroad, conclusively proved that he was not guilty of murder.¹

Flight.—At common law, flight was considered so strong a presumption of guilt that in cases of treason and felony the effect was forfeiture of the goods of the accused, even if he was acquitted;² and until the practice was abolished by statute the officer required the jury, after a verdict of acquittal, to say whether or not the accused had fled because of the charge.³ A consciousness of innocence will inspire its possessor with a sense of the justness of his cause, and make him ready to meet his accuser face to face. This is the general rule, yet who will say that it is applicable in every case? even an innocent person, as experience has shown, may be so constituted as not to have the courage to stand a trial

¹ *Com. v. Webster*, 5 Cush., 316-317.

² *Co. Litt.*, 375.

³ *Wills, Cir. Ev.*, 80.

but seek safety in flight. The older cases certainly placed too much stress upon flight as an evidence of guilt, which later authorities to a great extent have modified.

Conduct and Behavior.—A person who has arrived at mature years and who has heretofore enjoyed the confidence and respect of his fellow men, and who has, perhaps, an interesting family and respectable connections, is suddenly arrested upon a charge of felony; who can say what would be proper conduct on such an occasion, or what evidence of either innocence or guilt? The language of the eminent judge in the case of *Com. v. Webster*,¹ is worthy of consideration where he remarks, "Who of us can say how an innocent or guilty man ought, or would be likely to act in such a case, or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, will always appear calm and collected, or that a guilty man, who, by knowledge of his danger, might be somewhat braced up for the consequences, would always appear agitated, or the reverse? It is impossible to lay down any rule by which to determine what is proper conduct of a party charged with crime. Where one is charged with an atrocious offense, and the appearances are such as to give color to the charge, and the public indignation and prejudice are thoroughly aroused, a trial in such a community, under such conditions, ordinarily will have but one result—a conviction, if there is sufficient evidence to colorably support the charge; or even where there is no prejudice and a fair trial can be had, as is almost invariably the case, but the fear of the ordeal of the trial to one unaccustomed to courts and juries may lead to conduct on his part apparently inconsistent with innocence. The most that can be said of such evidence is, that while it is receivable, and is to be weighed by the jury, it should be received with caution and carefully weighed, and no hasty conclusions of guilt drawn from it either by the jury, court or prosecutor; and in no case is such conduct alone sufficient to authorize a verdict of guilty.

¹ Bemis, R., 486.

Motive.—Mere motive is always inconclusive in establishing the *corpus delicti*. Mr. Burrill has classified motives under two principal heads, viz.: The desire for unlawful gain, and to gratify unlawful passion.¹ The first of these—the desire of unlawful gain, is shown in the ordinary crimes of burglary, forgery, larceny and robbery, and occasionally is the incentive to murder itself.

The motives to the gratification of unlawful passion, which are supposed to constitute a fruitful source of the atrocious offenses of murder, mayhem, rape and arson, are discussed at length in Burrill on Circumstantial Evidence,² to which the reader is referred.

Proof of motive is not necessary to procure a conviction,³ although it is competent evidence against the accused.⁴

And where two or more persons have acted *in concert* in the commission of the homicide, it is competent for the state to prove upon the separate trial of each, the motives which actuated the others in the alleged homicide.⁵

Can not be Proved to Show a Conspiracy.—Where parties are charged with the commission of a murder, ill-feeling toward the person killed, on the part of those not on trial, can not be proved for the purpose of showing a conspiracy between them and the defendant to commit the homicide.⁶

Conspiracy must be First Proved.—Nor can the declarations of those not on trial be proved in such case, to show their motives, or malice on their part toward the deceased, unless such declarations were made during the pendency of the conspiracy, and in furtherance of the common design.⁷ Where an act or transaction is given in evidence for the purpose of

¹ Burrill on Cir. Ev., 285.

² 290-328.

³ Schaller v. State, 14 Mo., 502; Crawford v. State, 12 Geo., 142; Sumner v. State, 5 Blackf., 579; People v. Robinson, 1 Park., Cr. R., 649.

⁴ Rufer v. State, 25 O. S., 464; Murphy v. People, 63 N. Y., 590; Hendrickson v. People, 6 Seld., 13; Rex v. Clewes, 4 Car. & P., 221; Overstreet v. State, 46 Ala., 30; Thompson v. State, 55 Geo., 47.

⁵ Rufer v. State, 25 O. S., 465.

⁶ Id., 25 O. S., 465.

⁷ Id., 25 O. S., 465.

showing the motive or state of mind which actuated the parties to it, it is proper to permit the parties to be affected to show the immediate circumstances which led to the transaction, in order that the real object of the inquiry may be ascertained.¹

The Absence of Apparent Motive may always be shown and is a circumstance for the jury to consider.²

In the investigation of a charge of crime we look at all the surrounding circumstances, including motives, by which the accused is connected with other persons and things. We judge of men's motives from their previous statements, desires, or supposed advantages to be gained by the commission of the offense. It is to be feared that the existence of apparent inducements to the commission of the offense, as where the accused will gain some advantage thereby, is sometimes permitted to supersede the necessity for the same amount of proof as otherwise would be deemed necessary to establish guilt. Motive alone, without action, can never be a crime or warrant a conviction. When, however, a motive has been shown, the adequacy of the motive is considered of little importance. Experience has shown that atrocious crimes have been committed from a very slight motive, not merely to gratify malice or revenge, but to gain a small pecuniary advantage, and to drive off for the time being pressing pecuniary difficulties.³

The supposed homicide may actually be a case of accidental death and not a crime, or, supposing a crime to have been committed, the circumstances may fail to point out the accused as the person who must have committed the offense. In considering circumstantial evidence it should be taken up link by link, without feeling, bias or preconceived opinion, and only after each link in the chain of circumstances material to establish the charge shall have been established to that degree of certainty as to exclude reasonable doubt, should a verdict of guilty be returned.

Confessions.—The confession of a prisoner is received in

¹ *Rufer v. State*, 25 O. S., 465.

² *People v. Ah Fung*, 17 Cal., 377; *Howser v. Com.*, 51 Pa. St., 392.

³ *Wills, Cir. Ev.*, 44.

evidence on the same principle upon which admissions in civil suits are received, viz.: the presumption that a person will not make an untrue statement against his own interest. Not unfrequently, however, the motive of hope or fear induces a party to make an untrue confession, which seldom operates in the case of ordinary admissions. In consequence, also, of the necessity of using the testimony of witnesses frequently not of high character, for the discovery of secret crimes, confessions are subject in a remarkable degree to the imperfections attaching generally to hearsay evidence. In criminal cases experience has shown that the language of the accused is often misrepresented, through ignorance, inattention or malice, and is exceedingly liable to misconstruction, and can not be disproved by negative evidence in the same manner as facts,¹ while the accused being an interested party, his denial of the confession has but little weight.²

A Confession must be Voluntary, to be admissible as evidence, and this fact must be found by the court before the alleged confession can be received. The usual course is to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him.³

¹ 1 Phillips, Ev., 532-534.

² In a valuable article in the Albany Law Journal, June 12, 1886 (page 465), it is said: "So far as relates to alleged confessions of persons under accusation, the oath of the average detective is not as good as the oath of an honest and conscientious man. The latter is not able to do a tithe of the dirty things supposed to be essential to the average detective in the pursuit of a suspect. It goes without saying that very frequently the detective will build up for himself a theory of crime which will enslave, befog and befool him utterly; he will furnish the most cogent and conclusive circumstantial evidence against an accused person wholly innocent.

³ Greenleaf, Ev., § 219. "No improper influence, either by threat, promise, or misrepresentation, ought to be employed; for however slight the inducement may have been, a confession so obtained can not be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or interest than from a sense of guilt. A confession so obtained is not rejected from a regard to public faith, but because when forced from the mind by the flattery of hope, or by the torture of fear, it comes in so questionable a shape that no credit should be given to

The witness may be cross-examined and it should be made clearly to appear that the alleged confession was voluntary.

The common law, harsh in many respects in the procedure and punishment of those violating the law, yet gives but little weight to confessions alleged to have been obtained from persons accused of crime. Hence by the statute Wm. III, c. 3, in prosecutions for treason, two witnesses were required to the same overt act of treason, and this addition, that the confession of the prisoner, that would countervail the necessity of such proof, must be in open court.¹

A Confession Made under Promises, threats, menace or by any artifice, is not admissible. An officer who is a stranger to the prisoner approaches him as a friend, but ready to catch any suggestion or insinuation that may fall from his lips and use it against him; it would be very remarkable if this officer, who probably but an hour or day before was totally unacquainted with the accused, should be able to obtain a confession from him without an inducement of some kind, which even the best friends of the prisoner could not obtain.²

it by a jury. * * The examination of the prisoner ought not to be upon oath, and when taken it has been rejected. On first view it might appear unreasonable to refuse to receive in evidence a confession made under this sanction requiring stricter adherence to truth, and which would otherwise have been evidently admissible, but it must be remembered that every admission of a prisoner must, in order to be available, be purely voluntary; and that the dread of perjury, with the apprehension of additional penalties in case he deviates from the truth may add an influence of fear in his mind." Chitt. C. L., 69-70.

¹ 4 Blacks. Com., 357. In the construction of this statute it was held that a confession of a prisoner taken out of court before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. *Id.* Blackstone adds, "But hasty, unguarded confessions made to persons having no such authority, ought not to be admitted as evidence under this statute. And, indeed, even in cases of felony at common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menace, seldom remembered accurately or repeated with due precision, and incapable in their nature of being disproved by other negative testimony." *Id.*

² In *Preuit v. People*, 5 Neb., 377, in a trial for murder, the accused asked the court to instruct the jury, "That in weighing the testimony greater care should be used by the jury in relation to the testimony of persons who are employed to find evidence against the accused than in other cases, because

Judicial Confessions.—The testimony of a witness given voluntarily, before any tribunal having jurisdiction, is, unless specially excepted by the statute, generally competent evidence in any proceeding, civil or criminal, to which it is pertinent; and the same is true of the party's voluntary affidavit.¹ Such confessions are received because, being voluntarily made, in a case where the accused could not be required to criminate himself, the presumption is that they are true.

When not Voluntary.—When, however, a witness is compelled to answer questions against his objections that the answers would tend to criminate him, or the tribunal had no jurisdiction, or the witness was under constraint or fear, such testimony is not admissible.²

Examination before a Magistrate.—Where a prisoner's statement is taken before a magistrate in writing, whether taken under a statute or not it must be produced, or a valid reason for the failure shown, otherwise parol evidence of the writing can not be received.³

Confessions of Prisoners Made before a Magistrate, taken in the course of judicial proceedings and according to prescribed forms, are free from many of the objections attending extra judicial confessions. Still, even as to these, it should appear that they were made voluntarily.⁴

of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinion of the matter in which they are engaged. The court held that the instruction should be given; it said, "We think the observation of every judge who is much accustomed to preside in criminal trials, will bear us out in saying that the testimony of informers, detectives and other persons employed in hunting up testimony in criminal cases, should be criticised more closely than that given by witnesses who are wholly disinterested."

¹ *Coker v. State*, 20 Ark., 53; *Alston v. State*, 41 Tex., 39; *Reg. v. Goldshede*, 1 Car. & P., 161; 2 *Bish. Cr. Pro.*, § 1225.

² *Reg. v. Coote*, Law R., 4 P. C., 599; *Reg. v. Garbett*, Dears. C. C., 236; *State v. Broughton*, 7 Ired., 96; *People v. McMahon*, 15 N. Y., 384; U. S. *v. Mannier*, 1 Hughes, 412; 2 *Bish. Cr. Pro.* 1256.

³ *Lightfoot v. People*, 16 Mich., 507; *Rex v. Rivers*, 7 Car. & P., 177.

⁴ At common law it was required that the examination be reduced to writing and returned to the court, and the particulars of such examination could not be given in evidence by parol unless it be clearly proved that in

Dying Declarations.—In prosecutions for murder, dying declarations of the person with whose murder the prisoner stands charged are admissible, if made under a sense of impending death. In Woodcock's case,¹ Eyrie, Ch. J., said, "being made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

Must be Made under a Sense of Impending Death.—Before such declarations can be received it must be made to appear that they were made under the present apprehension of impending death. If it be shown that the declaration of the deceased was so made, it will not become inadmissible by showing that the dying person subsequently appeared stronger.²

Incompetent When.—The dying declarations of persons who, fact such examination was never reduced to writing, the reason assigned being that it would permit the negligence of the magistrate to operate to the prejudice of the prisoner, as a witness, by selecting only part of what had been said, might by using different words give a different color to the original statement. If, however, it was proved that the examination was not taken in writing, parol evidence of the prisoner's declarations was admissible. Therefore, minutes taken by an attorney for the prosecution at the direction of the magistrate, have been admitted in evidence, though not signed by either the prisoner or magistrate. Under the statute, 2 and 3 Ph. & M. c. 10, it was competent for the prisoner to retract his admission of guilt so as to prevent his examination being read in evidence against him; but the courts held that the previous admission of guilt might still be given in evidence against him as a confession. 1 Chitt. Cr. L., 70.

¹ 1 Leach, 437. It has long been settled, by an almost unbroken series of cases, that dying declarations are restricted to the trial for the identical homicide which is supposed to have occasioned the death of the person who made the declaration. They can be received only where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the declaration. *Rex v. Mead*, 2 Barn. & Cres., 605. Dying declarations of a deceased person in favor of a prisoner are receivable in favor of a prisoner charged with his death, as they would be against him if unfavorable. *R. v. Scaife*, 1 Mo. & R., 551; *People v. Knapp*, 26 Mich., 112; *Moore v. State*, 12 Ala., 764.

² *State v. Tilghman*, 11 Ired., 513; *Rakes v. People*, 2 Neb., 163; *Fitzgerald v. State*, 11 Id., 579; *State v. Medicott*, 9 Kas., 257.

if living, would have been incompetent to testify, can not be received, as, where a defect of religious principle is made a test of the competency of a witness, if the deceased had no idea of a future state his declaration will be inadmissible. So the dying declarations of a child four years of age were rejected, because it was considered that a child of that age could not possibly have any idea of a future state. When, however, a statement is made by a child of intelligence, much impressed with the nature of an oath, and expecting to die, the statement may be received.¹

Testimony which would be Irrelevant if testified to by a witness, is equally so in a dying declaration, and therefore should be excluded.²

Representations Made to the Deceased are often of importance in ascertaining the opinion the deceased entertained of his own danger, as on the trial of a prisoner for the murder of a woman by inducing her to take poison, the declaration of the deceased, made to an apothecary within an hour of her death, in consequence of which the apothecary told her that she must know what she had done, and that she could not live twenty-four hours unless relief was given, a majority of the court held a declaration thereafter made inadmissible, because the deceased was given to understand that if she told what was the matter with her she might have relief and recover.³ The same rule was applied in *King v. Christie*,⁴ where, in answer to an inquiry, by the person injured, of the surgeon, if the wound was necessarily mortal, the surgeon answered that persons similarly wounded had recovered, but that the case was one of extreme danger.⁵

¹ 1 Phillips' Ev., 287-288. A child who has not arrived at the years of discretion is not supposed capable of understanding the nature of an oath, or of entertaining such views of a future accountability as in the prospect of present dissolution are deemed equivalent to an oath; and therefore he is not received as a competent witness on the stand, and his dying declarations are not allowed in evidence. *Id.*

² Bish. Cr. Pro., § 1211, and cases cited.

³ 1 Phillips' Ev., 294; *King v. Welborne*, 1 East, P. C., 258.

⁴ 2 Russ. Cr. & M. by Greaves, 754; 1 Phillips' Ev., 294.

⁵ 1 Phillips' Ev., 296. If the expressions used by the deceased do not indicate an utter abandonment of hope, the declarations should be rejected. *R. v. Howell*, 1 Car. & K., 689.

Form of Declaration.—The form of the declaration is not material. It may become the subject of legal evidence when made under oath before a magistrate and signed by the deceased and by the magistrate. It is no objection to it that it was made in answer to questions, and obtained by pressing the questions,¹ or in a foreign language or by signs.² Such declarations have been received in evidence, although it appeared that the deceased had made a subsequent statement which had been taken in writing before a magistrate, but which statement was not ready to be produced on the trial. The statement of the deceased, when taken down in writing, is more reliable and accurate than the memory of most persons. The courts, however, seem to hold that the written statement is of no higher grade than the unwritten testimony;³ and it has been held that the substance of the declaration may be given, if the witness is not able to state the exact words used.⁴

The better rule, however, seems to be where the statement of the deceased was reduced to writing to require it to be produced if existing, and neither a copy nor parol evidence of such declarations should be received.⁵

The Declaration must be Complete in Itself; for if the declaration appear to have been intended by the dying person to be connected with and qualified by other statements, which he or she was prevented by any cause from making, it can not be received.⁶ Such declarations are admissible, although there may be other witnesses by whom the same facts may be proved as are sought to be established by the dying declarations.⁷

The Effect of Dying Declarations, that is, the weight to be

¹ *R. v. Fagent*, 7 C. & P., 238; *R. v. Woodcock*, 1 Leach, 437.

² *Com. v. Casey*, 11 Cushing, 417.

³ *Rex v. Reason*, 1 Str., 499.

⁴ *Montgomery v. State*, 11 Ohio, 424.

⁵ *Rex v. Gay*, 7 C. & P., 230; *Trowter's case*, P. 8 Geo. I, B. R., 12; *Vin. Abr.*, 118; *Leach v. Simpson*, 1 L. & E., 58; 1 *Greenleaf, Ev.*, § 161.

⁶ 1 *Greenleaf, Ev.*, § 159.

⁷ *People v. Green*, 1 Park. Cr. R., 11; 1 *Denio*, 614.

given to them, ordinarily must be left to the jury.¹ It will often happen, however, that the particulars of violence of which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed. The consequences also of the violence may have been to occasion an injury to the mind and an indistinctness of memory as to the transaction. Nor is it to be forgotten that animosity and resentment are likely to be felt in such a situation, that even the near approach of death can not extinguish. Great care is necessary therefore in receiving impressions from the statements of persons in a dying state, and the importance also of inquiring into their manner and deportment at the time.²

The Testimony of the Statements of a Deceased Witness, given on a former trial between the same parties, touching the same subject-matter, has been admitted, among the exceptions to the rule excluding hearsay evidence, and has been sanctioned by an almost unbroken current of authorities both in England and this country. It has been received from necessity and under proper precaution as secondary evidence, being the best attainable under the circumstances. This doctrine has been denied when applied to criminal cases, but no substantial reason exists for a distinction between civil and criminal cases. The competency of such testimony in criminal cases is clearly sustained by the weight of authority in England. In *King v. Radburn*,³ the testimony of a deceased witness, who had been examined in the presence of the accused, was admitted; and the same rule was recognized by Lord Kenyon, in *King v. Joliffe*.⁴ In *U. S. v. Wood*,⁵ it was held that what a witness, since dead, had testified at a former trial on the indictment,

¹ *Donnelly v. State*, 2 Dutcher, 463; *State v. Quick*, 15 Rich., 342; *Walker v. State*, 37 Tex., 366; *Moore v. State*, 12 Ala., 764.

² 1 Phillips' Ev., 299.

³ 1 Leach, C. C. L. (3 Ed.), 512.

⁴ 4 Term R., 290.

⁵ 3 Wash., C. C., 440. See also *Kendrick v. State*, 10 Humph., 479; *Crawford v. State*, 2 Yerg., 60; *State v. Hooker*, 17 Vt., 659; *Campbell v. State*, 11 Ga., 354; *Hill's case*, 2 Grattan, 595; *State v. Tighlman*, 11 N. C., 514; *Woodsides v. State*, 2 How. (Miss.), 656.

may be proven by a person who was present and heard his testimony. In *Com. v. Richards*,¹ the constitutional question of the competency of such testimony was directly presented, and after full consideration it was held that the competency of such evidence was not affected by that provision of the bill of rights requiring the witnesses for the prosecution to meet the accused face to face; in effect, that where a witness has appeared on a former trial of the same case, and testified, has then appeared face to face with the accused, that in case of his death his testimony, so given, may be introduced in evidence. The statements of the deceased witness having been made under oath and under legal requirement, and in a case in which an opportunity for cross-examination was afforded to the person against whom they were offered, carry with them, *prima facie* at least, a presumption of being true. Neither is it necessary that the witness should remember and repeat the exact words of the deceased witness.

Such a rule has never, except in two or three cases,² so far as the writer is aware, been applied by the courts, and if adopted would practically prevent the reception of testimony concerning what a deceased witness may have testified to, as no person could, perhaps years afterward, testify to the very words of a witness.³

Impeachment of Declarant.—The accused may introduce testimony showing that the declarant made statements in conflict with his dying declarations for the purpose of weakening their force, but not to exclude such declarations from being introduced in evidence.⁴ The accused may also introduce proof to impeach the veracity of the declarant in the same manner as if he

¹ 18 Pick., 439.

² *Rex v. Joliffe*, 4 Tenn. R., 285; *Com. v. Richards*, 18 Pick., 434; U. S. v. Wood, 3 Wash. C. C., 440.

³ While there is but little doubt of the right to introduce the statements of a deceased witness, yet such testimony must be carefully scrutinized, and both the court and jury should be fully convinced that it is substantially that of the deceased witness. There is danger of a want of recollection of some material fact.

⁴ *People v. Lawrence*, 21 Cal., 368; *Moore v. State*, 12 Ala., 764; *Wiroe v. State*, 20 O. S., 460. In this case it is said (page 469) that the introduction

were a witness.¹ These rules, no doubt, apply to the testimony of a deceased witness, who may be impeached either generally, as being unworthy of belief, or by showing inconsistent statements.

Res Gestæ.—Written and verbal declarations are often admissible as constituting a part of the *res gestæ*, usually when they accompany some act, the nature, motive or object of which is the subject of inquiry. In such cases the words employed are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best evidence, for ascertaining the character of such equivocal acts as admit of explanation from those indications of the mind which language affords.²

Where words or writings accompany an act, or where they indicate the state of a person's bodily sufferings or feelings, they derive their credit from the surrounding circumstances, and not from the bare expressions of the declarant; therefore the language of a person while doing a particular act, like demeanor or gesture, is more likely to be a true disclosure as to what is really passing in his mind than subsequent statements.³

The Admissibility of such Evidence is to be determined by the judge according to the degree of their relation to the fact and in the exercise of a wise discretion.

The principal points of inquiry are whether the declarations and circumstances offered in evidence were contemporaneous with the main fact under consideration and whether they were so connected with it as to illustrate its character.⁴

Declarations which are a Narration of a Past Transaction are not admissible as evidence of the existence of such occurrence.

of evidence (contradictory) was no valid objection to the introduction of the dying declarations.

¹ *State v. Thomason*, 1 Jones, 274; 1 Bish. Cr. Pro., § 1209.

² 1 Phillips, Ev., 185.

³ 1 Phillips, Ev., 185.

⁴ 1 Greenleaf, Ev., § 108. It is only in cases when the thing done is equivocal, and it is necessary to explain the meaning to show the nature, motive or object of the act, that it is competent to prove declarations accompanying it as a part of the *res gestæ*. Bigelow, J., in *Nutting v. Pope*, 4 Gray, 584.

The declarations must be concomitant with the principal act, and be so connected with it as to be regarded as the result and consequence of the co-existing motives, so as to form a proper criterion in judging the whole conduct of the party.¹ In other words, a party may show the whole transaction to the jury. In *Allen v. Duncan*,² Ch. J. Shaw said it was difficult to lay down any precise general rule as to the cases in which declarations are admissible as part of *res gestæ*.

Time of Making the Declaration.—In order to determine the time, the court will inquire into the existence of any connecting circumstances between the declaration and the act itself; that is, “the nature and strength of the declarations with the act are the material things to be looked at; and although convenience of time can not but be always material evidence to show the connection, yet it is by no means essential.”³

This is illustrated by the declarations of a party while making preparations to commit a homicide. Thus, if a deadly encounter occurs between two persons, in which one of them is killed, if the survivor should claim that he acted in self-defense the evidence of persons who witnessed the encounter might leave it in doubt which of the two was the assailant; but if it was proved that one of the parties, before the encounter, had procured a weapon, which, at the time of obtaining it, he threatened to use on his antagonist, the jury ordinarily would be justified in inferring that such person was the aggressor.⁴

The procuring of the weapon would be a part of the transaction—preparation for the homicide, and ordinarily whatever was said thereafter by either of the parties in relation to the homicide, until the completion of the act, would be admissible. Therefore declarations of the deceased, or threats by him, if connected with the transaction, are admissible in evidence in favor of the accused.⁵

Conspirators.—Where several persons are proved to have

¹ 1 Greenleaf, Ev., § 115.

² 11 Pick., 309-310.

³ *Rand v. Great W. Ry. Co.*, 1 Q. B., 51-61.

⁴ *People v. Scoggins*, 37 Cal., 676; *Wiggins v. People*, 93 U. S., 465.

⁵ *Pitman v. State*, 22 Ark., 354; *Williams v. People*, 54 Ill., 422.

combined together for some illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party. Therefore any writing or verbal expressions of any of such conspirators, in furtherance of the common design, is part of the *res gestæ*.¹

The Conspiracy must be Established by proof sufficient in the mind of the judge to submit to the jury. The gist of the offense is the confederacy to do an unlawful act. The accused must confederate together to do a criminal act, or to do an act which is not criminal by illegal means. The conspiracy may be proved either expressly, by direct evidence, or by the proof of facts from which the jury may infer its existence. It can rarely be proved by express evidence, and necessarily must be by circumstantial. The usual course is to prove that the defendants were acquainted with each other, and that a certain degree of intimacy existed between them; then add any evidence of a common desire to further the unlawful scheme complained of, with proof, if it can be given, of private meetings and consultations.²

The Connection of the Individuals in the Unlawful Enterprise being Prima Facie Shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan and in reference to the common object, is, in the view of the law, the act and declaration of them all, and is therefore original evidence against each one. Nor does it make any difference at what time any one entered into the conspiracy.³ This subject will be further considered in a subsequent chapter.

Defenses.—Homicide is justifiable where the slayer, in the careful and proper use of his faculties, has reasonable ground to believe, and in good faith does believe, that he is in imminent danger of great bodily harm or death from his assailant, and that the only mode of escape from such danger is to take the life of such antagonist, although in fact he may be entirely mistaken as to the imminence or existence of such

¹ Phillips' Ev., 205.

² 2 Arch. Cr. Pl., 1843.

³ 1 Greenleaf, Ev., § 111.

danger.¹ The fact of the existence of such danger is not an indispensable requisite.

Need not Retreat to the Wall, When.—Where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted without retreating, although it be in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent bodily harm.²

In Defense of Person, Habitation and Property.—The rule may be stated generally that a person may repel force with force in defense of his person, habitation or property, against one

¹ *Marts v. State*, 26 O. S., 167-8. It is said, "Such being the law of the case, we think the court erred in ruling out the evidence of the 'violent, vicious and dangerous character' of the deceased. That evidence, offered as it was in connection with proof that the character of deceased was known to defendant, was competent for the purpose of showing that the homicide was justifiable on the ground of self-defense. It tended to show the *quo animo* of the prisoner, and it was for the jury to determine its weight. It could only be used for that single purpose, and could not be considered or used for the purpose of disproving the homicide, or of showing that the prisoner was assaulted, attacked or menaced by the deceased.

* We suppose that evidence of the *reputation* of the deceased, as being a vicious, violent or dangerous person, could only be given after the introduction of testimony showing that such was in fact his character, and then only for the purpose of proving that the prisoner had notice of that character."

² *Erwin v. State*, 29 O. S., 187. The rule is stated differently by Sir Matthew Hale, in *Plea of the Crown*, Chap. 40, but Mr. Justice Foster, in *Foster's Crown Cases*, page 273, published in 1762, states the law as follows: "Self-defense naturally falleth under the head of homicide founded in necessity, and may be considered in two different views: It is either that sort of homicide *se et sua defendendo*, which is perfectly innocent and justifiable, or that which in some measure is blamable and barely excusable. The want of attending to this distinction hath, I believe, thrown some darkness and confusion upon this part of the law. The writers on the common law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at; yet all agree that there are cases in which the man may, without retreating, oppose force to force even to the death. This I call justifiable self-defense, they justifiable homicide. * * In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation or property, against one who manifestly intendeth and endeavoreth with violence or surpris to commit a known felony upon either."

who manifestly intends by violence or surprise to commit a known felony, such as murder, rape, robbery, arson, burglary and the like. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from danger, and if he kill him in so doing it is justifiable self-defense; but a bare fear of any of these offenses unaccompanied by any overt act will not warrant the killing of the other by way of prevention.¹

The Selfridge Case.—The law, as stated by Parker, J., in the Selfridge case, has generally been accepted in this country as correct, although some of the expressions in the charge have led to some confusion. The common law rule therefore, as generally accepted by the courts of this country, may be stated as follows: that where there is not only reasonable ground to believe that there is an intent on the part of A to take the life of B, such belief being based on an actual, immediate and physical attack from A and not on mere conjecture, B may defend his person, even if necessary to take the life of the assailant. The right of resorting to force, however, in self-defense, does not arise while the apprehended mischief exists in machinations only; nor does it continue so as to authorize violence in retaliation or by way of revenge. But if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, although it should afterward appear that there was no such design, it will not be murder, but will be either manslaughter or excusable homicide, according

¹East, P. C., 271. This work was published in 1803, and soon after its publication the celebrated case of *Com. v. Selfridge* was tried in the Supreme Judicial Court of Massachusetts. Chief Justice Parsons, in charging the grand jury which indicted Selfridge, said: "A man may repel force by force in defense of his person against any one who manifestly intends or endeavors, by violence or surprise, feloniously to kill him. And he is not obliged to retreat, but may pursue his adversary until he has secured himself from danger; and if he kill him in so doing it is justifiable homicide. But a bare fear, however well grounded, unaccompanied by any overt act indicative of such intention, will not warrant him in killing. There must be actual danger at the time. But if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, although it should afterward appear there was no such design, it would not be murder." *Stata v. Rose*, 30 Kas., 501.

to the degree of caution and the probable grounds for such belief.¹

Not Excusable.—Where the slayer provokes an assault upon himself in order to have a pretext for killing his adversary, and does, upon being assaulted, kill him, such killing is not excusable homicide in self-defense.²

Not Excusable.—One who makes a malicious assault upon another and continues in the conflict which ensues, can not justify taking the life of his adversary however necessary it may be to save his own.³

But when he has succeeded in wholly withdrawing from the conflict, and in good faith has retreated to a place of apparent security, his right of self-defense is fully restored; and if pursued by his antagonist and there attacked in a manner to endanger his life, he is justified in taking life if it becomes inevitable to save his own.⁴

No more Force to be Used than Seems Necessary.—No one has a right to use any more force in self-defense than a person of ordinary prudence would consider necessary if placed in that position;⁵ and even if an attack is made upon him with intent to take his life, he will not be authorized to *needlessly* kill his assailant, unless he has reason to believe, and does believe, that

¹ In the Selfridge case, Parker, J., said, "A, in the peaceable pursuit of his affairs, sees B, rushing toward him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A, who has a club in his hand, strikes B over the head before or at the same instant the pistol is discharged, and of the wound B dies. It turns out that the pistol was loaded with powder only and that the real design was to terrify A. Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol?" *State v. Potter*, 13 Kas., 414. } \

² *Stewart v. State*, 1 O. S., 67.

³ *Stoffer v. State*, 15 O. S., 47.

⁴ *Id.*; *Bishop*, 2 Cr. L., § 566, has stated the rule with admirable clearness; in effect, that an opportunity for repentance is always open, and when a combatant in good faith abandons the conflict, not merely to gain a greater advantage, and the other pursues him, then if the taking of the life of his adversary is necessary to save his own he will be justifiable. *State v. Hoover*, 4 Dev. & Bat., 365; *Greschia v. People*, 53 Ill., 295-301; *People v. Doe*, 1 Mich., 451.

⁵ *Bish. Cr. Law*, § 842; *State v. Collins*, 32 Iowa, 39; *State v. Neeley*, 20 Id., 108.

it is necessary for his defense, and if a person is struck with the naked hand and he has no reason to apprehend a design to do him great bodily harm, he will not be justified in using a dangerous weapon in return.¹ That is, he can not use such an attack as a pretext to commit a homicide.

Killing in Defense of Others.—Master and servant, parent and child, husband and wife, killing an assailant in the necessary defense of each other, respectively, are excused, the act of the relative assisting being construed the same as the act of the party himself.² This rule has been extended to a guest in a house³ and neighbors of the occupant.⁴

In Defense of Property.—All necessary and reasonable force may be used by a party in defense of either real or personal property, of which he is lawfully possessed, provided this force does not extend to killing the trespasser.⁵ If a mere trespass is committed, the party must seek his redress by

¹ *State v. Vance*, 17 Iowa, 138; *State v. Scott*, 4 Ired., 409; *Atkins v. State*, 16 Ark., 568; *Shorter v. People*, 2 Comst., 193; *Stewart v. State*, 1 O. S., 66. In *Stewart v. State*, 1 O. S., 71, the court instructed the jury that, "if the person killing was not in any supposed or real danger of his own life, or of enormous bodily harm, and if the jury find that the prisoner could not reasonably have apprehended from the deceased and did not so apprehend danger of his own life, or of enormous bodily harm, the killing is not excusable homicide." *State v. Horne*, 9 Kas., 120.

² 4 Blacks. Com., 186; 1 H. P. C., 484. In the work last cited it is said by Ch. J. Hale, "I come now to the second consideration, namely, what the offense is if a man kills another in the necessary saving of the life of a man assaulted by the party slain: A assaults his master who flees as far as he can to avoid death; the servant kills A in defense of his master; this is homicide *defendo* of the master, * * but if the master had not been driven to that extremity it had been manslaughter at large in the servant if he had no precedent malice in him." Plowd. Com., 100.

"The like hath been for the master killing in the necessary defense of his servant, the husband in defense of the wife, the wife of the husband, the child of the parent or the parent of the child; for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have had if it had been done by himself, for they were in mutual relation one to another."

³ *Curtis v. Hubbard*, 4 Hill, 437; *Coopers case*, Cro. C., 544.

⁴ *Semanye's case*, 5 Coke, 91.

⁵ *Com. v. Kennard*, 8 Pick., 133; *Harrington v. People*, 6 Barb., 607; 1 East, P. C., 402; *State v. Godsey*, 13 Ired., 348; *Deforest v. State*, 21 Ind., 23.

resorting to the law. Where, however, a party in protecting his property, accidentally kills one of the attacking party, he will not be liable unless he used more force than was necessary, or a dangerous weapon.¹ A person can not kill an aggressor except in defense of his dwelling when such aggressor is endeavoring to commit a felony thereat. Where a party has lawfully entered a house, the mere refusal of such party to leave will not justify killing him, unless in ejecting him no more force was used than was necessary for that purpose.²

* Where there is a mere **Trespass upon the Property** of another, the law does not consider the provocation sufficient to justify the taking of life, or the use of a dangerous or deadly weapon,³ but in the following case the killing of the aggressor was held excusable: A man and his servant undertook to place corn in the prisoner's barn—she objected. They resorted to force; whereupon, in a scuffle that ensued, the prisoner threw a stone at the master, which killed him. On the trial of the prisoner for manslaughter, Holroyd, J., said: "The case fails, as it appears the deceased received the blow in an attempt to invade the prisoner's barn against her will. She had a right to defend her barn and to employ such force as was reasonably necessary for that purpose, and she is not answerable for any unforeseen accident that may have happened in so doing."⁴

Where an Attempt is Made to Commit Burglary or Arson on a dwelling house, the owner, or any member of his family, or even a lodger, may lawfully kill the assailant to prevent the

¹ *Dukes v. State*, 11 Ind., 557; *State v. Zellers*, 2 Halst., 220; *Com. v. Drew*, 4 Mass., 391; *McDaniel v. State*, 8 Sm. & Ch., 401; *Wild's case*, 2 Lewin, 217.

² Wharton on Homicide, § 552.

³ *Carroll v. State*, 23 Ala., 28; *Harrison v. State*, 24 Id., 67; *State v. Morgan*, 3 Ired., 186; *Com. v. Drew*, 4 Mass., 391.

⁴ *Hinchcliffe's case*, 1 Lew., 161. "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment and anger. If a person takes forcible possession of another man's close so as to be guilty of a breach of the peace, it is more than a trespass. So, if a man with force invades and enters the dwelling of another; but a man is not authorized to fire a pistol on every intrusion and invasion of his house." *Mead's case*, 1 Lew., 184; *State v. Taylor*, 20 Kas., 643.

threatened mischief. So if a riotous body attempt to burn a church or bank it may be resisted to the extent necessary to protect the property, and the killing of the assailants if unavoidable will be justifiable. In such case the mob is engaged in the commission of a crime of a high grade and may lawfully be resisted.¹

Expulsion from Dwelling.—While one in lawful possession of a house may lawfully require a person whose presence is not desired to leave, yet he will not be justified in resorting to force until gentle means fail.² He will be justified in using only so much force as is reasonably necessary, and if he use a greater degree and death ensue he will be liable.³

Parents, Masters, etc., may give reasonable correction to those under their care, and if death ensue without their fault, it will be merely accidental. But if the correction exceeds the bounds of due moderation, either in the degree of punishment or in the instrument used, the party will be liable.⁴

If excessive punishment is inflicted with an instrument likely to kill, due regard being had to the age and strength of the party, the offense may be murder or manslaughter as the proof may show.⁵

Where, however, a person who has no right inflicts punishment upon another by way of correction, and death ensues, it will be manslaughter at least.⁶

Burden of Proof in Self-defense.—In a case of murder the burden of proving that the act was done in self-defense rests on the accused and should be shown by a preponderance of the evidence.⁷ When there is any proof tending to show that the party acted in self-defense it must be submitted to the jury.⁸

¹ *Com. v. Daly*, 4 Penn., L. J., 154; 1 Arch. Cr. Pl., 896.

² *McCoy v. State*, 3 Eng., 451; *State v. Smith*, 3 Dev. & Bat., 117.

³ *Wild's case*, 2 Lew., 214. Alderson, B., said: "A kick is not a justifiable mode of turning a man out of your own house, though he be a trespasser. If a person becomes excited and gives another a kick it is an unjustifiable act. If the deceased would not have died but for the injury he received, the prisoner, having unlawfully caused that injury, is guilty of manslaughter."

⁴ 1 Arch. Cr. Pl. & Proc., 656; *Fost.*, 262.

⁵ *Id.*

⁶ 1 Arch. Cr. Pl. & Proc., 658.

⁷ *Weaver v. State*, 24 O. S., 584; *Silvus v. State*, 22 O. S., 90.

⁸ *Burden v. People*, 26 Mich., 162. In *Silvus v. State*, 22 O. S., 110, it

Insanity.—Idiots, or persons who have been *non compos* from their birth, lunatics who labor under temporary insanity with lucid intervals, and persons who have become permanently insane from disease or other cause, if not able to distinguish right from wrong are not punishable for any offense they may commit while in that state.¹

Insanity from Intoxication.—A temporary frenzy from drunkenness will not excuse the commission of a crime. That voluntary species of madness which it is in the party's power to abstain from does not excuse him.² Drunkenness, however, may be taken into consideration for the purpose of showing a want of premeditation,³ and in that class of crimes which depend upon guilty knowledge, or the coolness and deliberation with which they shall have been perpetrated, to constitute their commission, and fix the degree of guilt, the question should be submitted to the jury.⁴

is said, quoting from *People v. Schryver*, 42 N. Y., 1: "The people, in every case of homicide, must prove the *corpus delicti* beyond a reasonable doubt, and if a prisoner claims a justification he must take upon himself the burden of satisfying the jury by a preponderance of evidence." But see *State v. Porter*, 84 Iowa., 131.

¹ 1 Arch. Cr. Pl. and Proc., 16 *et seq.* In *U. S. v. McGlue*, 1 Curtis, C. C. R., 1, it is said: "Persons of great ability, filling important stations in life, who upon some one subject are insane; and there are others whose minds are such that the conclusion of their reason and the result of their judgment is very far from being right, and others whose passions are so strong, or whose conscience, reason and judgment are so weak or perverted, that they may in some sense be derominated insane. But it is not the business of the law to inquire into these peculiarities, but solely whether the person accused was capable of having and did have criminal intent. If he had, it punishes him; if not it holds him dispunishable. And it supplies a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is the capacity to distinguish between right and wrong, as to the particular act with which he is charged."

² 1 Hale, P. C., 32; Coke, Litt., 347; *Schaller v. State*, 14 Mo., 502; *State v. Harlow*, 21 Id., 446; *People v. Robinson*, 2 Parker, Cr. R., 235; *People v. Hammill*, Id., 223; *Hester v. State*, 17 Ga., 146; *Carter v. State*, 12 Tex., 500; *Cornwell v. State*, 1 Martin & Yerger, 147; *Swan v. State*, 4 Humph., 186; *Burroughs v. Richman*, 1 Green (N. J.), 2:3.

³ *R. v. Grindley*, 1 Russ., 8; *R. v. Thomas*, 7 C. & P., 817; *R. v. Meakin*, Id., 297; *Pigman v. State*, 14 Ohio, 555.

⁴ *Pigman v. State*, 14 Ohio, 555. The court say: "The older writers regarded drunkenness as an aggravation of the offense, and excluded it for

No Excuse, When.—If a person intending to commit a crime should become intoxicated for the purpose of carrying out that intent, such drunkenness would form no excuse whatever; and in some of the states this rule has been extended so as to raise a presumption of criminal intent in certain cases, as where one kills another wantonly and without provocation.¹

Where a Party is Actually Insane, whether from the continued and excessive use of intoxicating liquor or other cause, he will not be responsible for his acts. The law looks to the actual condition of the party, not to the causes which produced it. That is, where insanity has been produced by habitual drunkenness it is a sufficient excuse where the party at the time of the commission of the offense was so insane, but not intoxicated or under the influence of liquor.²

Delirium Tremens.—In a large number of cases it has been

any purpose. It is a high crime against one's self, and offensive to good morals; yet every man knows that acts may be committed in fits of intoxication which would be abhorred in sober moments."

¹ *People v. Rogers*, 18 N. Y., 9; *Rafferty v. People*, 66 Ill., 118; *O'Herrin v. State*, 14 Ind., 420. Ch. J. Hale tersely states the common law rule as follows: "This vice doth deprive men of the use of reason and puts many men into a perfect but temporary frenzy; * * by the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses. * * But yet there seems to be two allays to be allowed in this case: 1. That if a person by the unskillfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent frenzy, as *aconitum* or *nux vomica*, this puts him in the same condition in reference to crimes as any other frenzy and equally excuseth him. 2. That although the *simplex* frenzy, occasioned *immediately* by drunkenness, excuse not in criminals, yet if by one or more such practices, an *habitual* or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed frenzy thereby caused puts the man in the same condition, in relation to crimes, as if the same were contracted involuntarily at first." 1 Hale's P. C., 32.

² *U. S. v. Drew*, 5 Mason, 28. It is impossible to harmonize the cases upon the effect of intoxication, and but little benefit would be derived from an attempt to do so. The subject is not free from difficulty. There is no doubt, however, that the charitable view of the case has made itself felt in the courts, and that there is a general disposition to modify, to some extent, the harsh rule of the common law, by submitting all the facts to the jury to determine the grade of the offense.

held that this disease is real insanity, and that a person is not responsible for criminal acts committed under its influence.¹

Effect of Intoxication.—At common law, the killing being proved, malice was presumed²—that is, the intent to kill. In such states however as have degrees of the offense, and make deliberation, premeditation, and the purpose to kill, ingredients of the highest grade of the crime, the question of intent becomes a material fact to be proved by the state. It would seem proper to submit to the jury the fact of the prisoner's intoxication, simply for the purpose of showing a want of premeditation. In other words the fact of intoxication should be submitted to the jury with the other facts in the case, for the purpose of enabling the jury to determine the intent of the accused in committing the act.³

Presumption of Sanity.—The law presumes every person sane until the contrary is proved.⁴

The Evidence of those who saw the person accused every day previous to the commission of the act, who were intimate with him, talked with him, ate and drank with him, and who testify to his words, his conversation, his looks, his whole deportment, is that on which the jury ought to place the greatest reliance. The evidence of competent medical men, who have had frequent opportunities of observing him about the

¹ *Bliss v. Com., etc., Ry. Co.*, 24 Vt., 424; *Lanergan v. People*, 50 Barb., 266; *Bales v. State*, 3 W. Va., 685; *Renne's case*, 1 Lew., C. C., 76; *Macconnehy v. State*, 5 O. S., 77; *State v. McGonigal*, 5 Harr., 510; *State v. Dillahunt*, 3 Harr., 510; *U. S. v. Clarke*, 2 Cranch, C. C., 158; *Bailey v. State*, 26 Ind., 422; *State v. Pike*, 49 N. H., 399.

² "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him; for the law presumed the fact to have been founded in malice until the contrary appeareth." *Foster*, 255; *Williams v. State*, 6 Neb., 334; *Clarke v. State*, 35 Geo., 75; *State v. Smith*, 77 N. C., 488; *Com. v. Webster*, 5 Cush., 295; 2 Bish., Cr. Proc., § 606.

³ *Haile v. State*, 11 Humph., 154; *Gwatkin v. Com.*, 9 Leigh, 678; *People v. Williams*, 43 Cal., 344; *Jones v. State*, 29 Geo., 595; *Golden v. State*, 25 Geo., 527; *Mooney v. State*, 33 Ala., 419; *State v. Bell*, 29 Iowa, 316; *Figman v. State*, 14 Ohio, 555; *Nichols v. State*, 8 O. S., 435; *State v. McCants*, 1 Spears, 384; *State v. Mahn*, 25 Kas., 182.

⁴ *State v. Spencer*, 1 Zab., 196; 1 Arch. Cr. Pl. & Proc., 30.

time in question, especially if they have been in attendance upon or have visited him, with a view to prove the state of his mind, is entitled to very great consideration.¹ No impressions, however, are more reliable than those made upon the minds of intelligent persons, who, in addition to being well acquainted with the alleged lunatic, have themselves witnessed the facts supposed to indicate mental derangement.²

Opinions of Neighbors and acquaintances of the prisoner, who know him well, and form their opinions of the condition of his mind from seeing him for several months daily and conversing with him, are entitled to great weight.³

Burden of Proof.—As heretofore stated the law presumes every person to be sane, and in the absence of any proof on that point the court and jury are bound to presume that the person is sane. Where, however, there is proof tending to show insanity, there is a direct conflict in the authorities on whom rests the burden of proving sanity. It is a fundamental rule that when a given state of facts is shown to exist it will be presumed to continue until a different state is proved. Therefore, sanity, being presumed or shown to exist, is presumed to continue. When, however, there is testimony tending to show insanity of the accused when the act was committed, it is a circumstance to be submitted to the jury, and the burden of proof to show sanity is on the state. In other words the prosecution holds the burden of proof and must prove sanity as well as the elements of the offense, the general presumption of sanity also being submitted to the jury.⁴

Moral insanity, or insanity of the moral faculties while the intellect and reasoning faculties remain sound, has no substantial basis and is rejected, as it should be, by all courts, as a defense.

¹ *State v. Spencer*, 1 Zab., 196; *State v. Brinyea*, 5 Ala., 241; 1 Arch. Cr. Pl. & Prac., 32.

² *Schlenker v. State*, 9 Neb., 251; *Clark v. State*, 12 Ohio, 483, *State*, 46 Mo., 224; *Titlow v. Titlow*, 54 Penn. St., 216.

³ *Schlenker v. State*, 9 Neb., 251.

⁴ *Wright v. People*, 4 Neb., 409; *State v. Crawford*, 11 Kas., 32; *State v. Johnson*, 40 Conn., 136; *Wagner v. People*, 4 Abb. App. Dec., 509; *Westmoreland v. State*, 45 Ga., 225; *State v. Jones*, 50 N. H., 370; *Smith v. Com.* 1 Duv., 224; *Kriel v. Com.*, 5 Bush., 362; *Polk v. State*, 19 Ind., 170; *Bradley v. State*, 31 Ind., 492; *Stevens v. State*, 31 Ind., 485; *People v. Garbutt*, 17 Mich., 9; *People v. McCann*, 16 N. Y., 53; 1 Arch. Cr. Pl. & P., 35.

CHAPTER XXI.

FIGHTING BY AGREEMENT.

Prize Fighting.—If any person shall actually engage as a principal in any premeditated fight or contention, commonly called a prize fight, every person so offending shall be imprisoned in the penitentiary not less than one year nor more than ten years, and pay the costs of prosecution.¹

ENGAGING AS PRINCIPALS IN A PRIZE FIGHT.

That A B and C D, on, etc., in said county, did actually, unlawfully and feloniously,² engage, each with the other, as principals, in an unlawful and premeditated fight and contention, commonly called a prize fight, and did then and there unlawfully strike and bruise each other [for prize and reward].³

Aiding a Prize Fight.—If any person shall engage or be concerned in, or attend, any such fight or contention as described in the last preceding section, as backer, trainer, second, umpire, assistant, or reporter, every person so offending shall, on conviction, be fined in any sum not less than five hundred dollars, and be imprisoned in the jail of the county not less

¹ Cr. Code, § 7. Public boxing matches, prize fights, and the like, exhibited for money, were indictable at common law. *Reg. v. Brown*, C. & Marsh., 314. It may be an unlawful assembly, a riot or an affray. *Rex v. Perkins*, 4 Car. & P., 537; *Rex v. Billingham*, 2 Id., 234; but an assault and battery and an affray are distinct offenses, to be punished by different penalties. *Chamfer v. State*, 14 O. S., 437. The greater offense, however, includes the less, and the jury may so find.

² As prize fighting was not a felony at common law, the word "feloniously" is not used in the common law forms.

³ It is probable that these words are unnecessary, the character of the contention being sufficiently stated in the indictment. See *Com. v. Welsh*, 7 Gray, 324.

than ten days nor more than three months, and pay the costs of prosecution.¹

AIDING A PRIZE FIGHT AS BACKER, ETC.

That A B and CD, on, etc., in said county, actually, unlawfully and feloniously did engage, each with the other, as principals in an unlawful and premeditated fight and contention commonly called a prize fight, and then and there did strike and bruise each other for a reward; and E F, being then and there present, willfully and unlawfully did engage in and attend said prize fight and contention as [backer, trainer, etc.]

Dueling.—If any person shall engage in or fight a duel with another, or shall be second to such person who shall fight a duel, or if any person shall by word, message or letter, or in any other way, challenge another to fight a duel, or shall accept a challenge to fight a duel, although no duel may be fought, or shall knowingly be the bearer of such challenge, or shall advise, prompt, encourage or persuade any person to fight a duel, or shall challenge another to fight a duel, whether such duel be fought or not, every person so offending shall be imprisoned in the penitentiary, not more than ten years nor less than one year, and shall forever be incapable of holding any office of honor, profit or trust within this state; provided, however, if death ensue from such duel the person or persons concerned shall be deemed guilty of murder, and shall be punished for murder in the first or second degree, as the case may be.²

¹Cr. Code, § 8. In Murphy's case, 6 C. & P., 103, where one of the parties to a prize fight had been killed, and the prisoner was indicted for murder, as a "second," on the trial, Mr. Justice Littledale, in summing up, said: "My attention has been called to the evidence that the prisoner did nothing; but I am of opinion that persons who are at a fight in consequence of which death ensues, are all guilty of manslaughter, if they encourage it by their presence. * * If they were not merely casually passing by, but stayed at the place, they encouraged by their presence, although they did not say or do anything. But, if the death ensued by violence unconnected with the fight itself, that is by blows not given by the other combatant, but by persons breaking into the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter." 1 Arch. Cr. Pl. & P., 656. This appears to be a correct statement of the law.

²Cr. Code, § 9.

Dueling at Common Law.—The common law condemned dueling, and treated a party who caused the death of another as a murderer, but the military spirit of the people kept the practice alive; hence, until the present century, the law against dueling was not enforced to any extent. Coke and Mr. Justice Croker seem to have condemned the practice in strong terms, and it is said, in passing sentence on the defendant, who was the party challenged, they exhausted every phrase of abhorrence afforded by the English language.

There must be a Judicial Determination to Disfranchise.—The statute of Nebraska, and other states have a like statute, debarb any person who shall fight a duel, challenge another to fight a duel, accept a challenge to fight a duel, knowingly be the bearer of a challenge, or who shall advise, prompt, encourage or persuade any person to fight a duel, from holding any office of honor, profit or trust within the state.

The power of the legislature to impose such penalty to break up a barbarous practice, is undoubted; but before it would affect the rights of any individual he must be tried for the offense, and an opportunity given him to make his defense. The law does not condemn unheard. The party accused might be able to show that the charge was false and the jury acquit.

FOR SENDING A CHALLENGE.

That A B, on, etc., in said county, intending to do great bodily harm to one C D, and with the intent to provoke and incite him, the said C D, unlawfully to fight a duel with and against him, the said A B, unlawfully, wickedly and maliciously did write, send and deliver, and cause to be written, sent and delivered to the said C D, a certain paper writing, in the form and manner of a letter from the said A B to the said C D, as follows:

OCT. 1, 1886. SIR:—The expression you (*meaning the said C D*) thought proper to make use of last night at Mr. S's, I (*meaning himself, the said A B*) can not interpret in any other light than as a direct insult. I (*meaning himself, the said A B*) therefore expect, if you (*meaning the said C D*) have the courage and spirit of a gentleman, and which I (*meaning himself*) very much doubt, you (*meaning the said C D*) will fix the time and place for the necessary explanation, and I (*meaning himself, the said A B*) am your, etc.,

: 1 2 Chitty's Cr. L., 728; 3 Balster, 171.

servant. A B, meaning and intending by the said paper writing a challenge to the said C D to fight a duel with and against him, the said A B.¹

VERBAL CHALLENGE TO FIGHT A DUEL.

That A B, on, etc., in said county, being a person of a wicked and malicious mind and of an unruly and turbulent disposition, unlawfully and maliciously intending to incite and provoke one C D to fight a duel with him, the said A B, and thereby of deliberate and premeditated malice to kill and murder the said C D, on the day aforesaid, in said county, did unlawfully, maliciously and feloniously challenge and endeavor to incite and provoke him, the said C D, to fight a duel with him, the said A B, he, the said A B, then and there, unlawfully, maliciously and openly, and in the presence and hearing of said C D, and without any just cause or provocation whatsoever, but out of deliberate and premeditated malice, spoke the following words: You (*meaning C D*) wear a sword, do you? D— you, I (*meaning himself, the said A B*) have a mind to beat your brains out with this stick (*meaning a certain stick which said A B had then and there in his hands*) and drag you (*meaning said C D*) through the kennel; and if you, the said C D. do not fight me, said A B, I (*meaning said A B*) will post you (*meaning said C D*) as a coward, and did then and there of deliberate and premeditated malice, as much as in him lay, urge and try to provoke the said C D to combat him, the said A B, in a duel; by reason whereof he, said C D, was then and there put in the utmost fear and apprehension of losing his life.

CARRYING A CHALLENGE.

That A B, on, etc., in said county, intending to procure great bodily harm to be done to C D. to provoke said C D unlawfully and feloniously to fight a duel with and against one E F, of said county, did then and there knowingly, unlawfully and feloniously deliver a certain [written] challenge from the said E F to the said C D, unlawfully and feloniously to fight a duel with him, the said E F, which said written challenge is as follows: (*Here copy challenge*) the said A B, then and there well knowing that said message was a challenge to fight a duel, before delivering the same to said C D.

The above is the substance of the form given by Chitty, 2 Cr. L., 854. The common law precedents seem to require the challenge to be set out in the indictment, in substance at least, so that it may be seen whether or not the message was in fact a challenge. This seems to be the proper practice as the precedents, drawn from actual cases, show that many of the letters

¹ The above is the substance of the form in 2 Chitty, Cr. L., 848. It is said to have been prepared by an eminent lawyer. The indictment for this offense resembles in some respect the proceedings on threatening letters, and, as in them, generally sets forth the letter, or expressions charged, as criminal. 2 Chitty., Cr. L., 849.

claimed to be challenges are exceedingly vague and indefinite, and but for the innuendoes would fail to show a challenge. If, therefore, the letter, with the aid of the innuendoes, fails to show a challenge, or that the accused was aware of its contents, a demurrer to the indictment would be sustained. Where, however, the challenge is not in possession of the prosecution, it has been held sufficient to state that one was sent, without producing it. *Com. v. Hooper*, *Thacher's Cr. Cas.*, 400.

INCITING ANOTHER TO FIGHT A DUEL.¹

That A B, on, etc., in said county, unlawfully and maliciously intending to encourage and incite one C D, then and there being, to fight a duel with and against one E F, did then and there willfully, unlawfully and feloniously encourage, advise, prompt and persuade said C D to fight a duel with and against said E F, with deadly weapons, to wit, swords, by (*set out the means used to incite, etc.*)

ENGAGING IN A DUEL.

That A B, on, etc., in said county, voluntarily, unlawfully and feloniously, did then and there engage in and fight a duel with one C D, with deadly weapons, to wit: (*state weapons if known*) with the intent then and there of him, the said A B, purposely and of deliberate and premeditated malice, unlawfully and feloniously to wound, maim and kill said C D.

BEING SECOND IN A DUEL.

That A B, on, etc., in said county, voluntarily, unlawfully and feloniously did then and there engage in and fight a duel with one C D, with deadly weapons, to wit: (*state weapons if known*) with the intent, then and there, of him, the said A B, purposely and of deliberate and premeditated malice, unlawfully and feloniously to wound, maim and kill said C D; and one E F, on the day and year aforesaid, in said county, then and there, voluntarily, unlawfully and feloniously was second to said A B, while he, the said A B, was engaged in said duel with C D.

ACCEPTING A CHALLENGE.

That A B, on, etc., in said county, received from one C D a challenge to fight a duel with him, said C D, in said county, with deadly weapons, to wit pistols; that thereupon said A B, on the day and year aforesaid, in said

¹ Provoking another to send a challenge to fight a duel seems to have been a misdemeanor at common law, and indictable, especially so where such provocation was given in a letter which contained matter of a libelous nature. *Rex v. Phillips*, 6 East, 464; 1 Arch. Cr. P. & P., 835.

county, voluntarily, unlawfully and feloniously did accept said challenge from said C D, and did then and there voluntarily, unlawfully and feloniously promise and agree with said C D to fight with and against him, said C D, with deadly weapons, to wit, pistols loaded with gunpowder and leaden bullets.

Evidence—Challenge.¹—If the challenge is in writing, parol evidence is admissible to explain its meaning.² It is not material whether the challenge is verbal or written.³ The words in which the challenge is given are not material if they were intended for a challenge, and to be understood as such.⁴ Merely expressing a readiness to accept a challenge, however, is not a challenge.⁵ The crime consists of the invitation to fight; and is complete when the challenge is delivered.⁶ In *Rex v. Williams* it was held that the offense was complete when the challenge was sent, whether it reached the person challenged or not; but this may be doubted, as the power to recall the message continues in the party challenging until the message is received by the party challenged.

Place.—A person sending a challenge by mail, may be tried in the county from which the letter was sent, or in that in which it was received.⁷ But if the letter containing the challenge was sent out of the state, the sender would not be a fugitive from justice, and must be tried, if at all, in the county where the letter was mailed. A challenge to fight in

¹ Dueling is not defined by the statute, and resort must be had to the common law for a definition. See 4 Bl. Com., 145. In 4 Bl. Com., 199, it is said: "This (malice) taken in the case of deliberate dueling, where both parties meet avowedly with an intent to murder, thinking it their duty as gentlemen, and claiming it as their right to wanton with their own lives and those of their fellow creatures, without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man."

² *Com. v. Pope*, 3 Dana, 418; *Com. v. Hart*, 6 J. J. Marsh, 119.

³ *State v. Perkins*, 6 Blackf., 20; *State v. Strickland*, 2 Nott & McCord, 181; 1 Hawk., 487.

⁴ Whether a challenge was intended as a challenge to fight with deadly weapons or not is a question for the jury. *Ivey v. State*, 12 Ala., 276; *Herriott v. State*, 1 McMullan, 126; 1 Arch. P. & P., 835.

⁵ *Com. v. Tibbs*, 1 Dana, 524.

⁶ *Rex v. Williams*, 2 Camp., 506.

⁷ *Rex v. Williams*, 2 Camp., 506; *Rex v. Burdett*, 4 B. & Ald., 95, 127; *State v. Dupont*, 2 McCord, 334.

another state is indictable.¹ It has been held that the admissions of a second were receivable in evidence against his principal.² Provocation, while not a defense, may be shown for the purpose of mitigating the punishment.³

Affray.⁴—If any two persons shall agree, and willfully fight or box at fisticuffs, the persons so offending shall be deemed guilty of an affray, and upon conviction thereof shall be fined, each in a sum not exceeding fifty dollars, or be imprisoned in the county jail not exceeding ten days, or both, at the discretion of the court.⁵

Words Alone do not Constitute an Affray, nor is a party guilty of the offense who is attacked but makes no resistance;⁶ but if one of the parties was ready to engage in a fight and provoked the other to strike him, he is guilty of an affray.⁷ A fight commenced in a private place but afterward carried on in a public one is an affray.⁸ A common road is not necessarily a public place.⁹ A person who abets an affray is guilty as principal.¹⁰

AFFRAY.¹¹

That A B and C D, on, etc., in said county, willfully and unlawfully did agree to fight together and box-at fisticuffs in a public place, to wit (*state where*), and did then and there, in pursuance of said agreement, fight together and box at fisticuffs at said public place, and did beat, strike and wound each other, to the terror of many people then and there lawfully assembled.

¹ *State v. Taylor*, 3 Brev., 243; *State v. Farrier*, 1 Hawks, 487.

² *State v. Dupont*, 2 McCord, 334.

³ *Rex v. Williams*, 2 Camp., 506; *Rex v. Burdett*, 4 B. & Ald., 95, 127.

⁴ The common law definition of an affray is, the fighting of two or more persons in some public place. 4 Blacks. Com., 144. This seems to apply under the statute.

⁵ Cr. Code, § 10.

⁶ *O'Neill v. State*, 16 Ala., 65.

⁷ *State v. Sumner*, 5 Strobb., 53.

⁸ *Wilson v. State*, 3 Heisk., 278.

⁹ *State v. Weekly*, 29 Ind., 206.

¹⁰ *Cooney v. Burke*, 11 Neb., 258; *Hawkins v. State*, 13 Geo., 322.

¹¹ The offense includes assault and battery, if the indictment is so framed as to include that offense. *State v. Allen*, 4 Hawks, 356; *Cash v. State*, 2 Tenn., 198.

CHAPTER XXII.

VIOLENCE TO PERSONS NOT RESULTING IN DEATH.

Carnal Knowledge of Daughter or Sister.—If any person shall have carnal knowledge of his daughter or sister, forcibly and against her will, every such person, so offending, shall be deemed guilty of a rape, and shall be imprisoned in the penitentiary during life.¹

Rape.—If any person shall have carnal knowledge of any other woman or female child than his daughter or sister, aforesaid, forcibly and against her will, or if any male person of the age of seventeen years and upward, shall carnally know or abuse any female child under the age of twelve years, with her consent, every person so offending shall be deemed guilty of a rape, and shall be imprisoned in the penitentiary not more than twenty nor less than three years.²

Rape Defined.—Rape is the carnal knowledge of a female, forcibly and against her will.³

CARNAL KNOWLEDGE OF DAUGHTER OR SISTER.

That A B, on, etc., in said county, in and upon one C D violently and feloniously did make an assault, and her, the said C D, then and there, forcibly and against her will, feloniously did ravish and carnally know, she, the said C D, then and there, being the sister [or daughter] of him, the said A B, as he, the said A B, then and there well knew.

¹ Cr. Code, § 11.

² 2 Cr. Code, § 12. The indictment at common law must charge the offense to have been feloniously committed, and must contain the technical word *ravished*. 1 Hale, P. C., 632; 2 Chitty, Cr. L., 812.

³ 4 Bl. Com., 210; 3 Inst., 60.

RAPE UPON A WOMAN NOT THE SISTER OR DAUGHTER OF THE ACCUSED.¹

That A B, on, etc., in said county, in and upon one C D, violently, unlawfully and feloniously did make an assault, and her, the said C D, then and there forcibly, unlawfully, and against her will, feloniously did ravish and carnally know, she, the said C D, not being the sister or daughter of him, the said A B.²

It is unnecessary to allege that the female was not the wife of the accused, or that he was fourteen years of age or upward.³ And the words "then and there being a female," were held to be unnecessary.⁴ Nor need it be averred that the female was under the age of twelve years, such allegation being necessary only when the act was done with her consent.⁵ A husband can not be guilty of rape on his wife because of the matrimonial consent which she has given which can not be withdrawn; but he may be guilty of assisting another to commit a rape upon her, as the husband can not compel her to prostitute her person to another.⁶

The court will take notice of the sex of the parties from the names, as well as the use of the pronoun "her," as applied to the injured party. Common law indictments, without designating the sex of the parties, were held sufficient at a time when the practice was more technical than at present.

¹Some of the American precedents mention the sex, and some of the English ones contain a designation denoting the sex as "spinster," but as Bishop in his Forms and Directions, Sec. 905, says, if the sex of the party injured is required, so also should be that of the accused, but none of the precedents contain the latter.

²In *Howard v. State*, 11 O. S., 328, it was held that in charging this offense it was essential for the indictment to state that the woman or female child, upon whom the crime is charged to have been committed, was not the daughter or sister of the accused.

³*State v. Storkey*, 63 N. C., 7; (*Com. v. Scannel*, 11 Cush., 547; *Com. v. Fogerty*, 8 Gray, 489; *People v. Ah Yek*, 29 Cal., 575; *State v. Farmer*, 4 Ired., 224.

⁴*State v. Hussey*, 7 Iowa, 409; *State v. Farmer*, 4 Ired., 224; *Harman v. Com.*, 12 Serg. & R., 69; *Taylor v. Com.*, 20 Grat., 825.

⁵*Com. v. Sugland*, 4 Gray, 7.

⁶*Earl of Castlehaven's case*, 1 State Trials, 387; 1 Hale's P. C., 629.

UPON A FEMALE CHILD OTHER THAN THE DAUGHTER OR SISTER
OF THE ACCUSED.

That A B, on, etc., in said county, in and upon one C D violently, unlawfully and feloniously did make an assault, and her, the said C D, unlawfully, forcibly and against her will, feloniously did ravish and carnally know, she, the said C D, then and there being a female child other than the daughter or sister of him, the said A B.

ON FEMALE CHILD UNDER TWELVE YEARS OF AGE WITH HER
CONSENT.

That A B, on, etc., in said county, being then and there a male person of the age of seventeen years and upward, knowingly, unlawfully and feloniously did carnally know and abuse one C D, a female child, with her consent, she, said C D, then and there being but nine years of age.

INDICTMENT FOR RAPE AT COMMON LAW ON WOMAN ABOVE THE
AGE OF CONSENT.¹

That A B, on, etc., * * at —, in and upon one C D, spinster, * then and there being, violently and feloniously did make an assault, and her, the said C D, against the will of her, the said C D, then and there feloniously did ravish and carnally know.

INDICTMENT AT COMMON LAW FOR RAPE ON A CHILD WITHIN
THE AGE OF CONSENT.

That A B, on, etc., at —, in and upon one E P, a woman child under the age of ten years, to wit, of the age of nine years * * * then and there being, feloniously did make an assault, and, her, the said E P, then and there wickedly, unlawfully and feloniously did carnally know and abuse.²

¹ 2 Chitty, Cr. L., 815.

² Abuse, at common law and under the statute, of a female child within the age of consent, means an injury to the genital organs. *Dawkins v. State*, 58 Ala., 376; *Bish. Stat. Cr.*, § 487. It has been held, under the English statute, that the words "carnally know," when referring to a girl within the age of consent, includes all that is contained in the words "carnally know and abuse." *Reg. v. Holland*, 16 Law T., N. S., 536; *Bish. Stat. Cr.*, § 487. The Nebraska statute, as also the statutes of a number of other states, contain the words "carnally know or abuse any female child." It is probable that under this statute either offense would be

Attempt to Commit.—If any person shall assault another with intent to commit a murder, rape or robbery upon the person so assaulted, every person so offending shall be imprisoned in the penitentiary not more than fifteen nor less than two years.¹

ASSAULT WITH INTENT TO COMMIT A RAPE.²

That A B, on, etc., in said county, in and upon one C D, then and there being, violently, unlawfully and feloniously did make an assault, and her, the said C D, did then and there beat, bruise, wound and illtreat, with an intent her, the said C D, forcibly and against her will, feloniously to ravish and carnally know.

To constitute an Assault with Intent to Commit a Rape, there must be an intent on the part of the accused to accomplish his purpose by force, and against the will of the woman. The facts and circumstances accompanying the transaction should be such that had the prisoner succeeded, and carried his intention into effect, the crime would have been rape.³

Evidence in Case of Rape.—Formerly it was held that there must be proof both of penetration and emission, but statutes have been passed in England and many of the states requiring proof of penetration alone, and such is now the law. In some of the cases it is held that any—the slightest penetration is sufficient;⁴ but the private member of the male must be in-

sufficient to warrant a conviction. *Dawkins v. State*, 58 Ala., 376; *Bish. Stat. Cr.*, § 489. A mistake of the age of the female will not exempt the party from punishment. He acts at his peril. *Lawrence v. Com.*, 30 Grat., 845; *State v. Newton*, 44 Iowa, 45.

¹ Cr. Code, § 14.

² At common law, the attempt to commit was a misdemeanor which was punished by fine, imprisonment or the pillory, and the finding of sureties for good behavior. In one instance the latter were required for life. *Cro. Car.*, 332. Mr. East contends that the latter punishment was an abuse of discretion. 1 East, P. C., 441.

³ *Sullivant v. State*, 3 Eng. (Ark), 400; *Fields' case*, 4 Leigh, 648; *Charles v. State*, 6 Eng., 389; *State v. Boon*, 13 Ired., 244; *Mathews v. State*, 19 Neb. 330.

⁴ *Reg. v. Hughes*, 9 Car. & P., 752; *State v. LeBlanc*, 3 Brev., 339; *Reg. v. Lines*, 3 Car. & K., 393; 3 Inst., 59.

serted in that of the female, and this fact must be proved.¹ The penetration,² however, need not be sufficient to break the hymen.³

The Essence of the Crime consists in the violence done to the person of the woman and to her sense of honor and virtue.⁴

The first point to be established is that the offense has been committed by some one. This, if the offense is recent, can readily be shown. No sane woman will permit a man to have connection with her forcibly and against her will without making an effort to preserve her chastity. And if the act is done by force or violence, there will be some evidence of it on her person, or clothing, or both. Therefore, as in case of murder, there must be proof that some person has been murdered, or in larceny that certain goods have been stolen, before any person can be charged with the murder or larceny, so in rape it must be clearly established in the first instance that the crime has actually been committed by some one. This fact seems to have been overlooked in some of the cases.

Second, The Proof must Show that it was Done by Force and against her Will.—Mr. Bishop in his excellent book on statutory crimes, § 480, *et seq.*, states in substance that the statutes of this country in relation to rape, employ substantially the same terms as those old English ones which are common law with us, but that the statutes of the several states use the words “against her will” oftener than the old English statutes, “where she did not consent.” He also says that while the former words are a permissible substitute for the latter, it is not so clear that the latter are for the former.

¹ *Rex v. Jordan*, 9 Car. & P., 118; *Audley's case*, 3 St. Tr., 404; *Robertson's case*, 1 Swinton, 93; *Fitchpatrick's case*, 3 H. St. Tr., 419.

² “To make a rape there must be an actual penetration or *res in re* (as also in buggery) and therefore an *emissio seminis* is indeed an evidence of penetration, but simply of itself it makes neither rape nor buggery, but is only an attempt of rape or buggery. * * * But the least penetration maketh it rape or buggery, yea, although there be not *emissio seminis*.” 1 Hale, P. C., 628.

³ 1 East, P. C., 10; *Reg. v. McRae*, 8 Car. & P., 641; *Stout v. Com.*, 11 Serg. & R., 177.

⁴ 3 Greenleaf Ev., § 210.

This difference in the statutes will explain the difference in the decisions where it has been held sufficient if the offense was committed without the woman's consent. It must be made to appear that the woman resisted to the extent of her ability.¹ The connection must be absolutely against her will. If she half resists and half consents, it is no rape, a mixed case will not do.²

Nature has given her hands to strike and feet to kick, teeth to bite and a voice to cry out, and she should put all these into requisition for her own protection.³ Where the prosecutrix made no outcry, although her husband was within hearing distance, and herself and husband remained in friendly conversation with the accused for some time after the offense was alleged to have been committed, it was held to raise a strong presumption that no offense had been committed.⁴ The presumption in such a case would seem to be conclusive that the charge was a fabrication. So if the party on whom the alleged offense was committed was strong and robust, and of nearly equal strength with the man, it would be almost impossible for him to commit a rape upon her.⁵ There should be some marks of violence on her person,⁶ and the want of such marks raises a strong presumption against the charge.

¹ *People v. Morrison*, 1 Park. Cr. R., 625; *Oleson v. State*, 11 Neb., 276; *Woodin v. People*, Id., 464; *Mathews v. State*, 19 Neb. 330.

² *People v. Hulse*, 3 Hill, 316; *Hull v. State*, 22 Wis., 580; *Reg. v. Hallet*, 9 Car. & P., 748; *Pollard v. State*, 2 Iowa, 587; *State v. Murphy*, 6 Ala., 765; *People v. Abbott* 19 Wend., 195. In the case last cited, Cowen, J., speaking for the court, said: "In such a case the material issue is on the willingness or reluctance of the prosecutrix—an act of the mind. These offenses, as well as the kindred moral one of mere seduction, to which, on examination, they often dwindle down, are in their very nature committed under circumstances of the utmost privacy. The prosecutrix is usually, as here, the sole witness of the principal facts, and the accused is but to rely on circumstantial evidence. Any fact tending to the inference that there was not the utmost reluctance and utmost resistance is always received."

³ *People v. Morrison*, 1 Park. Cr. R., 644; *State v. Cross*, 12 Iowa, 66.

⁴ *Barney v. People*, 22 Ill., 160.

⁵ 2 Arch. Cr. Pl. & P., 176.

⁶ 1 Hale, P. C., 634.

Where there is a conflict in the testimony as to the woman's consent the jury should carefully weigh the evidence; an instruction that if the defendant procured her consent with promises, it was held should have been given.¹

Witnesses for the Prosecution.—Ch. J. Hale says,² the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offense and made pursuit after the offender; showed circumstances and signs of the injury, whereof many are of that nature that only women are the most proper examiners and inspectors; if the place wherein the fact was done was remote from people, inhabitants or passengers; if the offender fled for it—these and the like are concurring evidences to give greater probability to her testimony when proved by others as well as herself.

Probability that Testimony is False.—But, on the other hand, if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was supposed to be committed was near to inhabitants, or a common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it was probable that she might be heard by others—these and the like circumstances carry a strong presumption that her testimony is false.

Concealment.—It is scarcely possible that any woman upon whom a rape has actually been committed will conceal the fact longer than until an opportunity is presented to inform her friends or acquaintances. Had she been robbed she would have made it known at once, and she will do no less if a brutal assault is made upon her. And where months are permitted to elapse before any charge of that kind is made, the charge may be regarded as a fabrication, and insufficient to justify a jury

¹ Clarke v. State, 30 Tex., 448.

² 1 P. C., 633.

in finding either that a crime has been committed, or that the accused is guilty of committing it. A woman who has suffered the brutality and indignity of an actual rape, whose feelings have been wounded and sense of decency shocked, and whose person bears the marks of the struggle, will be certain to inform some one soon after the occurrence. Hence the law permits her to state that she made complaint that an outrage had been perpetrated upon her.¹ In *Fisk v. State*² the prosecutrix was fourteen or fifteen years of age, and had lived in the plaintiff's family about six years. Becoming dissatisfied, evidently from the meddling of officious persons, she left his residence in January, 1879. At that time no complaint was made of any improper conduct on his part, nor until the following April, when she went before the grand jury and swore that in September, 1878, the plaintiff had committed a rape upon her. The trial took place at once and the jury found the plaintiff guilty of an assault with intent to commit a rape, upon her unsupported testimony. The supreme court set the verdict aside as not being sustained by sufficient evidence, and it has since transpired that the whole charge was a fabrication. Courts and juries should carefully and without any feeling or bias sift the evidence, and ascertain from it whether or not an offense has been committed, and if so, by whom.³

¹ 1 Greenleaf, Ev., § 213.

² 9 Neb., 62.

³ In *People v. Hulse*, 8 Hill, 317, Bronson, J., in delivering the opinion of the court, said: "Cases of this kind do not call for any relaxation of the rules of evidence, for the purpose of supporting the accusation. On the contrary, courts and juries can not be too cautious in scrutinizing the testimony of the complaining witness, and guarding themselves against the influence of those indignant feelings which are so naturally exerted by the enormity of the alleged offense. Although no unreasonable suspicion should be indulged against the accuser, and no sympathy felt for the accused if guilty, there is much greater danger that injustice will be done the defendant, in cases of this kind, than there is in prosecutions of any other character. The evidence, if it amounts to anything, is always direct; and whatever may be the force of countervailing circumstances, honest and unsuspecting jurors may think themselves bound of necessity to credit that which is positively sworn to," etc.

The fact that the prosecutrix made complaint soon after the commission of the alleged offense is admissible, and indeed is generally required; but the particulars of the complaint made can not be given in evidence as to the truth of her statement.¹ The complaint, however, constitutes no part of the *res gestæ*, and is only a fact in corroboration of the prosecutrix; and if she is not called as a witness in the case is wholly inadmissible.²

Complaint not Admissible in Chief.—If the prosecutrix mention a person to whom she made complaint, such person may be called to testify to such fact.³ But neither the prosecutrix nor the person named can be permitted to state the particulars of the complaint, on their direct examination on behalf of the state.⁴ The usual course is to ask the prosecutrix if she made complaint that such an outrage had been committed upon her, and to receive only a simple answer, yes or no.⁵ The name of the party of whom she complained should not be mentioned.⁶ The inquiry should be confined to the bare proof of the fact that a complaint of personal violence was made, and that an individual was charged.⁷ If the prosecutrix is not a witness

¹ 1 Phillips, Ev., 184; R. v. Clarke, 2 Starkie, 242; R. v. Walker, 2 Mo. & R., 212; R. v. Wink, 6 C. & P., 397; R. v. Megson, 9 Id., 420; R. v. Osborne, Car. & M., 622; R. v. Nichols, 2 C. & K., 248.

² 3 Greenleaf, Ev., § 213; People v. McGee, 1 Denio, 19; R. v. Nichols, 2 C. & K., 246; R. v. Guttridge, 9 C. & P., 471. In Johnson v. State, 17 Ohio, 595, it was held that the declarations made by the injured female, as to the transaction, immediately after the offense was committed, may be given in evidence to sustain the testimony, not as substantive testimony, but as corroborative. The court say (page 595): "If these declarations are in accordance with the testimony given in court, they tend to strengthen and give effect to that testimony; if against it, the testimony is destroyed. If such testimony were to be entirely excluded, when offered on the part of the prosecutrix, it would be exceedingly difficult to convict in any case. For, as a general rule, it would be dangerous to convict unless immediate complaint was made by the female to her friends and other." *McCombs v. State*, 8 O. S., 643. This is a departure from the general rule.

³ Phillips v. State, 9 Humph., 246.

⁴ People v. McGee, 1 Denio, 19; Stevens v. State, 11 Geo., 225.

⁵ 3 Greenleaf, Ev., § 213; R. v. Walker, 2 M. & Rob., 212; People v. McGee, 1 Denio, 19; Rex v. Clarke, 2 Stark., 241; R. v. Megson, 9 Car. & P., 420.

⁶ Rex v. Osborne, Car. & M., 622.

⁷ 1 Phillips, Ev., 184.

in the case, or is not competent as a witness, by reason of infancy, idiocy or other cause, no evidence in regard to the fact that she made complaint, can be given.¹

The Complaint Forms no Part of the Transaction, and the cases holding it to be such are in conflict with the clear weight of authority, and the reason of the rule. While, however, it should be required that a complaint be made in every case immediately after the occurrence, to justify a conviction, with liberty to the accused to inquire as to what was said, if he so desire, it is not, where the circumstances tend to corroborate the prosecutrix, indispensably necessary that the particulars of the complaint should be called out to corroborate her.²

The State and Appearance of the Prosecutrix, marks of violence upon her person, and the torn and disordered state of her dress recently after the alleged transaction, are material circumstances, and admissible in evidence, whether she be called as a witness or not.³ Where the prosecutrix is a witness, she may be asked, on cross-examination, if the treatment she complains of was with her consent, or against her will. This is the material inquiry in the case.

Prosecutrix, How Impeached.—It was formerly held in England that the accused might impeach the character of the prosecutrix for chastity by general evidence in that regard; but not by proving particular acts of unchastity.⁴ And it was held that she could not be compelled to answer whether she had had connection with a particular man named or with other men.⁵ Since these decisions were rendered, however, the prosecutrix has been required to answer whether or not, on a previous occasion, she had voluntary connection with the accused,⁶ and where in another case she denied it, evidence was received to contradict her.⁷ So evidence was received to

¹ *People v. McGee*, 1 Denio, 19, and cases cited; *Pleasant v. State*, 15 Ark., 624; *Stevens v. State*, 11 Geo., 225.

² *Woodin v. People*, 1 Park. Cr. R., 464.

³ *People v. McGee*, 1 Denio, 22; 1 Hale, P. C., 628; 1 Hawk., 41, § 6.

⁴ *R. v. Clarke*, 2 Stark., 242; 2 Wharton, Cr. Ev., § 1151.

⁵ *R. v. Hodgson*, R. & R., 211.

⁶ *R. v. Martin*, 6 Car. & P., 562.

⁷ *R. v. Robins*, 2 Moody & R., 512. See *State v. Boyland*, 24 Kas., 186.

show that the prosecutrix had previously had voluntary connection with the accused.¹ In this country a number of the states follow the common law rule and confine the evidence to general character.²

Whatever reasons may have existed for the early English decisions and of other courts following them, they do not seem applicable at the present time. When the decisions referred to were rendered in England, the lips of the accused were sealed. In no case was there a full inquiry into the facts, and if the technical rules of law were satisfied the accused was condemned in many cases upon *ex parte* testimony. At the present time, however, the courts not only permit but endeavor to secure a full inquiry into all the facts of a case, and it is then submitted to the jury.

The Previous Conduct of the Prosecutrix, as to whether or not she had connection with other men, is a proper subject of inquiry, as tending to show a want of chastity, and therefore that she would be more likely to consent than a virtuous woman³—it is a circumstance for their consideration as bearing upon the question of consent.

¹ R. v. Aspinwall, 2 Stark. Ev., 700; 2 Wharton's Cr. Ev. § 1151.

² McCombs v. State, 8 O. S., 643; McDermott v. State, 13 Id., 332; Wilson v. State, 16 Ind., 392; State v. Forshner, 44 N. H., 89; State v. Knapp, 45 Id., 148; State v. Jefferson, 6 Ired., 305.

³ State v. Johnson, 28 Vt., 512; State v. Murry, 63 N. C., 31; Camp v. State, 3 Kelly, 417; State v. Jefferson, 6 Ired., 305; Rex v. Martin, 6 Car. & P., 562; R. v. Robins, 2 M. & Rob., 512; People v. Benson, 6 Cal. 221; Carr v. McDonald, 110 Mass., 406; People v. Abbot, 19 Wendell, 192. The argument of Cowen, J., in delivering the opinion of the court in the case last cited, seems to be conclusive. He said (page 194): "A mixed case will not do; the connection must be absolutely against the will; and are we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? That the jurors should be advised to make no distinction in their minds between the virgin and a tenant of the stew; between one who would prefer death to pollution, and another, who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? And how is the latter case to be made out? How more directly and satisfactorily than by an examination of the prosecutrix herself? I speak not now of her privilege, though the question being relevant, I do not believe there is either principle or authority which would allow it to her." * * * "It seems in the first place to be perfectly agreed that you may

Evidence of Familiarities with the Prosecutrix by the accused and others is admissible as a circumstance to disprove the use of force.¹

The fact that the woman was a prostitute, however, is merely a circumstance. She is still under the protection of the law. It would require much stronger evidence, however, to prove that one whose whole life was given up to illicit commerce with men, indiscriminately, and who thereby, by her actions at least, held herself out as a common woman, resisted to the extent of her ability an attempt to have connection with her.²

Judge Cowen, in *People v. Abbott*, used the following language: "Shall I be answered that both are under the protection of the law? That I admit, and so are the common prostitute and the concubine. If either have, in truth, been ravished, the punishment is the same, but the proof is quite different. It requires that stronger evidence be added to the oath of the prosecutrix in the one case than the other. Shall I be answered that an isolated case of criminal connection does not make a *common* prostitute? I answer, yes; it only makes a prostitute, and, I admit, introduces a circumstance into the case of less moment; but the question is not whether it be of more or less persuasive force, it is one of competency; in other words whether it be of any force at all."

The Credit of the Prosecutrix may be impeached as in other cases, by showing contradictory statements made by her, and

prove the prosecutrix to be in fact, not merely by *general* reputation, but in fact, a common prostitute; because, say Mr. East and Mr. Roscoe, that is a proper circumstance to be submitted to the jury. 1 East, C. L., 444-5; Roscoe, Cr. Ev., 738; and it has been repeatedly adjudged that you may show a previous voluntary connection between the prosecutrix and the prisoner. *Rex v. Aspinwall*, 2 Stark. Ev., 700; *Rex v. Martin*, 6 Car. & Payne, 562. Why is this? Because there is not so much probability that a common prostitute, or the prisoner's concubine, would withhold her assent as one less depraved; and may I not ask does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another, and the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity?"

¹ *People v. Benson*, 6 Cal., 221.

² 19 Wend., 194.

by evidence affecting her general character for veracity.¹ An attempt to impeach a prosecutrix on the ground that her general reputation for veracity is bad, is always a dangerous experiment, even if sufficient cause exists, and is liable to enlist the sympathies of the jury.

Where the Woman is Made Insensible, etc.—If the accused caused the woman to become intoxicated or stupefied with liquor or chloroform or other means, in order to have connection with her while in that condition, which purpose he accomplished, he may be convicted of rape.²

And the same rule applies when the offense is committed on a child within the age of legal consent, she being deemed, in law, too young to resist,³ or on an idiot⁴ or insane person,⁵ or on one too feeble to resist.⁶

Consent Procured by Fraud.—Whether, when connection with a woman is effected by fraud and stratagem, it constitutes the offense of rape, is one upon which the courts are divided in opinion. In the absence of a statute to that effect it can scarcely be said that such connection was effected by *force*,

¹ *Starks v. People*, 5 Denio, 106; 1 Greenleaf, Ev., § 561; Wharton, Cr. Law, § 814.

² *R. v. Camplin*, 1 C. & K., 746; 1 Denison, C. C., 91. In 1 Denison, C. C., 1, is the following note: "Of the judges who were in favor of the conviction several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether such state is caused by the man or not, the accused knowing at the time that she is in that state; and Tindal, C. J., and Parke, B., remarked that in the statute of Westminster, 2 Ch., 34, the offense of rape is described to be ravishing a woman *where she did not consent*, and not ravishing her *against her will*." But all the ten judges agreed that where the prosecutrix had been made insensible by the accused, and connection had with her in that condition, the offense was rape.

³ *Hays v. People*, 1 Hill, 351; *Stephens v. State*, 11 Geo., 255; *State v. Cross*, 12 Iowa, 66; *R. v. Case*, Temp. & M., 318. In *Hays v. People*, 1 Hill, 351, it was held, that if the infant consented to or even aided in the prisoner's attempt, it could not, as in the case of an adult, be alleged in favor of the accused.

⁴ *People v. McGee*, 1 Denio, 19; *State v. Crow*, 10 W. L. J., 501; *Rex v. Ryan*, 2 Cox, C. C., 115.

⁵ 2 Bish., Cr. L., §§ 1121-1123.

⁶ *Stephens v. State*, 11 Geo., 225.

and this seems to be a test.¹ The offense, however, is a grave assault, and should be punished to the full extent of the law.

Consent Procured by Threats.—In some of the cases it is held that where consent is obtained by fear of death, or duress, it will constitute rape.² This, however, can only excuse the failure to make an outcry; it will not waive the making of a complaint at the earliest opportunity, which is more necessary in a case of that kind than in any other, as, in addition to proving that the act was committed forcibly and against the will, an excuse must be proved for a failure to resist.

The Acts and Declarations of the Husband of the woman on whom the offense was alleged to have been committed are not admissible to discredit the wife examined as a witness.³

Boy under Fourteen.—The law presumes that a boy under the age of fourteen is incapable of committing the crime of rape. This presumption, however, may be overcome by proof that he has arrived at the age of puberty.⁴

At common law this presumption is conclusive and a boy under that age can not be convicted of the offense.⁵

The actual facts in an alleged case of rape are as Bishop correctly states, frequently known only to the accused and prosecutrix,⁶ hence the necessity of carefully weighing the testimony and all the facts and circumstances of the case. There is but little doubt that many cases of seduction are charged by the woman to be rape, where, perhaps, she has given no express consent but has made no resistance. The woman satisfies her conscience in swearing that the act was committed against her will, because her express consent was not given; while in such cases, as well as those in which the facts as to the connection become known, as in *People v.*

¹ *R. v. Jackson*, R. & Ry., 487; *R. v. Clark*, 29 E. L. & E., 542; *R. v. Williams*, 8 C. & P., 286; *R. v. Sanders*, Id., 265; *People v. Bartow*, 1 Wheeler, Cr. Cas., 378; 3 Greenleaf, Ev., § 211; *State v. Ruth*, 21 Kas., 583.

² *R. v. Day*, 9 Car. & P., 722; *R. v. Hallett*, Id., 748; *Pleasant v. State*, 8 Eng., 360; *Wright v. State*, 4 Humph., 194.

³ *McCombs v. State*, 8 O. S., 643; *Jefferson v. State*, 6 Ired., 305.

⁴ *Williams v. State*, 14 O. R., 222.

⁵ 3 Greenleaf, Ev., § 215, and notes.

⁶ 2 Bish. C. Pro., § 962.

Abbott,¹ she frequently deems it better to be a victim than a *participant* and liable to be prosecuted. Then, too, there is the adventuress and the woman who is under the control of some person who has a purpose in view in charging another with the commission of the offense. All these facts must be considered in determining the question of the guilt or innocence of the accused.

That false cases have occurred and are liable to occur is well known to every one familiar with the proceedings of courts and the reports of cases. They seem to have been common in the lifetime of Sir Matthew Hale, and from the time of Joseph until the present, so far as we have an account, women have existed who have falsely made the charge without even a shadow of truth to base it on.

These facts do not reflect on the sex as a whole, but show the necessity of care in the trial of such cases. Neither will it do for either the court or jury to estimate the degree of credit to be given to an adventuress or one under the influence of another—trained to tell her part, by the female members of their own families.²

¹ 19 Wend., 192.

² In 1 Hale's P. C., 635-636, Ch. J. Hale mentions that at the assizes in the county of Suffolk a man had been convicted of rape before another judge and executed, and "some malicious people seeing how easy it was to make out such an accusation, and how difficult it was for the party accused to clear himself, furnished the two assizes following with many indictments for rapes, wherein the parties accused with some difficulty escaped. At the several assizes following there was an ancient, wealthy man, about sixty-three years old, indicted for a rape, which was fully sworn against him by a girl of fourteen years old, and a concurrent testimony of her mother, father and some other relations. The ancient man, when he came to his defense, alleged that it was true the fact was sworn, and it was not possible for him to produce witnesses to the negative; but yet, he said, his very age carried a great presumption that he would not be guilty of that crime; but yet he had one circumstance more that he believed would satisfy the court and jury that he neither was nor could be guilty; and being demanded what that was, he said he had for about seven years last past been afflicted with a rupture, so hideous and great that it was impossible he could carnally know any woman; neither had he, on that account, during all that time, carnally known his wife, and offered to show the same openly in court, which for the indecency of it I declined, but appointed the jury to withdraw

Robbery.—If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatever, with the intent to rob or steal, every person so offending shall be deemed guilty of robbery, and, upon conviction thereof shall be imprisoned in the penitentiary not more than fifteen nor less than three years.¹

Defined.—At common law, robbery is defined as the “felonious taking from the person of another, money or goods of any value, by putting in fear.”² It will be seen that the statute adds to the common law the taking of property “forcibly and by violence” from the person of another, any money or personal property.

To Constitute Robbery.—Something, either money or property, must be taken from the person of another either forcibly and by violence, or by putting in fear. The value is not material.³ To constitute a taking, the property must have passed into the possession of the offender; but if the robber once had the property in his hand, although it was immediately relinquished, the offense is complete.⁴

The Taking must be from the Person.—The taking must be with felonious intent, and may be in any form of words that

into some room to inspect this unnatural evidence; and they accordingly did so, and came back and gave an account of it to the court: that it was impossible he should have to do with any woman in that kind, much less to commit a rape, for all his bowels seemed to be fallen down in those parts; * * * whereupon he was acquitted. Again, in Northampton a man was indicted for a rape on two young girls, and the rapes fully proved although denied by the accused, but he was convicted. Before judgment, however, it was most apparently discovered that it was but a malicious contrivance and that the party was innocent.” He adds, “I only mention these instances that we may be more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and *false witnesses*.”

¹ Cr. Code, § 13.

² 2 Chitty, Cr. L., 801; 3 Inst., 68; 4 Bla. Com., 243.

³ 3 Inst., 68; 2 Chitty, Cr. L., 801.

⁴ 2 Chitty, Cr. L., 801; 3 Inst., 69; 1 Leach, 228.

imply a positive order.¹ In Donnelly's case² it is said, "The true nature and original definition of robbery was, felonious taking of property from the person of another by force, in which there were three things to be observed: first, that it must be done feloniously, which went to the intent of the taker; secondly, that it must be taken from the person of another; thirdly, that it must be taken by force. That all the rest that was to be found in the books on this subject formed no part of the definition of the offense, but arose from legal construction to prevent an evasion of the law, as if the owner threw down his money, or had it about his person at the time, though it were in his presence; these, by construction, have been held to be equivalent to an actual taking from the person."

If a man take a purse, which another, on being assaulted, has thrown down through fear, or his hat, which has fallen from his head, or his property from a servant in his presence, he will be considered as having taken from the person.³

The Taking Must not Precede the Violence.—The previous taking by force, violence or putting in fear, is the criterion that distinguishes robbery from other larcenies.⁴ That is, that violence or putting in fear, exerted after property has been obtained clandestinely, will not make the original taking robbery;⁵

¹ Donnelly's case, 1 Leach, 196.

² 1 Leach, 229; 2 East, P. C., 715.

³ 2 Chitt. Cr. L., 802; 3 Inst., § 9.

⁴ 4 Blacks. Com., 243.

⁵ 1 Hale, P. C., 534. "Without putting in fear or violence is not robbery but only larceny." * * * "Harman was indicted for the robbery of Halfpenny in the highway; and upon the evidence it appeared that Harman was upon his horse and required Halfpenny to open a gap for him to go out. Halfpenny going up the bank to open the gap, Harman came to him and slipped his hand in his pocket and took out his purse, Halfpenny not suspecting the taking of his purse until, turning his eye, he saw it in Harman's hand, and then he demanded it. Harman answered him: Villain, if thou speakest of thy purse, I will pluck thy house over thine ears and drive thee out of the country, as I did John Somers, and then went away with his purse; and because he took it not with such violence as put Halfpenny in fear, it was ruled to be stealth and not robbery, for the words of menace were used after the taking of the purse, wherefore he was found guilty of larceny only."

but if the taking be done forcibly and against the will of the owner with felonious intent, no doubt, under the statute, the offense would be robbery.

It is Sufficient if the Property was in the Presence of the Owner and under his immediate control, and was taken from him by the accused through fear, etc.¹

Taken under Color of Purchase.—If a person forcibly and by violence take the property of another against his will for less than its value, it is robbery,² whether taking the goods and paying more than their value is robbery, is not decided,³ but probably depends on the question whether or not there was felonious intent.

The Taking must be Forcibly and by Violence, or by Putting in Fear.—This is the circumstance which distinguishes robbery from all other larcenies. The principle ingredient in robbery is a man's being forced to part with his property against his will. What degree of force must be used and what kind of fears exerted are questions upon which the authorities are not entirely agreed; but all are agreed that the property must be taken against the will of the owner; therefore where three persons agree to rob a fourth in order to obtain a reward to be shared among them all, and the fourth consented to the scheme, it was held not to be robbery;⁴ but where a person is suddenly knocked down and his property taken from his person while he is senseless, it is robbery. So, where a man

¹Turner v. State, 1 O. S., 422. In this case the prisoner entered the dwelling house of one Robert Morton, in the night time, armed with a bowie knife and sledge hammer, there being in the house at the time Morton, his wife and a daughter, and threatened to kill them, and put Morton in great fear and danger of his life. The prisoner then demanded his money, and ordered him to get up and light a candle and get it. Morton and wife then went to a secretary in the same room, and his wife took from the drawer two bank bills, and while in the act of handing them to her husband the prisoner snatched them and put them in his pocket. He then proceeded to rifle the drawers of the secretary, and took therefrom between fifty and sixty dollars in bank bills and coin, and departed. The court held that this was robbery from the person.

²Rex v. Simons, Cornwall Lent Assizes, 1773, 2 East, P. C., § 128.

³The Fisherman's case, 2 East, P. C., pp., 661-62.

⁴Fost., 123; 2 Chitty, Cr. L., 803.

knowing a road to be infested with highwaymen put a little money in his pocket and went out for the purpose of detecting and securing them, and on being accosted delivered to them his money, and thereupon succeeded in arresting the offenders, it was held to be robbery.¹

Money Paid under Threats.—It seems to have been held formerly that to obtain money by threatening to accuse a party of an unnatural crime, though he were under no apprehension for his life, was robbery.² Afterward it was held not sufficient unless the threat was to charge him with some specific crime, as sodomy,³ and that the only place that fear would supply the place of force was an accusation of unnatural practices.⁴ It has since been held that to constitute robbery the money must be taken immediately on the threat, as part of the same transaction,⁵ and then only for a threat to accuse the party of sodomitical practices.⁶ Where, upon a false charge of this kind against a party, he was prevailed upon to deliver to the accused \$20, and a receipt for \$13 more for money due from the accused to the other party, and a promise to pay the accused \$20 additional, it was held that the accused was guilty of robbery in the second degree.⁷

The Indictment should contain a substantial allegation of the intent to steal or rob, and an averment that the party "feloniously did seize, take and carry away" is not equivalent to such allegation.⁸

A Description of the Property as "one United States note commonly called a greenback, of the value of ten dollars," is sufficient.⁹ The property may be described with the same particularity, and no greater, than in a charge of larceny,¹⁰ and

¹ Fost., 129; 2 Chitty, Cr. L., 803.

² 1 Leach, 139, 193, 278; 2 Chitt., Cr. L., 803.

³ 2 Leach, 721.

⁴ 2 Leach, 735.

⁵ 1 East, P. C. App., 22; 2 Chitt., Cr. L., 804.

⁶ Long v. State, 12 Ga., 293; Britt v. State, 7 Humph., 45.

⁷ People v. McDaniels, 1 Parker's Cr. R., 198.

⁸ Mathews v. State, 4 O. S., 539; Boose v. State, 10 Id., 575.

⁹ McEntee v. State, 24 Wis., 43.

¹⁰ Brennon v. State, 25 Ind., 403; Terry v. State, 13 Id., 70.

where the property taken consists of bank notes or bills or treasury notes or bills, the word "denomination" should be used, or an equivalent word.¹ A description: "the United States gold coins of the denomination and value of ten dollars each," is sufficient.² "Twenty-four dollars of Clark's exchange bank bills, of the value of twenty-four dollars, and seven dollars of other banks, the names of the banks to the grand jurors unknown, of the value of seven dollars, and one hundred and nine dollars of gold and silver coin of the value of one hundred and nine dollars," was held sufficient.³ The amount and value of promissory notes should be stated,⁴ and the same rule will apply to the treasury notes and bank bills.

The Name of the Owner should be correctly stated,⁵ and it should be alleged that the taking was from the person.⁶ But where the robbery is committed in a dwelling house, it will not be fatal if the ownership of the *house* is not correctly stated.⁷

FOR ROBBERY OF PERSONAL PROPERTY.⁸

That A B, on, etc., in said county, in and upon one C D, forcibly and by violence, did make an assault, and then and there one silver watch of the value of twenty dollars, the goods and chattels of him, the said C D, from the person and against the will of the said C D, then and there feloniously, forcibly and by violence, and by putting him, the said C D, in fear, did take with the intent feloniously to steal, take and carry said goods away.

¹ Arnold v. State, 52 Ind., 281; Brennon v. State, 25 Ind., 403; Hickey v. State, 23 Id., 21. See Cr. Code, § 420.

² Daily v. State, 10 Ind., 536.

³ Munson v. State, 4 Greene, 483.

⁴ United States v. Barry, 4 Crouch, C. C., 606; Wilson v. State, 1 Porter, 118.

⁵ Collins v. People, 39 Ill., 233; People v. Vice, 21 Cal., 344; Smedly v. State, 30 Tex., 214.

⁶ People v. Beck, 21 Cal., 385; Kit v. State, 11 Humph., 167.

⁷ Johnson's case, 2 East, P. C., 786. The crime of robbery includes assault and battery, and larceny, and the jury may find the accused guilty of either of those offenses on the trial of an indictment for robbery. Murphy v. People, 5 T. & C. 302; 3 Hun, 114.

⁸ The above is the substance of the form in 2 Chitty, Cr. L., 807, by ad-

ROBBERY OF MONEY.

That AB, on, etc., in said county, in and upon one C D, unlawfully, forcibly and with violence did make an assault; and him, the said C D, in bodily fear then and there feloniously did put, and from the person and against the will of him, the said C D, then and there feloniously, forcibly and by violence did steal, take and carry away one purse of the value of one dollar, and one piece of the gold coin of the United States called an eagle, of the value of ten dollars, the property of the said C D, with the intent then and there to steal, take and carry said property away.

FOR ROBBERY IN A DWELLING HOUSE AT COMMON LAW.

That A B, on, etc., in the dwelling house of one E F, situate in said county, in and upon C D forcibly and by violence did make an assault, and him, the said C D, in bodily fear and danger, in said dwelling house, then and there feloniously did put, and one purse of the value of one dollar, and one silver coin of the United States called one dollar, of the value of one dollar, the property of said C D, from the person and against the will of the said C D, in said dwelling house then and there feloniously, forcibly and by violence did steal, take and carry away, with the intent then and there to steal, take and carry the same away.

FOR AN ASSAULT WITH INTENT TO ROB.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, maliciously and feloniously, did make an assault, and that the said A B, then and there, with menaces, and forcibly and with violence, feloniously did attempt to take from the person of said C D, and against his will, two eagles of the gold coin of the United States, of the value of twenty dollars, the property of said C D, with the intent of him, the said A B, then and there forcibly, violently and feloniously to steal, take and carry the same away.

FOR ROBBERY AGAINST PRINCIPAL AND ACCESSORY.

That A B, on, etc., in and upon one C D, then and there being, unlawfully, forcibly and with violence did make an assault, and him, the said C D, in bodily fear then and there feloniously did put, and from the person and against the will of him, the said C D, then and there, feloniously, forcibly and with violence did steal, take and carry away one purse of the value of twenty-five cents, and one piece of the silver coin of the United States

ding did "take * * with intent to steal," etc., as required by the statute, § 13.

called a half dollar, of the value of fifty cents, the property of said C D, with the intent then and there to steal, take and carry said property away, and that one E F, before said robbery was committed, to wit, on the — day of —, in said year, in said county, unlawfully, purposely and feloniously, did incite, procure, aid and abet, said A B in committing the robbery aforesaid.

ASSAULT WITH INTENT TO COMMIT MURDER.¹

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, did make an assault with a dangerous and deadly weapon, to wit: (*describe*) which he, the said A B, then and there in his right hand had and held, with the intent of him, the said A B, then and there and thereby him, the said C D, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice to kill and murder.

Maiming.—If any person shall voluntarily, unlawfully and on purpose cut or bite the nose, lip or lips, ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, ear or lip, cut or disable any limb or member of any person, with intent to murder, kill, maim or disfigure such person, every person so offending shall be imprisoned in the penitentiary not more than twenty years, nor less than one year.²

Mayhem at Common Law is the violently depriving another of the use of such of his members as may render him less able in fighting, either to attack his adversary or to defend himself.³ The cutting off of a limb, or disabling or weakening

¹ Great care is necessary, in cases of this kind, to distinguish between a mere assault, aggravated, it may be, but no intent to murder, and an assault with intent to commit murder.

The felonious intent, which is the essence of the offense, should be proved beyond a reasonable doubt. It should appear, too, that the weapons used were dangerous and deadly. In many cases, in which it is claimed there was an intent to commit murder, it will be found there was a mere assault and battery, of which, under an indictment of this kind, the party may be convicted.

The name of the person upon whom the assault was made should be stated, if known. *Vandermark v. People*, 47 Ill., 122; *Jones v. State*, 11 S. & M., 815.

State v. Patrick, 3 Wis., 812. If the offense be described in the language of the statute, it is sufficient. *Hunter v. State*, 29 Ind., 80; *Dooley v. State*, 28 Id., 239.

² Cr. Code, § 15.

³ 2 Chitty, Cr. L., 784; Hawk., b. 1, c. 55, § 1.

the hand or finger, or the striking out an eye or front tooth, or depriving him of those parts the loss of which in all animals abates their courage, were held to be mayhems.¹ But mere disfiguring of the person injured in such a way as not to affect his strength, such as the cutting off his ear, or nose, or the like, were not held to be mayhems.² To constitute the offense, the act must be done maliciously—purposely.

Various statutes were passed upon the subject, before the settlement of the colonies, which are common law to us. The principal statute, from which that of Nebraska is largely copied, is known as the Coventry Act passed in the time of Charles II.

The Intent usually will be presumed from the act of maiming, as a person is presumed to intend the natural and probable consequences of his own act.³ Where the injury takes place during a conflict, it is not necessary to a conviction that the accused should have formed the intent before engaging in the conflict. It is sufficient if he does the act voluntarily, unlawfully, and on purpose. A description of the offense in the language of the statute is sufficient.⁴ At common law it must be alleged after a statement of the injury that the party was thereby maimed.⁵ Where the injury charged is biting off an ear, it has been held that it was unnecessary to allege whether it was the right or the left,⁶ the injury being the same in either case.

FOR MAIMING BY PUTTING OUT AN EYE.

That A B, on, etc., in said county, then and there being, in and upon one C D, unlawfully, purposely and feloniously did make an assault with (*state what instrument, if one was used*) which he, the said A B, then and there in his right hand had and held, and the right eye of him, the said C D, then

¹ 4 Bla. Com., 205.

² Id.; Hawk., b. 1, c. 55, § 2.

³ State v. Evans, 1 Hayw., 281; State v. Crawford, 2 Dev., 425; State v. Gerkin, 1 Ired., 121.

⁴ Republica v. Reiker, 3 Yeates, 282; State v. Briley, 8 Port., 472.

⁵ Hawk., P. C., 179; Chick v. State, 7 Humph., 161.

⁶ State v. Green, 7 Ired. 39.

and there voluntarily, unlawfully, feloniously, and on purpose, did strike and put out, with the intent of him, the said A B, then and there to maim and disfigure said C D.

Shooting, etc., with Intent to Kill, etc.—If any person shall maliciously shoot, stab, cut, or shoot at, any other person, with intent to kill, wound or maim such person, every person so offending shall be imprisoned in the penitentiary not more than twenty years nor less than one year.¹

It need not be averred in the indictment that the person assaulted was so near to the person shooting that the bullet would reach him. This is covered by the words charging the assault²—in and upon; but it must be proved that the gun was so loaded as to be capable of doing the injury which it is claimed was intended,³ and where a gun was charged with powder and a light cotton wad, and the person shot at was about forty feet from the person shooting, it was held that accused could not be convicted of shooting with intent to kill; he could be convicted of an assault however.

To Constitute the Offense of Malicious Shooting with Intent to Kill, the offense must be of such a character that had death ensued, it would have been murder either in the first or second degree.⁴

Where a Shot Fired at One Person Kills Another.—Where a pistol shot discharged with criminal intent at one person wounds another, who is at the time known to be in such a position or proximity that his injury may be reasonably apprehended as a probable consequence of the act, a conviction on an indictment averring the shooting of the latter with intent, is sufficient.⁵ If a person maliciously intending to wound, maim or kill A, but by mistake shoots at and wounds B, supposing

¹Cr. Code, § 16.

²*Shaw v. State*, 18 Ala., 547.

³*Vaughan v. State*, 3 S. & M., 553.

⁴*State v. Swails*, 8 Ind., 524; *Henry v. State*, 18 Ohio, 32.

⁵*Rapp v. Com.*, 14 B. Mon., 614; *Elliott v. State*, 46 Ga., 159; 22 Gratt., 924; *Nichols v. State*, 8 O. S., 435; *Curry v. State*, 4 Neb., 545; *Curry v. State*, 5 Id., 413; *Candy v. State*, 8 Neb., 486.

⁶*Callahan v. State*, 21 O. S., 306.

him to be A, a conviction on an indictment for maliciously shooting B with intent to kill is valid.¹

Malice.—On an indictment for maliciously cutting with intent to wound, a verdict of “guilty of cutting with intent to wound,” omitting the word maliciously, is not sufficient.² Malice is a material ingredient of the offense, and a verdict that the jury “find the defendant guilty of shooting with intent to kill, while in a fit of passion and excitement, but without malice, is not sufficient.”³

Intent.—It is sufficient to describe the intent as follows: “with intent in and upon him, the said W, then and there, feloniously, willfully and of his malice aforethought to commit a murder.”⁴ If death is the natural and probable consequence of wounds inflicted in such assault, the inference may be that death was intended,⁵ but if the killing was manslaughter only, there can be no conviction of an intent to kill.⁶

SHOOTING AT WITH INTENT TO KILL.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully and maliciously, did make an assault with a certain pistol loaded with gun powder and one leaden bullet, which said pistol, he, the said A B, then and there in his right hand had and held, one C D; unlawfully, maliciously and feloniously did shoot with the intent, in so doing, willfully, unlawfully, maliciously and feloniously him, the said C D, to kill and murder.

SHOOTING AT AN UNKNOWN PERSON WITH INTENT TO WOUND.

That A B, on, etc., in said county, in and upon a certain person, to the grand jurors [or deponent] unknown, then and there being, unlawfully and maliciously did make an assault with a certain pistol loaded with gunpowder and one leaden bullet, which said pistol he, the said A B, then and there in his

¹ Callahan v. State, 21 O. S., 306.

² Rifemaker v. State, 25 O. S., 396.

³ Heller v. State, 23 O. S., 582.

⁴ Sharp v. State, 19 Ohio, 379.

⁵ State v. Shields, 1 W. L. J., 118.

⁶ Id. As to the effect of drunkenness on the malicious intent, see Nichols v. State, 8 O. S., 435; State v. White, 14 Kas., 538.

right hand had and held, at and against said person, to the jurors [or deponent] unknown, then and there unlawfully, maliciously and feloniously did shoot, with the intent, in so doing, willfully and unlawfully, maliciously and feloniously, him, the said person, to the jurors [or deponent] unknown, to kill and murder.

STABBING WITH KNIFE WITH INTENT TO WOUND.¹

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully and maliciously did make an assault with a certain knife which he, the said A B, then and there in his right hand had and held, one C D, on the right side of the neck of him, the said C D, then and there unlawfully, maliciously and feloniously did strike, stab, cut and wound with the intent then and there of him, the said A B, him, the said C D, then and there to wound.

Kidnapping.—Any person or persons who shall kidnap, or forcibly or fraudulently carry off or decoy out of this state any person or persons, or shall arrest or imprison any person or persons, with the intention of having such person or persons carried out of the state, unless it be in pursuance of the laws thereof, shall be confined in the penitentiary not less than three nor more than seven years, and shall, moreover, be liable for the costs of prosecution.²

Kidnapping is the Forcible Abduction or Stealing away of a Man, woman or child from their own country, and sending them to another. It is a species of false imprisonment, aggravated, it may be by the circumstances of the case. Under the English statute,³ from which in substance, most of American statutes were taken, the indictment must allege: 1. "That the maid, wife or widow have substance of goods or land, or be heir apparent. 2. That she be taken against her will. 3. That she be married to, or defiled by the misdoer or some others by his consent." * * * 4. "That she be not in ward or a bondwoman in the person that taketh her, or causeth her to

¹ In *Candy v. State*, 8 Neb., 483, the indictment contained two counts, one for shooting with intent to kill, and one for shooting with intent to wound. It was held that the punishment being the same in each case the court properly overruled the motion to elect.

² Cr. Code, § 18.

³ 3 H. VII, c. 2.

be taken only as his ward or bondwoman.”¹ It was unnecessary to allege that the taking was with the intent to marry or defile the woman, because the statute did not require the allegation of such intent.²

Indictment.—The statute of Nebraska and of many other states applies to all persons unlawfully abducted and held in restraint. The statute of Virginia seems to be a copy of 3 H. VII, c. 2. As the taking is by force, actual or constructive, the indictment should allege: 1st, an assault, and 2d, unlawful restraint. Bishop suggests the addition also of aggravating matter;³ but this would seem to be unnecessary as it would be merely evidence of the acts done in consequence of the unlawful restraint.⁴

To constitute the offense actual physical force is not necessary; and it will be sufficient if the fears of the party were falsely excited by threats and menaces, so that acting under them there was coercion;⁵ so if artifice is resorted to, as by procuring the intoxication of a sailor in order to get him on ship-board and carry him to another country.⁶ But where actual physical force was not resorted to, it would require very clear evidence of the party's guilt to justify a conviction. The after condition of mind of the party and the circumstances of the case may be considered by the jury in connection with proof of restraint.⁷

FORCIBLY CARRYING A PARTY OUT OF THE STATE.

That A B, on, etc., in said county, in and upon one CD, then and there being, unlawfully did make an assault, and without lawful authority then and there unlawfully, forcibly, fraudulently and feloniously did seize, take,

¹ 1 Hale, P. C., 660.

² Id., 661.

³ 2 Cr. Pro., § 691.

⁴ The allegations of assault, or assault and battery, may be omitted; but in case the proof fails to show a case of unlawful detention, there could be no conviction for the minor offense. *Com. v. Turner*, 3 Met., 19-26. In stating the offense it is sufficient to follow the words of the statute. *State v. Griffin*, 3 Harring. (Del.), 559; *Hamilton v. Com.*, 3 P. & W., 142; *State v. McRoberts*, 4 Blackf., 178.

⁵ *Moody v. People*, 20 Ill., 315.

⁶ *Hadden v. People*, 25 N. Y., 373.

⁷ *Moody v. People*, 20 Ill., 315.

kidnap and carry away said C D, without his consent and against his will, out of his state into another state, to wit: — the same not being done by him, said A B, in pursuance of the laws of the state or of the United States.

ARREST AND IMPRISONMENT OF PARTY WITH THE INTENTION OF HAVING HIM CARRIED OUT OF THE STATE.

That A B, on, etc., in said county, in and upon one C D, then and there being, unlawfully did make an assault and without lawful authority, then and there unlawfully, forcibly, fraudulently and feloniously did seize, arrest and imprison with the intention then and there of him, the said A B, of having him, the said C D, carried out of the state against his will and without his consent, and not in pursuance of the laws of the state or of the United States.

In England, under the statute of Henry VII, it was held that persons who were only privy to the marriage but in no way parties to or assenting to the forcible taking were not liable as accessories.¹

False Imprisonment is the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. Any person convicted of false imprisonment shall be fined in any sum not exceeding five hundred dollars, or imprisoned not exceeding one year in the county jail.²

To constitute False Imprisonment two things are necessary, first, the detention of the person, and second, the unlawfulness of such detention.³ Every confinement of the person is imprisonment, whether by forcibly detaining one in a public place, in a private house or in a prison.⁴

Words, When They Accompany an Assumed Authority, may be sufficient to constitute false imprisonment, as where a bailiff having a writ against a person which did not authorize an arrest, met him on horseback and said to him, "You are my prisoner," whereupon the party sought to be arrested turned back and submitted it was held to be a good arrest.⁵

¹ Fulwood's case, Cro. Car., 482-489; 1 Hawk. P. C., c. 41, § 10.

² Cr. Code, § 19.

³ Bla. Com., 127.

⁴ Floyd v. State, 7 Eng. (Ark.), 43; Johnson v. Tompkins, 1 Baldwin, 571.

⁵ Homer v. Battyn, Buller's N. P., 62; Russen v. Lucas, 1 C. & P., 153; Chrinn v. Morris, 2 Id., 361; Pocock v. Moore, Ry. & M., 321; Strout v. Gooch, 8 Greenleaf, 127; Gold v. Bissell, 1 Wend., 210. In Gold v. Bissell,

"It is the fact of compulsory submission which brings a person into imprisonment;¹ and impending and threatened physical violence, which to all appearance can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. There are cases in which a party who does not submit can not be regarded as arrested until his person is touched; but when he does submit no such necessity exists."²

"If the party is under restraint, and the officer manifests an intention to make a capture, it is not necessary there should be actual contact.³ In such cases, however, the officer without lawful authority must have restrained the person to some extent of his liberty.

If a **Private Person through Threats Detains** another, as if a person on a ferry boat should say to another that he should not leave until a certain demand was paid and he should submit through fear, it would be false imprisonment.⁴ But it should be clearly shown that the party did submit through fear.

A **Writ, Regular on its Face**, and issued by a court having jurisdiction, will protect an officer who serves and returns it properly and in good faith.⁵ But if the warrant is executed at an unlawful time, or at a place privileged from arrest, the detention will be unlawful.⁶

What Does not Constitute.—Merely giving charge of a person to a peace officer, without any arrest or restraint, is not false imprisonment, although the person to avoid arrest called next day at the police office.⁷ And where a party, in consequence

1 Wend., 214, it is said: "We understand the law to be well settled that no manual touchings of the body or actual force is necessary to constitute an arrest and imprisonment. It is sufficient if the party is within the power of the officer and submits to arrest."

¹ *Floyd v. State*, 7 Eng. (Ark.), 43; *R. v. Tracy*, 6 Mod., 80.

² *Campbell, J.*, in *Brushaber v. Stegeman*, 22 Mich., 266-269; *Cooley on Torts*, 170.

³ *Vaughan, J.*, in *Grainger v. Hill*, 4 Bing., 212-222; *Cooley on Torts*, 170.

⁴ *Smith v. State*, 7 Humph., 43-45.

⁵ *Rowland v. Veale*, 1 Cowp., 18; *Tefft v. Ashbaugh*, 13 Ill., 602.

⁶ 4 Bla. Com., 218; 2 Inst., 589; 1 Hawk. P. C., c. 60.

⁷ *Simpson v. Hill*, 1 Esp., 431; *Russen v. Lucas*, 1 C. & P., 153.

of a message from a deputy from the sheriff's office, holding a writ, that the defendant execute a bail bond and send to him, and he complies with the request, it will not constitute an arrest.¹

The Justification may be either under process or without it. A degree of restraint is permitted in certain relations, without any writ or legal process, as the control, within certain limits, of the child by the parent, the ward by the guardian, the apprentice by the master, and the bail by his principal.²

To a certain extent the parent's authority over his child is judicial in its nature. He is supposed to be anxious to promote its welfare and happiness, and neither individuals nor the courts have any right to interfere, unless there is a clear abuse of this power. So a guardian of the person of his ward has the same right of personal restraint possessed by the parent, except that of chastisement. The powers of the master over his apprentice are governed by the statute of the state and the articles of apprenticeship. The teacher in whose care a child is placed for the time being, by its parents or guardian, possesses the power of reasonable restraint and even punishment, to compel obedience to lawful rules or orders; and the bail may arrest and surrender his principal and be exonerated from liability.³

Arrest by Private Persons without Warrant.—To justify such an arrest, the party making the arrest must show the following facts: First. That a felony was actually committed. Second. Facts which had come to his knowledge, which justified him in believing that the person arrested committed the crime. Third. An offense being committed, as an attempt to commit murder, break into a house, steal goods, etc.⁴

¹ *Berry v. Adamson*, 6 Barn. & C., 528; *Amos v. Blofield*, 9 Bing., 91.

² *Cooley on Torts*, 170.

³ *Cooley on Torts*, 172. There is some conflict in the authorities, as to right of a teacher to chastise a child for disobedience; but it seems to be generally conceded that the teacher may exercise a reasonable restraint over the pupil. Indeed, without this power it would be impossible to govern a school.

⁴ *Holley v. Mix*, 3 Wend., 353. "If a felony has actually been committed by the person arrested, the arrest may be justified by any person without a warrant, whether there is time to obtain one or not. If an innocent per-

Breaches of the Peace in riots, affrays, etc., committed in the presence of a party, will justify him in making an arrest of those actually engaged in the disturbance, as there is a tendency in such cases to lead to serious, if not fatal, injuries;¹ but except to prevent felonies, breaches of the peace, or the escape of a known felon, the power of arrest by private parties should be sparingly exercised.

A Military Officer in time of war may arrest a party on a reasonable suspicion that he is transporting munitions of war to the enemy's country.²

Insane Persons may be restrained of their liberty for their own benefit, either to protect them or because proper medical treatment requires it,³ and for the safety of the public.

FOR FALSE IMPRISONMENT.

That A B, on, etc., in said county, in and upon one C D, then and there being, did unlawfully make an assault, and him, the said C D, then and there unlawfully and injuriously, against the will and without the consent of him, the said C D, and also against the laws of the state and without any legal warrant, authority or justifiable cause whatever, did unlawfully imprison and detain for a long time, to wit, for the space of — days.

Abducting Child.—Every person who shall maliciously or forcibly or fraudulently lead, take or carry away or decoy or entice away any child under the age of ten years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian or other person having the lawful charge of such child, shall be imprisoned in the penitentiary not more than seven years nor less than one year.⁴

son is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the party arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on.' 1 Chitty, Cr. L., 15; Com. v. Deacon, 8 S. & R., 47; State v. Roane, 2 Dev., 58; State v. Holmes, 48 N. H., 377; Cooley on Torts, 175.

¹ Cooley on Torts, 177.

² Clow v. Wright, Brayt., 118.

³ Cooley on Torts, 179.

⁴ Cr. Code, § 20.

Custody under a Decree or Order.—Where, upon a divorce being granted, the custody of a child is given to one of the parents, the other will have no right to seize and carry such child away, and no doubt would be liable if he did so.¹ In such cases the law looks to the welfare of the child, and places it in the custody of the parent who is presumed to be best qualified to properly instruct it and supply its wants, and the natural right of the parent to his child must yield. The same rule has been applied where a third person, who, at the request or order of a parent not entitled to the custody of a child, seized and carried it away.²

But the mere employment of a runaway child is not enticement.³

The law is designed to protect the person entitled to custody of a child of tender years from the danger of intrusion of another with no rights, or whose right is inferior to his own. The statute, however, should not receive a forced construction, nor be extended to cases not within the province of the act. Experience has shown that there are cases where the shelter of a child from those entitled to its custody, from personal abuse, is a moral duty.⁴ The *quo animo* of the defendant is a material inquiry in such cases.⁵

CARRYING AWAY A CHILD.

That A B, on, etc., in said county, in and upon C D, then and there being, did make an assault, and him, the said C D, did forcibly, unlawfully, maliciously and feloniously lead, take and carry away, said C D then and there being under ten years of age, to wit: — years, with the intent of said A B unlawfully to detain [or conceal] such child from E F, the [father] of said child, and then and there having the legal custody of the same.

HARBORING AND CONCEALING A STOLEN CHILD.

(Follow the preceding form to the close, then add) And afterward to wit, on the — day of — in said year, one T S, in said county,

¹ State v. Farrar, 41 N. H., 53.

² Com. v. Nickerson, 5 Allen, 518.

³ Butterfield v. Ashley, 6 Cush., 249; Keane v. Boycott, 2 H. Bl., 511.

⁴ Cooley on Torts, 229.

⁵ Schouler on Dom. Rel., § 260.

knowingly, unlawfully, fraudulently and feloniously, did conceal said child, then and there being under the age of ten years, as said T S then and there well knew, with the intent of him, the said T S, unlawfully to detain said child from said E F, the [father] of said child, said T S then and there well knowing that said child had been carried away from its said father with the aforesaid intent.

Every person who shall harbor or conceal, with intent to obtain from its parent or parents, or guardian, any child under the age of ten years, so led, taken, carried, decoyed or enticed away, as in the preceding section (20) specified, shall, upon conviction thereof, be imprisoned in the penitentiary not more than seven years nor less than one year.¹

¹Cr. Code, § 21.

CHAPTER XXIII.

OFFENSES AGAINST PUBLIC PEACE AND JUSTICE.

Treason.—Any person or persons residing in this state, who shall levy war against this state, or the United States of America, or shall knowingly adhere to the enemies of this state, or of the United States, giving them aid and comfort, shall be deemed guilty of treason against the state of Nebraska, and shall be imprisoned in the penitentiary during life.¹

Misprision of Treason.—Any person or persons residing within this state, who shall surrender or betray, or be in any way concerned in the surrendering or betraying any military post, fortification, arsenal or military stores of the state, or the United States, into the possession or power of any enemies of either, or shall supply any arms or ammunition or military stores to such enemies, or shall unlawfully and without authority usurp possession and control of any such military post, fortification arsenal or military stores; or having knowledge of any treason against this state, or the United States, shall willfully omit or refuse to give information thereof to the governor, or some judge of this state, or to the president of the United States, shall be imprisoned in the penitentiary not less than ten years, nor more than twenty years.²

Unauthorized Military Expeditions.—If any person shall within this state begin or set on foot, or provide or prepare the means for any unauthorized military expedition or enterprise, to be carried on from thence against the territory or people of any of the United States, every person so offending shall be punished by imprisonment in the penitentiary not less than one nor more than ten years.³

¹ Cr. Code, § 22.

² Cr. Code, § 23.

³ Cr. Code, § 24.

"Treason" *Proditio*, which is borrowed from the French, imports a betraying, treachery or breach of faith.¹ At common law great latitude was given to the judges to determine what was treason or not; whereby, as Blackstone says, "The creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise by force and arbitrary constructions offenses into the crime and punishment of treason which were never suspected to be such."² The several heads of the offense, twelve in number, are commented on in East's *P. C.*, 58 to 93.

The constitution of the United States declares that "treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." The offense of adhering to and giving aid and comfort to the public enemies of the United States is not treason against the state.⁴ Treason against the United States is not cognizable in the state courts.⁵

It is evident that that part of the statute relating to treason against the United States is inoperative, the offense being against the United States and punished by the laws of the same.⁶

Treason against the State in its distinct capacity seems to be confined to cases of open and armed public opposition to the laws of the state, with the intention of usurping authority or subverting its government.⁷

The *Dorr Case*, of Rhode Island, is the first reported case of treason against a state since the federal constitution was adopted. In his charge to the jury Durfee, Ch. J., said: "If the blow be aimed only at the internal and municipal regulations or institutions of the state, without any design to dis-

¹ 4 *Bla. Com.*, 75.

² *Id.*

³ Constitution of U. S., Art. 3, § 7.

⁴ *People v. Lynch*, 11 *John.*, 549.

⁵ *Id.* In 1 *Kent Com.*, 403, it is said: "Every criminal prosecution must charge the offense to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose executive may pardon him." This proposition is self-evident.

⁶ 1 *Kent, Com.*, 403.

⁷ *Id.*

turb it in any of its functions under the constitution of the United States, it is treason against the state only.¹

Levying War.—In construing the words “levying of war against the state,” the Chief Justice, quoting from Story, said: “To constitute an actual levy of war there must be an assembly of persons met for a treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or toward executing that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use it, if necessary, to further, to aid or to accomplish, their treasonable design. If the assembly is arranged in a military manner for the express purpose of overawing or intimidating the public, and to attempt to carry into effect the treasonable design, that will of itself amount to a levy of war, although no actual blow has been struck or engagement has taken place.” This seems to be a correct statement of what constitutes levying of war.

In the Case of John Brown, who, in 1860, invaded Virginia with a few followers for the purpose of liberating the slaves in that state, and who was afterward convicted of treason against the state in one of the state courts, and executed, the principal ground for conviction was the levying war against the state.

The Power of the State, therefore, to punish for treason, is confined to cases where the blow is aimed only at the internal and municipal regulations of the state by armed force, without any design to disturb it in any of its functions under the constitution of the United States. If the offense passes beyond these bounds it is one against the laws of the United States and punishable under them.

INDICTMENT FOR TREASON.

That A. B., on, etc., in said county, being an inhabitant of and residing within the state of —, and under the protection of the laws of said state, and owing allegiance and fidelity to said state of —, on the day and year afore-

¹ Pitman's Dorrs' Trial, 21.

said, in said county, unlawfully, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said state of —, and to carry into effect said traitorous intent, did, on the — day of —, in said year, in said county, with a great multitude of persons whose names are to the jurors unknown, being persons owing allegiance to the state of —, to wit, to the number of — and upward, armed and arrayed in a warlike manner, that is to say with guns and swords and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together against the said state of —, did then and there, by force and arms, unlawfully, maliciously and traitorously, in a warlike and hostile manner, attempt to subvert the government of the state by (*state overt acts*) as by law established, contrary to the duty of allegiance of him, the said A B.

ORGANIZING AN UNAUTHORIZED EXPEDITION.

That A B, on, etc., in said county, with divers other persons to the jurors unknown, did conspire, consult, consent and agree to raise, levy and make insurrection, rebellion and war, in the state of —, and against the lawfully constituted authorities of said state, did, in said county, on the day and year aforesaid, unlawfully begin and set on foot an unauthorized military expedition and enterprise, to wit, (*state the nature of the enterprise*) to be carried from thence against the people of the state [or territory] of —.

Venue.—The prosecution must be instituted in a county in which an overt act of treason can be proved; but after proof of an overt act in the county, evidence may be given of any other overt acts as the same species of treason in other counties.¹ Intercepted letters are received as evidence of overt acts of treason in the county in which they were written.²

Traitorously.—Every indictment for treason should allege that the offense was committed traitorously,³ and should conclude against the duty of the defendant's allegiance.⁴ A charge of committing an act *seditionously*, is not a charge of treason.⁵

¹ 2 Chitty, Cr. L., 63; 1 East, P. C., 125; 4 East, R., 171.

² 2 Chitty, Cr. L., 63; 2 Compl., 506.

³ *Id.*, 2 Ld. Raymond, 870; 1 East, P. C., 115.

⁴ 2 Chitty, Cr. L., 63; 1 Ld. Raymond, 1, 2, Salkeld, 630; 1 E. P. C., 115.

⁵ 2 Chitty, Cr. L., 63; 1 East, P. C., 115. It is now well settled that to constitute treason, the conspiracy and the insurrection connected with it must be to effect something of a *public nature*. There must be proof of overt

Allegiance.—As treason is an offense against the allegiance which a person owes to the government, it can only be committed by one from whom such allegiance is due. An enemy from a hostile nation, therefore, if taken here, owes no allegiance, and will be treated as an enemy. If, however, he is residing within the state, he owes it allegiance, and may be guilty of treason toward it.¹ It may be proved, therefore, that the offender is a citizen of the state, to show his duty of allegiance to the state. The *allegiance of an alien* terminates when he removes from the state.²

Two Witnesses³—**Overt Acts.**—After proof of a conspiracy to publicly resist the execution of the laws, and there is evidence to connect the accused with it, any declarations or acts of those engaged in the conspiracy may be given in evidence. Two witnesses are necessary to establish each overt act.

Prosecutions for treason against a state, will rarely be necessary, and in most cases it will be found that the criminal laws afford a more efficient remedy which juries will not hesitate to enforce.

Carrying Concealed Weapons.—Whoever shall carry a weapon or weapons concealed on or about his person, such as a pistol, bowie knife, dirk or any other dangerous weapon, on conviction, for the first offense shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days, and for the second offense not exceeding one hundred dollars or imprisoned in the county jail not more than

acts of a general and public resistance to some statute of the state. A mere insurrection for the accomplishment of some private purpose, is not treason. The tendency of the courts at the present time is to restrict treason to acts committed in pursuance of a conspiracy to subvert the government.

¹ 1 Hale, P. C., 59, 62; 1 Hawk. Cr., 17, § 5; Fost. C. L., 183, Rel., 38.

² 1 Hale, P. C., 59-60.

³ The necessity for two witnesses was stated by the chancellor on the trial of Stafford, as follows (L. Raym., 408): "Anciently, all or most of the judges were churchmen and ecclesiastical persons, and by the canon law now and then in use all over the Christian world, none can be condemned of heresy, but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and anciently heresy was treason; and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason."

three months, or both, at the discretion of the court. Provided, however, if it shall be proved from the testimony on the trial of any such case that the accused was, at the time of carrying any weapon or weapons as aforesaid, engaged in the pursuit of any lawful business, calling or employment, and the circumstances in which he was placed at the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid for the defense of his person, property or family, the accused shall be acquitted.¹

The original statute on this subject is 2 Edw. III, c. 3, which declared that no one should go, nor ride armed by night nor by day, in fairs, markets nor in the presence of the justices or other ministers, nor in no part elsewhere.²

This was regarded as a crime against the public peace by terrifying the good people of the land, and it was punishable by forfeiture of the arms and imprisonment during the king's pleasure.³

The Purpose of the Statute is to protect the community,⁴ as the carrying of weapons has a tendency to incite broils, not unfrequently ending in homicide. In an Alabama case it is said the word "concealed" means willfully or knowingly covered or kept from sight, and that locomotion is not essential to constitute a carrying under the statute.⁵

Offense, How Charged.—It is sufficient to charge the offense in the language of the statute. It need not be alleged that the accused was in the habit of carrying such weapons; nor where the offense is for carrying a pistol need it be averred that it was loaded.⁶ The motive is not material, therefore the fact that the defendant carried the weapon "as a kind of curiosity" is no defense.⁷

¹ Cr. Code, § 25.

² 1 Hawk. P. C. (Curw. Ed.), 488; Bishop, Stat. Cr., § 783.

³ 4 Bla. Com., 149.

⁴ Haynes v. State, 5 Humph., 120; Evins v. State, 46 Ala., 83.

⁵ Owen v. State, 31 Ala., 387-389.

⁶ State v. Swope, 20 Ind., 106; State v. Duzan, 6 Blackf., 31. In Indiana it seems to be unnecessary to allege that the act was done unlawfully, probably upon the ground that the fact stated showed it to be unlawful.

⁷ Walls v. State, 7 Blackf., 572.

CARRYING A CONCEALED WEAPON.¹

That A B, on, etc., in said county, unlawfully did carry, concealed on and about his person, a dangerous weapon, to wit: a bowie knife [dirk, pistol loaded, etc.]

CONCEALED WEAPONS—SECOND OFFENSE.

That A B, on, etc., in the — court of said county, was duly convicted of the offense of carrying concealed weapons, and was thereupon sentenced to pay a fine of — dollars, and be imprisoned in the jail of the county of — for — days, which sentence and judgment are in full force and unreversed; that since the conviction and sentence above set forth, to wit: on the — day of — in said county, said A B unlawfully did carry concealed on and about his person, a dangerous weapon, to wit: a dirk.

Rout—Unlawful Assembly.—If three or more persons shall assemble together with intent to do any unlawful act, with force and violence, against the person or property of another, or to do any unlawful act against the peace, or, being lawfully assembled, shall agree with each other to do any unlawful act as aforesaid, and shall make any movement or preparation therefor, the person or persons so offending shall be fined in any sum not exceeding one hundred dollars, and be imprisoned in the jail of the county not exceeding three months.²

A Rout is where three or more persons meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way, and make some advances toward it.

An Unlawful Assembly is where three or more persons assemble to do an unlawful act, as to pull down inclosures, and part without doing it or making any motion toward it.³ As to the evidence required, see riot.

UNLAWFUL ASSEMBLY.

That A B, C D and E F, and other persons to the jurors [or affiant] un-

¹ In stating the offense, the statute must be followed. An indictment charging the offense in the language of the statute is sufficient.

² Cr. Code, § 26.

³ 4 Bla. Com., 146.

known, on, etc., in said county, unlawfully did then and there assemble together to do an unlawful act with force and violence, against the person [or property] of one G H, to wit: (*state the nature of the act.*)

ROUT.

That A B, C D and E F, and other persons to the jurors [or affiant] unknown, on, etc., in said county, being then and there lawfully assembled together, unlawfully and routously did agree with each other to do an unlawful act with force and violence against the person [or property] of G H, to wit: (*state the nature of the act*) and then and there in pursuance of said agreement, unlawfully did make a movement and preparation therefor, as follows: (*State what preparations were made.*)

ROUT—AGREEING TO DESTROY THE PROPERTY OF A RAILWAY COMPANY.

That A B, C D, E F and other persons, to the jurors [or affiant] unknown, on, etc., in said county, being then and there lawfully assembled together, did then and there unlawfully and routously agree with each other to then and there do an unlawful act with force and violence against the property of the — Railway Company, to wit, to destroy the track of said railway on — street, in the city of —, in said county, and then and there, in pursuance of said agreement, did unlawfully and routously make certain movements and preparation therefor, as follows, viz.: by procuring pick-axes, crowbars and sledges, and taking them on the railroad track, with which to break up, destroy and then and there remove said track from said street.

Dispersing Rout, etc.—Whenever three or more persons shall be assembled as aforesaid, and proceed to commit any of the offenses aforesaid, it shall be the duty of all judges, justices of the peace and sheriffs, and all ministerial officers, immediately, upon actual view, or as soon as may be on information, to make proclamation in the hearing of such offenders, commanding them in the name of the state of Nebraska to disperse to their several homes or lawful employments; and if, upon such proclamation, such persons shall not disperse and depart as aforesaid, it shall be the duty of such judges, justices of the peace and sheriffs, and all other ministerial officers, respectively, to call upon all persons near, and, if necessary, throughout the county, to aid and assist in dispersing and taking into custody

all persons assembled as aforesaid; and military officers and others called as aforesaid and refusing to render immediate assistance shall be fined in any sum not exceeding twenty-five dollars.¹

Riot, etc.—If any person shall forcibly obstruct any of the authorities aforesaid, or if any three or more persons shall continue together after proclamation made as aforesaid, or attempted to be made, and prevented by such rioters, or, in case of proclamation, any three or more persons, being assembled as aforesaid, shall commit any unlawful act as aforesaid, every such offender shall be fined in any sum not exceeding one hundred dollars, and be imprisoned in the jail of the county not exceeding three months, and shall, moreover, find security for good behavior and to keep the peace for a time not exceeding one year.²

Rioters Resisting Officers.—If any of the persons so unlawfully assembled shall be killed, maimed or otherwise injured in consequence of resisting the judges or others in dispersing and apprehending them, or in attempting to disperse or apprehend them, said judges, justices of the peace, sheriffs and other ministerial officers, and others acting under their authority, or the authority of either of them, shall be holden guiltless, provided such killing, maiming or injury, shall take place in consequence of the use of necessary and proper means to disperse or apprehend any such persons so unlawfully assembled.³

A Riot is where three or more actually do an unlawful act of violence, either with or without a common cause of quarrel.⁴

The Distinction Between Rout, Unlawful Assembly, and Riot is as follows: A riot is a tumultuous meeting of three or more persons for some unlawful purpose, which they actually execute in whole or in part with violence. A rout is a similar meeting for a purpose which, if executed, would make them rioters, and which they actually do make a motion to execute;

¹ Cr. Code, § 27.

² Id., § 28.

³ Cr. Code, § 29.

⁴ 4 Bla. Com., 146.

an unlawful assembly is a similar meeting for a similar purpose, but which they do not attempt to execute.¹

FOR RIOT.

That A B, C D, E F, and other evil disposed persons to the jurors [or affiant] unknown, to the number of five or more, on, etc., in said county, unlawfully, routously and riotously did assemble and gather together to disturb the public peace; and being then and there assembled and gathered together, with the intent then and there, with force and violence, unlawfully, routously and riotously to disturb and break up a certain camp meeting, at which were lawfully gathered great numbers of people for religious services in said county, and did then and there, in pursuance of such intent, unlawfully, routously and riotously, and with force and violence, beat drums, fire off guns and throw clubs, in and upon said camp meeting ground, with the intent then and there, unlawfully and riotously to obstruct the services and break up said meeting, and did annoy and greatly disturb said camp meeting.

RIOT WITH AN ASSAULT ON AN INDIVIDUAL.²

That A B, C D, E F, and other persons to the jurors [or affiant] unknown, to the number of three or more, on, etc., in said county, in and upon G H, then and there being, unlawfully, routously and riotously did make an assault, and him, the said G H, then and there unlawfully, routously and riotously did beat, wound and ill-treat, and other wrongs to the said G H, unlawfully, routously and riotously then and there did.

OBSTRUCTING AUTHORITIES UPON PROCLAMATION BEING MADE.

That A B, C D, E F and other persons to the number of three, to the jurors [or affiant] unknown, on, etc., in said county, unlawfully, routously and riotously did assemble and gather together with the intent then and there, with force and violence, unlawfully, routously and riotously to compel one G H, a resident of said county, to abandon his residence therein and leave the state, and then and there in pursuance of said intent in and upon said G H, in said county, did unlawfully, routously and riotously make an assault, and him, the said G H, did then and there unlawfully, routously and riotously beat, wound and ill-treat, and one L M, being then and there a [justice of the peace] in said county, then and there, upon actual view of said riot, did, in the hearing of A B, C D, E F and the other persons engaged in said

¹ 1 Hawk. P. C., c. 65, §§ 1, 8, 9; 3 Inst., 176.

² This form, which is in substance from Chitty, Cr. L., may be varied in case the assault was upon a number of persons.

riot, make proclamation aloud in the name of the state of —, commanding said persons then and there to disperse and depart to their several houses or lawful employments; * but the said A B, C D, E F, and the other persons there assembled, did not disperse and depart to their several houses or lawful employments upon the said proclamation of said justice, but unlawfully, routously and riotously, to the number of three or more, then and there remained, whereupon said justice did call upon M N and O P, persons near, to take into custody and disperse the persons so assembled as aforesaid, and then and there, while said justice, with the aid of M N and O P, was endeavoring to disperse the persons so assembled as aforesaid, A B, C D and E F did unlawfully and forcibly obstruct said justice and M N and O P in the performance of their duty, by then and there knowingly, unlawfully and forcibly assaulting and beating said M N to prevent the dispersing of the persons aforesaid.

RIOT—FAILING TO DISPERSE UPON PROCLAMATION MADE.

Follow the preceding form to the * then add: but the said A B, C D, E F and other persons aforesaid, did not disperse and depart to their several homes or places of employment, as upon said proclamation of said justice it was their duty to do, but then and there, to the number of three or more, unlawfully, routously and riotously remained together after said proclamation, for the space of one hour.

To constitute riot under the statute it is not necessary that the act complained of should be calculated to terrify others.¹ In Pennsylvania it has been held sufficient to allege that the defendants assembled with force and arms and committed acts of violence;² but in Missouri it has been held necessary to allege that the act was done with force and violence,³ and this seems to be the rule.

Must be at Least Three Persons.—A riot can not be committed by less than three persons, but where certain persons are named, it may be alleged that there were others to the number of — engaged therein whose names are not known.⁴

¹ *Com. v. Runnels*, 10 Mass., 518. The rule, as stated by Greenleaf on Ev. Vol. 3, § 219, is, that in case of assault and battery or the pulling down of a house it is not necessary either to allege or prove terror or disturbance of the people; but where the offense consists of tumultuous disturbance of the peace such allegation and proof are necessary.

² *Donoghue v. County*, 2 Pa. St. 230.

³ *Martin v. State*, 9 Mo., 286.

⁴ *State v. Allison*, 3 Yerg. 428; *Thayer v. State*, 11 Ind., 287; *Turpin v. State*, 4 Blackf. 72. Where, however, the names of those classed as unknown are known to the jurors [or the affiant] they must be stated; the al-

Against One or All.—The trial may be of one or all, but at each step in the proceedings it must appear that at least three persons participated therein jointly;¹ but where six persons were indicted, and two died before the trial, two were acquitted and two found guilty, the verdict was sustained upon the ground that it must be *presumed* that the persons convicted committed the offense with one or both of the persons who died.²

Declarations of Rioters.—The same rule applies between rioters as between conspirators: that where a foundation is laid by proof, sufficient in the opinion of the judge to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish that fact, the connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in pursuance of the common design is, in contemplation of law, the act and declaration of all, and is admissible as evidence against each.³

It will be sufficient to fix the guilt of any defendant if it is proved that he joined himself to the others after the riot began, or encouraged them by words, signs or gestures, wearing their badge, etc.⁴

A Rout is proved in the same manner as a riot, the proof only showing an advance toward the riotous act but stopping short of its perpetration.

legation of "others unknown" being admissible only where in fact they are unknown—that is, that the indictment or complaint shall speak the truth. *State v. Brazil*, 1 Rice, 257; *Thayer v. State*, 11 Ind., 287; *State v. O'Donald*, 1 McCord, 532; *State v. Calder*, 2 Id., 462; 2 Bish. Cr. P., § 928.

¹ 2 Hawk. P. C., c. 47, § 8.

² *R. v. Scott*, 3 Burr., 1262. This decision entirely ignores the presumption of innocence, which continues as evidence in every man's favor until he is proved guilty. It is pretty evident that such a decision can not be sustained. The rule seems to be that where three are indicted for riot and one of the three is tried separately, he may be convicted on proof of a riot in which he joined with two others. *Com. v. Berry*, 5 Gray, 93.

³ 1 Greenleaf, Ev., § 111; 1 Phillips' Ev., 209; 3 Greenleaf, Ev., § 221.

⁴ 1 Hale, P. C., 463; *Clifford v. Brandon*, 2 Camp., 358; *Rex v. Royce*, 4 Burr., 2073.

An Unlawful Assembly is proved in the same way without any evidence showing a motion or preparation toward the execution of the riotous act.¹

Abuse of Judge, etc.—If any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable or other officer in the execution of his office, the person so offending shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the jail of the county not exceeding three months, or both, at the discretion of the court.²

ABUSE OF JUDGE, JUSTICE OF THE PEACE, ETC.³

That A B, on, etc., in said county, in and upon one C D, the county judge of said county, while he, the said C D, was in the lawful execution of his said office as judge of said county. did then and there him, the said C D, beat, bruise, wound and ill-treat, he, the said A B, then and there well knowing the said C D to be such judge and to be then and there in the execution of his said office.

Rescue by Force.—If any person shall rescue by force any offender, charged with or convicted of any offense by the laws of this state made punishable with imprisonment, from any jail or other place of confinement, or from the custody of any officer or other person charged with the safekeeping of such offender, every person so offending shall be fined in any sum not exceeding five hundred dollars, and be imprisoned in the jail of the county not exceeding thirty days.⁴

Resisting an Officer—Indictment.—It is unnecessary to allege that the officer was lawfully elected and qualified; the words "then and there being constable of the said county," are sufficient.⁵ It must appear that the process was legal in order

¹ 3 Greenleaf, Ev., § 222.

² Cr. Code, § 30.

³ It will be observed that the language of the statute is while the officer named was "in the execution of his said office." This must be averred. If the abuse or resistance is to a justice of the peace, sheriff, etc., the form can readily be changed.

⁴ Cr. Code, § 31.

⁵ State v. Copp, 15 N. H., 212; but where the indictment alleged the legal election and qualification of the officer, it was held necessary for the state to prove the allegation. Id.

⁶ Bowers v. People, 17 Ill., 373; State v. Hooker, 17 Vt., 658.

to make resistance to it unlawful. The words "lawful process," probably are sufficient.¹ The writ itself need not be set out in the indictment if a sufficient description is given to identify it.² In Ohio³ and Missouri it seems necessary to recite the writ so that the court may see if the officer had authority to execute it.⁴ It is necessary to allege that the accused knew that the person resisted was an officer.⁵

It must appear from the indictment that the officer was in the lawful performance of his duty; but that may be alleged either by stating the facts or by a direct allegation to that effect.⁶

RESISTING SHERIFF OR CONSTABLE IN THE EXECUTION OF HIS OFFICE.

That A B, on, etc., in said county, while C D, the sheriff of said county, in the execution of his office as said sheriff, under a lawful execution, duly issued out of the — court of — county, on a judgment therein, recovered by E F against A B, and upon which there was due, on said execution from said A B to E F, the sum of — dollars, was proceeding in the due execution of his said office under said execution to levy the same upon ten head of two year old steers, as the property of said A B, for the satisfaction of said debt, he, the said A B, then and there, in a menacing manner pointed a rifle loaded with powder and one leaden bullet at said C D, sheriff, as aforesaid, and compelled him, said sheriff, to go away without levying upon said cattle or other property, and without obtaining satisfaction of said execution, he, the said A B, then and there well knowing that C D was sheriff of said county.⁷

¹ *State v. Burt*, 25 Vt., 373; *State v. Hailey*, 2 Strobb., 73; *Cantrill v. People*, 3 Gilm., 356.

² *Slicker v. State*, 13 Ark., 397; *State v. Beasom*, 40 N. H., 367.

³ In *Lamberton v. State*, the indictment set forth that the accused, "on, etc., at, etc., with force and arms, one David Bryte, then and there being sheriff of said county, and also then and there being in the execution of his said office as such sheriff aforesaid, unlawfully 'did resist.'" It was held that the indictment set forth no fact whatsoever, and was insufficient—that is, did not show what acts of resistance the accused had been guilty of.

⁴ *Lamberton v. State*, 11 Ohio, 282; *State v. Henderson*, 15 Mo., 486.

⁵ *State v. Deniston*, 6 Blackf., 277; *State v. Hooker*, 17 Vt., 658; *Com. v. Kirby*, 2 Cush., 577.

⁶ A public officer who performs his duty in a quiet, unassuming manner, like a gentleman, will have but little cause of complaint of being resisted.

⁷ In *Faris v. State*, 30 S., 158, there were three counts in the indictment:

RESCUE OF PRISONER FROM SHERIFF.

That A B, on, etc., in said county, was duly charged, by a complaint upon oath, with the offense [of the murder of one ¹ E F] before C D, a justice of the peace of said county, who thereupon issued a lawful warrant in writing under his hand [and seal] directed to the sheriff or any constable of said county, commanding him forthwith to arrest said A B and bring him before said C D or some other magistrate having jurisdiction in said county; which warrant was delivered to G H, the sheriff of said county, duly authorized in the premises, who thereupon, on said day, arrested said A B, and took him, said A B, into his custody; that thereupon one L M, while said A B was in the care and custody of said sheriff, under said warrant, for the purpose and with the intent of rescuing said A B by force, in said county, unlawfully and violently did make an assault upon said C D, and then and there and thereby unlawfully and by force, by knocking said C D down, did rescue said A B from said C D, against the will of said C D, sheriff as aforesaid. he, said L M, then and there well knowing that said C D was sheriff as aforesaid, and had said A B in lawful custody.

Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment.² To constitute the offense the accused must be in actual custody, though whether in that of the officer or a private individual is not material; but in the latter case the accused must know that the prisoner is in lawful custody, while at common law if the prisoner was in the custody of an officer the party was bound to take notice of the cause of arrest at his peril.³

The indictment at Common Law must set forth the nature and cause of the imprisonment and the special circumstances of the fact in question.⁴ Thus in rescue from the house of correction it must be shown for what the prisoner was committed there.⁵ The word *recussit*, or some word equivalent to it

two for resisting an officer, and one for assault and battery. The court virtually held the counts for resisting an officer insufficient, but sustained the judgment, which seemed to have been based on the third count. To constitute the offense it is not necessary that the officer should be assaulted, bruised or beaten. *Woodworth v. State*, 26 O. S., 196.

¹ State the nature of the offense with which the accused is charged so that it may appear to have been sufficient to authorize his arrest and retention by the officer.

² 4 Bla. Com., 131.

³ 2 Chitty, Cr. L., 183.

⁴ 2 Hawk. c. 21, § 5; 2 Chitty, Cr. L., 184.

⁵ 2 Stra. 1226; 2 Chitty, Cr. L., 184.

should be used to show that it was forcible and against the will of the officer having the prisoner in charge.¹

RESCUE FROM PRISON.

That A B, on, etc., by the judgment of the — court of — county, was, upon the charge of [larceny in stealing a watch from one G H, in said county, on the — day of — in said year] duly made, lawfully found guilty of said charge and was thereupon sentenced to imprisonment in the — in said county, for the term of — years, and was thereupon duly committed to said prison, and to the care and custody of one E F, the keeper thereof; that while said sentence was in full force and effect, and while said A B, in pursuance thereof, was lawfully imprisoned in said —, one C D, in said county, unlawfully and violently did make an assault in and upon said E F, by ²striking him over the head with an iron rod, thereby causing him, the said E F, to fall to the floor and become insensible, and while in such condition said C D opened the door of the cell of said A B, and then and there him, the said A B, did take with force and violence from out of said prison and the custody and against the will of said E F, the keeper thereof, and unlawfully and purposely did set at large and rescue; he, the said C D, then and there well knowing that said A B so confined in said prison, had been duly convicted of larceny and was then and there lawfully imprisoned under said conviction.

Molesting Religious Meetings.—If any person or persons shall at any time interrupt or molest any religious society, or any member thereof, or any persons when meeting or met together for the purpose of worship, or performing any duties enjoined on or appertaining to them as members of such society, the person or persons so offending shall be fined in any sum not exceeding twenty dollars. Provided, that this section shall not be so construed as to deprive any religious society of the right of laying hands upon the person or persons who may be disturbing the congregation, and turning him or them out of the church or place of worship.³

The Indictment.—An indictment in the language of the statute

¹ *Rex v. Burrige*, 3 P. Wms., 483. The punishment for rescuing a prisoner at common law, where the prisoner was charged with treason, was treason, for felony, was felony, and for a misdemeanor, a misdemeanor. 4 Bla. Com., 131; 2 Chitty, Cr. L., 184.

² In *Lamberton v. State*, 11 Ohio, 282, it was held that the indictment must specify the acts of resistance.

³ Cr. Code, § 32; *Kindred v. State*, 33 Tex., 67.

that, etc., the defendant, "at the county aforesaid, at the church in H, unlawfully and willfully did disturb a congregation there and then assembled for religious worship and conducting themselves in a lawful manner" is sufficient.¹ And in Missouri it is held that it is sufficient to charge the offense in the words of the statute ;² and similar decisions have been rendered in Arkansas and Virginia.³ The manner of the disturbance, however, must be alleged as "by talking and laughing aloud," "by profane swearing," etc.⁴

Sufficient Averments.—Where it was alleged that the defendant "did unlawfully, contemptuously and of purpose interrupt a congregation of methodists then and there assembled for the purpose of worshipping the Deity, by then and there talking and swearing⁵ with a loud voice," it was held sufficient, and where the allegation was that the accused "being present at and when a religious society was convened and met together for the worship of Almighty God, did then and there interrupt, molest and disturb said society and meeting and the individual members thereof, by then and there in a loud, insulting and boisterous manner talking," etc., it was held sufficient.⁶

Duplicity.—As the offense charged is disturbing the meeting, a statement of the facts constituting the disturbance being a part of the same transaction—the disturbance, will not render the indictment bad for duplicity. Thus, "by profanely swearing" and "talking and laughing aloud," is a mere statement of the manner in which the disturbance was effected and does not charge two offenses.⁷

Evidence.—It will be observed that the language of the statute is "interrupt or molest any religious society or any

¹ *Kindred v. State*, 33 T. x. 167.

² *State v. Stubblefield*, 32 Mo., 563; *State v. Bankhead*, 25 Id., 558; *State v. Hopper*, 27 Id., 599.

³ *Com. v. Daniels*, 2 Va. Cases, 402; *State v. Ratliff*, 5 Eng., 530.

⁴ *Stratton v. State*, 13 Ark., 688; *State v. Sherrill*, 1 Jones (N. C.), 508.

⁵ *Cockreham v. State*, 7 Humph., 11.

⁶ *State v. Ringer*, 6 Blackf., 109.

⁷ *State v. Horn*, 19 Ark., 578. Where the charge is against the defendant for disturbing a religious society and the individual members thereof, it is sufficient, and is not bad for duplicity. *State v. Ringer*, 6 Blackf., 109.

member thereof, or any persons when meeting or met together for the purpose of worship, or performing any duties enjoined on or appertaining to them as members of such society." This is very broad language and no doubt applies to any disturbance affecting the members of the society immediately before the meeting, during the services, or before the members have dispersed after the close of the services.

The state must prove a meeting such as is described in the statute, and the disturbance as charged, and that it took place in the county. It is only necessary to allege that the offense was committed in the county, but if the pleader has described a particular place as "Downer's church" the place must be proved as alleged.¹

A disturbance any time before the meeting has dispersed is within the statute.² Where the disturbance is at a camp meeting after the services have closed for the day and the persons camped on the ground have retired to rest, a person creating a disturbance is liable.³

DISTURBING A RELIGIOUS SOCIETY.⁴

That A B, on, etc., at a certain camp ground of the Methodist church, [or at a certain meeting house of the Presbyterian church] in said county, unlawfully and willfully, by loud talking and profane swearing, did interrupt and molest a religious society, and the members thereof, then and there met together for the worship of God.

INDICTMENT AT COMMON LAW FOR EXCITING DISTURBANCE AT CHURCH.

That A B, on, etc., being Sunday, at — with force and arms, in the parish church, there during the celebration of divine service, the bench

¹ *Stratton v. State*, 13 Ark., 688.

² *Hollingsworth v. State*, 5 Sneed., 518; *Williams v. State*, 3 Id., 313; *Kinney v. State*, 38 Ala., 224.

³ *Com. v. Jennings*, 3 Gratt., 595. There can be no doubt that such a disturbance is within the Nebraska statute.

⁴ The name of the society need not be stated. *State v. Ringer*, 6 Blackf., 109. The offense lies in disturbing a religious society—not any particular one.

of C D, gentleman, there being, from its ancient and proper place, unlawfully and unjustly did take and remove, and also then and there, with force and arms, unlawfully, unjustly and irreverently did disturb and hinder one E F, clerk, then being curate of the parish church aforesaid, in the execution of his office and in the reading of divine service, in contempt of the laws of this realm, to the evil example of others in the like case offending, and against the peace, etc.¹

Disturbance at Election, etc.—If any person or persons shall be found making or exciting any contention or disturbance at any tavern, court, election or other meetings of the citizens, for the purpose of transacting or doing any business appertaining to, or enjoined on them; the person or persons so offending shall be fined in any sum not exceeding five dollars nor less than fifty cents each, and if necessary, imprisoned until such meeting is ready to disperse.²

DISTURBANCE AT ELECTION, ETC.

That A B, on, etc., at — in said county, where divers citizens of said — were lawfully assembled together for the purpose of transacting certain business appertaining to them as citizens, to wit, an election, did then and there, willfully and unlawfully, disturb said meeting, by loud, boisterous, menacing, abusive and profane language, and thereby did then and there unlawfully make and excite contention, and a disturbance at said election.

Disturbing School Meeting, etc.—If any person or persons shall hereafter willfully disturb, molest or interrupt any literary society, school, or society formed for the intellectual improvement of its members, or any other school or society organized under any law of this state, or any school, society or meeting formed or convened for improvement in music, letters, or for social amusement, such person or persons so offending shall be fined in any sum not less than five nor more than twenty dollars.

¹The above is copied from 2 Chitty, Cr. Law, 20. The statute imposes a penalty for disturbing a religious meeting at any time, whether on Sunday or a week day; and where there has been a deliberate violation of the law there should be no hesitation in punishing the offender.

²Cr. Code, § 33.

DISTURBING A SCHOOL.

That on, etc., at — in said county, in a certain school there situate, for the intellectual improvement of its members, duly organized under the laws of the state of — then and there lawfully held; and then and there, while the scholars in said school were duly engaged in the recitations and proper exercises thereof, one A B came into the presence thereof, and unlawfully and willfully, by loud and indecent talking and profane swearing, did then unlawfully and willfully disturb and molest said school in said recitations and exercises.

Improper Interference with County Surveyor.—If any county surveyor, or deputy surveyor, shall be molested or prevented from doing or performing any of his official duties by means of the threats or improper interference of any person or persons, such surveyor shall call on the sheriff of the county, who shall accompany him and remove all force; and the person or persons thus threatening or improperly interfering with any surveyor while performing his official duties, shall be fined in any sum not exceeding one hundred dollars, and, moreover, be liable for all damages by any person sustained by the hindrance of the surveyor, and also for all expenses and costs that may accrue in consequence of the attendance of the sheriff.¹

IMPROPER INTERFERENCE WITH THE COUNTY SURVEYOR.

That, on, etc., one C D was the county surveyor of said county, duly elected and qualified; and then and there, while in the performance of his official duties in said county, to wit: while by virtue of his office said C D was surveying a tract of land therein, in the possession of A B and E F, said A B did then and there, in and upon said C D, willfully, unlawfully and forcibly make an assault, and him, the said C D, did unlawfully molest in the performance of said official duties by (*state the means used*), with the intent then and there of him, the said A B, him, the said C D, unlawfully, by threats and improper interference to prevent from performing his official duties.

Failure of Judge, etc., to Prevent a Duel.—If any judge, justice of the peace, sheriff or other officer, bound to preserve the public peace, shall have knowledge of an intention on the

¹ Cr. Code, § 35.

part of any two persons to fight with any deadly weapon or weapons, and such officer shall not use and exert his official authority to arrest the parties and prevent the duel, every such officer shall be fined not exceeding one hundred dollars.¹

FOR FAILURE OF JUDGE, ETC., TO PREVENT A DUEL.

That A B, on, etc., was county judge of — county, duly elected and qualified, and exercising the duties of his office, and on said day, in said county, he, said A B, was informed by the oath of one C D, then and there duly made before him, that E F and G H, then within said county, were about to fight a duel with each other with deadly weapons, yet said A B did not use and exert his official authority to arrest said E F and G H, and prevent said duel, but unlawfully neglected to perform his duty in that regard, although he could have caused the arrest of said E F and G H, and prevented said duel.

Influencing Juror, etc.—If any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate or impede any juror, witness or officer in any court of this state, in the discharge of his duty, or shall corruptly or by threats or force obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending shall be punished by fine not exceeding one hundred dollars, or by imprisonment not exceeding twenty days, or both.²

ENDEAVORING TO INFLUENCE A JUROR.

That A B, on, etc., in said county, in a certain cause then on trial to a jury, in the — court of said county, wherein A B was plaintiff and O D defendant, said A B then and there corruptly intending to obstruct and impede a just and lawful trial of the issues in said cause by said jurors,

¹ Cr. Code, § 36. Mr. Chitty, in his valuable work on Cr. Law, Vol. 1, 76, 77, entertains no doubt that a magistrate may issue a warrant for witnesses to testify, if they fail to obey a subpoena in order to testify concerning a crime. This common law power was recognized in *Com. v. Jones*, 1 Virg. Cases, 720, where a judge out of court called on Jones and demanded his affidavit for a warrant against one about to fight a duel. He refused to testify. The case was then referred to the general court, and it was held that the judge might commit Jones until he would testify.

² Cr. Code, § 37.

corruptly and unlawfully did, on the day aforesaid, in said county, endeavor to influence one G H, a juror in said cause, duly impaneled and sworn for the trial of the issue therein, in the discharge of his duty as such juror by (*state the means used*), and did then and there and thereby unlawfully and corruptly endeavor to have said G H solicit and persuade the other jurors on said jury to return a verdict for said A B, or failing in that to prevent an agreement of said jury, he, the said A B, during all said time well knowing that said G H was a juror in said cause.

ENDEAVORING TO INTIMIDATE A WITNESS.

That on, etc., in said county, one A B was bound in a recognizance in the sum of — dollars before one C D, a justice of the peace of said county, to be and appear before the district court of — county on the first day of the next term thereof, to answer to a charge of [larceny] and abide the judgment of the court and not depart without leave thereof; that one E F was a material witness on behalf of the state in said cause to establish said charge against said A B, and was required by said justice to enter into his personal recognizance in the sum of — dollars for his appearance before said district court on the first day of the next term thereof, to testify in said cause on behalf of the state; that said A B, on the — day of —, in the same year, well knowing that said E F was a material witness in said cause on behalf of the state, corruptly and willfully did offer said E F the sum of — dollars, if he, said E F, would leave the state and not appear as a witness in said cause, with the intent corruptly and unlawfully to influence said witness in the discharge of his duty, and not to appear in said cause in said court, but to absent himself therefrom.

INDICTMENT AT COMMON LAW FOR DISSUADING WITNESS.

That, on, etc., a certain writ of subpoena was duly issued and tested in the name of C D, of, etc., at —, the day and year aforesaid, the said C D then and there being *custos rotulorum* in and for said county, which said writ was directed to E S, commanding him to subpoena one J H to be and appear before the — court at — etc., to testify in the case of —; that A B being an evil disposed person, and contriving and intending to obstruct and impede the due administration of justice in said county, on, etc., unlawfully and unjustly dissuaded, hindered and prevented the said J H from appearing in said court to testify the truth in said cause on behalf of —, in consequence whereof said J H did not appear and give evidence according to the expression of said writ.¹

Administering Poison with Intent, etc.—If any person or persons shall administer poison to another with the intent to

¹The above is the substance of the form in 2 Chitty, Cr. L., 235.

destroy or take the life of the person or persons to whom the same shall be administered, or do him, her or them any injury, or if any person or persons shall mix poison in water, food, drink or medicine with the aforesaid intent, the person or persons so offending, their aiders and abettors, shall be imprisoned in the penitentiary not more than fifteen nor less than two years.¹

Administered.—Under the statute it must be proved that the accused administered to another person poison with the intent to cause death or injury. To administer is to cause to be taken. The statute is not violated until some act of administering is done;² but it is immaterial how the poison is administered, whether by concealment, by the consent of the victim or by threats of violence compelling him to swallow it.³

What Constitutes Administering.—Where a servant, in preparing breakfast for her mistress, put arsenic in the coffee, and afterward told her mistress that she had prepared the coffee, of which the mistress drank, it was held an administering of the poison.⁴ And where corrosive sublimate was mixed with moist sugar, and the whole put up in a paper parcel with a writtendirection: "To be left at Mrs. Daws', Townhope," and left by the accused on the counter of the grocery where she had purchased some salt, the groceryman, finding the package on the counter, by mistake sent it to a Mrs. Davis, who used a portion of the sugar, it was held that the offense was complete.⁵ In a case that arose afterward, however, where the poison was not taken by the party intended, but by another, the court directed the finding of a new indictment, alleging the intent to murder in the words of the statute with-

¹ Cr. Code, § 38.

² *R. v. Carman*, 1 Moody, 114.

³ *Blackburn v. State*, 23 O. S., 162, 163. The court say: "It is immaterial whether the party taking the poison took it willingly, intending thereby to commit suicide, or was overcome by force, or overreached by fraud. True, the atrocity of the crime would be greatly diminished by the fact that suicide was intended: yet the law as we understand it makes no discrimination on that account."

⁴ Arch. Cr. Pl. & Prac. (3 Ed.), 860, 861.

⁵ *Id.*; *R. v. Lewis*, 6 Car. & P., 161.

out alleging whom; ¹ and this, no doubt, is the proper practice where the poisonous mixture prepared by the accused for one person is received by others and used without knowledge of its contents.

Where it appeared that the prisoner had given a child nine weeks old two berries of the *coculus indicus* with the intent to cause its death, it appeared that the kernel is a strong narcotic poison which is inclosed in a strong shell, very difficult to break and which shell is harmless, and the berries would either pass through the child without harm or be vomited up, it was contended that these berries were not poison, and therefore a conviction could not be sustained; but the court held that the berries were poison, and that they were administered with intent to kill.²

The Intention may be shown by proving acts or admissions of the accused from which it may be presumed, or by proving such circumstances that had the party attempted to be poisoned died, it would have been murder in the first or second degree.³ In offenses which consist in the guilty intention of the accused it is frequently necessary to examine into collateral facts in order to arrive at a correct conclusion on a matter which must necessarily depend altogether on presumptive evidence.⁴ It is not necessary to prove that any bodily injury was caused by the attempt.

ADMINISTERING POISON WITH THE INTENT TO KILL.

That A B, on, etc., in said county, willfully, unlawfully and feloniously, then and there did administer to one C D a certain poison, to wit: two drachms of a certain deadly poison called oxalic acid, with intent then and there in so doing, unlawfully and feloniously, the life of him, the said C D, to destroy and take.⁵

¹ Arch. Cr. P. & P., 861; 2 Mo. & R., 213.

² Arch. Cr. P. & P., 862; R. v. Cludero, 2 Car. & K., 907.

³ Arch. Cr. P. & P., 862.

⁴ 1 Phil. Ev., 768.

⁵ It will be observed that the language of the statute is: "Shall administer poison to another, with the intent to destroy or take the life of the person or persons." It is sufficient to charge the offense in the language of the statute.

ADMINISTERING POISON WITH THE INTENT TO INJURE.

That A B, on, etc., in said county, willfully, unlawfully and feloniously, then and there did administer to one C D a certain poison, to wit: one half ounce of a certain deadly poison called —, with intent then and there in so doing, unlawfully and feloniously, him, the said C D, to do an injury, and thereby cause him to become sick and distempered in body.

MIXING POISON IN DRINK, OR FOOD, OR MEDICINE.

That A B, on, etc., in said county, willfully, unlawfully and feloniously, did mix a large quantity of poison, to wit: one half ounce of corrosive sublimate with one half pound of food, then being prepared for the use of said C D, and then and there about to be administered to said C D, as he, the said A B, then and there well knew, with intent of him, the said A B, unlawfully and feloniously to destroy and take the life of him, the said C D.

Attempt to Produce Miscarriage.—Any physician, or other person, who shall willfully administer to any pregnant woman any medicine, substance or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.¹

At common law the act of causing an abortion was indictable as a misdemeanor.² An unsuccessful attempt to produce it therefore was also punishable, as the administering of some drug or substance to a pregnant woman with that intent.³

At Common Law, to constitute the offense, the child must have reached that stage of development as to move in the womb; "quick or great with child," is the language of Ch. J. Hale.⁴ The defects* of the common law seem to have been

¹ Cr. Code, § 39.

² 1 Hale, P. C., 433; 3 Inst., 50.

³ 101 Russ. Cr., 853; State v. Slagle, 82 N. C., 653.

⁴ "If a woman be quick or great with child, if she takes or another gives her any potion to make an abortion, or if a man strike her whereby the child within her is killed, it is not murder or manslaughter by the law of England, because it, the child, is not yet *in rerum natura*, though it be a great crime, and by the judicial law of Moses was punishable with death."

cured by the statute, 43 Geo. III, c. 58, §§ 1 and 2, under which Chitty furnishes a number of precedents of indictments.¹

Offense Complete, When.—If a drug, medicine, substance or thing be administered or instrument used at any time during the period of gestation, with the intent to produce a miscarriage, the offense will be complete, unless such miscarriage was necessary to preserve the life of the woman, or shall have been advised by two physicians to have been necessary for that purpose.²

ATTEMPTING TO PRODUCE MISCARRIAGE BY A KNOWN DRUG.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did administer to one C D, then and there being a pregnant woman, a large quantity, to wit: — of a certain drug called savin, with the intent of him, the said A B, then and there and thereby to procure the miscarriage of the said C D, the same not being necessary to preserve the life of said C D, and had not been advised by two physicians to be necessary for that purpose.

ATTEMPTING TO PROCURE MISCARRIAGE BY THE USE OF AN UNKNOWN INSTRUMENT.

That A B, on, etc., in said county, willfully, unlawfully and maliciously, did use a certain instrument, the name of which is to the jurors [or affiant] unknown, by thrusting and inserting said instrument into the womb of one C D, then and there being a pregnant woman, with the intent then and there and thereby to procure the miscarriage of the said C D, the same not being necessary to preserve the life of said C D, and had not been advised by two physicians to be necessary for that purpose.

ATTEMPTING TO PROCURE A MISCARRIAGE BY ADMINISTERING UNKNOWN COMPOUND.

That A B, on, etc., in said county, willfully, unlawfully and maliciously, did give and administer to one C D, then and there being a pregnant

¹ 3 Chitty, Cr. L., 797-799.

² Wilson v. State, 2 O. S., 319.

³ Unless the woman was pregnant, the offense would not be committed, although the prisoner had had sexual intercourse with her and supposed that she was with child. Rex v. Scudder, R. & M., C. C. R., 216; 3 C. & P.,

woman, a large quantity, to wit: — of a certain noxious and poisonous substance, the name of which is to the jurors [or affiant] unknown, with the intent of him, the said A B, then and there and thereby to procure the miscarriage of the said C D, the same not being necessary to preserve the life of said C D, and had not been advised by two physicians as necessary for the purpose.

INDICTMENT AT COMMON LAW FOR ADMINISTERING, ETC., TO
CAUSE A MISCARRIAGE.

That E F, late of —, etc., being a wicked, malicious and evil disposed person, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on, etc., with force and arms, at — aforesaid in and upon one A E, the wife of F E, in the peace of God and our said Lord the King then and there being, and also then and there being big and pregnant with child, did make a violent assault, and that he, the said E F, then and on divers other days and times between that day and the day of taking this inquisition, with force and arms at, etc., aforesaid, knowingly, unlawfully, willfully, wickedly, maliciously and injuriously, did give and administer, and cause and procure to be given and administered to the said A E, so being big and pregnant with child, as aforesaid, divers deadly, dangerous, unwholesome and pernicious pills, herbs, drugs, potions and mixtures, with intent feloniously, willfully and of his, the said E F's, malice aforethought to kill and murder the said child with which the said A E was so then big and pregnant as aforesaid, by reason and means whereof, not only the said child, whereof she, the said A E, was afterward delivered, and which by the providence of God was born alive, became and was rendered weak, sick, diseased and distempered in body, but also the said A E, as well before as at the time of her said delivery, and for a long time, to wit, for the space of six months then next following, became and was rendered weak, sick, diseased and distempered in body and mind, and other wrongs to the said A E, he, the said E F, then and there unlawfully, willfully, wickedly, maliciously and injuriously, did to the grievous damage of the said A E, and against the peace, etc.¹

Prescribing Medicine while Intoxicated.—If any physician or

605; Arch. Cr. P. & P., 955. The offense consists in administering to a pregnant woman any medicine, etc., the natural effect of which will be to produce a miscarriage, etc., with the intent.

¹The words *big* or *great* with child, were used by the common law writers as equivalent to *quick*: Hence, in states where the common law in that respect has not been changed, the indictment must allege that the woman was big and pregnant, or quick with child, or words expressing the same meaning; under the statute, however, it is unnecessary to either allege or prove that fact. *Mills v. Com.*, 13 Penn. St., 631; *People v. Jackson*, 3 Hill, 92; *Com. v. Bangs*, 9 Mass., 387; *Wilson v. State*, 2 O. S., 319.

other person, while in a state of intoxication, shall prescribe any poison, drug, or medicine to another person, which shall endanger the life of such other person, he shall be punished by a fine of not more than one hundred dollars.¹

PRESCRIBING MEDICINE WHILE INTOXICATED, ENDANGERING THE
LIFE OF ANOTHER.

That A B, on, etc., in said county, then and there being a [physician], and as such was duly employed to prescribe medicine and other necessary remedies for one C D, then and there being sick; that said A B, being in a state of intoxication did then and there unlawfully prescribe for said C D a large quantity, to wit, — of [morphine] which said medicine so prescribed was thereupon in said county administered according to said prescription to said C D, and then and there did greatly endanger the life of said C D.

Prescribing Secret Drug.—If any physician or other person shall prescribe any drug or medicine to another person, the true nature and composition of which he does not, if inquired of, truly make known, but avows the same a secret medicine or composition, thereby endangering the life of such other person, he shall be fined in any sum not exceeding one hundred dollars.²

PRESCRIBING A SECRET DRUG, ETC.

That A B, on, etc., in said county, then and there being a [physician] willfully and unlawfully did prescribe for one C D a certain drug or medicine, the true nature and composition of which he, the said A B, when inquired of by said C D, did not truly make known, but then and there did avow that the same was a secret medicine and composition, which said medicine on said day was administered to said C D, according to said prescription, thereby endangering the life of said C D.

Duty of Apothecary on Sale of Poison.—Every apothecary or other person who shall sell or give away, except upon the prescription of a physician, any article or articles of medicine belonging to the class usually known as poisons, shall be required: first, to register in a book kept for that purpose the name, age, sex and color of the person obtaining such poison,

¹ Cr. Code, § 40.

² Cr. Code, § 41.

second, the quantity sold; third, the purpose for which it is required; fourth, the day and date on which it was obtained; fifth, the name and place of abode of the person for whom the article is intended; sixth to carefully mark the word "poison" upon the label or wrapper of each package; seventh, to neither sell nor give away any article of poison to minors of either sex.¹

Must Mix Soot or Indigo with.—No apothecary, druggist or other person shall be permitted to sell or give away any quantity of arsenic less than one pound, without first mixing either soot or indigo therewith, in the proportion of one ounce of soot or half an ounce of indigo to the pound of arsenic.²

Penalty.—Any person offending against the provisions of either of the last two preceding sections shall be fined in any sum not less than twenty nor more than one hundred dollars.³

FOR FAILING TO REGISTER NAMES, ETC., OF PERSON PROCURING POISON.

That A B, on, etc., in said county, willfully and unlawfully did sell and deliver to one C D one half ounce of an article of medicine called strychnine, a deadly poison, and the said A B did not register either the name, age, sex, or color of the said C D, the person who obtained said poison, nor did he, the said A B, register the quantity sold of said poison, nor the purpose for which it was required, nor the day and date on which it was obtained, nor the name and place of abode of the person for whom the article was intended, but wholly neglected his duty in the premises; nor was said poison sold upon the prescription of any physician.⁴

FOR FAILING TO ATTACH LABEL TO PACKAGE CONTAINING POISON.

That A B, on, etc., in said county, being an apothecary therein, unlawfully did put up, sell and deliver, to one C D, one ounce of a certain article of medicine belonging to the class usually known as poisons, to wit: deadly

¹ Cr. Code, § 42.

² Cr. Code, § 43.

³ Cr. Code, § 44.

⁴ A failure in respect to any one of the requirements of the statute is sufficient cause on which to found a prosecution.

poison called nux vomica, and he, the said A B, did not carefully or in any other manner mark the word "poison" upon the label or wrapper of said package, but then and there willfully and unlawfully neglected to do so, said sale not being made upon the prescription of any physician.

SELLING OR GIVING AWAY POISON TO A MINOR.

That A B, on, etc., in said county, being a druggist therein, willfully, unlawfully and knowingly did sell and deliver to one C D an article of medicine belonging to the class usually known as poison, to wit: one ounce of white arsenic, said poison not being furnished on the prescription of any physician, and said C D being a minor, to wit: of the age of — years.

SELLING LESS THAN A POUND OF ARSENIC WITHOUT MIXING SOOT OR INDIGO, ETC.

That A B, on, etc., in said county, unlawfully and willfully did sell and deliver to one C D four ounces of arsenic without mixing either soot or indigo therewith in any manner or form.

Secret Drug or Nostrum.—If the publishers of any newspaper in the state shall permit or publish any advertisement of any secret drug or nostrum purporting to be exclusively for the use of females, or if any druggist or other person shall sell or keep for sale, or shall give away any such secret drug or nostrum purporting to be exclusively for the use of females, or if any person shall by printing or writing or in any other way publish an account or description of any drug, medicine, instrument or apparatus for the purpose of preventing conception, procuring abortion or miscarriage, or shall by writing or printing in any circular, newspaper, pamphlet or book, or in any other way, publish or circulate any obscene notice, or shall, within the state of Nebraska, keep for sale or gratuitous distribution any newspaper, circular, pamphlet or book containing such notice of such drugs, instruments or apparatus, or shall keep for sale or gratuitous distribution any secret nostrum, drug or medicine for the purpose of preventing conception, procuring abortion or miscarriage, such person or persons so violating any of the provisions of this section shall be fined in any sum not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding six months, or

both, at the discretion of the court. Provided, that nothing in this section shall be so construed as to affect teaching in regular chartered medical colleges, or the publication of standard medical books.¹

KEEPING FOR SALE OR GIFT A DRUG TO PREVENT CONCEPTION.

That A B, on, etc., in said county, willfully, knowingly and unlawfully did keep for sale and gratuitous distribution a certain secret nostrum, drug and medicine called (*give name if known, if not so allege*) for the purpose of preventing conception [procuring abortion or miscarriage] of females.²

PUBLISHERS OF NEWSPAPER PUBLISHING ADVERTISEMENT OF SECRET DRUG, ETC.

That A B, on, etc., in said county, being the publisher of the Watertown Times, a newspaper published in said county, did willfully, knowingly and unlawfully, print and publish in said newspaper an advertisement of a secret drug and nostrum exclusively for the use of females, for the purpose of preventing conception, as follows: (*Copy advertisement.*)

SALE OR GIFT OF SECRET DRUG TO PREVENT CONCEPTION, ETC.

That A B, on, etc., in said county, willfully, knowingly and unlawfully, did sell and deliver [or give away] to one C D, a certain secret drug and nostrum called —, purporting to be exclusively for the use of females, for the purpose of preventing conception [procuring abortion or miscarriage] of females.³

¹ Cr. Code, § 45.

² The offense appears to be complete when the drug or medicine, etc., is kept either for sale or gift. The purpose of the vendee or donee is an unlawful one—against the best interests of society; hence the statute prohibits the keeping for sale or gift such drugs or nostrums.

³ Other forms can readily be drawn by using the language of the statute to describe the offense charged.

CHAPTER XXIV.

LIBEL AND THREATENING LETTERS.

If any person shall knowingly send or deliver any letter or writing with or without a name subscribed thereto, or signed with a fictitious name, containing willful and malicious threats of injury of any kind whatever, or with the intent or for the purpose of extorting money or other valuable thing from any person, every person so offending shall be fined in any sum not less than fifty nor more than five hundred dollars, or be imprisoned in the jail of the county not exceeding ten days, or both, at the discretion of the court.¹

What Constitutes a Letter Containing Threats.—The letter must, on its face, contain a threat of injury of some kind, or the communication must be of such a nature as is calculated to extort money or other valuable thing.²

Threats Verbally Made afterward and obligations rightfully or wrongfully extorted thereby, can not be used as proof of threats, which the letter on its face did not contain.³ But evidence of prior and subsequent letters between the prisoner and the party threatened, may be received to explain the intention of that on which the indictment is framed.⁴

¹ Cr. Code, § 46.

² *Brabham v. State*, 18 O. S., 485. In that case the letter was as follows: "Washington County, Dec. 2, 1865. Mr. W. D. Hall. Dear Sir: Upon examining the excise law, I find that note you made me requires a stamp, and that you are liable to a fine of two hundred dollars for not stamping it. You will please call immediately and make satisfaction, and save yourself trouble. Yours with respect, W. A. Brabham." Held, not a letter containing threats within the meaning of the statute.

³ *Brabham v. State*, 18 O. S., 485. No doubt such verbal threats would be sufficient to justify a prosecution in those states, where verbal threats are punishable.

⁴ 3 Chitty, Cr. Law, 844. The statute is substantially a copy of that of

The indictment must not only pursue the words of the statute, but must set forth the letter itself on which the prosecution is founded,¹ and the defendant's intent must be correctly stated.² An exact copy of the instrument must be set forth in words and figures, to enable the court to determine whether it comes within the meaning of the statute.³

Where Verbal Threats are Punishable, the indictment must allege to whom they were made.⁴ It is unnecessary to allege that threats were falsely made, or that the party against whom they were made was innocent of the charge of which the threat was made.⁵

The Intent.—As many letters of this character are ambiguous in their language, the true intent may be alleged and the meaning of the words explained to the jury by evidence, who may find therefrom the true meaning ;⁶ but the allegation in the accusation and the proof of the intent must agree—that is, if the allegations are that the intent of the writer was to extort money, proof that he intended to obtain chattels would not sustain the charge.⁷

At Common Law the offense was not punishable unless the threat was of such a nature as to overcome a person of ordinary firmness.⁸ Under the statute, however, there is no such distinction.

30 Geo. II, c. 24, § 1; 3 Chitty, Cr. L., 846. It will be observed that any person who shall knowingly send or deliver any letter or writing containing willful and malicious threats of injury, with or without name, or with a fictitious name, is liable.

¹ 1 East, P. C., 1122; 3 Chitty, Cr. L., 844.

² 2 East, P. C., 1124.

³ 2 East, P. C., 975; 3 Chitty, Cr. L., 844. A letter accusing the prosecutor of the murder of one of the defendant's friends, and threatening to revenge his death, is sufficient evidence to be left to the jury to determine whether a threat of murder was implied. 1 Leach, 142.

⁴ *Kessler v. State*, 50 Ind., 229.

⁵ *Id.*; *R. v. Cracknell*, 10 Cox, C. C., 408; *R. v. Hamilton*, 1 Car. & K., 212; *R. v. Miard*, 1 Cox, C. C., 22.

⁶ *R. v. Handy*, 4 Cox, C. C., 243; *R. v. Carruthers*, 1 Cox, C. C., 138; *Longley v. State*, 43 Tex., 490; 2 *Bish. Cr. Pro.*, § 1029.

⁷ *Rex v. Major*, 2 East, P. C., 1124; 2 *Bish. Cr. Pro.*, § 1028.

⁸ *R. v. Southerton*, 2 East, 126-140; 2 *Arch. P. & P.*, 1062.

Evidence.—To prove the sending of the letter or writing the prosecutor must produce it and prove that he received it. Proof must then be introduced to show that the accused sent or delivered it. Proof that it is in his handwriting is not sufficient, although that is a strong circumstance and with other circumstances may be sufficient.¹

Sending or Delivering the Writing.—To constitute a sending or delivery of the writing it is not necessary that it should be sent by mail or by carrier. A letter directed to the party threatened and left on his premises where he would be likely to find it, or some other person who would deliver it to him, is a sending of the letter.² And if a party leave a letter in any place with the intent that it shall be found and delivered to the party threatened, and it is so found and delivered, it is within the statute.³

2d. The letter itself, as delivered, must be read, and when its terms are ambiguous and the indictment is properly framed, evidence *aliunde* may be received to explain its meaning.⁴

3d. The intent or purpose to extort money or other valuable thing must be proved. This will generally appear on the face of the letter. When such is not the fact, however, proof of facts and circumstances may be given from which the jury may infer the intent.⁵

LETTER CONTAINING THREATS OF INJURY TO CHARACTER WITH INTENT TO EXTORT MONEY.

That A B, on, etc., in said county, willfully, knowingly and unlawfully did send to one J W a certain letter, with the name of him, the said A B, subscribed thereto, directed to Mr. J W, containing willful and malicious threats of injury to the character of said J W, with the intent and for the purpose of extorting money⁶ from the said J W, being the person so threat-

¹ 7 Car. & P., 268; 2 Arch. Cr. P. & P., 1063.

² R. v. Wagstaff, R. & Ry., 398; 2 Arch. Cr. P. & P., 1003.

³ R. v. Grimwade 1 Car. & K., 592.

⁴ R. v. Tucker Ry. & M., 134; 2 Arch. Cr. P. & P., 1064.

⁵ The reader is referred to 2 Arch. Cr. P. & P., 1062, for valuable notes relating to the subject.

⁶ In some of the forms the *amount* of the money demanded is stated. This

ened to be accused, which said letter is in the words and figures following: (*Copy letter verbatim.*)

SENDING A WRITING THREATENING TO ACCUSE OF CRIME.

That A B, on, etc., in said county, willfully, knowingly and unlawfully, did send to one J W a certain writing with the name of him, the said A B, subscribed thereto, directed to Mr. J W, containing willful and malicious threats of injury to the said J W, by accusing him of the crime of [rape], which is punishable under the laws of the state by imprisonment in the penitentiary, with the intent and for the purpose of extorting money from the said J W, being the person so threatened to be accused, which said letter is in the words and figures following: (*Copy writing.*)

SENDING WRITING CONTAINING THREATS OF INJURY TO THE PERSON.¹

That A B, on, etc., in said county, willfully, knowingly and unlawfully did send to one J W a certain writing, with the name of him, the said A B, subscribed thereto, directed to Mr. J W, containing willful and malicious threats of injury to the person of said J W, to wit: (*set out the injury threatened*) which said writing is in the words and figures following: (*Copy verbatim.*)

FOR SENDING LETTER SIGNED WITH A FICTITIOUS NAME.

That C D, on, etc., in said county, willfully, knowingly and unlawfully did send a certain letter with the name of E J subscribed thereto, and directed to Mr. A B, containing willful and malicious threats of injury to the character of said A B, by accusing him of the crime of [sodomy] which is punishable under the laws of the state by imprisonment in the penitentiary, with the intent and for the purpose of extorting money from said A B, being the person so threatened to be accused, which said letter is in the words and figures following: (*Copy verbatim.*)

INDICTMENT FOR THREATENING LETTER AS GIVEN BY CHITTY.²

That A B, late of, etc., on, etc., at, etc., did knowingly send to one J W a seems to be unnecessary and in many cases might cause embarrassment in making proof. At common law the obtaining of money by threats was regarded as a species of robbery. When, therefore, any amount was extorted or attempted to be extorted by threats the offense was complete, whether the amount received was great or small.

¹ Where a letter is sent containing willful and malicious threats of injury it is unnecessary to allege that the object was to extort money.

² 3 Chitty, Cr. L., 846-847.

certain letter with the name of him, the said A B, subscribed thereto, directed to Mr. J W, threatening to accuse the said J W of having maliciously hired and procured a man willfully to burn the dwelling house of him, the said A B, being a crime punishable by law with death, with the view and intent to extort and gain money from the said J W, being the person so threatened to be accused, and which said letter is of the tenor following, that is to say: Salford, August 29, 1803. Sir: The purport of this letter is to inform you that last Saturday evening I was informed that you and J M hired a man to set the house on fire where I lived on Church street, which was done by you and J M's order; now sir, if you and J M do not come and give me ample satisfaction your malicious action shall be made known to the whole town. A B.

Libel.—If any person shall write, print or publish, any false or malicious libel of or concerning another, or shall cause or procure any such libel to be written, printed or published, every person so offending shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding six months, or both, at the discretion of the court, and moreover be liable to the party injured.¹

Blackstone, in treating of libels, uses the following language: "Of a nature very similar to challenges are libels, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writing, pictures, or the like, of an immoral or illegal tendency, but in the sense under which we are now to consider them are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs or pictures, in order to provoke him to wrath or expose him to public hatred, contempt and ridicule. The direct tendency of these libels is the breach of the public peace by stirring up the objects of them to revenge and perhaps to bloodshed."²

The difficulty of defining the offense at common law was felt and admitted, although text writers have undertaken to describe it.³

Definition of Libel.—Hamilton, in his argument before the

¹ Cr. Code, § 47.

² 4 Com., 150.

³ 3 Greenleaf, Ev., § 164.

court of errors, in *People v. Croswell*,¹ spoke as follows: "Lord Camden said that he had not been able to find a satisfactory definition of a libel. He would venture, however, but with much diffidence, after the embarrassment which that great man had discovered, to submit to the court the following definition: 'A libel is a censorious or ridiculing writing, picture or sign, made with mischievous and malicious intent toward government, magistrates or individuals.' This definition was afterward accepted by the highest court of New York as correct.² In its more restricted sense, as an offense against an individual, libel may be defined as a malicious defamation, either printed or written, imputing to another that which renders him liable to punishment, or to injure his reputation in the estimation of mankind generally, or to hold him up as an object of contempt, scorn, ridicule or hatred."³

What Publications are Libelous.—To charge an attorney with offering himself as a witness in order that he may divulge the secret of his client, is libelous;⁴ so to charge a person with being a drunkard, or cuckold,⁵ and to write, "I look on him as a rascal, and have watched him for many years," is libelous.⁶ So a charge that a person is a swindler, hypocrite or itchy old toad, or the like, is libelous.⁷

A Publication in the Interrogative Form as, "Is M. H. the gentleman who wrote to General H., in behalf of the O. Association, the individual who broke jail at Albany, in the state of New York, while confined on a charge of forgery?" This was copied by another paper with this statement: "We do not believe it is M. H., of this village, who has received the appointment, for corrupt as we view the executive, we can hardly think Van Buren would risk the throw." This was held to be libelous. In the body of the opinion the court

¹ 3 Johns. Cas., 354; *Watson v. Trask*, 6 Ohio, 531; *Tappan v. Wilson*, 7 Ohio, 190.

² *Steele v. Southwick*, 9 John., 215; *Cooper v. Greeley*, 1 Denio, 347.

³ *Cary v. Allen*, 39 Wis., 481.

⁴ *Riggs v. Denniston*, 3 Johns. Cas., 198.

⁵ *Giles v. State*, 6 Geo., 276.

⁶ *Williams v. Karnes*, 4 Humph., 9.

⁷ 2 Arch. Cr. P. & P., 1028-1029.

say: "The act of publication is an adoption of the original calumny which must be defended in the same way as if invented by the defendant."

Words charging a woman with want of chastity, or which would bring her into contempt and prevent her from occupying such position in society as is her right as a woman, are actionable *per se*.¹

Distinction Between Libel and Slander.—"There is a marked distinction in the cases between oral and written slander. The latter is premeditated and shows design; it is more permanent and calculated to do a much greater injury than slander merely spoken. There is an early case upon the subject in which this distinction was adverted to, *King v. Lake* (Hardr. 470), where the libel charged the plaintiff with having presented a petition to the House of Commons, 'stuffed with illegal assertions, inaptitudes, imperfections, clogged with gross ignorances, absurdities and solecisms.' A special verdict was found, and, upon argument, Hale, Ch. J., held that although such general words, spoken once without writing or publishing them, would not be actionable, yet here being written and published, which contains more malice, they are actionable."²

¹ *Alfele v. Wright*, 17 O. S., 242; *Sexton v. Todd*, *Wright, R.*, 316; *Malone v. Stewart*, 15 Ohio, 319. Judge Clifford, in *Pollard v. Lyon*, 91 U. S., 225, 226, has clearly and concisely classified the cases in which *spoken* words are actionable: "1. Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge be true, may be indicted and punished. 2. Words spoken of a person which impute that the party is infected with some contagious disease, when, if the charge is true, it would exclude him from society. 3. Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a party which prejudice such party, as in his or her trade or profession. 5. Defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage." *Cooley on Torts*, 196.

² *Bailey, J.*, in *Clement v. Chivis*, 9 *Barn. & Cress.*, 172; 1 *Am. L. C.*, 108, 109. To authorize a criminal prosecution, the matter complained of must be expressed on paper or other substance, by writing, printing, pictures,

Judicial Proceedings.—When a case has been finally disposed of a correct publication of the proceedings, as a rule, is not libelous,¹ and at common law no allegation, however false or malicious, contained in articles of peace, in answers to interrogatories in affidavits duly made, or in any other proceedings in the regular course of justice, would render the party liable as a libeler, although the offensive matter was ordered to be stricken out with costs.² Nor could anything be charged as libelous which was contained in a petition to either house of parliament, however it might affect individuals,³ because otherwise a party would be unable to present his grievances to the tribunal which has the power to grant relief. And it has been held that no want of jurisdiction in the court before which the proceeding is instituted will take away this protection.⁴ Such proceedings probably would protect a party only in those cases where the party has acted in good faith throughout, not only in instituting the proceedings but in making the charges.

If, however, a person not only charge another with improper conduct in the course of judicial proceedings, but publish the charge, he may, if the matter is libelous, be found guilty of libel.⁵ And a correct account of judicial proceedings, if accompanied with insinuations and comments calculated to cast discredit upon a party's character, may be libelous;⁶ and in a number of cases it has been held that the publication of a criminal charge contained in an affidavit, or

etc. *Rex v. Bean*, 2 Salk., 417; *Rex v. Langley*, 6 Mod., 125. Oral slander was not indictable at common law, and is not under the statute. As to what will constitute a libel, it seems to be deducible from the cases, that if the matter be understood as scandalous, and calculated to excite ridicule or abhorrence against the party intended, it is libelous. 3 Chitty, Cr. L., 868; 5 East, 463; 1 Price, 11-17, 18.

¹ *Storey v. Wallace*, 60 Ill., 51.

² 3 Chitty, Cr. L., 869; 4 Co., 14; 2 Burr., 807.

³ 3 Chitty, Cr. L., 869; 1 Saund., 132.

⁴ *Id.*

⁵ 3 Chitty, Cr. L., 870, and cases cited.

⁶ *Thomas v. Crowell*, 7 Johns., 264; *Com. v. Blanding*, 3 Pick., 304.

other *ex parte* evidence in a criminal proceeding, was indictable as tending to incite undue prejudice against the accused.¹

Libels against a Party in his Business.—To charge a person in his trade, profession, business, or in his "official capacity," with any kind of fraud, dishonesty, incapacity, unfitness or misconduct, is libelous. Where the words complained of impute negligence, want of integrity, etc., in the prosecutor, in his profession, and such words are actionable *per se*, no proof of special damage or actual malice is necessary.²

Publication is Indispensable, and must be proved to have been made within the county where the trial is had. If it was contained in a newspaper printed in another state, it has been held sufficient to prove that it was circulated and read within the county where the prosecution is instituted.³ Where, however, a libel is contained in a newspaper published in one state and circulated in another, the publisher will not be subject to extradition under the laws of the latter state, as a fugitive from justice;⁴ but where it is written in one county and sent by mail to a person in another county, this is evidence of publica-

¹ Storey v. Wallace, 60 Ill., 54; Carr v. Jones, 3 J. P. Smith, 491; Rex v. Fisher, 2 Camp., 563; Rex v. Fleet, 1 Barn. & Ald., 379.

² Pratt v. Pioneer Press Co., 28 N. W. R., 708. In the case cited from the Supreme Court of Minnesota will be found an able discussion of what constitutes a libel upon a professional man—a physician. In Russell v. Anthony, 21 Kas., 450, the defendant, who was the publisher of a newspaper, published an article in his paper saying: "Who is E. R., in whose eyes swindling is no crime? He is secretary of the bankrupt Kansas Insurance Company. Less than two years ago he was state commissioner of insurance, and certified under his oath of office that this bankrupt concern was a sound and solvent insurance company, while he knew that it was at the time hopelessly bankrupt. He was forced to leave the office of commissioner of insurance because the Leavenworth Times exposed his official 'crookedness,' and compelled him to disgorge eight thousand dollars of the state's money." The court held that the article, if false, and was published 'without sufficient excuse, was libelous; and that it will be presumed to be false and without sufficient excuse until the contrary was shown. It was also held that the fact that the party was not in office when the article was published made no difference, as the article in question imputed to him the crimes of perjury and embezzlement.

³ Nicholson v. Lothrop, 3 Johns., 139.

⁴ Wilcox v. Nolze, 34 O. S., 520.

tion in the latter county.¹ A person who knowingly circulates libelous matter publishes it.² If a person procure another to print a libel, he is guilty of publication.³ Payment of the printer or publisher of a newspaper for inserting matter which is libelous, is evidence tending to show his adoption or authorship of the matter complained of.⁴

Corroboration.—To prove the accused to be the author of the libel, evidence of other libels, written by the same person and concerning the same subject, has been admitted in corroboration of a witness who showed the accused to be the author of the libel which was the subject of the action.⁵

Libelous Matter Dictated to Another.—Where the defendant dictates the libelous matter to another with a view to its publication, it is sufficient to charge him with its publication, as where one meeting a reporter for the public press communicated to him the defamatory matter saying, "It would make a good case for the newspaper," and then proceeded to give the reporter a detailed account of it with a view to its publication, after which the reporter drew up a statement of the affair as communicated to him and published it in the paper; this was held a publication by the defendant.⁶

The Libel must be Produced on the Trial or its absence accounted for, and it must agree with the libelous matter which is the subject of the charge in every essential particular, such as names, dates,⁷ etc. The omission of a single letter from a word, where it does not change the sense, however, will not affect the proof.⁸ If the libel complained of is in the exclusive possession of the defendant, application should be made to the

¹ *R. v. Watson*, 1 Camp., 215; *R. v. Johnson*, 7 East, 65.

² *Layton v. Harris*, 3 Harring., 406.

³ *R. v. Johnson*, 7 East, 65.

⁴ *Schenck v. Schenck*, 1 Spencer, 208; 2 Arch. Cr. P. & P., 1044.

⁵ 1 Phillips, Ev., 552; *Rex v. Pearce*, Penke N. P. C., 75.

⁶ *Adams v. Kelly, Ry. & M.*, 157; 3 Greenleaf, Ev., § 172. In that case the newspaper article was not permitted to be read in evidence until the paper written by the reporter was produced and compared with the printed article, probably such proof would be unnecessary, where the reporter identified the article as his.

⁷ *Tabart v. Tipper*, 1 Camp., 352.

⁸ *Rex v. Beach*, 1 Leach, C. C., 133.

court for an order to require him to produce it before evidence of its contents can be given.¹ There must be evidence tending to show that the accused is responsible for the publication of the libel before the alleged libel can be submitted to the jury.²

The Truth as a Defense.—Where the charge complained of imputes to the plaintiff criminal conduct, and the truth of the charge is relied on as a justification in a *civil action*, it is sufficient to establish the defense by a preponderance of evidence.³ Other cases, however, even in a civil action, require the same degree of proof as if the party were on trial for the alleged crime.⁴ The latter rule no doubt prevails in a criminal charge of libel, as no one ought to publish reports of another calculated to injure him, unless he is prepared to establish the charge.

Privileged Cases.—A witness in judicial proceedings is absolutely protected even though malice be charged.⁵ If, however, the witness abuse his privilege and testify to irrelevant and immaterial matter not called out by questions from the attorneys in the case, he will not be protected.⁶

A Party or his Attorney is privileged in full freedom of speech in conducting his case, and advocating and sustaining his rights.⁷ Words, therefore, which impute crime to another, if

¹ *Rex v. Watson*, 2 T. R., 201.

² *Bent v. Mink*, 46 Iowa, 576.

³ *Ellis v. Buzzell*, 60 Me., 209; *Matthews v. Huntley*, 9 N. H., 146; *Kincaid v. Bradshaw*, 3 Hawks., 63.

⁴ *Tucker v. Call*, 45 Ind., 31; *Chalmers v. Shackell*, 6 C. & P., 475; *Fountain v. West*, 23 Iowa, 9; *Ellis v. Lindley*, 38 Iowa, 461.

⁵ *Revis v. Smith*, 18 C. B., 126; *Henderson v. Broomhead*, 4 H. & N., 569; *Marsh v. Ellsworth*, 50 N. Y., 309; *Smith v. Howard*, 28 Iowa, 51.

⁶ *White v. Carroll*, 42 N. Y., 161; *Calkins v. Sumner*, 13 Wis., 193; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me., 442; *Kidder v. Parkhurst*, 3 Allen, 393; *Cooley on Torts*, 211-212.

⁷ *Ring v. Wheeler*, 7 Cow., 725; *Hastings v. Lusk*, 22 Wend., 410; *Mower v. Watson*, 11 Vt., 536; *Lester v. Thurmond*, 51 Geo., 118; *Jennings v. Paine*, 4 Wis., 358; *Lawson v. Hicks*, 38 Ala., 279; *Brow v. Hathaway*, 13 Allen, 239; *Hoar v. Wood*, 3 Met., 193. In the case last cited it is said, "A party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions either against a party, witness or

they are applicable and pertinent to the subject of inquiry, are not actionable. This will apply more particularly to slander but also includes words in writing.

A **Legislator is Protected** in whatever he may have said in the house of which he is a member, and the question whether what is said or written by him therein was or was not pertinent to the matter before the house, will not be inquired into.¹

Judges of Courts and Judicial Officers, while acting within the limits of their jurisdiction, are protected, and the same rule applies to the executive of the nation or a state.²

The **Pleadings and Papers** filed by a party in the course of judicial proceedings are privileged, if they do not contain immaterial matter for the purpose of libeling other parties.³

Affidavits made for the purpose of instituting criminal proceedings in order to bring supposed guilty parties to justice, are also privileged.⁴

Conditionally Privileged.—All communications by members of corporate bodies, churches, and like voluntary associations, addressed to the proper party, stating facts which, if true, it was proper thus to communicate, are privileged.⁵ Official communications made by an officer in the performance of his duty are privileged.⁶ Petitions and remonstrances addressed by the

third person, which have no relation to the cause or subject-matter of the inquiry.”

¹ Coffin v. Coffin, 4 Mass., 1; State v. Burnham, 9 N. H., 34; Perkins v. Mitchell, 31 Barb., 461. If, however, a legislator cause a speech containing libelous matter to be published, he will not be protected in such *publication*. Rex v. Abbington, 1 Esp., 226.

² Cooley on Torts, 214, and cases cited.

³ Cooley on Torts, 214, and cases cited.

⁴ Allen v. Crofoot, 2 Wend., 515; Hartssock v. Redick, 6 Blackf., 255; Briggs v. Byrd, 12 Ired., 377. In Washburn v. Cooke, 3 Denio, 112, the court stated the rule where the charge is made in giving the character of a servant, or in the regular course of discipline between members of the same church. In answering an inquiry concerning the solvency of a tradesman, etc., malice is not inferred from the publication alone.

⁵ Henshaw v. Bailey, 1 Exch., 743; Furnsworth v. Storrs, 5 Cush., 412; Chapin v. Calder, 14 Penn. St., 365; O'Donohue v. McGovern, 23 Wend., 26; Haight v. Cornell, 15 Conn., 74; Servatius v. Pichel, 34 Wis., 292; Van Wyck v. Aspinwall, 17 N. Y., 190; Cooley on Torts, 215.

⁶ Cooley on Torts, 214.

citizen to an officer or body, asking for or opposing what such officer or body may lawfully grant, are said to be privileged.¹ No action will lie for a false statement in a petition to the executive for an appointment, unless it be shown that it was both false and malicious.²

Confidential Inquiries and the answers thereto concerning the character and conduct of servants, or the responsibility of tradesmen, etc., by a person having an interest in knowing, of one who is supposed to have special opportunities of knowing, are privileged.³ This rule, however, does not prevail in favor of one who has undertaken for a consideration to furnish to others information concerning the habits, character, responsibility and standing of persons engaged in business.⁴ Confidential communications between principal and agent in any matter relating to the business, are privileged.⁵ In *Washburn v. Cook*, the court, in speaking of a letter which the court below had charged was not privileged, say: "It was the communication of an agent to his principal, touching the business of his agency and not going beyond it. The charge of larceny, of which the plaintiff complains, was directly pertinent to the matter in hand; and I think the letter must be regarded as a privileged communication."

Confidential communications between a person and his professional adviser, legal, spiritual and medical, are privileged.⁶

¹ *Bradley v. Heath*, 12 Pick., 163; *Howard v. Thompson*, 21 Wend., 319; *Venderzee v. McGregor*, 12 Wend., 545; *Vanarsdale v. Lavery*, 69 Penn. St., 103; *Thorn v. Blanchard*, 5 Johns., 508.

² *Thorn v. Blanchard*, 5 Johns., 508; *Bodwell v. Osgood*, 3 Pick., 379; *Larkin v. Noonan*, 19 Wis., 82; *Whitney v. Allen*, 62 Ill., 472.

³ *Pattison v. Jones*, 8 B. & C., 578; *Storey v. Challands*, 8 C. & P., 234; *Dunman v. Bigg*, 1 Camp., 269, note; *Bradley v. Heath*, 12 Pick., 163; *Atwill v. McIntosh*, 120 Mass., 177; *Hatch v. Lone*, 105 Mass., 394; *Noonan v. Orton*, 32 Wis., 106; *Lewis v. Chapman*, 16 N. Y., 375; *Cooley on Torts*, 217.

⁴ *Taylor v. Church*, 8 N. Y., 452; *Ormsby v. Douglass*, 37 Id., 477; *Sunderlin v. Bradstreet*, 46 Id., 188; *Cooley on Torts*, 217.

⁵ *Washburn v. Cooke*, 3 Denio, 110; *Knowles v. Peck*, 42 Conn., 386, 19 Am. R., 542; *Harwood v. Keech*, 4 Hun, 389; *Cooley on Torts*, 216-217.

⁶ *Cooley on Torts*, 216.

Judge Cooley, in his valuable work on Torts, mentions other cases where the communications are privileged, as that of a father who discusses with his daughter the habits, reputation, character and ability of one who has sought her hand in marriage. In such and like cases, the communications are privileged, and the fullest discussion should be permitted.¹ A mere stranger, however, who interferes in marriage negotiations, is not protected.²

Freedom of the Press.—The first amendment to the constitution of the United States prohibits the passage by congress of any law “abridging the freedom of speech or of the press,” and similar provisions are found in all or nearly all of the state constitutions.³ This exempts the press from censorship, and leaves it free to publish what may be deemed proper, being liable for the abuse of the right. The press, therefore, in good faith, may discuss the character, habits, qualifications, etc., of any person who is a candidate for a public office, and the same liberty no doubt exists where the official character or conduct of one holding an office is concerned.⁴ The press may also publish full reports of judicial trials, if they are not *ex parte*, and are not blasphemous or indecent;⁵ and this privilege extends to trials in voluntary associations, such as a medical society.⁶ Reports of judicial proceedings, however, to be privileged, must be confined to the actual proceedings, and must contain no defamatory comments, observations or

¹ Id.; Todd v. Hawkins, 8 C. & P., 88; Atwill v. McIntosh, 120 Mass., 177.

² Joannes v. Bennett, 5 Allen, 170.

³ These provisions in connection with one, in some of the states, that in all actions for defamation the truth of the charge may be given in justification, probably were adopted in consequence of the decisions of the English courts, that where the libel imputes a crime to another, proof of the truth of the charge was inadmissible, and that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances. King v. Burdett, 4 B. & Ald., 95, 2 Kent, 19.

⁴ Palmer v. Concord, 218 N. H., 211; Purcell v. Sowler, 1 L. R. C. P. Div., 781; Purcell v. Sowler, 2 L. R. C. P. Div., 215; Kelly v. Sherlock, L. R., 1 Q. B., 686; State v. Balch, 31 Kas., 465.

⁵ Cooley on Torts, 218, and cases cited.

⁶ Barrows v. Bell, 7 Gray, 301.

headings.¹ As heretofore stated, *ex parte* proceedings by reason of their tendency "to prejudice those whom the law still presumes to be innocent, and to poison the source of justice," are not privileged.²

The Publication of News is not Privileged, and publishers are liable for the appearance in their papers of false items of news, even if published without their personal knowledge.³

Copying Defamatory Publications is no defense. It is the business of a party who puts a statement, derogatory to the character of another, in circulation, to know the truth of that which he asserts. Where, however, a party in good faith copies the statement of another believing it to be true, such fact may be considered in lessening the punishment.⁴

Malice, in a legal sense, means the intention to injure another. If the statement published in regard to another be false, it is not essential that it should have been published with the intention to injure the party libeled. The injury results from the false publication, and the intention of the publisher is not a material inquiry, except in fixing the punishment. Still, one publishing false and injurious statements, affecting the charac-

¹ Stiles v. Nokes, 7 East, 493; Dehgal v. Highley, 3 Bing., N. C., 950; Thomas v. Crowell, 7 Johns., 264; Pittock v. O'Neill, 63 Penn. St., 253; Cooley on Torts, 219.

² Rex v. Fisher, 2 Camp., 563; Cooley on Torts, 219.

³ Daily Post Co. v. McArthur, 16 Mich., 447. The court observes (page 454): "The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items. would reduce the blameworthiness of a publisher to the minimum for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feelings beyond what is inevitable from the nature of the libel. * * * If, on the other hand, it should appear from the frequent recurrence of similar libels, or from other proof tending to show a want of solicitude for the proper conduct of his paper, that the publisher was reckless of consequences, then he would be liable to increased damages, simply because, by his own fault, he had deserved them. By such recklessness he encouraged fault or carelessness in his agents, and becomes in a manner in complicity with their misconduct." Perett v. N. O. Times, 25 La. Ann., 170; Scripps v. Reilly, 35 Mich., 371; Gibson v. Cincinnati Enquirer, 5 Cent. L. J., 280; Cooley on Torts, 217.

⁴ Cooley on Torts, and cases cited.

ter or reputation of another, can scarcely claim that he did so with no intention to injure him. Such a plea, if made, would carry its own refutation on its face. It would be equivalent to that of an incendiary, that he did not intend to injure the man whose buildings he set on fire. The terms "malice" and "malicious" therefore, when referring to libelous charges, mean without legal excuse. As Judge Cooley well remarks, "It is the protection of the party injured the law aims at, not the punishment of bad motive instigating bad action in the party injuring him."¹

The Indictment.—The material allegations are that at a time and place stated the defendant did unlawfully and maliciously write and publish of *and concerning* the party complaining, a false, scandalous and malicious libel, a copy of which must be set out. If the intent does not sufficiently appear, proper innuendoes must be introduced to show the meaning contended for.² The name of the person libeled should be correctly stated, so that it will correspond with that given in the libel. If a scurrilous name is given to the person libeled, but he is pointed out in other ways, the pleader, by proper allegations, may state who was intended to be charged. The addition of the residence and office need not be stated unless the libel is for misconduct in office.³ It must be alleged that the defendant published the libel. To aver that he wrote it is not sufficient.⁴

Where the meaning of the words is latent, that is, does not fully appear on the face of the publication, such meaning must be alleged.⁵

Where the libel is too obscene to be set out at length, an

¹ Cooley on Torts, 209. The allegation that the act was malicious is made, "rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose." Abbott, Ch. J., in *Duncan v. Thwaites*, 3 B. & C., 556-585; Cooley on Torts, 209.

² See *Maxw. Pl. & Prac.* (4 Ed.), 98-275.

³ 2 *Bish. Cr. Pl. & Prac.*, 784.

⁴ *Rex v. Hunt*, 2 Camp., 583; *Taylor v. State*, 4 Ga., 14.

⁵ *Miller v. Maxwell*, 16 Wend., 9; *Wilson v. Soule*, 3 Mich., 514; *Rex v. Burdett*, 4 B & Ald., 314; *State v. White*, 6 Ired., 418.

avermment of too great obscenity may be made and the subject set out.¹

Where only Parts of the Libel are Selected they may be set out thus: "In a certain part of which said libel there were and are contained certain false, malicious, scandalous and libelous matters of and concerning [the prosecutor] according to the tenor and effect following, that is to say: (*Copy the first part selected.*) And in certain other parts," etc.²

If the Libel is in a Foreign Language, the original as published must be set out with a correct translation of the same.³

An Innuendo is an averment to explain the defendant's meaning by reference to matter previously introduced into the proceedings. It is necessary only where the intent may be mistaken or where it can not be collected from the libel itself.⁴

It is necessary where the words of a writing are general, ironical, or spoken by way of allusion or inference, so that, although a person reading them will perceive their offensive meaning, it is by connecting them with some facts or associations not expressed in words, but which they necessarily present to his mind. It is only explanatory of some matter already expressed, but it neither alters nor enlarges the sense of previous averments.⁵

LIBEL BY WRITING AND SENDING A LETTER CONTAINING LIBELOUS MATTER TO A THIRD PERSON.

That A B, on, etc., in said county, unlawfully and maliciously devising, contriving and intending to scandalize, vilify and defame one C D, and to bring him into public scandal, infamy and disgrace, and to injure, prejudice and aggrieve him, the said C D, unlawfully and maliciously did compose, write and publish a certain false, scandalous, malicious and defamatory libel of and concerning the said C D, containing among other things the false, scandalous, malicious, defamatory and libelous words and matter following of and concerning the said C D, that is to say (*here copy the libelous words*

¹ Com. v. Tarbox, 1 Cush., 66; State v. Brown, 27 Vt., 619; Com. v. Holmes, 17 Mass., 336; McNair v. People, 89 Ill., 441.

² Tabart v. Tepper, 1 Camp., 350.

³ Zenobio v. Axtell, 6 T. R., 162; 1 Saund., 242.

⁴ 3 Chitty, Cr. L., 873; Cowp. 679-683; 5 East, 463.

⁵ 3 Chitty, Cr. L., 873. The office of an innuendo is simply to explain the words used, and if the meaning is plain, no innuendo should be employed.

with proper innuendoes), which said false, scandalous, malicious and defamatory libel, he, the said A B, afterward, to wit, on the day and year aforesaid, in said county, unlawfully and maliciously did send to one E F, in the form of a letter addressed to said E F, and did thereby then and there, unlawfully and maliciously, publish and cause to be published the said libel, to the great damage, scandal, infamy and disgrace of the said C D.¹

LIBEL BY PUBLISHING SCURRILOUS VERSES.

That A B, on, etc., in said county, unlawfully and maliciously contriving and intending to injure, scandalize and vilify the good name, fame and reputation of one Mrs. M B, a widow, and to bring her into great hatred, contempt, ridicule and disgrace, unlawfully and maliciously did write and cause to be written a certain false, malicious and defamatory libel of and concerning the said Mrs. M B, which said false, scandalous, malicious and defamatory libel is according to the tenor following, to wit: "The penitent tyrant believe and tremble, now C—n (*meaning the town of C. in said county*), dry up every tear; no more does tyranny appear, 'tis changed to penitence severe; lament no more, to thee is given the succoring hand of pitying heaven. Tyrannus (*meaning the said M B*) quite worn out with swearing, lawsuits, scandal, and despairing, with all the blackest scenes of sinning, surpassing ought from the beginning," which said false, malicious and defamatory libel he, the said A B, on said day and year, in said county, unlawfully and maliciously did publish, by sending the same in the form of a letter to one E F, directed to the said E F, to the great damage, disgrace and scandal of said Mrs. M B.²

BY POSTING UP LIBELOUS MATTER IN PUBLIC STREET.

That A B, on, etc., in said county, unlawfully and maliciously contriving and intending to injure, scandalize and vilify the good name, fame and reputation of one C D, and to bring him into public scandal, infamy and disgrace, and to injure, prejudice and aggrieve him, the said C D, unlawfully and maliciously did compose and publish a certain false, scandalous, malicious and defamatory libel, of and concerning the said C D, which said false and malicious libel was as follows, that is to say: "C D (*meaning C D aforesaid*) is a liar, a coward, and a villain," which said false, scandalous, malicious and defamatory libel he, the said A B, on the day and year aforesaid, caused to be printed, and posted the same up on the public streets of the city of — in said county, where it was seen and read by people generally.

¹ The above is the substance of the form in 3 Chitty, Cr. Law, omitting certain words and allegations deemed to be unnecessary.

² The above is the substance of the form in 3 Chitty, Cr. Law, 893, omitting certain portions.

LIBEL BY EXHIBITING AN OBSCENE PAINTING.

That A B, on, etc., in said county, unlawfully and maliciously contriving and intending to injure, scandalize and vilify the good name and reputation of one C D, and to bring him into public scandal, infamy and disgrace, and to injure, prejudice and aggrieve him, the said C D, unlawfully and maliciously did publish and show to various persons, to the jurors unknown, a certain false, malicious and obscene painting, representing said C D in an obscene, impudent and indecent posture with a strumpet, to the great damage of him, the said C D.

BY HANGING IN EFFIGY.

That A B, on, etc., in said county, unlawfully and maliciously contriving and intending to bring one C D into contempt and disgrace, and to cause him and others to commit breaches of the public peace, then and there unlawfully and maliciously, on a certain public road, where on great numbers of people were continually passing and repassing, did erect a structure in the form of a gallows, and thereon hang an effigy in rude resemblance of a man, labeled C D, and did then and there write the words, "C D is an infamous scoundrel," and place the same on said gallows above said effigy, and in plain view of and was read by the people aforesaid, passing along said public road, and did then and there unlawfully and maliciously permit the same to remain for a long period, to wit, for the space of — days, to the great damage of him, the said C D.

FOR AN OBSCENE LIBEL.

That A B, on, etc., in said county, unlawfully and maliciously contriving and intending to bring one C D into contempt and disgrace, and the debasement of public morals, especially of children and youth, unlawfully and maliciously did write and publish of and concerning one C D, an unlawful, malicious, false and obscene libel, of the tenor following; that is to say: (*Here copy the libelous matter verbatim.*) If the libel is too obscene to be set out at length, then such a description of the words used should be given as is consistent with decency, with the further allegation that the libel is grossly obscene and disgusting.¹ The allegation may be, "which said libel is so grossly obscene and disgusting that decency forbids that it be set out according to the tenor, and the jurors [or affiant] can not from a regard for decency recite the tenor thereof."

¹ 1 Bish. Cr. P. & P., § 469. The safe course is to set out every libelous publication, according to its tenor. Where this is not done, questions may arise as to what publication was complained of, that may render the indictment or information a nullity.

ON THE DEAD.

That A B, on, etc., in said county, unlawfully and maliciously contriving and intending to injure, defame, disgrace, and vilify the memory and character of one G N C, then deceased, and to bring the family of said G N C into great scandal, infamy and contempt, and to cause it to be believed that said G N C, in his lifetime, was a person of a vicious and depraved mind and disposition, and led a wicked and profligate course of life addicted to criminal and unmanly practices, vices and debaucheries, on the day and year aforesaid, in said county, unlawfully and maliciously did print and publish in a certain newspaper, called *The World*, a certain false, scandalous and malicious libel of and concerning said G N C, of the tenor following; that is to say: (*Here copy the libel verbatim.*)¹

¹ The above is the substance of the form in 3 Chitty, 914.

CHAPTER XXV.

OFFENSES RELATING TO DOMESTIC ANIMALS.

If any person shall willfully and maliciously alter or deface any artificial ear mark or brand, upon any horse, mare, foal, filly, mule or ass, sheep, goat, or swine, cow, steer, bull or heifer, the property of another, every person so offending shall be fined in any sum not exceeding fifty dollars, and be liable in treble damages to the party injured.¹

FOR ALTERING OR DEFACING MARK OR BRAND ON STOCK.

That A B, on, etc., in said county, willfully and maliciously did alter and deface the ear mark [or brand] of a certain horse, the property of C D, of the value of — dollars, by (*describe the alteration*), without the consent of said C D, and with the intent then and there and thereby unlawfully to deprive said C D of said horse.

Killing or Injuring Animals of the Value of Thirty-five Dollars.²— If any person or persons shall willfully or maliciously kill or destroy any horse, mare, foal, filly, mule, ass, sheep, goat, cow, ox, steer, bull, heifer or swine, the property of another or others, of the value of thirty-five dollars or upward, or shall willfully and maliciously injure any such animal or animals, the property of another or others, to the amount of thirty-five dollars or upward, the person or persons so offending shall be imprisoned in the penitentiary not more than three years nor less than one year.³

¹ Cr. Code, § 63.

² The object of the statute is to protect owners in their property. Hence if an ear mark or a brand is changed so that by the help of this alteration the party, either directly or through some one else, may be able to appropriate the animal, he at least attempts to commit larceny. Bishop has collected the cases bearing upon this subject. Stat. Crimes, §§ 454-461. It will be seen that the decisions are not numerous, and not very satisfactory. A party to be liable must intentionally alter a mark or brand.

³ Id., § 64.

FOR KILLING ANIMALS OF THE VALUE OF THIRTY-FIVE DOLLARS.¹

That A B, on, etc., in said county, willfully, unlawfully, maliciously and feloniously did kill and destroy a certain [horse] of the value of thirty-five dollars and upward, the property of one C D, by unlawfully, maliciously, willfully and feloniously opening a vein in the neck of said horse.

FOR INJURING AN ANIMAL TO THE AMOUNT OF THIRTY-FIVE DOLLARS.

That A B, on, etc., in said county, willfully, unlawfully, maliciously and feloniously did injure a certain [horse], the property of one C D, of the value of — dollars before said injury, to the amount of thirty-five dollars and upward, to wit, to the amount of — dollars by (*state the means used.*)

WHERE MORE ANIMALS THAN ONE ARE INJURED.

That A B, on, etc., in said county, willfully, unlawfully, maliciously and feloniously did injure certain animals, to wit, fifty swine, the property of C D, of the value of — dollars before said injury, to the amount of thirty-five dollars and upward, to wit, to the amount of — dollars, by (*state the means used to injure.*)

Killing or Injuring Animals of Less Value than Thirty-five Dollars.

—If any person or persons shall unlawfully and maliciously kill or destroy any horse, mare, foal, filly, mule or ass, sheep, goat, cow, ox, steer, bull, heifer or swine, the property of another or others, of less value than thirty-five dollars, or shall willfully and maliciously injure any such animal or animals, the property of another or others, to an amount less than thirty-five dollars, such person or persons shall be fined in any sum not more than one hundred dollars nor less than five dollars, or imprisoned in the jail of the county not exceeding three months, or both fined and imprisoned as aforesaid at the discretion of the court.²

¹ Great care is necessary in this class of cases in sifting the evidence to see that personal difficulty between neighbors is not at the bottom of the prosecution. In other words, that no real injury has been committed, or if so that there is an object in fastening the crime on the accused.

² Cr. Code, § 65.

FOR KILLING AN ANIMAL OF LESS VALUE THAN THIRTY-FIVE DOLLARS.

That A B, on, etc, in said county, willfully, unlawfully and maliciously did kill and destroy a certain cow of the value of less than thirty-five dollars, to-wit, of the value of twenty-five dollars, the property of one C D, by unlawfully and maliciously shooting said cow through the body.

FOR INJURING ANIMALS TO AN AMOUNT LESS THAN THIRTY-FIVE DOLLARS.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did injure a certain [cow], the property of one C D, of the value of twenty-five dollars, before said injury [to the amount of less than thirty-five dollars],¹ to wit: to the amount of ten dollars by (*state the means of injury.*)

Poisoning Animals.—If any person or persons shall willfully and maliciously administer or cause to be administered poison of any sort whatever to any horse, mare, foal, filly, jack, mule, ass, sheep, goat, cow, ox, steer, bull, heifer or swine, the property of another, with intent to injure or destroy such horse, mare, foal, filly, jack, mule or ass, sheep, goat, cow, ox, steer, bull, heifer or swine, the person or persons so offending shall be fined in the sum of one hundred dollars, or imprisoned in the jail of the proper county, not exceeding thirty days, at the discretion of the court.²

FOR POISONING DOMESTIC ANIMALS WITH INTENT TO KILL OR INJURE THE SAME.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did administer and cause to be administered to a certain horse, the property of C D, of the value of — dollars, a large quantity of poison, to wit: one half ounce of aconite, without the consent of the said C D, and with the intent of him, the said A B, to injure and destroy said horse.

The original act upon the subject of killing, maiming, etc., cattle, appears to be 9 Geo. I, c. 22, which declared, if any person should unlawfully and maliciously "kill, maim or wound any cattle," he should be guilty of a

¹ The words in brackets probably may safely be omitted, as the injury could not exceed the value.

² Cr. Code, § 66.

felony. The word "cattle" was held to include horses.¹ It is not necessary that the animals should die in consequence of the injuries, nor that the injury done to them should be permanent.² In Dawson's case, who was indicted for poisoning horses, in order to prevent them from running the race against which he had made bets, it was held that this intent was sufficient to bring the case within the act.³

FORM AS GIVEN BY CHITTY FOR POISONING A MARE.⁴

That D D, late of, etc., being an ill designing and disorderly person, and of a wicked and malicious mind, on, etc., with force and arms, at, etc., one mare of great value, to wit, of the value of £20, of the goods and chattels of one W A, then and there being, feloniously, unlawfully, willfully and maliciously, then and there did kill and destroy, by having before then (*that is to say*) on, etc., in said county, willfully, maliciously and unlawfully put and infused into and mixed with certain water, then and there being in a certain trough, used for the purpose of watering horses, and at which said trough the said mare of the said W A was usually watered, a certain quantity of deadly poison, to wit: white arsenic, and of which said water wherein said poison had been put and infused and mixed as aforesaid, the said mare of the said W A, afterward, to wit, on, etc., did drink, and by reason of and in consequence thereof, the same mare then and there became and was poisoned, and, etc., by reason of her having been so poisoned on the — day of — did die.

Cruelty to Animals.—If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdriven, overloaded, tortured, tormented, or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated or killed as aforesaid, any domestic animal, every such offender shall, for every such offense, be deemed guilty of a misdemeanor⁵ [and subject to a fine of not less than five nor more than fifty dollars].⁶

¹ 3 Chitty, Cr. L., 1087; *King v. Paty*, 2 Bla. R., 721.

² Id.

³ Id.

⁴ 3 Chitty, Cr. L., 1088. This was the indictment against Dawson referred in 3 Chitty, Cr. Law, 1087, for placing poison in horse troughs, for which he was convicted and executed.

⁵ Cr. Code, § 67.

⁶ Cr. Code, § 71.

OVERDRIVING ANIMALS.

That A B, on, etc., in said county, unlawfully and willfully did overdrive certain domestic animals, to wit: [a span of horses] belonging to [himself.]

CONFINING DOMESTIC ANIMAL WITHOUT NECESSARY SUSTENANCE.

That A B, on, etc., in said county, unlawfully and willfully did confine certain domestic animals, to wit, ten steers, in a certain inclosure called a — for the space of twenty-five successive hours, and willfully and unlawfully did deprive said animals of necessary sustenance during said time.

Neglect to Feed and Water Impounded Domestic Animals.—Any person who shall impound, or cause to be impounded, in any pound or yard, for sale or slaughter, or for any other purpose, any domestic animal, shall supply the same during such confinement with a sufficient quantity of wholesome food and water, and in default thereof shall, upon conviction, be adjudged guilty of a misdemeanor, and in case any domestic animal shall be at any time impounded or yarded as aforesaid, and shall continue to be without necessary food and water for more than twenty-four successive hours, it shall be lawful for any person, from time to time, and as often as it shall be necessary, to enter into and upon any pound or yard in which any domestic animal shall be so confined, and to supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost for such food and water may be collected by him of the owner of such domestic animal, and the said domestic animal shall not be exempt from levy and sale upon an execution issued upon a judgment therefor.¹ [The punishment is a fine of not less than five nor more than fifty dollars.]²

NEGLECT TO FEED AND WATER IMPOUNDED DOMESTIC ANIMALS.

That A B, on, etc., in said county, did impound fifty head of domestic animals, to wit, two-year old steers, in a pound there situate, and did un-

¹ Cr. Code, § 68.

² Cr. Code, § 71.

lawfully allow the same to remain therein for the space of twenty-five ¹ successive hours without supplying said animals during said confinement with a sufficient quantity of good and wholesome food and water.

Transporting Animals in a Cruel Manner.—If any person shall carry or cause to be carried, in or upon any vehicle or otherwise, any domestic animal in a cruel or inhuman manner, he shall be deemed guilty of a misdemeanor, and whenever he shall be taken into custody therefor by any officer, such officer may take charge of such vehicle and its contents, and deposit the same in some safe place for custody; and any necessary expenses which may be incurred for taking charge of and keeping and sustaining the same, shall be a lien thereon, to be paid before the same can be lawfully recovered, and if the said expenses or any part thereof remain unpaid, they may be recovered, by the person incurring the same, of the owner of said domestic animal, in any action therefor; and it shall be unlawful for any person or corporation engaged in transporting live stock on railway trains to detain such stock in cars for a longer continuous period than twenty-four hours without supplying the same with food and water.²

FOR TRANSPORTING DOMESTIC ANIMALS IN A CRUEL OR INHUMAN MANNER.

That A B, on, etc., in said county, unlawfully did cause to be carried from — to —, in a vehicle, to wit, a two-horse wagon, certain domestic animals, to wit, ten head of hogs, in a cruel and inhuman manner.

AGAINST A RAILROAD COMPANY FOR DETAINING LIVE STOCK IN A CAR FOR MORE THAN TWENTY-FOUR HOURS.

That the — railroad company is duly incorporated under the laws of the state of —, and is operating a railroad in said county, and on, etc., in said county, in carrying and transporting live stock, to wit, one hundred head of steers on said railway, did unlawfully detain such stock in cars for a

¹ The statute fixes twenty-four hours as the limit, after which time any person may feed and water the animals and charge the cost to the owner thereof.

² Cr. Code, § 69.

longer continuous period than twenty-four hours without supplying the same with food and water.¹

Abandonment of Infirm or Disabled Animals.—If any maimed, sick, infirm or disabled domestic animal shall be abandoned to die, by any person in any public place, such person shall be deemed guilty of a misdemeanor, and it shall be lawful for any magistrate or chief of police, in this state, to appoint suitable persons to destroy such domestic animal if unfit for further use.²

Any person convicted of a violation of any of the provisions of the last four preceding sections, shall pay for every offense not less than five nor more than fifty dollars.³

ABANDONMENT OF INFIRM DOMESTIC ANIMAL.

That A B, on, etc., in said county, unlawfully did abandon, to die, in a public place, to wit: (*state where*) a disabled and infirm domestic animal, to wit, a horse.

Bull Baiting.—Any person or persons who shall confine or aid, or assist in confining, any bull, steer or other domestic or domesticated animal or animals, either by tying, penning or inclosing the same, for the purpose of bull baiting, bear baiting or other purpose of torture, or shall aid or assist in torturing the same when so tied or penned, either by dogs, whips, spears or other instruments, shall pay a fine not exceeding one hundred dollars.⁴

FOR BULL BAITING.

That A B and C D, on, etc., in said county, willfully and unlawfully did confine a certain bull, the property of one E F, by then and there penning and inclosing said bull for the purpose of bull baiting, and torture of said bull by whips, dogs and spears.

Bull Baiting in a Public Street was an offense at common law where, in consequence thereof, a large number of people

¹ The venue, no doubt, may be laid in any county through which the stock passes while being unlawfully detained on the cars.

² Cr. Code, § 70.

³ Id., § 71.

⁴ Id., § 72.

assembled together in the street and obstructed it.¹ The offense seems to have been obstructing the street.

Cock Fighting.—If any person or persons shall publicly exhibit or aid, or assist in exhibiting, the game commonly called cock fighting, such person or persons shall forfeit and pay a fine not exceeding twenty dollars.²

FOR COCK FIGHTING.

That A B, on, etc., in said county, unlawfully did publicly exhibit the game commonly called cock fighting, by then and there publicly causing two or more cocks to fight.

Horse Racing.—If any two or more persons shall run a match horse race or races in any public road in common use, for the purpose of trying the speed of their horses, every person so offending shall be fined in any sum not exceeding five dollars nor less than one dollar.³

The Termini of the Road need not be stated,⁴ and it is sufficient to allege and prove that the road was used generally by the public as a public road, without proving the validity of the location; in other words, that *de facto* it was a public road in common use. Where there are two or more defendants, it should be alleged that they ran together.⁵ The omission, however, will be cured by the verdict.⁶ It has been held that an allegation that the defendant permitted his horse to be run in a race was not sustained by proof that he rode a horse in the race which he did not own.⁷

FOR HORSE RACING IN A PUBLIC ROAD.

That A B and C D, on, etc., in said county, each having the possession and control of a certain horse, then and there willfully and unlawfully did run a match horse race together on a certain public road in common use, for the purpose of trying the speed of their respective horses.

¹ See 2 Chitty, Cr. L., 627.

² Cr. Code, § 73.

³ Cr. Code, § 74.

⁴ State v. Armstrong, 3 Ind., 139; Bish. Stat. Cr., § 927.

⁵ State v. Catchings, 43 Tex., 654; Lewellen v. State, 18 Id., 538; Bish. Stat. Cr., § 927.

⁶ King v. State, 3 Tex. App., 7.

⁷ Robb v. State, 52 Ind., 216; Bish. Stat. Cr., § 928.

Sheep Having a Contagious Disease.—Any person being the owner of sheep, or having the same in charge, who shall turn out, or suffer any sheep having any contagious disease, knowing the same to be so diseased, to run at large upon any common, highway or inclosed ground, or who shall sell any such sheep knowing the same to be diseased without fully disclosing the fact to the purchaser, shall be punished by a fine of not less than twenty dollars, and not more than one hundred dollars, and be imprisoned in the jail of the county, not exceeding three months. Provided, this section shall not be so construed as to prevent any person owning such diseased sheep from driving along any public highway.¹

SELLING DISEASED SHEEP.

That A B, on, etc., in said county, being the owner of [four hundred] sheep having then a contagious disease called the [scab] and knowing said sheep to be so diseased, unlawfully and fraudulently did sell the same to C D, without fully or in any manner disclosing the fact to said purchaser.

PERMITTING DISEASED SHEEP TO RUN ON THE COMMON, HIGHWAY, ETC.

That A B, on, etc., in said county, having the charge of [three hundred] sheep having a contagious disease called the [scab], and knowing the same to be so diseased, did willfully and unlawfully turn the same out to run at large upon a certain common and public highway.

Diseased Animals.—It shall be unlawful for any person to sell, barter or dispose of, or permit to run at large, any horses, cattle, sheep or domestic animals, knowing that such horse, cattle, sheep or domestic animals are infected with contagious or infectious disease, or have been recently exposed thereto, unless he shall first duly inform the person to whom he may sell, barter or dispose of such horse, cattle, sheep or other domestic animal of the same; and any person so offending shall be fined in any sum not less than twenty dollars nor more than one hundred dollars, or be confined in the jail of the county not exceeding three months.²

¹ Cr. Code, § 75.

² Cr. Code, § 76.

DISPOSING OF DISEASED ANIMALS.

That A B, on, etc., in said county, being the owner of and in possession of ten head of hogs, infected with a contagious disease called hog cholera, of which he had full knowledge, unlawfully and fraudulently did sell and dispose of said hogs to one C D, without first duly or in any manner informing said C D that said animals were so diseased.

Contact with Diseased Animals.—If any person being the owner, or having charge of any horses, cattle, sheep or any kind of stock, knowing the same to be infected with a contagious or infectious disease, shall knowingly permit it to come in contact with any other person's horses or stock, without such person's knowledge or permission, such person shall be fined in any sum not less than fifty nor more than five hundred dollars, or be confined in the jail of the county not less than ten nor more than fifty days.¹

PERMITTING DISEASED ANIMALS TO COME IN CONTACT WITH OTHERS.

That A B, on, etc., in said county, being the owner and having charge of one hundred head of steers, which were infected with a contagious disease called the Texas fever, and well knowing said cattle to be so infected, unlawfully and knowingly did permit said diseased animals to come in contact with twenty head of steers belonging to C D, without the knowledge or permission of said C D.

Using Animals without Consent of Owner.—If any person shall unlawfully take any horse, mare, gelding, foal or filly, ass or mule from the stable, lot or pasture of another, or from the hitching rack, or any other place as aforesaid, having been lawfully placed, without the consent of the owner, with the intent to injure, set at large, or wrongfully use the animal so taken, such person shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding three months, or both, and shall also be liable to the party injured in double the amount of damages sustained.²

¹ Cr. Code, § 77.

² Cr. Code, § 78.

UNLAWFULLY TAKING ANIMALS BELONGING TO ANOTHER, WITHOUT LEAVE.¹

That A B, on, etc., in said county, unlawfully and wrongfully did take a certain foal, the property of C D, from the pasture of said C D, where he, said C D, had lawfully placed the same, without the consent of said C D, and with the intent of him, said A B, to set the same at large.

Liberating Impounded Animals.—It is hereby declared unlawful for any person or persons to interfere with or set at liberty any domestic animal or animals impounded in a lawful manner by any other person; and every person so offending shall, upon conviction thereof, pay a fine not exceeding one hundred dollars nor less than five dollars.²

LIBERATING IMPOUNDED CATTLE.³

That A B, on, etc., in said county, being the owner of certain stock, to wit, ten head of cows, unlawfully permitted the same to stray upon the cultivated lands of C D in said county, who thereupon duly and lawfully impounded said stock for the damages done by it, and served the notice required by law upon said A B, claiming damages therefor. Said A B thereupon, on said day, and without tendering or paying said damages or any part thereof, and while said animals were so impounded by C D in a lawful and proper manner, unlawfully and forcibly did break open said pound and set at liberty said cows against the will of and without the consent of said C D.

BREAKING A POUND AND LETTING OUT A MARE AT COMMON LAW.

That on, etc., in said county, one W S was bailiff of one W K, and by his command, in due form of law, took and distrained one mare, the property of one T B, of, etc., of the value of £20, in and upon a certain close of him,

¹ The *intent* must be averred—to injure, set at large or wrongfully use the animal.

² Cr. Code, § 80.

³ Facts should be stated showing the impounding to be lawful, then allege in the words of the statute the violent or forcible breaking of the pound, and liberating of the stock.

At common law, pound breach, unaccompanied with a breach of the peace, was not an indictable offense, but only ground for a civil action. 2 Chitty Cr. L., 204. But it was afterward held that pound breach was an injury and insult to public justice and *as such* indictable. 2 Chitty, Cr. L., 204; Hawk., b. 2, c. 21, § 20.

the said W K, situate, and being in said county, and there wrongfully and unlawfully feeding and depasturing upon the grass and herbage of the said W K, then growing and being in and upon said close, and doing damage there to him, the said W K, as a distress for the damage so then and there done and doing by the said mare, and the said mare so taken and distrained as aforesaid, he, the said W S, as such bailiff of the said W K, and by his command, on the day and year aforesaid, in a certain common and open pound of and within the said county impounded, and the said mare was then and there duly and lawfully secured and kept and detained in the common pound, thereby W K then and there being the lawful keeper of the said pound, as a distress for the cause aforesaid, and said mare being so impounded and remaining in the said common pound there as a distress for the cause aforesaid, the said T B afterward, to wit, on the said, etc., with force and arms at, etc., aforesaid, the common pound broke and entered, and the said mare from and out of the same, without the license or consent and against the will of the said W K, or of the said W S, or of the said W M, without any satisfaction having been made to the said W K for the said damage done by the said mare as aforesaid, unlawfully did rescue, take, lead and drive away, to the great damage of the said W K, in contempt, etc., and to the great hindrance of public justice.¹

Stealing Bees or Honey.—If any person shall steal any hive, box, bee palace, or other contrivance containing honey or honey bees, the property of another, of less value than thirty-five dollars, or if any person shall steal honey from any such hive, box, bee palace or other contrivance as aforesaid, or if any person shall willfully and maliciously disturb, injure or destroy any such hive, box, bee palace, or other contrivance containing honey or honey bees, or if any person shall steal, or by any art, device or contrivance or in any manner whatever decoy from any such hive, box, bee palace or contrivance any such honey bees, with intent to convert the same to his own use, or with intent to damage or defraud the owner thereof; or if any person shall by any art, contrivance or device unlawfully and maliciously injure, damage or destroy any such honey bees by means of poison or otherwise, every person so offending shall be fined in any sum not exceeding one hundred dollars, and shall be confined in the jail of the county not less than ten nor more than thirty days, and shall, moreover, be liable to the party injured in double the value of the property stolen, injured or destroyed.²

¹ The above is the substance of the form given by Chitty, 2 Cr. L., 205.

² Cr. Code, § 81.

STEALING BEES.¹

That A B, on, etc., in said county, willfully, unlawfully and maliciously did steal, take and carry away a certain hive containing honey bees, of the value of ten dollars, the property of one C D, with the intent to convert the same to his own use.

FOR WILLFULLY AND MALICIOUSLY DISTURBING BEES.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did disturb and injure ten hives containing honey bees and honey, the property of C D, of the value of seventy-five dollars by (*state in what manner the disturbance was made*), with the intent then and there to damage and defraud said C D.

Any person or persons who unlawfully enter the premises of another for the purpose of disturbing or carrying away any box, gum, or vessel containing bees or honey, shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the jail of the county not exceeding sixty days, or both, and shall make restitution to the party injured in double the amount of damages sustained.²

¹ The value of the property being less than \$35, the offense would be a misdemeanor and not a felony. Hence the word felonious is omitted.

² Cr. Code, § 82.

CHAPTER XXVI.

OFFENSES RELATING TO GAME AND FISH.

What Birds Protected.—It shall be unlawful for any person in the state of Nebraska to knowingly and intentionally kill, injure or harm, except upon the lands owned by such person, any robin, lark, thrush, bluebird, king bird, sparrow, wren, jay, swallow, turtle dove, oriole, woodpecker, yellow hammer, cuckoo, yellow bird, bobolink, or other bird or birds of like nature, that promote agriculture and horticulture by feeding on noxious worms and insects, or that are attractive in appearance or cheerful in song. Any person violating any of the provisions of this section shall be fined not less than three nor more than ten dollars for each bird killed, injured or harmed.¹

KILLING A ROBIN, ETC., ON THE LAND OF ANOTHER.

That A B, on, etc., in said county, unlawfully, knowingly and intentionally did kill a certain robin, upon land not owned by or in possession of said A B, but belonging to and in possession of C D.

FOR INJURING A ROBIN, ETC., IN A PUBLIC ROAD.

That A B, on, etc., in said county, unlawfully, knowingly and intentionally did injure, by breaking one of its wings, a certain robin, upon land not owned by or in possession of said A B, but in the public road owned and occupied by —.

Mink, Otter, etc.—It shall be unlawful for any person, between the fifteenth of April and the fifteenth day of Feb-

¹ Cr. Code, § 83.

² The law for the protection of song and inoffensive birds should be fully enforced. No worthless person with a gun or other instrument of destruction, should be permitted to go upon the lands of another and wantonly destroy such birds.

ruary following, to trap, catch, kill, or to pursue with such intent, on the premises of another, muskrat, mink or otter; and it shall be unlawful for any person at any time to enter upon the premises of another without his consent with a view of trapping, hunting, killing or pursuing with intent to kill, any such animal or animals; and it shall furthermore be unlawful for any person to enter upon the premises of another without his consent, and destroy, tear down, or in any manner injure the muskrat heaps or houses, on such premises; any person offending against any of the provisions of this section shall be fined in any sum not exceeding twenty dollars for each offense. Provided, this section shall not be so construed as to prevent the catching and killing of any animals specified, where there is danger of their doing injury to property, either public or private.¹

KILLING MINK, OTTER, ETC., WITHIN PROHIBITED TIME.

That A B, on, etc., in said county, unlawfully and purposely did kill a mink, on the lands of one C D, without the consent and against the will of said C. D.

FOR ENTERING UPON THE LANDS OF ANOTHER WITHOUT HIS CONSENT, WITH THE INTENTION OF TRAPPING, ETC.

That A B, on, etc., in said county, unlawfully and knowingly did enter upon the premises of one C D, without his consent, with a view of trapping, hunting and killing mink [otter, muskrats,] [or of pursuing with intent to kill mink, etc.]

FOR ENTERING UPON THE PREMISES OF ANOTHER, ETC., AND TEARING DOWN MUSKRAT HEAPS OR HOUSES.

That A B, on, etc., in said county, unlawfully did enter upon the premises of one C D, without his consent, and did tear down and destroy the muskrat heaps and houses on such premises.

Swivel Pivot Gun, etc., in Killing Wild Fowl Prohibited.—It shall also be unlawful for any person, at any time, by the aid or use of any swivel pivot gun, big gun [so called], or any gun other than

¹ Cr. Code, § 84.

the common shoulder gun, or by the aid or use of any punt boat, or sneak boat, used for carrying such gun, to catch, kill, wound or destroy, or to pursue after with the intent to catch, kill, wound or destroy, upon any of the waters, bays, rivers, marshes, mud flats, or any cover to which wild fowl resort within the state of Nebraska, any wild goose, wood duck, teal, canvas-back, blue bill, or other wild duck, or to destroy or disturb the eggs of any of the birds named; and any person offending against any of the provisions of this act shall be fined in any sum not less than two dollars nor more than twenty dollars for each offense, or be imprisoned in the county jail not more than twenty days, or both.¹

FOR KILLING WILD FOWL WITH A SWIVEL PIVOT GUN.

That A B, on, etc., in said county, unlawfully and willfully did kill ten canvas-back ducks by the aid and use of a swivel pivot gun.

FOR PURSUING WILD FOWL WITH A PUNT BOAT, WITH THE INTENT TO KILL OR DESTROY WILD FOWL.

That A B, on, etc., in said county, unlawfully and willfully did, by the aid and use of a punt boat, used for carrying a pivot gun, pursue after a large number of wild geese, upon the waters of the state, to wit (*state name*), with the intent to catch, kill and destroy the same.

FOR DISTURBING OR DESTROYING THE EGGS OF WILD FOWL.

That A B, on, etc., in said county, unlawfully and willfully did destroy certain eggs of the wood duck, to wit, — eggs, by then and there breaking said eggs.

Certain Game not to be Killed, When.—It shall be unlawful for any person to kill, ensnare or trap any wild buffalo, elk, mountain sheep, deer or antelope, (except for the purpose of domestication,) between the first day of January and the first day of October in each year, or to kill, ensnare or trap any grouse between the first day of January and the first day of

¹ Cr. Code, § 85.

September in each year, or to kill, ensnare, trap or net quail or wild turkey, between the first day of January and the first day of October in each year, or to ensnare, trap or net the same at any time of the year, or to buy, sell, ship, transport or carry, or have in possession any such animals or birds, between the dates within which the killing, ensnaring, trapping or netting of such animals or birds is prohibited by law. It shall also be unlawful for any person, agent or employe of any association, corporation, railroad company, or express company, to receive, carry, transport or ship any such animal or bird at any time of the year. It shall be unlawful for any person to go upon the premises of another person or corporation for the purpose of hunting, trapping, netting, ensnaring or killing any animal or bird at any season of the year, unless by consent of the owner or owners of such premises. It is further enacted that any person, agent, or employe, as aforesaid, who shall violate any provision of this section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of fifteen dollars for each buffalo, elk, mountain sheep, deer, antelope or wild turkey, so as aforesaid killed, ensnared, trapped, netted, bought or sold, shipped, transported or held in possession, in violation of this section, and the sum of five dollars for each grouse or quail so as aforesaid killed, trapped, ensnared, netted, bought, sold, shipped, transported or held in possession in violation of the provisions of this section. Having in possession any of the named animals or birds between said dates shall be deemed and taken as presumptive evidence that the same were killed, ensnared, netted or trapped in violation of this section, and the civil authorities of any city, town or precinct where any animal or bird shall have been killed or held in possession in violation of law be found, are hereby authorized to cause the same to be seized, with or without warrant, and to be distributed among the poor persons of such city, town or precinct, and any person who shall go upon the land of another in violation of this section, shall, upon conviction thereof, pay for such offense in any sum not less than five dollars nor more than fifty dollars, and shall be liable to the owner of the premises in an action of trespass.¹

¹ Cr. Code, § 86.

FOR KILLING A WILD DEER BETWEEN THE FIRST DAY OF JANUARY AND OCTOBER FIRST.

That A B, on, etc., in said county, unlawfully and willfully did kill a certain wild deer.

FOR TRAPPING OR CATCHING IN A NET WILD TURKEYS OR QUAILS.

That A B, on, etc., in said county, unlawfully and willfully did set a trap for the purpose of trapping wild turkeys and that on said day — wild turkeys were trapped and caught therein.

WHERE EMPLOYE OF RAILWAY COMPANY RECEIVES GAME TO SHIP.

That A B, on, etc., in said county, is the agent of the — railway company at —; that on the day and year aforesaid, he, the said A B, as such agent in said county, unlawfully and willfully did receive — wild turkeys for the purpose of shipping and transporting said birds over said railway to —.¹

HUNTING UPON THE PREMISES OF ANOTHER WITHOUT THE CONSENT OF THE OWNER.

That A B, on, etc., in said county, unlawfully and willfully did go upon the premises of one C D for the purpose of hunting. [trapping, netting, ensnaring or killing] wild (*names of animals prohibited*) and birds found thereon, without the consent of said C D, the owner of said premises.

Private Fish Pond.—That it shall be unlawful for any person to catch, interfere with, injure or in any manner destroy or maliciously disturb, to the damage of the private property of another, the fish in or work connected with any private fish pond, not exceeding ten acres, in this state. Any person or persons violating the provisions of this section shall be fined in any sum not less than ten dollars nor more than one hundred dollars, and it shall be lawful for any person to take up, remove or clean away any fish-net, fish-lines or fish-pond

¹ The authority of the legislature to impose the prohibition in question on the servant of a common carrier, and not upon the carrier, may admit of doubt.

placed or put in the waters of any lake, pond or reservoir contrary to the provisions of this act.¹

MALICIOUSLY INJURING FISH IN PRIVATE FISH POND.

That A B, on, etc., in said county, unlawfully and willfully did interfere with, injure and destroy the fish in the private fish pond of C D, said pond not exceeding ten acres in extent, by (*state the means used*) to the damage of the private property of said C D.

FOR CATCHING FISH IN PRIVATE FISH PONDS.

That A B, on, etc., in said county, unlawfully and willfully did catch and destroy a number of fish, to wit: (*state number and kind if known*) in the private fish pond of C D, to the damage of the private property of said C D, said fish pond not exceeding ten acres in extent.

Unlawful to Use a Seine, Trammel Net, Gill Net, etc.—It shall be unlawful for any person or persons to catch, kill, injure or destroy any fish in any river, creek, brook, stream, lake, pond, bayou, or other body of water in this state, with a seine, trammel net, gill net, pound net, basket or weir, or in any other manner whatever, except with a hook and line, spear and fork. It shall be unlawful for any person to set, place, deposit, or drag a seine, or net of any description, or basket or weir, in any of the above named waters in this state, and every seine, net, basket or weir found in any of the waters of this state, may be taken up by any one. Provided, this act shall not be construed to prohibit the owners of private ponds or streams from taking fish therein at any time or in any manner. Every person violating any provision of this section shall be deemed guilty of a misdemeanor, and punished by a fine of not less than five dollars for each offense, or be imprisoned in the county jail not less than ten days, or both fined and imprisoned, in the discretion of the court.²

CATCHING FISH WITH A SEINE.

That A B, on, etc., in said county, unlawfully and willfully did catch, kill and destroy a large number of fish in — lake, being a body of water in said county and state, by catching the same with a seine net.

¹ Cr. Code, § 87.

² Cr. Code, § 87.

SETTING A BASKET OR WEIR IN A RIVER, CREEK, ETC.

That A B, on, etc., in said county, unlawfully and willfully did set and place in the — river in said county, being a body of water in said county and state, a basket and weir for the purpose of catching, killing and destroying fish in said river.

Injuring Hatching Box or Pond.—It shall be unlawful for any person or persons to injure, disturb, or destroy any hatching box, hatching house or pond, used for hatching or propagating fish, or to injure or destroy or disturb any spawn or fry or fish in any hatching box, hatching house, or pond or stream. Provided, that the fish commissioners of this state may take or cause to be taken any of the fish named in this section for the purpose of propagation or stocking the waters of this state. Every person violating any provision of this section shall be deemed guilty of a misdemeanor, and punished by a fine of not more than ten dollars for each fish taken or held in possession, or other offense under this section, or by imprisonment in the county jail not more than ten days, or both fined and imprisoned, in the discretion of the court.¹

FOR INJURY TO HATCHING BOX.²

That A B, on, etc., in said county, unlawfully and intentionally, did injure and disturb the hatching box of C D, used for hatching and propagating fish by (*state how the injury was effected.*)

INJURING AND DESTROYING SPAWN, FRY, OR FISH.

That A B, on, etc., in said county, unlawfully and willfully did injure and destroy twenty fish, the property of C D, in a hatching box of said C D, used for hatching and propagating fish.

Unlawful to Catch or Injure Certain Fish.—It shall be unlawful for any person or persons to catch, injure, kill or destroy any California salmon, landlocked salmon, trout, shad, white fish or

¹Cr. Code, § 87 b.

²The language of the section is not clear, but that the injury and disturbing of a hatching box used for hatching and propagating fish is an offense, is evident, while the disturbing and destroying spawn, fry or fish is a distinct offense.

carp which shall have been planted or placed in any waters of this state by the fish commissioners, or by private persons. Every person violating any provision of this section shall be deemed guilty of a misdemeanor, and punished by a fine of not less than ten dollars for each fish so taken, injured, killed or destroyed, or had in possession, or imprisoned in the county jail not less than ten days, or both fined and imprisoned, in the discretion of the court. The having in possession of any fish named in this section shall be presumptive evidence that the same were taken in violation of law.¹

FOR CATCHING OR INJURING SALMON, WHITE FISH, ETC.

That A B, on, etc., in said county, unlawfully and willfully did catch and destroy ten white fish in the — lake, in said county, which said white fish were placed in said lake by the fish commissioners of the state of —.

¹ Cr. Code, § 87 c.

CHAPTER XXVII

INJURIES TO TREES, FRUITS AND VEGETABLES.

Malicious Injury to Trees to the Amount of Thirty-five Dollars.—

If any person or persons shall willfully and maliciously and without lawful authority, box, bore, bark, girdle, saw, cut down, injure or destroy, to the amount in value of thirty-five dollars or upward, any fruit, ornamental, shade or other tree or trees¹ standing or growing in any orchard, nursery or grove, the property of another, every such person or persons shall be imprisoned in the penitentiary and kept at hard labor not more than ten years, nor less than one year, and shall moreover be liable to the party injured in double the amount of damages by him sustained.²

MALICIOUS INJURY TO TREES TO THE AMOUNT OF THIRTY-FIVE DOLLARS.

That A B, on, etc., in said county, unlawfully, willfully and maliciously and without lawful authority, did girdle, bark and destroy certain fruit trees, to wit: twenty apple trees of the value of one hundred dollars, then and there standing and growing in an orchard [nursery or grove] the property of C D.

For Wrongfully and without Lawful Authority Cutting Down or Injuring Living Trees.—If any person shall wrongfully and without lawful authority cut down, fell, box, bore or otherwise injure or destroy any living tree or trees, standing or growing on any land owned by or belonging to any other person or persons, body politic or corporate, in any case other than in

¹ In the next section the term "living trees" is used; but it is clear that the trees referred to in section 88 are living trees, although it is sufficient to use the statutory word "trees" in the indictment under that section.

² Cr. Code, § 88.

the preceding section mentioned, every such person so offending shall be fined in any sum not exceeding one hundred dollars nor less than five dollars, and shall moreover be liable to the action of the injured party in double damages.¹

FOR WRONGFULLY INJURING OR DESTROYING TREES OF ANOTHER.

That A B, on, etc., in said county, wrongfully and without lawful authority did cut down and destroy two living trees, of the value of — dollars, standing and growing on land owned by one C D, but not standing or growing in any orchard, nursery or grove.

Ornamental Trees on Public Grounds.—If any person shall wantonly, willfully or maliciously cut down, injure or destroy, any living ornamental tree or trees, either planted or preserved as such, standing or growing on any common or public ground, or any street, alley, sidewalk, avenue, or promenade, every person so offending shall, on conviction thereof, be fined in any sum not more than one hundred dollars nor less than five dollars, and shall, moreover, be liable to the party injured in double the amount of damages by him sustained.²

FOR CUTTING DOWN, INJURING OR DESTROYING ORNAMENTAL TREES ON PUBLIC STREET.

That A B, on, etc., in said county, unlawfully, wantonly, willfully and maliciously did cut down and destroy two living ornamental trees, planted and preserved as such, of the value of — dollars, the property of —, standing and growing on Main street, in the city of — in said county.

Destroying or Carrying Away Trees, Shrubs, Vines, etc.—If any person or persons shall willfully and maliciously and without lawful authority cut down, root up, sever, carry away, injure or destroy any fruit or ornamental tree, shrub, bush or vine, or any cultivated root, plant or fruit, or other vegetable production standing, growing, or being on or attached to the lands of another, or shall willfully and without lawful authority cut down, root up, carry away, destroy or injure any fruit, shade or ornamental tree, vine or shrub, planted or growing on any street, lane or alley, state or county, or other public

¹ Cr. Code, § 89.

² Cr. Code, § 90.

road, or on any public grounds in any city, borough, incorporated village or town, or in any cemetery, or upon any burying ground within this state, every such person or persons shall be fined in any sum not exceeding one hundred dollars nor less than five dollars, and be liable to the party injured in double the amount of damages sustained.¹

FOR CUTTING DOWN AND DESTROYING TREES, SHRUBS, VINES, ETC., ON LANDS OF ANOTHER.

That A B, on, etc., in said county, willfully, maliciously and without lawful authority did cut down and destroy certain fruit-bearing vines, to wit: four grape vines of the value of four dollars, the property of C D, then and there standing, growing and being attached to the lands of said C D.

Evidence.—Where there is a charge or indictment for stealing trees, fruits or vegetables, the same may be sustained, though it should appear from the evidence that the trees, fruits or vegetables were, at the time of taking the same, attached to the freehold.²

¹ Cr. Code, § 91.

² Cr. Code, § 92; *Wiswell v. State*, 21 O. S., 658. In this case *Wiswell* was indicted under a statute which provided that "If any person * * shall pluck off, or shall carry away any cultivated root or plant, fruit, or any other vegetable production, standing or growing on the lands of another, in such manner that the taking of the same would amount to larceny, if severed from the freehold * with the intent * * to defraud the owner of the value thereof" of having plucked and carried away one bushel of corn. It was held, "That is substantially a charge that ears of corn were plucked off the standing and growing plant and carried away; and that proof of the stealing of the corn from the standing and growing stock sustained the charge." A motion for leave to file a petition in error was denied. See *State v. Priebnon*, 14 Neb. 484.

CHAPTER XXVIII.

INJURIES TO RAILROAD AND TELEGRAPH PROPERTY.

Willfully Injuring Railroad Track, etc.—Every person who shall willfully and maliciously remove, break, displace, throw down, destroy or in any manner injure any iron, wooden or other rail, or any branches or branch ways, or any part of the track or tracks, or any bridge, viaduct, culvert, trestle work, embankment, parapet or other fixture, or any part thereof, attached to or connected with such tracks of any railroad in this state, now in operation, or which shall hereafter be put in operation, or who shall willfully and maliciously place any obstructions upon the rail or rails, track or tracks of any such railroad, shall be punished by imprisonment in the penitentiary not less than one year nor more than twenty years. Provided, however, that if any person shall, by the commission of either of the aforesaid offenses, occasion the death of any person or persons, the person or persons so offending shall be deemed guilty of murder in the first or second degree, or manslaughter, according to the nature of the offense, and on conviction thereof shall be punished as in other cases.¹

FOR INJURING RAILROAD TRACK.

That A B, on, etc., in said county, unlawfully, willfully, maliciously and feloniously did remove and displace an iron rail on the main track of the — railway, being a railroad now in operation in said county, in this state, and in use for the passage of engines and cars thereon, and thereby by reason of the removal and displacing of said rail did break said track and render it impossible for engines or cars to pass over the same.

¹ Cr. Code, § 93.

FOR WILLFULLY AND MALICIOUSLY PLACING OBSTRUCTIONS ON
THE TRACK.

That A B, on, etc., in said county, unlawfully, willfully, maliciously and feloniously did place obstructions upon and across the track of the — railroad in said county and state, to wit, two railroad ties of solid wood, each of the length of eight feet, of the width of seven inches, of the thickness of six inches, said railroad being then and now in operation in said county and state, whereby the lives of divers persons, traveling on said railroad, were then and there greatly endangered.¹

Under the English statute that "whosoever shall unlawfully and maliciously, put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, etc., with intent * * to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage or truck using such railway." Archbold has given a precedent for an indictment as follows, omitting certain words:

"That A B, on, etc., willfully, maliciously and feloniously, did put, place, cast and throw a piece of wood upon and across a certain railway called — in the parish of — in the county of — with intent thereby, then and there to obstruct and injure a certain engine and carriages using said railway."²

It is unnecessary to either allege or prove that the obstructions placed on the track actually did hinder or obstruct trains.³ It is no defense that the defendant owned the land over which the railroad is located, and has never released the right of way.⁴ The remedy of such land owner is either to recover his damages at law, or to enjoin the operation of the road until the damages are paid; but the statute prohibits him

¹ It is probable that all allegations as to the consequences of placing the obstructions on the track are immaterial, and that the bare allegations of the placing of the obstructions in the language of the statute is sufficient. The statute of Nebraska, and a number of other states, does not require an allegation as to the *intent* to commit an injury, as "to obstruct, overthrow, injure or destroy any engine," etc., and the intent, therefore, need not be alleged. A different rule prevails, however, in states where that intent must be averred.

² 2 Arch. Cr. Pl. & Pra. (Pom. Ed.), 1239; Bish. Forms and Directions, § 1021.

³ State v. Clemens, 38 Iowa, 257.

⁴ State v. Hessenkamp, 17 Iowa, 26.

from interfering with the track, as by so doing he might endanger the lives of persons traveling on said railroad.

Driving Wagon, Carriage, etc., on Track.—Every person who shall draw or drive any wagon, carriage, cart, coach, gig, or other two or four wheeled vehicle on or between the rails or tracks, or on or along the graded roadway of such road (unless compelled by necessity so to do) without the knowledge and consent of the company owning or controlling said road, shall be fined in any sum not exceeding twenty-five dollars, nor less than five dollars.¹

FOR DRIVING WAGON, CARRIAGE, ETC., ON RAILROAD TRACK.

That A B, on, etc., in said county, willfully and unlawfully did drive a wagon on and between the rails of the track of the — railroad, without the knowledge and consent of the company owning and controlling said railroad, and without being compelled by necessity to drive said wagon between said rails on said railway track.

Injury to Fixtures of Railway.—Every person who shall willfully and maliciously throw down, break, remove, displace, cut, split, burn, or in any other manner destroy or injure any of the rails, sills, cross-ties, piles, bridges, culverts, viaducts, parapets, or any other fixture, to the value of thirty-five dollars or upward, or shall willfully and maliciously injure and destroy any embankment of any railroad within this state, now constructed or in process of construction, or any railroad which shall hereafter be constructed or in the process of construction, to the value of thirty-five dollars or upward, shall be punished by imprisonment in the penitentiary not exceeding three years, nor less than one year.²

FOR INJURY TO FIXTURES, ETC., ON RAILROAD.

That A B, on, etc., in said county, unlawfully, willfully, maliciously and feloniously, did then and there throw down, break, remove, displace and destroy a certain bridge on the — railroad, to the value of one hundred dollars, said railroad being then and there constructed and in operation in said county and state and belonging to the — railroad company.

¹ Cr. Code, § 94.

² Cr. Code, § 95.

FOR INJURING OR DESTROYING THE EMBANKMENT OF A RAILROAD.

That A B, on, etc., in said county, willfully, maliciously and feloniously, did then and there destroy an embankment of the — railroad, to the value of thirty-five dollars, and upward, said railroad being then in process of construction within said county and state.

Injury to Rolling Stock.—Every person who shall willfully and maliciously cut, break, burn, injure or destroy any locomotive, car, or other machinery, now, or which may hereafter be, in use upon any railroad within this state, or any wood house, car house or water station erected for the accommodation and use of any railroad within this state, to the value of thirty-five dollars or upward, shall be punished by imprisonment in the penitentiary not exceeding three years nor less than one year.¹

FOR INJURY TO RAILWAY ENGINES OR CARS.

That A B, on, etc., in said county, willfully, maliciously, unlawfully and feloniously did cut, break, injure and destroy, to the amount and value of thirty-five dollars, a certain locomotive, the property of the — railroad company, and then in use on the — railroad, which then was and now is a railroad within said county and state.

FOR INJURY TO WATER TANKS, ETC.

That A B, on, etc., in said county, unlawfully, willfully, maliciously and feloniously did cut, break and destroy, to the amount and value of thirty-five dollars, a certain water station, the property of the — railroad company, and then erected for the accommodation and use of the — railroad, the same being then and there a railroad within this state.

Injury to Rolling Stock, etc., where the Damages are Less than Thirty-five Dollars.—Every person who shall willfully or maliciously commit any of the acts or offenses enumerated in the last two preceding sections, but the injury or damage therefrom shall be of a less value than thirty-five dollars, every person so offending shall be fined in any sum not exceeding one hundred dollars, nor less than five dollars, or be

¹ Cr. Code, § 96.

imprisoned in the county jail not exceeding thirty days, or both, at the discretion of the court.¹

FOR INJURY TO ROLLING STOCK OR FIXTURES OF LESS THAN THIRTY-FIVE DOLLARS.

That A B, on, etc., in said county, unlawfully, willfully and maliciously did break, cut, burn and destroy, to the amount and value of — dollars, a certain tile of the length of twenty feet and the thickness of one foot, the property of and in use by the — railroad company, being a railroad then and there constructed [or in process of construction] within this state.

Malicious Injury to Telegraph Lines.—Every person who shall willfully and maliciously injure, molest or destroy any of the lines, wires, posts, piers or abutments of any telegraph company, owner or association, or any other materials or property of such company, owner or association, used in or about the transmission of dispatches or other communications, shall be punished by imprisonment in the penitentiary not less than one year nor more than three years, in case the damage to such company, owner or association, from such injury, be thirty-five dollars or upward; but if such damage be less than thirty-five dollars, then the person so offending shall pay a fine of not less than ten dollars nor more than five hundred dollars.²

FOR MALICIOUS INJURY TO TELEGRAPH LINE TO THE AMOUNT OF THIRTY-FIVE DOLLARS.

That A B, on, etc., in said county, unlawfully, willfully, maliciously and feloniously did injure, molest and destroy, to an amount in damage of thirty-five dollars, two of the wires of the — telegraph company, the property of said company, used in and about the transmission of dispatches and other communications.

FOR MALICIOUS INJURY TO TELEGRAPH LINE WHERE THE DAMAGES ARE LESS THAN THIRTY-FIVE DOLLARS.

That A B, on, etc., in said county, unlawfully, willfully and maliciously did injure and destroy to an amount in damage of ten dollars, one telegraph pole of the — telegraph company, the property of said company, used in and about the transmission of dispatches and other communications.

¹ Cr. Code, § 97.

² Cr. Code, § 98.

CHAPTER XXIX.

INJURIES TO PROPERTY GENERALLY.

Removing Landmarks, etc.—If any person shall knowingly, willfully and maliciously demolish, cut down or destroy, any private, public, or toll bridge, cut, fell, deface, alter or remove any landmark, corner or bearing tree, properly established, the person so offending shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the jail of the county not exceeding thirty days, or both, at the discretion of the court.¹

REMOVING A LANDMARK.

That A B, on, etc., in said county, willfully, knowingly, unlawfully and maliciously did demolish, alter, remove and carry away a certain landmark, to wit: a certain [stone] monument, then and theretofore properly established and lawfully erected, for the purpose of designating and marking the — corner of (*describe land*), the property of C D, there being and lying.²

Evidence.—To make the offense punishable, the landmark or bearing tree must have been properly established—that is by the original government surveys, or by a lawful survey after the original surveys were made. In other words it must be a legal landmark to make one guilty under the statute for removing it.³

¹ Cr. Code, § 99.

² *Stratton v. State*, 45 Ind., 468. Under the Indiana statute, that if any person shall *mischievously* remove a landmark, it is unnecessary to charge the *intent* with which the act is done, and no doubt the same rule prevails under the statutes of other states. Under the Mosaic law it was declared: "Thou shalt not remove thy neighbor's landmark, which they of old time have set in thine inheritance," Deut. 19, 14; and "cursed be he that removeth his neighbor's landmark," Deut., 27, 17. See also Prov., 22-28; 23-10.

³ *Ashe v. Lanham*, 5 Ind., 434; *Ball v. Cox*, 7 Id., 453; *Meyers v. Johnson*, 15 Id., 261; *Stratton v. State*, 45 Id., 468.

DEMOLISHING A PUBLIC BRIDGE.¹

That A B, on, etc., in said county, willfully, knowingly, unlawfully and maliciously did cut down, demolish and destroy a certain public bridge of the value of — dollars, then and there being situate on a certain public road leading from — to —.

DESTROYING PRIVATE BRIDGE.

That A B, on, etc., in said county, willfully, knowingly, unlawfully and maliciously did cut down, demolish and destroy a certain private bridge of the value of — dollars, the property of C D, then and there being situate on the land of said C D, and in his occupancy and possession.

Destroying Guideboard, etc.—If any person shall willfully and maliciously demolish, throw down, alter or deface any milestone or guideboard on or at the fork of any public road, every person so offending shall be fined in any sum not exceeding fifty dollars, or be imprisoned in the jail of the county not exceeding ten days, or both, at the discretion of the court.²

FOR DESTROYING GUIDEBOARD.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did throw down and demolish a certain guideboard at the fork of a certain public road there situate, which guideboard was lawfully erected for public use and to give information as to the course and distance of certain places.

FOR DEMOLISHING A MILESTONE OR A MILEBOARD.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did break down, demolish and destroy a certain milestone [or mileboard] then and there situate on a certain public road leading from — to —, said milestone being lawfully erected for public use.³

¹ On a trial for maliciously cutting down and destroying a public bridge on a public highway, it is competent for the state to prove, by the records of the commissioners' court, the establishment of the highway on which the bridge was constructed, and also that the party accused of the offense was paid his damages for the location of the road. *O'Dea v. State*, 16 Neb., 241.

² Cr. Code, § 100.

³ It was held in Indiana that the words that the defendant "destroyed and caused to be destroyed" were not objectionable, but that the specific injury should be stated. *State v. Kurns*, 5 Blackf., 314.

Destroying Tombstones.—If any person shall willfully or maliciously alter, deface, break down or destroy any monument or tombstone erected or set up to perpetuate the memory of any deceased person, every person so offending shall be fined in any sum not exceeding two hundred dollars, and be imprisoned in the county jail not exceeding thirty days, at the discretion of the court.¹

FOR DESTROYING TOMBSTONE.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did break down and destroy a certain monument of the value of seventy-five dollars, which monument was erected and set up to perpetuate the memory of one C D, a deceased person.

FOR DEFACING AND INJURING TOMBSTONE.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did alter and deface a certain monument of the value of fifty dollars by (*state how it is defaced*), which monument was erected and set up to perpetuate the memory of one C D, a deceased person.

Destroying Tombstone, Fence, Railing, etc.—Any person who shall willfully destroy, mutilate, deface, injure, or remove any tomb, monument or gravestone, or other structure placed in any cemetery, or any fence, railing, or other work for the protection or ornament of a cemetery or tomb, monument or gravestone, or other structure aforesaid, or of any cemetery lot within a cemetery, shall be punished by a fine of not less than five dollars nor more than five hundred dollars, or by imprisonment in the county jail for a term of not less than one nor more than thirty days; and such offender shall also be liable in an action of trespass in the name of the association or other owner of such cemetery, to pay all such damages as have been occasioned by his unlawful act or acts.

FOR DESTROYING A RAILING AROUND A CEMETERY LOT.

That A B, on, etc., in said county, willfully and unlawfully did mutilate, injure and destroy a certain fence and railing theretofore erected around the cemetery lot of one N O, in a certain cemetery there situate, for the

¹ Cr. Code, § 101.

protection and ornament of said lot and the tombs of C D, E F and G H, deceased, then and there being situate thereon.

Wantonly Injuring Fence or Gate.—If any person or persons shall wantonly or maliciously throw, put or lay down, prostrate, deface or injure any fence, inclosing an orchard, pasture, meadow, garden, yard, or other field or inclosure, the property of or lawfully occupied by any other person or persons or corporation, or shall wantonly or maliciously open, let down, throw down, prostrate, injure or deface any gate or bars belonging to any such inclosure, every such person or persons shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the jail of the county, not exceeding thirty days, or both, at the discretion of the court.¹

**FOR WANTONLY THROWING DOWN A FENCE OF ANOTHER,
AROUND AN ORCHARD.**

That A B, on, etc., in said county, unlawfully, wantonly and maliciously, did throw, put, lay down and prostrate a certain fence inclosing an orchard, [pasture, meadow, garden, yard, etc.,] the property of, and then and there lawfully occupied by one C D, and did then and there wantonly leave said fence thrown down.

FOR WANTONLY OPENING A GATE THE PROPERTY OF ANOTHER.

That A B, on, etc., in said county, unlawfully, wantonly and maliciously, did open a certain gate, then and there belonging to a part of a certain fence inclosing an orchard, the property of C D, and then and there lawfully occupied by him, said C D, and did wantonly leave said gate open.

The Want of Consent of the Owner or occupant is implied from the words “unlawfully, wantonly and maliciously.” Where, however, the words of the statute are “pull down or injure the fence or fences of another without the consent of the owner or person in possession,” the want of consent must be averred.²

¹ Cr. Code, § 103.

² Brewer v. State, 5 Tex. App., 248; State v. Hoover, 31 Ark., 676. In the last case the charge was that A B, on, etc., willfully and unlawfully did pull down the fence of certain inclosed grounds belonging to one C D, without the consent of said C D, and it was held sufficient.

Tearing Down and Destroying Legal Notices.—If any person shall intentionally deface, obliterate, tear down or destroy, in whole or in part, any copy or transcript of, or extract from, any law of the United States, or of this state, or any proclamation, publication, advertisement or notification whatsoever, set up in any public place within this state for the public information of any citizen by the authority of any law or act of this state, such person shall be fined in any sum not exceeding ten dollars, and may be committed to jail for a time not exceeding twenty-four hours.¹

FOR TEARING DOWN PUBLIC LEGAL NOTICES.

That A B, on, etc., in said county, intentionally and unlawfully did tear down and destroy [or deface and obliterate,] a certain advertisement and notification then set up in a public place, to wit, on the outer door of the school house in school district No. — in said county, that an election would be held in the several precincts [or townships] of said county, on the — day of November, then following, which notice was as follows: (*copy notice in full.*)

FOR DEFACING AND OBLITERATING LEGAL NOTICES.

That G H, on, etc., in said county, being the sheriff thereof [or a constable therein], duly received an execution issued by one E F, a justice of the peace of said county, on the — day of —, in the year of our Lord one thousand eight hundred and —, upon a judgment duly rendered by said justice in an action on an account for goods sold and delivered, pending before him, wherein C D was plaintiff and A B defendant, and in full force and effect, by which said execution said G H was commanded to make of the goods and chattels of said A B the sum of seventy-five dollars judgment, and five dollars costs; which execution was duly levied upon the goods and chattels of said A B, and one notice was thereupon duly posted on (*state place*) on said day, that a sale of said goods and chattels would take place at —, on the — day of —, at — o'clock —. M.; that the said A B afterward, to wit, on the — day of —, in said county, intentionally and unlawfully did deface and obliterate said advertisement and notice by (*state the means used.*)²

Fire not to be Carried across Wooden Bridge.—No person shall carry fire across any wooden bridge on any lawful public road in

¹ Cr. Code, § 104.

² See *Faulds v. People*, 66 Ill., 210.

this state, unless in a lantern or close vessel, and no person shall ride or drive any horse or horses, stage coach or other vehicle, over any such bridge faster than a walk, and any person who shall be convicted of a violation of either of the provisions of this section shall pay a fine of five dollars.¹

**FOR RIDING OR DRIVING OVER A PUBLIC BRIDGE FASTER THAN
A WALK.**

That A B, on, etc., in said county, unlawfully did ride a horse over a public bridge across the — river, on a lawful public road in this state, faster than a walk.

FOR CARRYING FIRE ACROSS A WOODEN BRIDGE.

That A B, on, etc., in said county, unlawfully did carry fire across a public wooden bridge across the — river, without the same being in a lantern or close vessel, said bridge being on a lawful public road in this state.

Malicious Injury to Public Road or Bridge.—Any person who shall willfully and maliciously injure any lawful public road in this state, or any bridge, gate or milestone, or other fixture on any such road, shall for every such offense pay a fine not exceeding fifty dollars nor less than ten dollars, and moreover be liable to the party injured in double damages.²

FOR INJURING PUBLIC ROAD OR BRIDGE.

That A B, on, etc., in said county, unlawfully and willfully did injure a lawful public road in this state, by digging a trench across the same, so as to render said road impassable.

For Depositing Material on Lawful Public Road.—Any person who shall deposit any wood, stone, or other kind of materials, on any part of any lawful public road in this state, inside of the ditches of such road, or outside of the ditches, but so near thereto as to cause the banks thereof to break into the same, or cause the accumulation of rubbish or any kind of obstruction, shall for every such offense pay a fine of five dollars.³

¹ Cr. Code, § 105.

² Cr. Code, § 106.

³ Cr. Code, § 107.

FOR PLACING OBSTRUCTIONS IN LAWFUL PUBLIC ROAD.

That A B, on, etc., in said county, unlawfully did deposit a large quantity of wood inside of the ditches on a lawful public road in this state.

Willful and Malicious Injury to Personal Property to the Amount of One Hundred Dollars.—That if any person shall willfully and maliciously destroy or injure, to the amount of one hundred dollars, any personal property of any description whatsoever, or any building or other structure upon land of any kind whatsoever, owned by any other person or persons, corporation or association of persons, every person so offending shall be punished by imprisonment in the penitentiary not less than one year nor more than three years, and, moreover, be liable to the party injured in double the amount of damages sustained thereby.¹

FOR MALICIOUSLY INJURING PROPERTY.

That A B, on, etc., in said county, willfully, unlawfully, maliciously and feloniously did injure (*state what property*) the property of C D, to the amount in value of one hundred dollars, by (*state the means used and how the property was injured.*)

FOR MALICIOUSLY DESTROYING PROPERTY.

That A B, on, etc., in said county, willfully, unlawfully, maliciously and feloniously did destroy a combined reaping and mowing machine, — the property of C D, of the value of one hundred dollars, by (*set out the means of destruction.*)

Malicious Injury to Property of Less Value than One Hundred Dollars.—If any person shall willfully and maliciously injure or destroy, to any amount less than one hundred dollars, any personal property of any description whatsoever, or any building, or other structure of any kind, owned by another person, every person so offending shall be imprisoned in the jail of the proper county not exceeding thirty days, and shall more-

¹ Cr. Code, § 108.

over be fined in double the amount of the damage of the property injured or destroyed.¹

Injury to Salt Well.—If any person shall willfully and maliciously destroy or injure, to the amount of thirty-five dollars and upward, any salt well, salt furnace or engine connected therewith, such person shall be confined in the penitentiary for any term not less than one nor more than three years, and shall moreover be liable to the party injured in double the amount of damages sustained.²

FOR INJURY TO A SALT WELL, ETC.

That A B, on, etc., in said county, willfully, unlawfully, maliciously and feloniously did injure and destroy, to the amount of thirty-five dollars and upward, a salt well, the property of C D, of the value of — dollars by (*state the means of injury.*)

Injury to Church or School House.—If any person shall willfully and maliciously injure or deface any church edifice, school house, dwelling house, or other building, its fixtures, books, or appurtenances, or shall commit any nuisance therein, or shall purposely and maliciously commit any trespass upon the inclosed grounds attached thereto, or any fixtures placed thereon, or any inclosure or sidewalk about the same, such person shall be fined in any sum not exceeding one hundred dollars.³

FOR INJURY TO A CHURCH OR SCHOOL HOUSE.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did injure and deface the public school house situate in school district No. —, of — county, the property of said school district, by (*state how injured.*)

COMMITTING NUISANCE IN CHURCH, ETC.

That A B, on, etc., in said county, unlawfully, willfully and maliciously did commit a nuisance in a certain church, the property of — by (*describe how nuisance was committed.*)

¹ Cr. Code, § 109. The form of the charge will be the same as under section 108, omitting the word "feloniously."

² Cr. Code, § 110.

³ Cr. Code, § 111.

Maliciously Loosing or Injuring a Water Craft.—If any person shall unlawfully and maliciously or wantonly loose, take, sink, injure or deface, or in any other manner render the same unfit for use by the owner, any boat or other craft used or kept by any person or persons within the state of Nebraska, to be used on any river or other watercourse, or on any lake or pond within this state, such person shall be fined in any sum not less than five dollars nor more than one hundred dollars, or be imprisoned in the county jail not exceeding forty days, or both, at the discretion of the court, and shall moreover be liable to the party injured in double the amount of the damages.¹

MALICIOUSLY LOOSING OR INJURING WATER CRAFT.

That A B, on, etc., in said county, unlawfully, wantonly and maliciously did unloose a certain water craft called a boat, the property of C D, of the value of — dollars, then and there fastened to a stake on the bank of — river, and set said boat adrift, whereby it was lost, said boat being kept by C D to be used on —, a [river] in the state of —.

Defacing Periodical, etc., in a Public Library or Reading Room.—If any person shall intentionally deface, obliterate, tear or destroy, in whole or in part, any newspaper, magazine or periodical on file in any reading room belonging to the state, or any library or other association in this state, or shall cut therefrom any article or advertisement, such person shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars, nor less than ten dollars, or be imprisoned in the county jail not exceeding thirty days, or both, at the discretion of the court.²

FOR INJURING OR DEFACING MAGAZINES IN PUBLIC LIBRARY, ETC.

That A B, on, etc., in said county, unlawfully and intentionally did injure, deface and destroy, in part, a certain periodical called *The Atlantic Monthly*, on file in the reading room of —, and belonging to [the state] [or any library or other association in the state] by (*state the injury.*)

¹ Cr. Code, § 112.

² Cr. Code, § 113. A law of this kind is necessary for the protection of papers and periodicals in public reading rooms; but the punishment provided for by the statute seems too great for the offense and practically makes it nearly impossible to secure a conviction.

CHAPTER XXX.

STEALING, ABETTING THE SAME AND DESTROYING WRITTEN INSTRUMENTS.

Stealing Money or Property.—If any person shall steal any money, or goods and chattels of any kind whatever, whether the same be wholly money or wholly in other property, or partly in money and partly in other property, the property of another, of the value of thirty-five dollars or upward, or shall steal or maliciously destroy any money, promissory note, bill of exchange, order, draft, receipt, warrant, check or bond, given for the payment of money, or receipt acknowledging the receipt of money or other property, of the value of thirty-five dollars or upward, every such person shall be imprisoned in the penitentiary not more than seven nor less than one year. Provided, the word “money” in this section shall be deemed and taken as including bank bills or notes, United States treasury notes or other bills, bonds or notes issued by lawful authority and intended to pass and circulate as money.¹

Larceny is the wrongful taking and carrying away of the personal goods of another from his possession with the felonious intent to convert them to the use of the taker without the consent of the owner.²

The four elements in the above definition will be considered separately.

First. There Must be a Taking from the Possession, either actual or constructive, of the owner or person having a special ownership therein. Therefore, if a party lawfully acquire possession of goods and afterward misapply them, it may consti-

¹ Cr. Code, § 114.

² 3 Chitty, Cr. L., 917; 2 East, P. C., 553.

tute embezzlement, but it is not¹ larceny. Where, however, a party having the property in charge has no interest in the things he is to use or preserve, a sale or disposition by him of the property will constitute larceny, as where a shepherd has charge of a flock, a butler of plate or a guest at an inn,² who has the mere use for the time being.

Where the Owner Voluntarily Parts with the Possession of his property, two conditions are essential to constitute larceny. First, the owner at the time of parting with the possession must expect and intend that the thing delivered will be returned to him, or disposed of under his direction for his benefit. Second, the party taking possession must at the time intend to deprive the owner of his property in the thing delivered. But where the owner intends to transfer, not the possession merely, but also the title to the property, although induced thereto by the fraud and fraudulent pretenses of the taker, the taking and carrying away do not constitute larceny.³

Second. There Must be a Carrying Away.—This, in the sense of the law, consists in removing the goods from the place where they were before, as if they be taken from one room to another in the house of the owner, or from a trunk to the floor, with the intent to steal them, or if a horse be taken

¹ "If a tradesman intrusts goods to his servant to deliver to his customer and he appropriates them to himself, 1 Leach, 251, * * * and if several persons play together at cards and deposit money for that purpose, and one sweep it all away and take it himself, he will be guilty of theft if the jury find he acted with *felonious design*. But as the property must, at the time of the offense, be either in the actual or constructive possession of the owner, it was held that where a banker's clerk had received a note for the use of his master and applied it only to his own use, he was found guilty only of breach of trust." In consequence of this decision the act of 37 Geo. III. 25, was passed punishing embezzlement. 3 Chitty, Cr. L., 918.

² 3 Chitty, Cr. L., 918.

³ Kellogg v. State, 26 O. S., 19. At common law, every larceny includes, as stated by Chitty, a trespass; hence the common form of the charge that the accused "did steal, take and carry away" the goods, etc., of another. The tendency of legislation, however, is in many cases to treat the charge of trespass as surplusage, in the proof at least, and that larceny in fact is the wrongful appropriation of the goods of another without his consent, with the felonious intent of the taker to convert them to his own use, as in case of a bailee, etc.

from one part of the owner's farm to another, the thief being surprised before he has completed his design.¹

Third. The Taking Must be Against the Will of the Owner; therefore, if the goods were delivered to the accused by the wife of the owner, *prima facie* this is evidence that the taking was not felonious, as the agency of the wife and consent of the husband, where the accused has acted in good faith, may generally be presumed.² Therefore, if a person merely assist a married woman, who has not and does not intend to commit adultery, in carrying away the goods of her husband without his knowledge and consent, he is not guilty of larceny. At the most such a party would be a mere trespasser.³ Where, however, the party acted in bad faith, well knowing that the taking was against the will of the husband, he may, upon proof of felonious intent, be convicted of larceny.⁴ If the

¹ 3 Greenleaf, Ev., § 154. In 1 Hale, P. C., 508, the rule is stated as follows: "11. The words of the indictment are not only *cepit*, but *cepit and asportavit*. * * * If A comes into the close of B, and takes his horse with an intent to steal him, and before he gets out of the close is apprehended, this is a felonious taking and carrying away, and is larceny. Co. P. C., 108, 109. So if a guest lodges in an inn and takes the sheets off the bed with an intent to steal them, and carries them out of his chamber into the hall, and going into the stable to fetch his horse is apprehended, this is felony and a felonious taking and carrying away; 27 Assis., 39 Co. P. C., 108; and accordingly it was ruled, 16 Car., 2 B. R., upon a special verdict found in Cambridgeshire (Simpson's case, Id., 31), A comes into the dwelling house of B, nobody being there, and breaks open a chest and takes out goods of the value of five shillings, and lays them on the floor of the same room, and is apprehended before he can remove them," and was found guilty of larceny.

² 3 Greenleaf, Ev., § 158, and cases cited.

³ Id.; R. v. Avery, 5 Jur. N. S., 577. Ch. J. Hale, 1 P. C., 514, states the rule as follows: "If a man take away another man's wife against her will *cum bonis viri*, that is a felony by the statute of Westm., 2 cap., 34, which faith *Habeat rex sectam de bonis sic asportatis*. 13 Assis., 6. But if it be by the consent of the wife though against the consent of the husband, it seems to be no felony but a trespass, for it can not be a felony in the man unless it be a felony in the woman who consented to it."

⁴ 3 Greenleaf, Ev., § 158, and cases cited. In *People v. Schuyler*, 6 Cowen, 572, it was held that where a man elopes with another man's wife, if he take the goods of the husband, even with the consent of the wife, he is guilty of larceny.

taking by the wife was *not larceny*, it is difficult to perceive how one assisting her could be guilty.

What Asportation Sufficient.—While there must be a carrying away to constitute larceny, yet the distance they were carried is not material if the goods were in the possession of the thief and out of the possession of the owner.¹ The felony lies in the very first act of removing the property with felonious intent; therefore the least removing of the entire thing, taken with the intent to steal it, if the thief thereby, for the instant, obtain the entire and absolute possession of it, is a sufficient asportation, though the property be not removed from the premises of the owner, nor retained in the possession of the thief;² that is, that the accused had, in fact, taken the property into his possession, but by reason of some circumstance was unable to make his escape with it. The court and jury should be fully convinced, however, from the evidence, of the felonious intent. This usually, if it exist, will appear from the circumstances.³

Fourth. The Intent must be Felonious.—No larceny will therefore be committed when the goods are taken on a claim of right; as if the owner of land takes cattle damage feasant, or a person seizes them as estrays, though no real title exists, he will only be liable to an action. And if the taking, though wrongful, is not fraudulent, it is not larceny but only trespass. And where goods are taken under a fair color of title, or if there is any doubt at all as to the title of the prosecutor, the court should direct the jury to acquit, as it is improper to settle such controversies in a criminal proceeding.⁴

¹ 1 Hale, P. C., 508. "A hath his keys tied to the strings of his purse. B, a cut-purse, takes his purse with money in it out of his pocket, but the keys which were hanged to his purse strings hanged in his pocket. A takes B with the purse in his hand, but the string hanged to his pocket by the keys; it was ruled that this was no felony, for the keys and purse strings hanged in the pocket of it, whereby A, in law, still had the possession of his purse."

² Eckels v. State, 20 Ohio S., 513.

³ In State v. Wood, 46 Iowa, 116, it was held that to constitute larceny the possession must have been acquired with the intent to steal it, and if the original possession was innocent, the offense would not be larceny.

⁴ 3 Greenleaf, Ev., § 157; 2 East, P. C., 661; State v. Bond, 8 Clarke, 540;

Not Larceny.—If the property in goods and chattels be voluntarily given by the owner, whatever false pretenses the purchaser may have used to obtain them he can not be guilty of larceny; as if a horse dealer delivers a horse to another on his promise immediately to pay for it, on which he rides off and does not return, this is not larceny, the sale being completed. So if a groceryman should sell groceries or other goods to a stranger for ready money, and sends them to him by a servant, who delivers them and takes in payment a check which proves to be worthless, this will not be larceny.¹ And obtaining a loan of silver money on a promise to exchange gold coins therefor immediately, but which the borrower did not intend to procure and send is not larceny.² So where the accused obtained a loan of money by means of a letter written by himself in the name of another person known to the lender the offense was held not larceny.³

Description of the Goods.—The goods and chattels should be described with such a degree of certainty as to enable the court and jury to determine whether the things proved to have been stolen are the very same as those upon which the indictment is founded. As expressed by Ch. J. Hale, "Touching the thing wherein or of which the offense is committed, there is required a certainty to an indictment;"⁴ therefore a

1 Hale P. C., 509. "If A leaves his harrow or his plow strings in the field, and B, having land in the same field useth it, and having done, either returneth them to the place where they were or acquaints B with it, this is no felony, but at most a trespass. If A and B, being neighbors, and A having an horse on the common and B having cattle there that he can not readily find, takes up the horse of A and rides about to find his cattle, and having done turns off the horse again in the common, this is no felony; but at most a trespass. So if my servant, without my privity, takes my horse and rides abroad ten or twelve miles about his own occasions and returns again, it is no felony, but if in his journey he sells my horse as his own this is declarative of his first taking to be felonious, *animo furandi*."

¹ 3 Chitty, Cr. L., 921; 2 Leach, 614; 1 Leach, 467; 1 Hale, 506.

² 3 Greenleaf, Ev., § 160; Rex v. Coleman, 2 East, P. C., 672.

³ Id. "If the original possession be rightful subsequent misappropriation does not make it larceny; but if the original possession be wrongful though not felonious and then *animo furandi* he disposes of the chattel, it is larceny." Pollock, C. B., Reg. v. Riley, 14 Eng. L. & Eq., 544; 3 Greenleaf, Ev., § 160.

⁴ 2 Hale, P. C., 181; Stark. Cr. Pl., 193.

charge of stealing "one hundred articles of household furniture" is bad;¹ and a charge of taking "one hundred pounds of meat without saying what kind, was held bad for uncertainty."² But a charge of the larceny of "nine printed books" was held sufficient.³ Goods may be described by the name they are known in trade, and the same rule applies to things known by particular names in the arts or various pursuits.⁴

Where an article is described by name, as a wagon, this imports that the whole wagon was stolen, and not certain portions of it, and evidence of the larceny of a part will not sustain a charge of larceny of the whole.⁵ The question probably is one for the jury whether the evidence showed the taking of the entire thing named.

Description of Promissory Notes.—If the instrument is described in the words of the statute creating the offense, it is sufficient; therefore an allegation of a "promissory note," describing it particularly and alleging its value, is sufficient.⁶ The courts have construed the term "promissory notes" very liberally in cases of larceny and forgery,⁷ and have held that it includes "bank notes" although they are not within the express words of the statute,⁸ and it is not necessary that the note should be locally negotiable or more than a mere due bill.⁹ And while an instrument signed by one A, and payable to his order, is not a promissory note until indorsed, an averment that C, in forging such indorsement, thereby forged the indorsement on a *promissory note* has been sustained.¹⁰

Money.—In the absence of a statute authorizing it, the

¹ *Rex v. Forsyth*, Russ. & Ry., 274.

² *State v. Morey*, 2 Wis., 494.

³ *Rex v. Johnson*, 3 M. & S., 540.

⁴ *State v. Clark*, 8 Ired., 226.

⁵ *State v. Sansom*, 3 Brev., 5; 2 Arch. Cr. Pl., 1145.

⁶ 2 Arch. Cr. Pl., 1147.

⁷ *McDivit v. State*, 20 O. S., 231.

⁸ *Com. v. Paulus*, 11 Gray, 305; *Hobbs v. State*, 9 Mo., 855.

⁹ *Sibley v. Phelps*, 6 Cush., 172; *People v. Finch*, 5 Johns., 237.

¹⁰ *Com. v. Dallinger*, 118 Mass., 439.

general term money does not include bank notes, treasury warrants and promissory notes, unless they are a legal tender;¹ but currency is money.

Any circulating medium that is a legal tender for debts may be described as money. A charge that the defendant unlawfully and feloniously did steal money of the amount and value of \$55, the property of, etc., is sufficient under the statute. It is not necessary that the indictment should show the kind of money, or that it was lawfully issued or intended to pass as money.²

The Value.—Some specific value should be assigned to whatever articles are charged to have been stolen.³ If the thing stolen has no intrinsic or artificial value the prosecution will fail.⁴

The rule as stated by Ch. J. Hale is, that "If theft be alleged of anything the indictment must set down the value, that it may appear whether it be grand or petit larceny." The object of requiring this allegation originally was to enable the court to make a distinction between grand and petit larceny; but there is a further reason that it may appear that the property was of some value; therefore some evidence should be given as to the value of the goods, even if but a trifle;⁵ but if

¹ *Johnson v. State*, 11 O. S., 324; *Com. v. Swinney*, 1 Va. Cas., 146; *Colson v. State*, 7 Blackf., 590; *Hale v. State*, 8 Tex., 171; *State v. Foster*, 3 McCord, 442; *State v. Jim*, 3 Murphy, 3.

² *McDavit v. State*, 20 O. S., 231. See also the chapter relating to forgery.

³ *People v. Payne*, 6 Johns., 103; *State v. Stimson*, 4 Zab., 9; *State v. Goodrich*, 46 N. H., 186; *State v. Fenn*, 41 Conn., 590; *State v. Allen*, R. M. Charlton, 518; *Wharton, Cr. Pl. & Proc.*, § 213.

⁴ In *Payne v. People*, 6 Johns., 104, the defendant was charged with stealing a letter of consequence from the house of one Parson of the value of \$12.50 and was found guilty. The testimony showed that the contents of the letter consisted of information respecting one Campbell, who was suspected of murder, and were of no intrinsic value. The court say: "The letter was of no intrinsic value, not importing any property in possession of the person from whom it was taken," and the proceeding was dismissed.

⁵ 3 Chitty, Cr. Law, 929; *Collins v. People*, 39 Ill., 241; *Payne v. People*, 6 Johns., 104.

the property is valuable to the owner it will be sufficient,¹ and on the trial the actual value of the property must be proved, for the purpose of determining the grade of the offense. If the property had no value whatever—was worthless, it would seem like a perversion of the machinery of the law to prosecute a party for taking such property. Let prosecutions be confined to cases where a crime has actually been committed.

The Aggregate of Values where the Several Articles are of One Kind.—Where several articles of the same kind are described, their value may be stated collectively; and if the proof fails to show that the accused had stolen all the articles charged, he may be convicted of stealing a part of less value than the whole, if there is sufficient in the record to show that the articles on which the party was found guilty were of sufficient value to sustain a conviction.²

Where the Articles are of Different Kinds.—Where articles are of different kinds, as sundry bank bills and sundry treasury notes, twenty sheep, ewes and lambs, and the value of the whole is aggregated, that charge can not be sustained by proof of stealing only a part of the articles and things enumerated.³

The Number of the things stolen should be alleged, because this is not only a part of the legal description, but the prosecutor can not in strictness claim restitution of any other goods

¹ *Rex v. Phipoe*, 2 Leach, 673; *R. v. Clark*, Russ. & R., 181. Where a number of coins were stolen, a charge that "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 can not give, as they have no means of knowledge," was held sufficient. *Com. v. Sawtelle*, 11 Cush., 142; *People v. Bogart*, 36 Cal., 245.

² *Com. v. O'Connell*, 12 Allen, 451; *Wharton, Cr. Proc.*, § 217. In *Com. v. O'Connell* it is said: "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. Where there are several articles of a kind the number should be stated, with an allegation that each was of the value of so much. Then, if for any cause a conviction is not had for all the articles charged, the jury can render a verdict for such as were proved to have been stolen by the accused. 2 Bish., *Cr. Proc.*, § 714.

³ *Wharton, Cr. Proc.* § 217, and cases cited.

than those stated in the record; ¹ and where the number is descriptive, it must be proved as alleged.²

The Owner of the Property.³—When the owner of the goods is known, the ownership must be alleged to be in him.⁴ A special property, however, is sufficient for this purpose; therefore a carrier, a party to whom goods were pawned or bailed, may be described as owner, or the property may be laid in the party beneficially interested in them.⁵ Goods stolen from a laundress who has them in charge to wash, may be described as hers, as she is answerable for them to her employers. So, if cattle are stolen from one having them in charge, the property may be laid in him.⁶ Clothes and necessaries provided for children may be laid either in the father or the children.⁷ If, however, the clothes were furnished by the father to a son who was apprenticed to him in pursuance of articles by which the father was bound to clothe the son in return for his services, the property must be laid in the son.⁸ If goods are stolen from an executor or administrator they may be described as his goods without adverting to the capacity in which they are held.⁹

¹ 1 Chitty, Cr. L., 947; 2 Hale, P. C., 182. "Certainty to a common intent, as it is technically termed, is generally sufficient; which seems to mean such certainty as will enable the jury to decide, in case of theft, whether the chattel proved to have been stolen is the very same with that upon which the indictment is founded, and show judicially to the court that it could have been the subject of the offense charged, and thus secure the defendant from any subsequent proceedings for the same cause after a conviction or acquittal. * * * And in general, at least as great a degree of certainty is required in an indictment for goods as in trespass, for what will be defective in the latter will be still more material in the former. A person having the rightful custody and control of property, may be alleged and proved to be the owner. *Huling v. State*, 17 O. S., 583. 1 Chitty, Cr. L., 245.

² 1 Bish. Pro., § 488 b; *People v. Coon*, 45 Cal. 672; *State v. Handy*, 20 Me., 81.

³ The ownership may be averred after naming the stolen article; add "of the goods and chattels of" (*name of owner*.)

⁴ 3 Chitty, Cr. L., 948; 1 Hale, P. C., 512; 2 Leach, 578.

⁵ 3 Chitty, Cr. L., 948; 1 Hale P. C., 512.

⁶ *Id.*

⁷ Chitty, C. L., 948; 1 Leach, 464.

⁸ Chitty, Cr. L., 948; 1 Leach, 463.

⁹ 1 Hale, P. C., 512, 513. "If A have a special property in goods as by

If a shroud be stolen from a corpse, it may be laid as the property of the executor or the person who buried the corpse, but not of the deceased himself.¹

Property in a Bailee.—Where goods are in the possession of a bailee when stolen, they may be laid in the indictment as his property.² Thus, where A had borrowed the watch of B for a few weeks, and it was stolen while in his possession, it was held that the property was properly laid in A.³ So, where one hires a pistol, and it is stolen from him, the property may be alleged to be his;⁴ and an officer who levies upon property which is stolen from his possession, may be alleged to be the owner of such property.⁵ The rule seems to be, that if a party is the general owner, or had a special interest and possession of the property when stolen, the ownership may be laid in him. The name of the owner, however, must be correctly stated, as it is a part of the charge which the accused has to meet, and it should be so defined that an acquittal or conviction will bar further prosecution for the same offense.

Proof that the goods were owned by A will not support an averment that they were owned by A and B jointly, or as partners.⁶

The Christian name and surname should be given if known.⁷ If the Christian name is unknown it should be so alleged.

pledge, or a lease for years, and the goods be stolen, they must be supposed in the indictment to be the goods of A. If A bail goods to B, to keep from him, or to carry for him, and B be robbed of them, the felon may be indicted for larceny of the goods of A or B, and it is good either way."

¹ Haynes' case, 12 Coke, 112; 3 Inst., 110.

² State v. Ayer, 3 Foster, 301; U. S. v. Burroughs, 3 McLean, 405; People v. Smith, 1 Parker, 329.

³ Yates v. State, 10 Yerg., 549.

⁴ Jones v. State, 13 Ala., 153.

⁵ Palmer v. People, 10 Wend., 166.

⁶ Hogg v. State, 3 Blackf., 326; State v. McCoy, 14 N. H., 364; Com. v. Trimmer, 1 Mass., 476; State v. Owens, 10 Rich., 169. This has been denied. Com. v. Maguire, 108 Mass., 469; State v. Cunningham, 21 Iowa, 433.

⁷ Johnson v. State, 59 Ala., 37; Willis v. People, 1 Scammon, 399; 2 Bish. Cr. Pro., § 718. In Willis v. People, 1 Scam., 401, Smith, J., says: "In the presen"

Where the Owner is Unknown.—It is well settled by authority that larceny may be committed by stealing property where the owner is unknown.¹

If, however, the owner be known, or may easily be ascertained, an indictment for stealing the goods of a person unknown can not be maintained. The law requires good faith upon the part of the prosecution, and where a larceny is charged to have been committed the name of the alleged owner must be given, if known, or it can be ascertained.² But few cases can arise, in which a prosecution will be instituted, where no one appears either as general owner or having a special interest in the property as bailee, etc.; and where such cases do occur the court should see that due proof is made that the very goods in controversy were *stolen* and that the accused was the thief.

Where Several Distinct Articles Belonging to Different Persons are stolen at the same time—being but one transaction, the whole may be embraced in one count of the indictment, and charged as but one offense.³ See form of indictment.

Stealing One's Own Goods.—Under certain circumstances a person may be guilty of the larceny of his own property, as where another has it in possession and it is sought to charge him with its value; thus, where an officer had levied upon

case the indictment alleges the goods to be the property of T. D. Hawke and E. Dobbins, doing business in the town of Equality, under style and firm of T. D. Hawke & Co. This was clearly erroneous, and there is no reason whatever to justify the omission to state the Christian name."

¹ 2 Hale., P. C., 512. In 2 P. C., 290, Hale says: "I would never convict any person for stealing goods *cujusdam ignoti* merely because he could not give an account how he came by them, unless there be due proof made that a felony was committed of these goods."

² 2 East, P. C., c. 16, § 88; Rex *v.* Deakin, 2 Leach, 862. Where a larceny was charged in two counts, in one of which the ownership was alleged to be in certain persons, and in the other in persons unknown, Richards, C. B., said: "I think the prisoner must be acquitted. The owners, it appears, are known, but the evidence is defective on that point; how can I say that the owners are unknown? I remember a case at Chester, before Lord Kenyon, where the property was laid in a person unknown; but upon the trial it was clear that the owner was known and might easily have been ascertained by the prosecutor. Lord Kenyon directed an acquittal." Rex *v.* Robinson, Holt, N. P. C., 595; 2 Stark. Ev., 608.

³ State *v.* Hennessey, 23 O. S., 338; Bell *v.* State, 42 Ind., 335.

certain shingles, the property of the debtor, and thereby acquired a special ownership in the property, after which the owner secretly sold the shingles and afterward was found guilty of larceny.¹ It is competent, however, for the actual owner to prove that the levy was excessive, and that he intended to leave and did leave sufficient property in the hands of the officer to satisfy the debt.² To justify a conviction in any case it should be clearly shown that the intent of the owner was to defraud the person having the goods in charge.

Lost Goods.—At common law where goods were found the subsequent conversion did not constitute larceny; but if the property was found where it was usually permitted to be, as a horse on a common, cattle in the owner's field, money in a place where the thief knew the owner had concealed it, the taking constituted larceny.³ And if a parcel were left in a coach, and the driver, not merely out of curiosity, but from a desire to appropriate part of its contents, opened it, it was held to be larceny; so if he undertake to deliver a package to another and fail to do so he could be found guilty of larceny.⁴ Where, however, the taking was without fraud, it would amount only to trespass, the question of intention being one for the jury.⁵

And where the owner is known, or there are marks on the property or other means of ascertaining who the owner is, and the person finding the goods, nevertheless appropriates them to his own use with the felonious intent to steal the same, he will be guilty of larceny.⁶

¹ *Palmer v. People*, 10 Wend., 166. "Savage, Ch. J.: There is no doubt a man may be guilty of larceny in stealing his own property, when done with intent to charge another with the value of it. 2 East, Cr. L., 558, § 7; 1 Hawkins, Ch., 33, § 30. The constable by levying on the shingles had acquired a special property in them. 7 Cowen, 297; 6 Johns., 196; and the charge was well laid by stating the property to be in the constable."

² *Com. v. Greene*, 111 Mass., 392.

³ 3 Chitty, Cr. Law, 920.

⁴ *Id.*; 1 Leach, 413. These cases rested to some extent upon the doctrine that the driver was a bailee.

⁵ *Id.*

⁶ *State v. Weston*, 9 Conn., 527; *Lane v. People*, 5 Gilm., 305; *R. v. Dixon*, 36 Eng. L. & Eq., 597; *State v. Williams*, 19 Mo., 389; *People v. McGarren*, 17 Wend., 462.

The law is clearly stated by Park, B., in *Regina v. Thurborn*,¹ "If a man find goods that have actually been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing that the owner can not be found, it is not larceny. But if he takes them with like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." The mere finding of goods does not make the finder the owner, and he is only permitted to retain the property when the actual owner is not known, or he has reason to believe that he can not be found.² This matter is regulated by statute in some of the states, notice being required to be given.

Larceny by a Bailee.—At common law if the goods are in the hands of a bailee of the owner, and the bailee fraudulently applies them to his own use during the continuance of the bailment, the offense is not larceny, for the reason that the possession of the bailee was lawful, and the misappropriation was a mere abuse of the trust. Therefore, to establish the charge in such a case it is necessary to show that the contract of bailment was at an end when the goods were appropriated, or that the accused was a mere servant of the owner, having no special property in the goods and not a bailee. 2d. Where the bailment is shown, evidence may be given that it had terminated by the wrongful act of the bailee before the commission of the larceny complained of, as where a carrier breaks open a package intrusted to his care and appropriates a part of its contents. In such case there is a clear repudiation on his part of the contract to carry safely, and his conversion of a part or all of the goods is an act of larceny. If, however, he sell the entire package in its original state it is held by the common law authorities that it is a mere breach of trust.³

¹ 1 Denison, C. C., 387.

² In *Baker v. State*, 29 O. S., 184, it was held that where a person finds goods that have actually been lost, and takes possession with intent to appropriate them to his own use, really believing at the time, or having good ground to believe that the owner can be found, it is larceny.

³ 1 Hale, P. C., 504. "So if a man deliver goods to a carrier, to carry to Dover, he carries them away, it is no felony; but if the carrier have a bale or

Starkie observes that "the distinction which has constantly been recognized, although its soundness has been doubted, seems to be a natural and necessary consequence of the simple principle upon which this branch of the law rests; and although it may at first sight appear somewhat paradoxical and unreasonable that a man should be less guilty in stealing the whole than in stealing a part, yet such a distinction will appear to be well warranted when it is considered how necessary it is to preserve the limits which separate the offense of larceny from a breach of trust as clear and definite as the near and proximate nature of these offenses will permit, and that the distinction results from a strict application of the rules which distinguish those offenses. If the carrier were guilty of felony in selling the whole package, so would every other bailee or trustee, and the offense of larceny would be confounded with that of a mere breach of trust and indefinitely extended."¹ Other cases are referred to in the common law works on criminal law, that do not properly come under the head of bailment, as where a party obtains possession of property by threats or duress, with the felonious intent at the time to convert it to his own use;² or where goods were stolen by the bailee after his contract in relation to them had terminated.³

Stealing from a Thief—Property in Whom.—Stolen goods, while in possession of the thief, if stolen by another thief, the latter may be charged with taking and carrying away the goods of the owner; and for the purpose of sustaining such charge the possession of the first thief will be regarded as the possession of the true owner.⁴ In England, if goods be stolen from a felon they are to be laid as the property of the crown.⁵ The rule as stated in the case cited from Ohio is no doubt the cor-

trunk with goods delivered to him, and he breaks the bale or trunk and take and carry away the goods *animo furandi*, or if he carry the whole pack to the place appointed, and then carry it away *animo furandi*, this is a felonious taking." The bailee is liable under the statute. Cr. Code, § 121 a.

¹ 2 Stark. Ev., 448, n.

² Rex v. Pear, 2 East, P. C., 685.

³ 1 Hale, P. C., 504-505.

⁴ Stanley v. State, 24 O. S., 169.

⁵ R. v. Whitehead, 9 Car. & P., 429; 2 Arch. Cr. Pl., 1167.

rect one, as the title to the property still remains in the actual owner.

Bringing Stolen Property from another County or State.—Where property is stolen in one county and the thief is afterward found in another with the stolen property in his possession, he may be indicted and convicted in either county, but not in both.¹ This constructive doctrine is derived from the common law, and is only so held for the purpose of giving the county where the thief is taken with the goods, jurisdiction to try and convict him of the original offense, and by this bar another conviction—the larceny being regarded as a continuing one against the laws of the state, and the venue merely fixes the place of trial.

Where, however, goods are stolen in one country or state and carried by the thief into another state, a different rule would seem to apply. In such case the goods are not *stolen* in the state to which they are carried, and therefore the act of “taking,” which is a material element in the crime of larceny, is wanting. And this was the doctrine of the common law. Thus, where goods were stolen in the island of Jersey and afterward carried by the thief into Dorsetshire, where the prisoner was charged with the larceny in Dorsetshire, the prisoner being convicted, all the judges (except Raymond, C. B., and Taunton, J., who did not sit,) agreed that the conviction was wrong.² And where property was stolen in France and carried to London, where it was found in possession of the thief, an indictment having been found against him in London, Park, B., directed an acquittal on the ground of want of jurisdiction.³ The same rule was applied by the supreme court of Massachusetts, where property was stolen in Nova Scotia and carried to Boston.⁴ And in Ohio, where property had been stolen in Canada and carried into that state, and there found in the possession of the thief, who was thereupon tried and convicted,⁵ the court by an unanimous decision re-

¹ *Stanley v. State*, 24 O. S., 170.

² *Rex v. Powers*, 1 Moody, C. C., 349.

³ *R. v. Madge*, 9 Car. & P., 29.

⁴ *Com. v. Uprichard*, 3 Gray, 424.

⁵ *Stanley v. State*, 24 O. S., 166. In the course of an able and elaborate

versed the judgment, and held that the act of carrying stolen goods into that state did not constitute the offense of larceny in Ohio. The rule of the common law was superseded in England by the statutes, 13 Geo. III, c. 31, §§ 4-7 and 8 Geo. IV, c. 29, § 76, whereby prosecutions were authorized in any county where the thief was found in possession of property stolen in any part of the United Kingdom.

The English decisions, under the statutes referred to, no doubt have misled some of the courts in this country as to the ground upon which such decisions were based, but both reason and the weight of authority sustain the doctrine that a crime committed without the jurisdiction of a state, and not in violation of *its* laws, is not punishable by such state.¹

The Time when the offense is alleged to have been committed need not be proved as averred, provided the offense is alleged to have been committed before the indictment was found, and it appears that the offense is not barred by the statute of limitations.²

The Place, however, must be proved as laid in order to show that the court has jurisdiction. Therefore it must appear either that the goods were stolen in the county where the trial is had, or that they are carried there by the thief and found in his possession.³

opinion, McIlvaine, J., observes, "We are unwilling to sanction the doctrine, or to adopt the practice, whereby a crime committed in a foreign country, and in violation of the laws of that country only, may, by construction, and a mere fiction, be treated as an offense committed within this state. * * The theory upon which this construction is sought to be sustained is, that the legal possession of the goods remained all the while in the owner. If this theory be true, it is true as a fiction of law only. The fact was otherwise. A further theory in support of the conviction is, that as soon as the goods arrived within the state of Ohio the thief again took them from the possession of the owner into his own possession. This theory is not supported by the facts, nor is there any presumption of law to sustain it."

¹ People v. Gardner, 2 Johns., 477; People v. Schenk, Id., 479; State v. LaBlanch, 2 Vroom, 82; Simmons v. Com., 5 Binn., 617; State v. Brown, 1 Hayw., 100; Simpson v. State, 4 Humph., 456; Beal v. State, 15 Ind., 578; State v. Reonnals, 14 La. Ann., 278. The common law rule was afterward changed in New York by statute.

² 3 Greenleaf, Ev., § 152.

³ Id., and cases cited.

FOR STEALING PROPERTY.

That A B, on, etc., in said county, unlawfully and feloniously did steal,¹ take and carry away fifty yards of silk, of the value of seventy-five dollars, the personal property of C D.

FOR STEALING VARIOUS ARTICLES OF DIFFERENT KINDS.

That A B, on, etc., in said county, unlawfully and feloniously did steal, take and carry away one hundred pounds of flour of the value of three dollars, two hundred pounds of bacon of the value of sixteen dollars, and seventy-five pounds of butter of the value of fifteen dollars, the personal property of C D.

FOR LARCENY WHERE THE PROPERTY WAS STOLEN IN ONE COUNTY, AND CARRIED BY THE THIEF INTO ANOTHER, AND THERE FOUND IN HIS POSSESSION.

That A B, on, etc., in — county, did unlawfully and feloniously steal, take and carry away one hundred bushels of wheat, of the value of one hundred dollars, the personal property of C D, and did then and there feloniously carry said wheat, so stolen, into — county, and did then and there, in said last named county, steal, take and carry away said personal property of said C D.²

FOR STEALING MONEY.³

That A B, on, etc., in said county, unlawfully and feloniously, did steal, take and carry away certain money, of the amount and value of — dollars, the property of C D.

¹ The word "steal" implies a carrying away, and therefore an indictment for the larceny of a sheep, charging that the defendant did "feloniously steal, take and drive" the sheep, without alleging that he drove and carried it *away* sufficiently describes the offense under the statute. *Mann v. State*, 25 O. S., 668; *Irvin v. State*, 37 Tex., 412; *State v. Gallimore*, 7 Ired., 147; *Sallie v. State*, 39 Ala., 691; *Maynard v. State*, 46 Id., 85; 2 Bish. Cr. Pro., § 698.

² To authorize a conviction in the second county, the property must remain specifically the same. Thus, where a brass furnace was stolen in one county and there broken up and carried into another, it was held that a conviction could not be had in the second county for the larceny of the furnace. *R. v. Halloway*, 1 C. & T., 127.

³ An indictment which charges that the accused "unlawfully and feloniously did steal money, of the amount and value of fifty-five dollars, the prop-

FOR LARCENY OF THE PROPERTY OF DIFFERENT PERSONS.

That A B, on, etc., in said county, unlawfully and feloniously did steal, take and carry away one watch of the value of twenty dollars, the property of Lucinda E B, and one overcoat of the value of twenty-five dollars, the property of Ebenezer B [all of said property being of the value of forty-five dollars].¹

WHERE THE OWNER IS UNKNOWN.

That A B, on, etc., in said county, unlawfully and feloniously did steal, take and carry away one red steer, four years of age, of the value of fifty dollars, the property of some person to the jurors [or affiant] unknown.

AT COMMON LAW, FOR STEALING THE PROPERTY OF DIFFERENT PERSONS.

That A B, late of, etc., laborer, on, etc., with force and arms, at, etc., aforesaid, one silver spoon of the value of ten shillings, of the goods and chattels of one J L, two brass candlesticks of the value of two shillings, and two linen shirts of the value of six shillings, of the goods and chattels of one E H, then and there being found, feloniously did steal, take and carry away.²

FOR LARCENY OF GOODS OWNED BY TWO OR MORE PERSONS JOINTLY.³

That A B, on, etc., in said county, unlawfully and feloniously did steal, take and carry away one barrel of sugar, of the value of thirty dollars, the personal property of James Otis and William Sweet, partners.

erty of," etc., sufficiently describes the property taken under the provisions of the criminal code, although the indictment does not show what kind of money is charged to have been taken, or that it was issued by lawful authority, or intended to pass as money. *McDivit v. State*, 20 U. S., 231. The charge being the stealing of "money," the presumption is it was lawful money.

¹ This allegation is probably unnecessary, and is not found in Chitty's precedents.

² Chitty, Cr. L., 960. At common law where several persons' goods are taken at the *same time*, so that the transaction is the same, the indictment may properly include the whole. *Id.*

³ In California it was held that an indictment stating the ownership in the firm name alone was sufficient. *People v. Ah Sing*, 19 Cal., 598. And

AT COMMON LAW FOR STEALING GOLD COIN.

That A B, ou, etc., in said county, thirty pieces of the gold coin of the realm called —, of the value of —, of the moneys of the said C D, then and there found, feloniously did steal, take and carry away.

Evidence.—The first point to be established is, that a larceny of the goods and chattels in controversy has been committed by some one.

The Best Evidence.—The larceny must be proved by the best evidence the nature of the case admits of.¹ This should be by the owner himself, if the property was taken from his immediate possession. If taken from a servant or other person, he should be sworn in order to show the felonious taking from him.² The state is required to prove a negative—non-consent, and the very person who can swear to it must, if possible, always be produced.³ Secondary evidence can not be resorted to, until it is shown to be impossible to procure the best evidence.⁴ This is illustrated by the case of one who was arrested on a charge of stealing a watch from a fellow-lodger—one Dimmick. The watch was sworn to positively as having been his [Dimmick's], and it was traced to the possession of the accused soon after they had lodged together.

The prisoner had left the watch in the care of one H. P. On being arrested the prisoner told the officer that he had given the watch to the proper owner, but he afterward attempted to bribe the officer to permit him to escape, and at

such seems to be the better rule. While at common law the names of the members of a firm ordinarily must be given in an action wherein the firm prosecutes or defends, still a firm is a distinct entity, having its own debts and credits, and in law is recognized in various ways as a person. It is not necessary that the person have legal capacity to sue or be sued in order to own property. Hence a minor may be alleged to be the owner. On principle it would seem that an allegation that this person owned the property stolen was sufficient, and under the statute it is sufficient to allege ownership in the firm, or some member thereof. Cr. Code, §418.

¹ 1 Phillips, Ev., 635, and cases cited in note 183.

² Id.

³ Rex v. Rogers, 2 Campb., 654; Williams v. East J. Co., 3 East, 192-201.

⁴ Note 193, 1 Phillips' Ev., the able annotators observe, "You shall not be permitted to grope in the twilight of circumstantial evidence when the broad daylight of direct and positive evidence is attainable."

tempted to escape forcibly. The morning after the accused had lodged with him, Dimmick had been heard to complain that his watch was stolen by the accused, and it also appeared that he had attempted to bribe Dimmick not to appear against him, and that his character was bad. On the trial Dimmick was not produced, having been compelled, it was said, to leave on necessary business. The court directed an acquittal, saying that Dimmick was the only person who could swear positively that the watch was stolen.¹

Cases frequently occur, however, where it is impossible to produce the owner, as where he had died before the trial, in which case secondary evidence may be received.² But the proof in every case should reach that degree of certainty as to fully establish the fact that a larceny of the goods in question has been committed by some one.

Second.—Due proof having been made that a larceny, in respect to the goods in controversy, has been committed by some one, the next step is to introduce testimony tending to show that the accused committed the larceny. The possession of the fruits of the crime in cases, particularly of larceny and robbery, recently after the commission of the offense, raises a strong presumption of guilt, so as to cast upon the possessor the burden of showing that he came by the property honestly. The rule is based on the consideration that if the possession has been lawfully acquired the party would be able, at least soon after its acquisition, to give an account of the manner in which such possession was obtained.³

The Possession, However, must be Recent.—If immediately after the commission of the offense, or on the day of its commission, the presumption occurs in its strongest form. If, however, an interval elapse between the larceny and the finding of the goods the presumption becomes weakened,⁴ as there is a possibility and consequently a supposition that the goods have

¹ 1 Phillips' Ev., 635; Plunket's case, 3 C. H. Rec., 137, 138.

² Rex v. Hazy, 2 Car. & P., 458.

³ Wills, Cir. Ev., 147; Burrill, Cir. Ev., 446.

⁴ Burrill on Cir. Ev., 447, and cases cited.

been disposed of by the thief, and therefore that the person in possession acquired them innocently.¹

There is a direct conflict in the authorities as to the effect of possession soon after the offense was committed, but the better rule seems to be that if the possession of the stolen articles be recent after the theft, such evidence is sufficient to make out a *prima facie* case, proper to be left to the jury, who are the sole judges in the first instance of the effect to be given to it.²

Possession of the Goods is always Competent Evidence, be the time longer or shorter; but in order to warrant a conviction where considerable time has elapsed between the larceny and the finding, there must be proof of other circumstances in addition to the fact of possession. Among these are false or improbable representations of the accused to account for the possession, as where he stated that he had purchased the horse at E, when there was not time to have done that and reached the place where the horse was found with him,³ his selling the article for much less than its value,⁴ contradictory statements regarding the purchase or acquisition of the property,⁵ etc.

The Place where the Property is Found is frequently a strong circumstance, as where it is secreted in his house or apartment.

¹ Burrill on Cr. Ev., 447.

² Thompson v. State, 4 Neb., 529; State v. Merrick, 19 Me., 398; 1 Phillips' Ev., 634; 2 Hale, P. C., 289. The danger of assuming the guilt of a person accused of crime without due proof, is thus stated by Hale, that eminent and fair-minded judge: "In some cases presumptive evidences go far to prove a person guilty, though there be no express proof of the fact to be committed against him; but then it must be warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die. If a horse be stolen from A and the same day B be found upon him, it is a strong presumption that B stole him; yet I do remember, before a very learned and wary judge, in such an instance B was condemned and executed at the Oxford assizes, and yet within two assizes after, C, being apprehended for another robbery and convicted, upon his judgment and execution confessed that he was the man that stole the horse, and being closely pursued desired B, a stranger, to walk his horse for him while he turned aside upon a necessary occasion and escaped, and B was apprehended with the horse and died innocently."

³ 1 Phil. Ev., 636; State v. Adams, 1 Hayw., 464.

⁴ Penn v. Myers, Addis, 320-327; Armstead's case, 1 C. H. Rec., 174.

⁵ 1 Phil. Ev., 637, and cases cited.

It must be proved, however, that the house or apartment is in his exclusive possession. Where, however, the house or room is occupied by a husband and wife, the possession of the wife is considered that of the husband.¹

Must be an Actual Possession.—A presumption of guilt from the possession of the fruits of the crime can arise only in case the accused is in the actual and exclusive possession of the property, as if found in his house, his private apartment, or the place where he kept the key, or on his person. If the property was found on premises owned or occupied as well by others as himself, or to which others had access, there is no good reason why, from the mere finding of goods on the premises, he should be charged rather than they.²

Buying or Receiving Stolen Bills, etc.—If any person shall receive or buy any bank bill or bills, or promissory note or notes, bill of exchange, order, receipt, draft, warrant, check or bond, given for the payment of money, of thirty-five dollars or upward, which have been stolen, knowing the same to be stolen, with intent to defraud the owner thereof, every person so offending shall be imprisoned in the penitentiary not more than seven years, nor less than one year.³

¹ Reg. v. Mansfield, 1 Carr. & M., 142; Wills' Cir. Ev., 50; Burrill, Cir. Ev., 451.

² 3 Greenleaf, Ev., § 33. A case is mentioned in note 183 of Phillips on Evidence, which shows the necessity of not forming a hasty judgment from merely finding property on the premises of another. "A blacksmith secretly deposited a piece of iron in a bed of coal, which lay in the coal house of a neighboring blacksmith [a Mr. Lamb, Morean, Saratoga Co., N. Y.]; he then swore out a search warrant on which he found the iron, to Mr. Lamb's great astonishment, and was proceeding to convict Lamb before a special session. He would probably have succeeded had not a boy of Mr. H. Billings, who resided within a few rods of the shop, accidentally seen the prosecutor a few mornings before, passing with something into the shop, about daylight, and returning in an unaccountable manner. This led to a suspicion that the whole affair was simulated, resulted in a thorough investigation, and the prosecutor afterward suffered the penalty of his fraud and perjury." Where two or more are charged jointly, and other circumstances are proved, proof of joint possession may be sufficient. Lewis v. State, 4 Kas., 297.

³ Cr. Code, § 115.

FOR BUYING OR RECEIVING STOLEN PROMISSORY NOTE.

That A B, on, etc. in said county, unlawfully and feloniously, with intent to defraud one E F, did buy and receive one promissory note, given by C D to E F or bearer, on the — day of — for the payment of — dollars, the property of E F, and of the value of — dollars, which note had lately before been stolen from said E F, and taken and carried away, as said A B then and there well knew.

Receiving Stolen Goods, etc.—If any person shall receive or buy any goods or chattels, of the value of thirty-five dollars or upward, that shall be stolen or taken by robbers, with intent to defraud the owner, or shall harbor or conceal any robber or thief guilty of felony, knowing him or her to be such, every person so offending shall be imprisoned in the penitentiary not more than seven years, nor less than one year.¹

FOR RECEIVING STOLEN GOODS.²

That A B, on, etc., unlawfully and feloniously did steal, take and carry away two barrels of sugar, of the personal property of C D, of the value of — dollars, and on the day and year aforesaid, in said county, one E F, with the intent to defraud said C D, unlawfully and feloniously did receive said personal property so as aforesaid stolen, and of the value of — dollars, he, the said A B, then and there well knowing the said goods and chattels to have been unlawfully and feloniously stolen, taken and carried away.

¹ Cr. Code, § 116.

² The indictment need not set forth the name of the thief, as in many cases it would be impossible to do so. *State v. Murphy*, 6 Ala., 845; *People v. Caswell*, 21 Wend., 86. In the case last cited, Cowen, J., in delivering the opinion of the court, said: "The receiving of stolen goods is in its own nature an offense, if they be known by the receiver to have been stolen; and if directly alleged to have been stolen by A, it is difficult to conceive that the prisoner would be able to defend himself, either by proving that they were stolen by B, or the failure of the evidence for the prosecution to show a thief in particular, so long as the accused knew that they were stolen. The one who delivers them to him may declare that they were stolen by another, who is desirous that his name should remain a secret from all the world; yet if he receives them, he is as guilty as if the deliverer had admitted himself to be the thief."

FOR RECEIVING STOLEN PROPERTY.¹

That A B, on, etc., in said county, unlawfully and feloniously did receive the personal property of C D, of the value of thirty-five dollars, then lately before stolen, taken and carried away, with the intent of him, the said A B, to defraud said C D, he then and there well knowing that said personal property to have been stolen.

Guilty Knowledge.—On the trial of *State v. Shriedley*,² evidence had been given on the part of the state tending to show that the carpeting mentioned in the indictment had been stolen from the cars of the carrier named; that one Charles Rapp had stolen it from the railway company and sold it to the defendant under its value, informing her at the time that it had been stolen. The court then permitted the state to give evidence that Rapp had previously sold the defendant other goods which she knew were stolen. The court held this evidence admissible as a circumstance for the purpose of showing guilty knowledge on the part of the accused that the goods were stolen.³

That decision is clearly right. Rapp was, according to his own admission, a thief, and if his admission was true the de-

¹ Where the indictment charged that the larceny had been committed by a certain "evil disposed person," without adding "to the jurors unknown," Tindal, Ch. J., held it sufficient, the offense not being the receiving of stolen property from any particular person, but receiving it knowing it to have been stolen. *R. v. Jervis*, 6 Car. & P., 156; *Thomas' case*, 2 East, P. C., 781; 2 Arch. Cr. Pl., 1426. In *Shriedley v. State*, 23 O. S., 138, 139, the following indictment was held sufficient: "Catherine Shriedley, on the 26th day of April, in the year 1872, at the county of Lucas aforesaid, forty-eight yards of carpeting of the value of seventy-seven dollars, twenty-three yards of carpeting of the value of thirty-seven dollars, the goods and chattels of the Lake Shore & Michigan Southern Railway Company, a corporation, then and there being lately before feloniously stolen, taken and carried away, unlawfully and feloniously did receive, buy and conceal, with intent thereby to defraud the said Lake Shore & Michigan Southern Railway Company, the owners thereof, she, the said Catherine Shriedley, then and there well knowing said goods, chattels and property to have been feloniously stolen as aforesaid."

² 23 O. S., 130.

³ Citing *King v. Dunn*, 1 Moody, C. C., 146; *Devoto v. Com.*, 3 Met. (Ky.), 417; *People v. Randos*, 3 Park. Cr. R., 335; *Rex v. Davis*, 6 C. & P., 177; 3 Greenleaf, Ev., § 15 and note; 2 Wharton, Cr. L., § 1889; 2 Russ. on Cr., 251; Ros. Cr. Ev., 875; *Contra, Regina v. Oddy*, 5 Cox, C. C., 210; 4 Eng. L. & Eq., 575.

fendant was a participant, who had acted in the larceny by purchasing the stolen goods from the *same* thief. It was a material circumstance tending to show guilty knowledge on her part.

The reader must bear in mind that the receiving of stolen goods, chattels, etc., is a statutory offense and that the charge being based on the statute must be as broad as that is. It will be seen that there are four elements in the charge: 1. The receiving or buying of stolen goods, chattels, etc. 2. That the value is thirty-five dollars or upward. 3. That the receiver knew that the goods were stolen. 4. That he intended to defraud the owner. If a person receive or buy stolen goods knowing them to have been stolen, there is a strong inference that he thereby intended to defraud the owner by depriving him of his property, and probably no additional proof is necessary in that event.

There are two modes of stating the offense: first, by setting out the original larceny and then alleging that the defendant received the goods in question with knowledge that they had been stolen; second, to simply allege the necessary facts of receiving stolen goods of a certain value, knowing them to have been stolen, with an intent to defraud the owner. The latter mode is to be preferred.¹

The following form is given by Chitty, 3 Cr. L., 961, 962:

That F M, late of, etc., laborer, afterward, to wit, on, etc., with force and arms at, etc., aforesaid, one silver watch, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, he, the said F M, then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away.

Evidence.—The state must prove, first, the larceny; second, the buying or receiving of a part or all of the stolen goods; third, that the defendant knew that the goods were stolen; fourth, the value of the goods received.² The subject of proving the larceny has already been considered. The thief

¹ The goods must be described accurately, (*People v. Wiley*, 3 Hill, 194-212,) and the value of the property alleged. *O'Connell v. Com.*, 7 Met., 460; *State v. Watson*, 3 R. I., 114; *Sawyer v. People*, 3 Gilm., 53.

² *R. v. Haslem*, 1 Leach, 418.

is a competent witness to prove the buying or receiving of the goods. His confession, however, is not admissible against the receiver unless a conspiracy be shown.¹ Guilty knowledge on the part of the accused may be shown directly by the evidence of the thief, or by circumstances. Thus, if the defendant bought the property for a sum greatly beneath its value.² So, if the goods were bought at untimely hours, or not openly, but under circumstances of apparent concealment.³ So where the receiver concealed or endeavored to conceal the property,⁴ and when the property is found in his possession makes contradictory statements and fails to give a satisfactory account of the manner in which he received it.⁵ It is not necessary to show that the goods were received from the thief.

In this class of cases not unfrequently a conspiracy exists between the thief and receiver in which the receiver is to act as the apparently innocent purchaser, and if caught, will thereby escape punishment.⁶ At common law the receiver seems to have been treated as an accessory, and not subject to conviction until after the conviction of the principal.⁷ This fact, no doubt, will explain many of the decisions by the common law courts, holding in effect that if the receiver is also an aider at the fact of the original larceny he can not be holden as a receiver.⁸

¹ *R. v. Turner*, 1 Moody, C. C., 347.

² 1 Hale, P. C., 619. "The buying at an under-value is presumptive evidence that he knew they were stolen." The purchase at a price greatly beneath the value of the property no doubt would be sufficient to put a purchaser on inquiry, but that alone would not authorize a conviction as a receiver of stolen goods; still it is a circumstance.

³ *Pros. Cr. Ev.*, 876.

⁴ *Wills v. People*, 3 Park. C. R., 498; *R. v. Mansfield*, C. & M., 140.

⁵ *People v. Teal*, 1 Wheel. Cr. Cas., 196-201.

⁶ Where the jury found from the evidence that such conspiracy existed, and in pursuance thereof goods were received at various times, they may aggregate the values in fixing the grade of the offense. *Levi v. State*, 14 Neb., 1.

⁷ By the statute 3 and 4 W. & M., c. 9, the receiver was made an accessory after the fact and therefore could not be tried so long as the principal had not been found guilty. 1 Bish. Cr. L., §493; 4 Bla. Com., 323.

Reg. v. Gruncell, 9 Car. & P., 365; *Reg. v. Smith, Dears.*, 494; 2 Bish. Cr. L., § 953.

The Buying or Receiving of Stolen Goods is a Substantive Offense under the statute, if done with intent to defraud the owner, and it is not necessary to show that the goods were received from the thief, or that he has been convicted.¹ While evidence is admissible to prove that the accused had before receiving the goods in controversy, at different times received stolen articles of the same person from whom he received the goods for which he stands charged, in order to show guilty knowledge, yet the state will not be allowed to prove that at the time his goods were found, other goods previously stolen from other persons were also found.²

Evidence of Good Faith on the part of the receiver, as that he paid a fair price for the goods; that they were permitted to remain in his place of business in plain view with the original marks upon them; that immediately upon the charge being made he caused the arrest of the thief; that he has heretofore borne a good character, or any fact tending to show that the transaction is *bona fide*, and therefore there was a want of guilty knowledge on his part, is competent;³ but he can not be permitted to prove what the person from whom he received them said as to the manner in which he became possessed of them, or that he had an opportunity to escape, which he did not endeavor to avail himself of.⁴

¹ *Levi v. State*, 14 Neb., 1; *Egster v. State*, 11 Id., 539.

² 2 Arch. Cr. Pl., 6(8); *Rex v. Oddy*, 20 L. J., 198, n. m.

³ *People v. Teal*, Wheel. Cr. Cas., 199; *Conkwright v. People*, 35 Ill., 204; *Jupitz v. People*, 34 Ill., 516; *Andrews v. People*, 60 Id., 354. The statute under which a conviction was had in *People v. Wiley*, 3 Hill, 194, was as follows: "Every person who shall buy or receive in any manner, upon any consideration, any personal property, of any value whatsoever, that shall have been feloniously taken away or stolen from any other, knowing the same to have been stolen, shall upon conviction be punished," etc.

⁴ *People v. Rathbun*, 21 Wend., 509; *People v. Wiley*, 3 Hill, 194. In the case last cited, Cowen, Judge, observes (p. 206): "With regard to all the statutes, Mr. East (Cr. Law, 2d Vol., 765, Ch. 16, § 153) remarks that it is sufficient if the goods be in fact received into the possession of the accused in any manner *malo animo*. An instance he put is the purpose of *favoring the thief*; a consequence which almost necessarily follows by disconnecting him from his felonious burthen, the ear mark by which he is commonly identified. Nor will the thief deal without an agreement to favor him, which was evidently made in the instance before us."

Horse Stealing.—If any person shall steal any horse, mare, gelding, foal or filly, ass or mule, of *any value*; or if any person shall receive or buy any horse, mare, gelding, foal or filly, ass or mule that shall have been stolen, knowing the same to have been stolen, with intent by such receiving or buying to defraud the owner; or if any person shall conceal any horse thief, knowing him to be such; or if any person shall conceal any horse, mare or gelding, foal or filly, ass or mule, knowing the same to have been stolen, every person so offending shall be imprisoned in the penitentiary not more than ten nor less than one year.¹

Under the statute, 1 Edw. VI, c. 12, § 10, horses were protected by stringent regulations, by which the thief was excluded from the benefit of clergy. Under that act, however, a doubt existed whether the thief of a single horse could be punished. To remove this doubt, the act 2 and 3 Edw. VI, c. 33, was passed. The last provision, however, speaks only of persons convicted by verdict, confession, or standing mute; and as a penal law could not be extended by implication, a question arose as to whether or not persons who peremptorily challenged more than twenty jurors were included. The statute 3 and 4 W. & M. was thereafter passed, which supplied the omission.²

Joinder with Larceny where Parts of the same Transaction.—Where an offense may be committed by different means, and the pleader doubts which was employed in that particular case, he may set forth in the several counts of the indictment the different forms in which he may suppose the crime to have been committed. This is illustrated by the case of the *Com. v. Webster*,³ where the mode of committing the homicide was set forth in a number of counts. In such case, however, it is for the same offense—the homicide. This mode of pleading,

¹ Cr. Code, § 117.

² 2 Chitty, Cr. L., 931.

³ 5 Cush., 386; 4 Wharton, Cr. Prac., § 290; *R. v. Tineman*, 8 C. & P., 727; *Cash v. State*, 10 Humph., 111; *Donnelly v. State*, 2 Dutch., 463-601; *Ham v. People*, 8 Wend., 203; *State v. Nelson*, 29 Me., 329; *State v. Tuller*, 34 Conn., 281; *Mershon v. State*, 51 Ind., 14; *Ketchingham v. State*, 6 Wis., 426; *People v. Thompson*, 28 Cal., 214; *People v. Valencia*, 43 Cal., 552; *Fisher v. State*, 33 Tex., 792.

however, is not required in cases of larceny, it being sufficient to note the ultimate fact—the larceny. Where two distinct felonies are charged in separate counts, the less not being included in the greater or not a part of the same transaction, the general rule is, the court on the trial will require the state to elect. The rule as stated by Wharton is, that where two or more distinct felonies are contained in the same indictment it may be quashed, or the prosecutor required to elect on which charge he will proceed.

If, However, Two Distinct Felonies are joined in the same or separate counts of an indictment, and the defendant, without objection, proceeds to trial and is found guilty, generally the court will not then require the prosecution to elect,¹ as the trial of all the charges at one time may be considered by the accused as a benefit. In any event a verdict of acquittal or conviction on such charges will bar a further prosecution for the offenses upon which he was tried. This seems to have been the view of the court in *Barton v. State*,² where, in a count for stealing one mare of the value of seventy-five dollars, one gelding of the value of sixty-five dollars, and second, a two horse buggy of the value of seventy-five dollars and one set of double harness of the value of forty dollars, the jury returned a general verdict of guilty, and assessed the value of all the property stolen at two hundred and twenty-five dollars. The defendant had hired the property that he was charged with stealing from a certain livery stable keeper in Cleveland, to drive to Avon, about twenty miles, but instead drove to Painesville, about thirty miles in an opposite direction, where he was arrested. The property was taken at one time—there being but one transaction, and the ruling of the court that the offenses could properly be joined is clearly right.³

The case was reversed because of the admission of improper evidence, and for the further reason that the jury did not find

¹ Wharton, Cr. Proc., §§ 294-297.

² 18 Ohio, 221.

³ The first point in the syllabus that "counts for horse stealing and grand larceny of other property may be joined in the same indictment," is misleading, and does not express the decision of the court, and seems to have misled some of the writers on criminal law.

the value of the property as stated in the several counts of the indictment.

The Animal, how Described.—It will be observed that the words of the statute are “shall steal any horse, mare, gelding, foal or filly, ass or mule of any value.” In general, the word “horse,” which primarily means the male, also, when it stands alone, as a generic term, includes both horses and mares, whether young or old. In a number of cases it has been held that where a special punishment is provided by statute for the larceny of a horse, gelding, mare, filly, foal, etc., that the proof must distinctly follow the charge, and if the indictment should charge the larceny of a gray horse, proof of the larceny of a gray gelding would not sustain the charge.¹

This view is sustained by respectable authorities.² The tendency of modern decisions, however, is to treat the words of the statute as overlying one another in meaning, and that if the statutory term is included in the words used, it will be sufficient.³ The safe course, however, is to use the language of the statute; then no question can arise as to what was intended. The word “horse” has also been held to include the word “mule.”⁴

FOR HORSE STEALING.⁵

That A B, on, etc., in said county, unlawfully and feloniously did steal, take and lead away one gelding, the personal property of C D, of the value of — dollars.

¹ *Hooker v. State*, 4 Ohio, 350. In the case cited the objection that proof of a gray gelding was not sufficient to sustain the charge of the larceny of a gray horse is thus stated: “The objection raised by the second bill of exceptions seems too insignificant to demand a serious consideration. The term *horse*, being a generic name, ought to include every variety of the animal, as diversified by age, sex, occupation or modification. The English authorities, however, and which have been recognized in several of the states as sound law, are too strong to be resisted, and too pointed to be evaded. It was therefore held that the proof was insufficient.

² *Turley v. State*, 3 Humph., 323; *State v. Plunkit*, 2 Stew., 11; *Rex v. Moyle*, 2 East, P. C., 1076; *Rex v. Mott*, 2 East, P. C., 1075; *Rex v. Beaney*, Russ. & Ry., 416.

³ 1 Bish. Cr. Proc., § 620, and cases cited.

⁴ *Allison v. Brookshire*, 38 Tex., 199; *State v. Cunningham*, 6 Neb., 90.

⁵ It is not necessary to state that animals are alive, as the law presumes them to be so. *Wharton's Cr. Proc.*, § 209, and cases cited.

**WHERE A MARE AND FOAL BELONGING TO DIFFERENT PERSONS
ARE STOLEN.**

That A B, on, etc., in said county, unlawfully and feloniously did steal, take and lead away one mare, the personal property of C D, of the value of — dollars, and one foal, the personal property of E F, of the value of — dollars.

FOR CONCEALING A HORSE THIEF.

That A B, on, etc., in said county, unlawfully and feloniously did steal, take and lead away one gelding, the personal property of C F, of the value of — dollars, and one C D afterward, to wit, on, etc., in said county, unlawfully and feloniously intending to aid and abet said A B in said theft, and then and there well knowing him, said A B, to be a horse thief, did willfully and unlawfully conceal him, said A B, in a barn [or dwelling] of the said C D.

FOR BUYING OR RECEIVING A STOLEN HORSE, ETC.

That A B, on, etc., in said county, unlawfully and feloniously did buy and receive a certain horse, the personal property of C D, of the value of — dollars, then lately before stolen, taken and led away, with the intent of him, the said A B, by said buying and receiving to defraud said C D, the owner, he, the said A B, then and there well knowing that said horse had been stolen.

CONCEALING STOLEN HORSE, ETC.

That A B, on, etc., in said county, unlawfully and feloniously did conceal a certain horse, the property of C D, of the value of — dollars, then lately before stolen, taken and carried away, he, the said A B, then and there well knowing said horse to have been so stolen.

FOR HORSE STEALING AT COMMON LAW.

That A B, late of, etc., at, etc., aforesaid, one gelding of the price of six pounds, of the goods and chattels of one I D, then and there found and being, then and there feloniously did steal, take and lead away.¹

The Confessions of the Alleged Thief, in the presence of the accused, are not admissible against such party when accused

¹ 3 Chitty, Cr. L., 976. If the jury found the value of the horse to be within twelve pence, the offense was petit larceny. Id.

of concealing a horse thief, to prove that a horse was in fact stolen. Such confessions are evidence against the party making them, but not against other persons.¹

There is no doubt of the correctness of the decision, and it is in accord with the well known rule that a confession alone is not sufficient proof that a crime has actually been committed.²

The Thief Alleged to be Concealed must be named in the indictment if his name is known. The concealing a horse thief is a distinct independent offense, and the party accused can be charged only with some specific offense or offenses—for keeping a particular person or persons. *Morris v. State*, 5 Ohio, 440.

The Jury Should Find the Value of the Property.—While under the statute the crime of stealing a horse of any value is punishable by imprisonment in the penitentiary, yet it is necessary for the jury to find the value of the property stolen, first, in order that it may appear to be of some value, second, to enable the court to determine the time of imprisonment.³

Stealing or Destroying Will.—If any person or persons shall, either during the life of the deviser, testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or secrete any will, codicil or other testamentary instru-

¹*Morrison v. State*, 5 Ohio, 438. In this case the declarations of one Driskell, made in the presence and hearing of Morrison, that he had stolen a horse, were admitted in evidence against Morrison for concealing Driskell, a horse thief. The court say (p. 440,) the court admitted the declarations of one not a party to the record, nor a confederate, to sustain the material allegation that said third party was a horse thief in general terms, and that, too, without any proof that a horse had in fact been stolen by or from any person known or unknown. Such declarations for such a purpose we think clearly incompetent. See *Daniel v. Patten, Moody & R.*, 501.

²*Dodge v. People*, 4 Neb., 231; *Stringfellow v. State*. 26 Miss., 157; *People v. Hennessey*, 15 Wend., 147; *Cooley, Const. Lim.*, 315; 1 *Greenleaf. Ev.*, § 217.

³*Armstrong v. State*, 21 O. S., 357. The court observes (p. 361): "The statute gives a wide discretion to the court as to the degree of punishment to be adjudged on conviction. In this view, it may be regarded as material to the substantial rights of the defendant, that the actual value of the property stolen, or falsely obtained, should be ascertained and returned in the verdict."

ment, whether the same relate to real or personal estate, or both, or shall procure the same to be done, every such person shall be imprisoned in the penitentiary not less than one year nor more than ten years.

It shall not be necessary in any indictment for the offense herein named to allege that such will, codicil or other instrument, is the property of any person, or that the same is of any value.¹

FOR STEALING A WILL, CODICIL, ETC.

That A B, on, etc., in said county, unlawfully and feloniously did steal, take and carry away a certain will of one C D, of both personal and real estate.

FOR DESTROYING OR CONCEALING A WILL FOR A FRAUDULENT PURPOSE.

That A B, on, etc., in said county, unlawfully and feloniously, for the fraudulent purpose of depriving one E F of an interest in the estate of one C D, devised to him by the will of said C D, did destroy and secrete the will of said C D, of both real and personal estate.²

Proof of Loss of Instrument.—The amount of evidence required to prove the loss of an instrument depends somewhat on the circumstances of the case.³ There must have been a diligent search,⁴ and it must appear that the search was made at a place where the instrument was likely to be found,⁵ and

¹ Cr. Code, § 118. The original statute upon this subject appears to be that of 7 and 8 Geo. IV, c. 29, § 22. It is unnecessary in the indictment to allege that the will was of any value or the property of any person. If, however, the indictment is for destroying or concealing the will, it has been held that the fraudulent purpose must be set out. *R. v. Morris*, 9 Car. & P. 89.

² It is probably unnecessary to state that the will relates to both personal and real estate, or either. The allegation is not found in Archbold, Cr. Pl. Still, as the words occur in the statute, in the absence of any adjudications the better course probably is to insert them, if such is the fact.

³ *Waller v. School District*, 22 Conn., 326.

⁴ *Harper v. Scott*, 12 Geo., 125; *Tannis v. St. Cyre*, 21 Ala., 449; *Prichard v. Bailey*, 5 Foster, 152; *Doyle v. Wiley*, 15 Ill., 576.

⁵ *Porter v. Wilson*, 13 Penn. St., 641; *Teall v. Van Wyck*, 10 Barb., 376; *Fletcher v. Jackson*, 23 Vt., 581; *Mariner v. Saunders*, 5 Gilm., 113; *Sellers v. Carpenter*, 33 Me., 485.

must have been recently made. The declarations of an absent or deceased person are not admissible to prove such loss.¹

Petit Larceny, etc.—If any person shall steal any money, or goods and chattels of any kind whatever, of less value than thirty-five dollars, the property of another, or shall steal or maliciously destroy any money, promissory note, bill of exchange, order, draft, receipt, warrant, check or bond, given for the payment of money, or receipt acknowledging the receipt of money, or other property of less value than thirty-five dollars, every person so offending shall make restitution to the party injured in two-fold the value of the property stolen or destroyed, and be fined in any sum not exceeding one hundred dollars, or shall be imprisoned in the county jail for any time not exceeding thirty days. The word "money," in the section, shall be held to include bank bills or notes, United States treasury notes, or other bills, bonds or notes issued by lawful authority and intended to pass and circulate as money.²

Larceny at Common Law when not punished by death on account of some aggravating circumstances, as taking by violence from the person, was divided into grand and petit, according to the value of the article stolen. If the value of the property stolen did not exceed twelve pence the offense was petit larceny, and was punished by whipping, imprisonment and other corporal penalties. If the value exceeded twelve

¹ *Robinson v. Blakely*, 4 Rich., 586; 2 Phil. Ev., 553. In *Betts v. Jackson*, 6 Wend., 184, the chancellor, in an able opinion, reviews the cases relating to lost wills. He observes: "The first case on the question now under consideration, which I have been able to find in those reports, is *Freeman v. Gibbon*, which came before the prerogative court of Canterbury in 1793. 2 Hagg. Ecl. Rep., 398. In that case the testator executed a will on the first of December and died on the tenth of the same month. The will was deposited in a bureau of the decedent, but could not be found at his death, and there being no sufficient evidence to rebut the presumption that it was destroyed by the testator, Sir W. Wynne pronounced for an intestacy. In the case of *Baumgarten v. Pratt*, which came before the court three years afterward, a similar decision was made. *Id.*, 229. In the last case the court says: 'A draft may be pronounced for, but it must be proved either that the will remained entire at the death, or, if destroyed in the lifetime, that it was done without the knowledge and approbation of the testator. The presumption is that it was destroyed by the deceased.'"

² Cr. Code, § 119.

pence the offense was grand larceny, and under the Saxon laws was punishable with death, although the offender was permitted to redeem his life.¹

In the time of Henry I, the right to redeem was taken away and the punishment made capital. Parties, however, where there were no circumstances of aggravation, were admitted for the first offense, at least, to the benefit of clergy.²

Joinder of Petit Larcenies.—Several distinct petit larcenies can not be added together in order to constitute one offense of a higher grade.³ If, however, two persons on the same occasion steal goods between them of sufficient value to constitute grand larceny, both will be guilty of the offense, because the taking was the act of each;⁴ and if the property of several persons be stolen at one time, there being but one transaction, the whole may be considered as one taking, and if of sufficient value will constitute grand larceny.⁵

**FOR STEALING MONEY OF LESS VALUE THAN THIRTY-FIVE
DOLLARS.**

That A B, on, etc., in said county, unlawfully and maliciously did steal, take and carry away certain money, the property of C D, of the amount and value of twenty-five dollars.

**FOR STEALING PROPERTY OF LESS VALUE THAN THIRTY-FIVE
DOLLARS.**

That A B, on, etc., in said county, unlawfully and maliciously did steal, take and carry away a certain promissory note, given for the payment of money, to wit, for the sum of — dollars, and of the value of — dollars, the property of C D.

¹ 3 Chitty, Cr. L., 925.

² 3 Chitty, Cr. L., 923.

³ 1 Leach, 294; 1 Hale, 531. "But if the goods be stolen at several times from several persons, and each a part under value, as from A four pence, from B six pence, from C ten pence, these are several petit larcenies, and though contained in the same indictment make not grand larceny."

⁴ 1 Hale, P. C., 530; 3 Chitty, Cr. L., 924.

⁵ Id. "If at the same time he steals the goods of A of the value of six pence, goods of B of the value of six pence, and goods of C of the value of six pence,

FOR MALICIOUSLY DESTROYING PROPERTY OF LESS VALUE
THAN THIRTY-FIVE DOLLARS.

That A B, on, etc., in said county, unlawfully and maliciously did destroy a certain promissory note given for the payment of money, to wit, — dollars, and of the value of — dollars, the property of C D.

FOR DESTROYING A RECEIPT.

That A B, on, etc., in said county, unlawfully and maliciously did destroy a certain receipt acknowledging the receipt of money, to wit, — dollars, [or the receipt of certain property] to wit (*describe it*) of the value of — dollars, the property of C D.

Both grand and petit larcenies were felonies at common law, but petit larceny was never punished with death. Under the statute petit larceny is not a felony, but a misdemeanor, and the word "felonious" may be omitted from the indictment. Its retention will not affect the validity of the indictment, however.

Concealing Stolen Property.—If any person shall conceal any stolen money, goods or chattels, of any kind whatever, of less value than thirty-five dollars, or shall conceal any bank bill or bills, promissory note or notes, bill of exchange, order, warrant, draft, check or bond, or any accountable receipt for money given for the payment or acknowledgment of any sum under thirty-five dollars, the person so concealing, knowing the same to have been stolen, shall be fined for every offense in any sum not exceeding one hundred dollars, or shall be imprisoned in the county jail not exceeding thirty days, either or both, at the discretion of the court.¹

FOR CONCEALING STOLEN MONEY OF LESS VALUE THAN THIRTY-
FIVE DOLLARS.

That A B, on, etc., in said county, unlawfully and maliciously did conceal certain money, the property of C D, of the amount and value of thirty

being, perchance, in one bundle, or upon a table, or in one shop, this is grand larceny, because it was one entire felony done at the same time, though the persons had several properties, and therefore, if in one indictment, they make grand larceny." 1 Hale, P. C., 530.

¹ Cr. Code, § 120.

dollars, lately before stolen, taken and carried away, he, the said A B, then and there well knowing the same to have been stolen, taken and carried away.

FOR CONCEALMENT OF A STOLEN ACCOUNTABLE RECEIPT.

That A B, on, etc., in said county, unlawfully and maliciously did conceal a certain accountable receipt, for money given for the payment of the sum of — dollars and of the value of — dollars, the property of C D, lately before stolen, taken and carried away, he, the said A B, then and there well knowing the same to have been stolen, taken and carried away.

CHAPTER XXXI.

THE PERVERSION OF PUBLIC JUSTICE.

Perjury.—If any person, having taken a lawful oath, or made lawful affirmation in any judicial proceeding, or in any matter where by law an oath or affirmation is required, shall, upon such oath or affirmation, willfully and corruptly depose, affirm or declare any matter to be fact, knowing the same to be false, or shall in any manner deny any matter to be fact, knowing the same to be true, every person so offending shall be deemed guilty of perjury, and shall be imprisoned in the penitentiary not more than fourteen years nor less than one year.¹

Perjury at Common Law is defined to be a willful false oath, by one who, being lawfully required to depose the truth in a judicial proceeding, swears absolutely in a matter material to the point at issue, whether he believed it or not.² In order to constitute perjury, therefore, the oath must be false, the intention willful, the party lawfully sworn, the proceedings judicial—that is, where an oath or affirmation is required, the assertion absolute, and the falsehood material to the matter in issue.³ The definition given by Blackstone, which will be noticed presently, is more accurate than that of Chitty and Hawkins, and shows that the statute has not materially changed the common law.

First. The Oath must be False.—That is, the party must willfully and corruptly depose, affirm or declare any fact to be true which he knows to be false, or shall in the same manner deny any matter to be fact, knowing the same to be true.

¹ Cr. Code, § 155.

² Hawks., b. 1, c. 69, § 1; 2 Chitty, Cr. L., 302.

³ 2 Chitty, Cr. L., 302.

Blackstone, in copying the definition of Sir Edward Coke, says, "Perjury is a crime committed when a *lawful* oath is administered in some *judicial* proceeding, to a person who swears *willfully, absolutely* and falsely in a matter *material* to the issue or point in question."¹ He also says the perjury must be corrupt; that is, committed *malo animo*, willful, positive and absolute, not upon surprise or the like; it also must be in some point material to the question in dispute, for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in voluntary extra judicial oaths.²

An indictment for perjury under the statute is insufficient which does not allege substantially, in the language of the act, that the accused willfully and corruptly did depose, affirm or declare matter to be fact knowing the same to be false, or denied matter to be fact knowing the same to be true.³ The act of willfully swearing to what the party knows to be false and untrue constitutes the offense. Where the charge in the indictment was that the accused, being a wicked and evil person, and unlawfully and unjustly contriving to injure one, etc., did depose, etc., and of his wicked and corrupt mind did commit willful and corrupt perjury, it is not sufficient, there being no allegation that the accused willfully and corruptly swore falsely.⁴ Where the charge was that the accused did depose and give evidence to the grand jury in substance and to the effect following (setting out the substance of his testimony), which said evidence was willfully false and corrupt, for in

¹ 4 Bla. Com., 137.

² 4 Bla. Com., 138. There is great force in his remarks in reference to extra judicial oaths: "The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath; or before some magistrate or proper officer invested with a similar authority, in some proceedings relative to a civil suit or criminal prosecution; for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them; for which reason it is much questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extra judicial matter, as is now too frequent upon every psty occasion." 4 Bla. Com., 137.

³ State v. Morse, 1 Greene (Ia.), 503; 4 Bacon's Abr., 328; Rex v. Young, 1 Russell, 391; U. S. v. Keen, 5 Mason, 453; Gatewood v. State, 4 Ohio, 386.

⁴ State v. Carland, 5 Dev., 114; U. S. v. Babcock, 4 McLean, 114.

truth (denying the truth of the statements sworn to) and alleging that in the manner and form aforesaid, the defendant did commit willful and corrupt perjury, was held insufficient.¹

The False Oath Must Have Been Willfully Made, for, as stated by Blackstone, if one swear falsely from surprise or inadvertence, or mistake, not intending to state an untruth, it is not perjury.² At common law, where the offense was charged as having been committed "falsely, maliciously, wickedly and corruptly," it was held sufficient;³ but the correctness of that decision may well be questioned. The common law authorities generally agree that no oath will amount to perjury unless it be sworn absolutely and directly; and that therefore he who swears to a thing according to his belief or as he remembers can not be found guilty of that offense.⁴ A few cases may be found in which it has been held that a person may be convicted for swearing to the best of his knowledge or belief.⁵

Oath According to the Party's Belief.—While in the cases cited it was held that perjury would be predicated upon an oath to the best of the party's belief, yet such decisions can not be sustained. A party is permitted to testify to facts as they are remembered by him. If he states that he is testifying as he recollects the facts his words do not have the force and effect of direct and positive testimony. They may not be intended to have that effect. So if one swears that he believes the facts stated to be true, such an oath would rarely be admissible as testimony, as ordinarily the party's belief would not be competent, and is employed solely in the verification of pleadings, etc. The testimony, to show that a party did not believe the facts sworn to by him, can not, from the nature of the case, reach that degree of certainty that would justify a court in sustaining a conviction. If it is said that persons who evidently have sworn falsely will thereby escape punishment, the answer is that it is impossible to know the thoughts and

¹ Thomas v. Com., 2 Robinson, 795.

² 4 Bla. Com., 137; 2 Hawk. C. 60, § 2.

³ R. v. Cox, 1 Leach, 71.

⁴ 1 Hawkins, C. 60, § 7.

⁵ Id., note; Com. v. Cornish, 6 Binney, 249.

feelings of another, and that an attempt to establish stringent rules in that regard would put the innocent in danger and have the effect to impede the administration of justice by deterring timid witnesses from testifying freely in cases in which they are called. Such witnesses, in many cases, from a desire to tell nothing but the truth, do not testify to the full extent of their knowledge, in other words, without great care in the examination, will withhold some of the facts, thus suppressing some of the evidence from a desire to feel fully justified by the facts in all that they may say. Such witnesses—comprising probably a very large proportion of those timid, conscientious persons who seldom appear in court, should be encouraged to give their testimony in full.

2. **The Party must be Lawfully Sworn.**—The party administering the oath must be lawfully authorized in the premises to administer the oath in question, and it must be in some proceeding where an oath is required by law.

Oath, how Administered.—At common law it was not material in what form the oath was administered, provided the party sworn professed to regard the form employed as binding on his conscience.¹ The oath usually administered is called a corporal oath, because the person who takes it lays his hand on some part of the Scriptures, usually the New Testament,² which supposes the person to be a Christian.³

¹ *Com. v. Knight*, 12 Mass., 274; *Thomas v. Com.*, 2 Rob., 795; *Com. v. Cook*, 1 Id., 729; *Campbell v. People*, 8 Wend., 636; *State v. Witherow*, 3 Murph., 153; *State v. Whisenhurst*, 2 Hawks., 458.

² 1 Chitty, Cr. L., 616; 3 Inst., 165.

³ 1 Chitty, Cr. L., 616; 2 Hale, 279. "I take it that although the regular oath, as is allowed by the laws of England, is *tactis sacrosanctis Die evangeliiis*, which supposeth a man to be a Christian, yet, in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by Jewish brokers, the testimony of a Jew *tacto libro legis Mosaiicæ* is not to be rejected, and is used, as I have been informed, among all nations; yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, * * and it would be a very hard case if a murder committed here in England, in the presence only of a Turk or a Jew, that owns not the Christian religion, should be dispunishable because such an oath should not be taken, when the witness holds binding and can not swear otherwise and possibly might think himself under no obligation if sworn according to the usual style of England." Hale, P. C., 279.

Coke says: "An oath is an affirmation or denial, by any Christian, of any thing lawful and honest, before one or more that have lawful authority to give the same for the advancement of truth and right, calling Almighty God to witness that his testimony is true. And it is two-fold, either *asser-torium ut de præterito siant testes, etc., sui promissorum de futuro siant judices justiciarum officiarum, etc.* So, as an oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same can not be ministered to any unless the same be allowed by the common law or some act of parliament, neither can any allowed by the common law or by act of parliament be altered, but by an act of parliament."¹

The form used at the assizes or sessions at common law was for the clerk of the arraigns or of the peace to hand to the witness the book and then say to him, "The evidence you shall give, between our sovereign lord the king and the prisoner at the bar, shall be the truth, the whole truth and nothing but the truth, so help you God," upon which the witness was required to kiss the book.² A Mahometan, however, was sworn upon the Koran,³ a Jew upon the Pentateuch,⁴ and a covenanter by holding up his hand without kissing the book.⁵

The origin of swearing on the Bible or Gospel and kissing the book may be traced to the Roman law, and the kissing the book is said to be in imitation of the priest kissing the ritual as a sign of reverence before reading to the people.⁶

The Uplifted Hand.—The oldest form of oath of which we have any record is by the uplifted hand,⁷ and this form, which

¹ 3 Inst., 165.

² 1 Chitty, Cr. L., 616.

³ Morgan's case, 1 Leach, C. C., 64; Cowp., 390; Fachina v. Sabine, 2 Stra., 1104.

⁴ 1 Atk., 40-42; Willis, 543; Cowp., 389.

⁵ Gould, J., in Melchone's case, 1 Leach, C. C., 459; Walker's case, Id., 498; Mee v. Reid, 1 Peake, N. P., C. 22.

⁶ 2 Bouvier, Law Dict., 248.

⁷ "And Abram said to the King of Sodom, I have lifted up my hand unto the Lord, the most high God, the possessor of heaven and earth, that I will not take from thee a thread, even to a shoelatchet, and that I will not take

is supposed to be an appeal to God of the truth of what the witness is about to say, is equally as solemn as any other and possesses the merit of simplicity. Any form of administering the oath authorized by the common law, where there are no statutory provisions governing the matter, makes the oath valid and renders the person swearing willfully and falsely, liable to the penalties of perjury.

A State Court has no jurisdiction to punish a violation of a law of the United States, therefore, where a prosecution for perjury was instituted against a party in a state court, for alleged perjury in swearing falsely before a United States land officer in a proceeding concerning the public lands, it was held that the court had no jurisdiction.¹ If, however, the same act violates the laws of both governments, the courts of either (perhaps both) will have authority to punish.

Not a False Oath.—Where a mortgage was made for \$5,000, but the actual amount of the loan was \$4,400, \$600 having been withheld in pursuance of an agreement as a bonus for the loan, an affidavit of the mortgagee of the truth and good faith of the consideration, as set forth in the mortgage, was held not to be perjury.² The decision apparently is placed upon the ground that there actually was a loan of \$5,000, the \$600 being paid as a premium. If a bankrupt, unacquainted with the requirements of the law, makes a full statement of his case to his attorney, and is advised that certain articles of property are exempt and need not be placed in the schedule, and therefore he omits them, he is not guilty of perjury.³ Where the accused was sworn before a justice of the peace who had no jurisdiction of the case before him, he can not be convicted of perjury on such oath.⁴ A voluntary affidavit made before a justice of the peace, not in an action pending, or where an oath was required, can not be made the foundation of a charge

anything that is thine, lest thou should say I have made Abram rich." Gen. c. xiv., 22, 23.

¹ *People v. Kelly*, 38 Cal., 145.

² *Smith v. Myers*, 41 Md., 421.

³ *U. S. v. Conner*, 3 McLean, 573.

⁴ *State v. Furlong*, 26 Me., 69.

of perjury.¹ Perjury can not be assigned on an answer in chancery unless the bill call for the answer under oath.² Where a party in custody made oath for the purpose of procuring a writ of habeas corpus that "he was forced into trial late Saturday night, without giving him an opportunity to produce his witnesses," it was held that this statement, though false, was not sufficient to authorize a conviction for perjury.³

Where the Oath is False.—An application for a marriage license, made to the court having authority to grant the same, may subject the applicant to the penalties of perjury, if he swear falsely before said tribunal touching the legality of the intended marriage.⁴

False Swearing in a Deposition of a witness taken in the state, to be used in a cause pending in a court of another state which has jurisdiction, may be sufficient to authorize a conviction for perjury.⁵ Where there was a compromise of an assault and battery, and the prosecuting witness afterward swore in a judicial proceeding that he had not agreed to a settlement with the defendant, and expressed himself satisfied, it was held that perjury could be committed by such false oath.⁶ The failure to enter a plea to a criminal information does not render a subsequent trial so far void that false swearing thereon is not perjury.⁷ An incompetent witness, if sworn, and he testifies falsely, may be convicted of perjury.⁸ In such case, if the court have jurisdiction of the subject-matter, the admission of improper testimony is merely an error.⁹

¹ *Shaffer v. Kintzer*, 1 Binney, 542; *Muir v. State*, 8 Blackf., 154; *Com. v. Knight*, 12 Mass., 274; *State v. Stephenson*, 4 McCord, 165; *Pegram v. Styron*, 1 Bailey, 595.

² *Silver v. State*, 17 Ohio, 365.

³ *White v. State*, 1 S. & M., 149.

⁴ *Call v. State*, 20 O. S., 330. The court say (p. 333): "The application was a matter * * depending before the court, and the court certainly had power to administer an oath."

⁵ *Stewart v. State*, 22 O. S., 477.

⁶ *State v. Smith*, Tappan R., 261.

⁷ *State v. Lewis*, 10 Kas., 157.

⁸ *Montgomery v. State*, 10 Ohio, 220.

⁹ In *Montgomery v. State* it is said: "It is of no consequence whether the party be competent to testify or not, without such plea being filed, or

The Court must have Jurisdiction.—That is, the oath must be taken in a judicial proceeding, or in any other matter where an oath is required by law.¹ If, therefore, an inferior court should entertain jurisdiction in some case where it was not conferred by law, as if an action for slander, or to transfer the title to real estate, was commenced before a justice of the peace, a false oath, in such a proceeding, could not be punished as perjury, for the reason that the entire proceedings were void. So, if certain persons authorized to administer oaths for certain purposes, as county commissioners or assessors, should administer an oath in a matter in which the law did not authorize them to act, perjury could not be predicated thereon;² and if the clerk of a court should administer an oath to a party, not required by statute or a rule of court, such party is not liable for perjury in case the oath was false.³

It is sufficient, however, if the jurisdiction is *prima facie* within the authority of the officer, and in such case perjury may be assigned on an oath erroneously taken while the proceedings remain unreversed,⁴ but not if the proceedings were void; and an affidavit to an account to be filed before a justice of the peace, is not authorized by law and is void.⁵

All oaths which are taken before those who are in any way intrusted with the administration of justice in respect to any matter regularly before them, may, if false, be assigned for perjury.⁶

Therefore, if a party make a false oath at any stage of the proceedings in a case, although it may not influence the final judgment, but merely some intermediate step to be taken, as

the oath embodied in an affidavit. It is well settled, where the court has jurisdiction over the subject-matter, if a witness totally incompetent be admitted he may commit perjury."

¹ Buxton v. Gouch, 3 Salk., 269.

² 1 Hawk. P. C., c. 69, § 4.

³ U. S. v. Babcock, 4 McLean, 113.

⁴ People v. Phelps, 5 Wend., 9; State v. Hascall, 6 N. H., 352; State v. Clark, 2 Tyler, 282; Van Steenberg v. Kortz, 10 Johns., 167. In the last case cited, Spencer, J., dissented, upon the ground that if the oaths were not judicially administered the false swearing could not be perjury.

⁵ Waggoner v. Richmond, Wright, 173.

⁶ 1 Hawk., c. 69, § 3.

if one justifying as bail for another should, in order to be accepted as bail, swear that he owned property not possessed by him.¹ This rule was extended in Massachusetts, where one on his examination to be accepted as bail swore that he owned certain parcels of land, some of which it seemed he did not own, although the value of what he did possess was sufficient for his acceptance as bail.² So if a person swears falsely before a justice of the peace, to compel another to find sureties to keep the peace;³ So if a false oath is taken to obtain a marriage license;⁴ and a person taking a false oath as a voter at an election is liable;⁵ but no oath made in a matter of private concern is indictable, nor can any criminal proceeding be maintained for the violation of an oath, however solemnly entered into, to perform duties in the future.⁶

The False Oath must be in Some Material Matter, or it will not be perjury. If it is immaterial it can not by any means induce the jury to render a verdict for or against either party; hence it can not injure the party against whom the verdict is rendered.⁷ Thus, if A swear that he saw B steal a deed of a blue color when in fact it was not of a blue color, the essential fact being the stealing of the deed, the color, unless a question arose as to the identity, would not be material. But testimony tending to affect the amount of recovery, or to influence the judgment of the court, is material.⁸

¹ Cro. Car., 146.

² Com. v. Hatfield, 107 Mass., 227. The correctness of the decision of the Massachusetts court may well be doubted, and is contrary to the rule as stated by Hawkins, 1 P. C., c. 29, § 8.

³ 1 Hawk., c. 69, § 3; 1 Camp., 404.

⁴ 1 Leach, 63; Call v. State, 20 O. S., 330; Warwick v. State, 25 Id., 21.

⁵ 6 East, 323; 2 Campb., 135; Campbell v. People, 8 Wend., 636.

⁶ 3 Inst., 166.

⁷ King v. Gripe, 1 Ld. Raym., 256; 3 Inst., 164; 11 Co., 13.

⁸ Beg. v. Rhodes, 2 Ld. Raym., 887; State v. Hathaway, 2 Nott & McC., 118. Hawkins makes but little distinction between cases where the evidence was material and where it was not. He seems to have been unable, like Hale and Blackstone, to take a comprehensive view of the law, or to make proper deductions from the rules stated by himself. To a limited extent he has been followed by the courts and a few cases of technical perjury may be found. The courts, however, at the present time, generally, as it is clearly their duty, hold that to constitute perjury the false oath must be willful and deliberate and the testimony material.

FOR PERJURY BEFORE A COURT OF GENERAL JURISDICTION.

That A B, on, etc., in said county, in a certain petition to foreclose a mortgage upon real estate in the district court of Douglas county, wherein A B was plaintiff and C D defendant, the said A B did then and there appear in said cause in said court while the same was open and transacting business, and being then and there duly sworn¹ by the clerk of said court, as required by law,² did then and there, in a matter material to said cause, willfully, corruptly and feloniously depose certain matters in regard to said petition and cause as follows, to wit: that at the time of the execution and delivery of the mortgage in question by said C D, he, the said A B, had loaned to said C D, as the consideration for said mortgage, the sum of — dollars, as stated in said mortgage; whereas in truth and in fact said A B had loaned to said C D as consideration therefor the sum of — dollars and no more, the sum of — dollars being added to said mortgage as usury, the said A B then and there well knowing that the said matters, so as aforesaid testified to, deposed, and declared by him to be true, were then and there false.

FOR FALSE TESTIMONY BEFORE AN OFFICER APPOINTED BY ANOTHER STATE.³

That E F was a commissioner, duly appointed, authorized and empowered by the state of — by virtue of an act of the legislature entitled "An act (*giving title*) approved — 18—," to take depositions in — county, in the state of —, to be returned and used in the courts of said state; that A B, on, etc., in said county, appeared before said E F, commissioner, and was by him, said E F, duly sworn to testify to the truth, the whole truth, and nothing but the truth, in a certain action then pending in the — court of — county, in the state of —, wherein G H was plaintiff and S T defendant, and that said A B being duly sworn as aforesaid, in a matter material to said cause, unlawfully, willfully, corruptly and feloniously did depose and declare certain matters then and there to be fact, to wit: that S was a

¹ It is enough to allege that the defendant was "duly sworn" without setting out the manner in which the oath was administered. *Dodge v. State*, 4 Zab., 455; *State v. Farrow*, 10 Rich., 165; *Respublica v. Newell*, 3 Yeates, 407; *Rex v. McCarther*, Peake, 155; *Tuttle v. People*, 36 N. Y., 431; *Com. v. Warden*, 11 Met., 406.

² The indictment must allege by whom the oath was administered, so that it may appear that he was duly authorized. *State v. Ellison*, 8 Blackf., 225; *Kerr v. People*, 42 Ill., 307.

³ *Stewart v. State*, 22 O. S., 477. In this case Stewart sought a divorce in Indiana from his wife, and one Saxton swore in a deposition that Stewart had been a resident of LaGrange county, Indiana, for one year prior to filing his petition. Chitty says it has been doubted whether at common law perjury lies on a deposition *de bene esse*. 2 Chitty, 304.

resident of L county in the state of — and had been such resident for one year last past before filing his petition for a divorce in the — court of L county, in said state; whereas in truth and in fact said S had not been a resident of L county in the state of —, and had not been such resident for one year prior to filing said petition, he, the said A B, then and there well knowing the matters so as aforesaid by him testified, deposed and declared as true, to be false.

FOR PERJURY IN ANSWERING INTERROGATORIES IN CASE OF CONTEMPT.

In a certain action pending in the — court of — county, wherein A B was plaintiff and one C D was defendant, he, the said A B, was present in said court, on the — day of —, etc., while said court was open and transacting business, being duly charged with a contempt thereof [in violating a certain injunction granted in said cause, restraining him from, etc.], and said A B, then and there being duly sworn by the clerk of said court, to make true answers to all such interrogatories as should be exhibited against him in said cause. The first interrogatory and the answer thereto, are to the tenor and effect following, that is to say: first interrogatory: Did you cut down, or cause to be cut down, certain trees on the lands claimed by C D, to wit: the (*description*) which you were restrained from cutting down or injuring, by the order of this court? Answer. I did not; the same being material matter. Whereas, in truth and in fact said A B did cut down and cause to be cut down said trees on said land, claimed by C D as aforesaid, he, the said A B, then and there well knowing the said matters, so willfully and corruptly deposed and declared by him to be true, then and there to be false, and he did thereby then and there falsely, willfully and corruptly commit willful and corrupt perjury.

Innuendoes.—Where the meaning of some portion of the sworn statement is not apparent, and it is necessary to explain it, in order to show that, as intended, the statement is false, this is done as in libel cases by innuendoes. (See Libel.)

FOR PERJURY IN GIVING EVIDENCE IN A TRIAL FOR PERJURY.

That on the — day of —, etc., in the — court of said county, in a certain issue in due manner joined in said court in said county, wherein the state of — was plaintiff and C D defendant, in which said C D was charged with willful and corrupt perjury, came on to be tried to a jury duly impaneled and sworn, and thereupon one E F was produced as a witness on behalf of the [state against said C D], and was then and there duly sworn by the clerk of said court to testify the truth, the whole truth, and nothing but the truth in the said cause, and the said E F being so sworn, he then and there, in a matter material to said cause, testified that in a certain proceeding had

in — court of said county, on the — day of —, in a certain action then pending in said court, of which it had jurisdiction, wherein C D was plaintiff and E F defendant, for the recovery of the sum of — dollars, said C D did falsely, knowingly, willfully and corruptly testify as follows: (*state*) whereas in truth and in fact said C D did not so testify in said cause, but the said E F did then and there willfully, knowingly and corruptly depose and declare said matters so as aforesaid to be true, he, the said E F, then and there well knowing the same to be false.

FOR PERJURY IN MAKING AN AFFIDAVIT WITH INNUENDOES.

That A B, on, etc., in said county, came in his own proper person before one E F, a justice of the peace in and for — county, and then and there was duly sworn by said justice in a certain complaint in writing [information or affidavit], did falsely, willfully, maliciously and corruptly depose and declare under oath in matter material in said complaint as follows, that is to say, that on the — day of —, in the year of our Lord one thousand eight hundred, and — in said county (*meaning in — county, —*), one sorrel horse, the property of said A B, of the value of fifty dollars, was feloniously stolen, taken and carried away, and that C D was the guilty party (*meaning that said C D had feloniously stolen and taken away said horse*), whereas in truth and in fact said C D did not on the day aforesaid, or at any other time, steal, take or dispose of said sorrel horse, he, the said A B, then and there falsely, willfully, maliciously and corruptly well knowing the matters so as aforesaid deposed and declared by him to be true, then and there to be false.¹

FOR PERJURY IN TESTIFYING FALSELY IN A DEPOSITION.

That E F, on, etc., was a notary public, duly appointed, commissioned and qualified, in and for — county, and duly authorized and empowered by law to take depositions in said county to be used in the courts of —; that one A B, on the day and year aforesaid, in said county, did appear before said E F, notary public as aforesaid, and was then and there duly sworn by said notary public to testify the truth, the whole truth, and nothing but the truth, in a certain cause pending before the — court of — county, in the state of —, wherein A B was plaintiff and C D defendant; that said A B, being

¹ Perjury may be assigned on false swearing to the fact in issue in an action; to any circumstance which tends to prove or disprove such fact; to any circumstance or matter which tends to corroborate or strengthen the testimony upon such issue, or which legitimately affects the credit of the witnesses giving such testimony. *Delcher v. State*, 39 O. S., 130. Where it is apparent on the face of the indictment that the testimony claimed to be false was material, there would seem to be no necessity for an allegation to that effect.

then and there so sworn as aforesaid, in a matter material¹ to said cause, did falsely, willfully and corruptly depose, declare and swear certain matters then and there to be facts, to wit: that he, the said A B, met Col. M. (meaning John F. M., the husband of Mary M.) in September, 1880, in D. L. city, D. L. county, Montana, during two or three days; that he, the said A B, met him, the said Col. M., several times, and that they, the said A B and Col. M., conversed together and had mutual recognition; whereas, in truth and in fact, the said A B did not meet the said Col. M. in September, 1880, at D. L. city, Montana, during two or three days; and said A B did not then and there meet the said Col. M., several times, and they, the said Col. M., and said A B did not have mutual recognition, he, the said A B, then and there well knowing that said matters, so as aforesaid by him deposed and declared to be true, then and there to be false and untrue."²

FOR PERJURY ON A TRIAL FOR GRAND LARCENY AT COMMON LAW.

That at the general quarter sessions of the peace, etc., holden at —, etc., in the county of —, before — justice, etc., to hear and determine divers felonies, trespasses and other misdemeanors committed in said county, one C D was in due form of law tried upon an indictment then and there depending against him for felony, to wit, grand larceny, and that A B, late of, etc., laborer, did then and there take his corporal oath before said justice, upon the holy gospel of God, to speak the truth, the whole truth and nothing but the truth, concerning the matter then depending, the said justice then and there having competent power and authority to administer the oath to the said A B; and it then and there became and was a material question, upon the trial of the said C D, whether he, the said A B, did or did not on, etc., for and on behalf of the said C D, offer to one E F, the prosecutor of said indictment, the sum of — to make up the prosecution, and that said A B, being duly sworn as aforesaid, did then and there falsely, corruptly, willfully and maliciously say, depose and give in evidence before said justice, that he, the said A B, did not on the — day of — for and on behalf of said C D, offer to give the sum of — to the said E F, to make up the prosecution for the said felony with which the said C D was so charged as aforesaid; whereas, in truth and in fact, the said A B did, on the said day at —, aforesaid, offer on behalf of the said C D to give the sum of — to the said E F to make up the prosecution for said felony. And so the jurors aforesaid now here sworn and charged to inquire, etc., for the body of the county of —, upon their oath aforesaid do say that the said A B, at the general quarter sessions of the peace, so holden, at — as afore-

¹ It is sufficient to charge generally that the false testimony was in respect to a matter material in the action in which it was given. *Dilcher v. State*, 39 O. S., 130.

² The above is the indictment in *Dilcher v. State*, 39 O. S., 130; it was held to be sufficient.

said, etc., in the county aforesaid, before the said justice, did, in manner and form aforesaid, commit willful and corrupt perjury.¹

Evidence—Exact Words not Necessary.—In proving what the accused swore to, it is not necessary to give his exact words, nor that the person testifying to what was sworn to took notes of the testimony; it being considered sufficient to prove substantially what was said upon the matter claimed to be false.² The same rule would seem to apply where a witness testifies to what another testified to at a previous time, as is applied to confessions, viz., from the liability to misunderstand the witness, to place a wrong construction upon his language, testimony as to what a witness may have sworn to is to be received with caution; and particularly is this true if considerable time has elapsed since the testimony was given. The imperfections of memory are such that no man should be condemned on the oral statement of two witnesses, who testify from memory to the substance of what a party may have said six months or a year before, unless it is upon a matter firmly fixed in the memory of the witnesses, and upon which it is apparent they are not mistaken.³

Materiality of the Matter.—It must appear that the testimony claimed to be false was either directly pertinent to the issue or point in question, or tended to increase or diminish the damages, or to influence the court or jury in the determina-

¹ The above is the form in 2 Chitty, Cr. L., 463. As heretofore stated a party can not be compelled to answer a privileged question, but if he does answer he must do so truthfully. The forms given in the old precedents require a formal conclusion substantially as follows: "And so the jurors aforesaid, upon their oaths aforesaid, do say, etc., that the defendant did commit willful and corrupt perjury," etc.; 2 Leach, 860; but even at common law this conclusion was considered immaterial. 2 Chitty, Cr. L., 312; 2 Leach, 856. In *Henderson v. People*, 7 N. E. Rep., 677, recently decided by the supreme court of Illinois, it was held that the ancient conclusion to an indictment for perjury, while appropriate, was not material.

² *Rex v. Munton*, 3 C. & P., 498; 2 Russ. on Cr., 658.

³ In some of the cases it has been held sufficient to prove that the prisoner swore falsely as to his impression, best recollection, or best knowledge and belief. In such cases, however, it is said it is not only necessary to prove that the witnesses' statement was untrue, but that he knew it to be so. 3 Greenleaf, Ev., § 194. The difficulty of proving a charge of that kind beyond a reasonable doubt, ordinarily will preclude a prosecution for such offense.

tion of the case.¹ The degree of materiality, however, is said not to be important; for if it tend to prove the issue or point in question it will constitute the offense of knowingly testifying falsely, although the evidence be but circumstantial.² But falsehood in the statement of collateral matters, not of substance, is not criminal, unless it tend to give force and weight to other testimony or circumstances.³ Therefore it is said that every question on the cross-examination of a witness is material.⁴ But this may be questioned. So it was said under the former chancery practice that matters not responsive to the bill might be material, but not if the contract for which a discovery was sought was void by the statute of frauds.⁵

The materiality of the testimony claimed to be false is a question of fact for the jury to consider.⁶ And proof that the testimony complained of was admitted on the trial is not sufficient, on the trial of an indictment for perjury, to warrant the jury to infer from such admission that the testimony was material.⁷

Number of Witnesses.—It was formerly held that two witnesses were indispensable in prosecutions for perjury to warrant a conviction, as otherwise there would be only oath against oath. This rule, however, has been relaxed, and a conviction may now be had upon legal evidence of a nature and amount to outweigh that upon which perjury is assigned. The oath of the opposing witness to establish perjury, must be corroborated by other independent circumstances sufficient to establish the charge. The same effect is to be given to the

¹ Russ. on Cr., 600; 1 Hawk. P. C., c. 29, § 8; Com. v. Parker, 2 Cush., 212; Com. v. Knight, 12 Mass., 273; Rex v. Pendergrest, Jebb, C. C., 64; 3 Greenleaf, Ev., § 195.

² Rex v. Grieppe, 1 Ld. Raym., 258; Reg. v. Rhodes, 2 Id., 889; State v. Hathaway, 2 Nott & McC., 118; Com. v. Pollard, 12 Met., 225; 3 Greenleaf, Ev., § 195.

³ 3 Greenleaf, Ev., § 195, and cases cited.

⁴ State v. Strat, 1 Murph., 124; R. v. Overton, 2 Moody, C. C., 263; R. v. Lavey, 3 C. & R., 26.

⁵ R. v. Yeates, Car. & Marsh, 132; R. v. Benesech, 2 Peake's case, 93; Rex v. Danston, Ry. & M., 109.

⁶ Reg. v. Lowry, C. & R., 26.

⁷ Com. v. Pollard, 12 Met., 225.

oath of the accused as though he were a credible witness, and to justify a conviction for perjury there must at least be the evidence of one witness, and strong and clear evidence, and more numerous than the evidence given for the defendant.¹

Corroborative Evidence. in cases where more than one witness is required, must not only show that the testimony of the accused was probably false, but it must reach that degree of certainty that excludes reasonable doubt. There is no reason why the same certainty of guilt should not be required in perjury as in other crimes. If therefore the oath of the accused is met by a single oath, the corroborating circumstances ought at least to equal the testimony of a single witness, the lowest quantity of testimony it has been said upon which a human being can be found guilty.

Circumstances without a Witness, where they exist in documentary or written testimony, may be sufficient, unaided by oral proof, except to establish their authenticity. Therefore a living witness of the *corpus delicti* may be dispensed with, and documentary or written evidence may be relied on to convict of perjury, first, where the falsity of the matters sworn to by the accused may be proved by documentary or written evidence springing from himself, together with circumstances showing the corrupt intent; second, where the matter sworn to is contradicted by a public record which was well known to the accused when he gave his testimony; and third, where the accused testified to matter contrary to what he must necessarily have known to be true. His own letters relating to the facts sworn to, or any other competent written testimony, may be shown for the purpose of proving his knowledge.²

¹ 1 Greenleaf, Ev. § 257; *Queen v. Muscot*, 10 Mod., 194. "At first two witnesses were required to convict in a case of perjury both swearing directly adversely from the defendant's oath. Contemporaneously with this requisition the larger number of witnesses on one side or the other prevailed; then a single witness corroborated by other witnesses swearing to circumstances bearing directly upon the imputed *corpus delicti* of a defendant was deemed sufficient." Wayne, J., in *U. S. v. Wood*, 14 Peters. 440-441. See *Crusen v. State*, 10 O. S., 258, where it was held that in addition to the testimony of one reliable witness the corroborating testimony need not be sufficient to equal the testimony of another.

² 1 Greenleaf, Ev., § 258.

Two Opposing Statements of the Accused.—Where the only evidence in support of the charge of perjury consists of two opposing statements of the accused and nothing more, he can not be convicted. If one only of such statements was made under oath, that will be considered the true version and the other an error or falsehood; and if both the contradictory statements were made under oath, still without additional evidence there is nothing to show which is true and which false.¹ There are cases, no doubt, where a witness testifying to his best knowledge and belief might honestly swear to a particular fact, and afterward from other circumstances find that he was mistaken, and if subsequently testifying upon that subject swear the reverse of what he did in his former testimony; and this, too, without swearing falsely either time.² Contradictory statements, however, when made under oath, with other circumstances showing the known falsity of one of the statements by the deponent when it was made, may be sufficient to warrant a conviction. In such case the prosecutor must establish which is the true one and which the false, and assign the perjury on the false.³

Willfully False.—In proof that the testimony of the accused was willfully false, evidence may be given showing his animosity and malice toward the party against whom he testified,⁴ and that he had sinister and corrupt motives in giving false testimony.⁵ And if the false testimony given on the direct examination of a witness was afterward retracted on cross-examination, it has been held that a conviction for perjury may be had upon such false testimony, notwithstanding the subsequent retraction.⁶ To justify a conviction in such a case, how-

¹ *Regina v. Hughes*, 1 C. & K., 519; *R. v. Wheatland*, 8 C. & P., 258; *R. v. Champney*, 2 Lew. 258; 1 Greenleaf, Ev., § 259.

² *Holroyd, J.*, in *Jackson case*, 1 Lewin's Cr. Cas., 270; 1 Greenleaf, Ev., § 259.

³ *Alison's Cr. L.*, 475; 1 Greenleaf, Ev., § 259 and note. While it may be impossible to convict a person, swearing to contradictory statements, of perjury, still the fact should be considered by the jury in weighing his evidence and the degree of credit to be given to it.

⁴ *Rex v. Munton*, 3 C. & P., 498.

⁵ *State v. Hascall*, 6 N. H., 352.

⁶ *Martin v. Miller*, 4 Mo., 47.

ever, it must be clearly shown that the testimony was willfully and corruptly given without any intention, at the time it was given, to modify or retract it; otherwise the rule is, that a general answer may subsequently be explained, and thus avoid the general imputation of perjury.¹ A rash oath may be sufficient to authorize a conviction for perjury,² as where a party having been shot in the night, in a riot, made complaint on oath before a magistrate against a particular individual, as having shot him, and afterward, on the trial, testified to the same facts, upon which testimony perjury was assigned; and upon clear proof that the person charged with the shooting was twenty miles distant from the scene, the alibi was conceded, and the accused placed his defense upon the ground of honest mistake of the person. The court instructed the jury, that if the accused had any reasonable cause for mistaking the person who fired the shot they ought to acquit; but if it was a rash and presumptuous oath, taken without any probable foundation, they could find him guilty, although he might not have been certain of the identity of the person charged with the shooting.³

Evidence in Defense.—It may be shown that the oath was taken before a court or magistrate having no jurisdiction of the cause or matter in dispute, as if an oath was administered by an officer outside of the jurisdiction within which he was required to perform his duties, or the court had no jurisdiction of the subject-matter, or that the testimony was given inadvertently, or by mistake or surprise; for where a witness is not culpable he ought not to be charged criminally.⁴ It may

¹ Roy v. Carr., 1 Sid., 418; 2 Russ. on Cr., 666; Rex v. Jones, 1 Peake Cas., 38; Rex v. Dowlin, Id., 170; Rex v. Rowley, Ry. & M., 299; 3 Greenleaf, Ev., § 199.

² Where an oath is made, "to the best of the *opinion* of the witness," to a statement which the witness had no reasonable grounds to believe, but which fact he did believe to be true, he can not be convicted of perjury for such erroneous opinion. Com. v. Brady, 5 Gray, 78.

³ Com. v. Cornish, 6 Binney, 249; 3 Greenleaf, Ev., § 200.

⁴ Rex v. Melling, 5 Mod., 349; R. v. Muscot, 10 Id., 195; Rex v. Crespiigny, 1 Esp., 280; 3 Greenleaf, Ev., § 201.

also be shown that the testimony was true, or was on a point not material to the issue.¹

The Competency of the Party Injured, as a Witness, to prove the perjury, was denied at common law where it appeared that the result of the trial might probably inure to his advantage in another action, as where he expected the accused to be the only witness or a material witness against him in a future trial.² In the latest common law cases, however, the prosecutor is placed in the same position as any other witness, rejecting him only where he has a direct, certain and immediate interest in the record or is otherwise disqualified.³ And where the accused is a material witness against the prosecutor in a cause still pending, the court in its discretion may suspend the trial of the charge of perjury until after the trial of the civil action.⁴ No doubt this discretion exists under the criminal

¹ *State v. Hattaway*, 2 Nott & McC., 118; *Hinch v. State*, 2 Mo., 158; 3 Greenleaf, Ev., § 201. In *State v. Jackson*, 36 O. S., 282, it was held, that in an arbitration, under the statute, the oath to the witnesses must be administered by a judge or justice of the peace and that perjury can not be assigned on the testimony of a witness in such a case, where the oath was administered by a notary public, notwithstanding the general language of the statute empowering notaries public to administer oaths in all cases required or authorized by law. *Boynton and Johnson, JJ.* dissented.

In *Staigt v. State*, 39 O. S., 496, it was held, that where an application for a marriage license was made to a deputy clerk of the probate court, who was holding without a new appointment during a second term of the judge appointing him, and such deputy administers an oath to the applicant and examines him as to the right of the parties to such license, a prosecution for perjury could not be maintained against such applicant based on such testimony, for the reason that the oath was not administered by lawful authority—not by an officer *de jure*. The opinion contains an interesting review of the cases upon that subject.

² *Rex v. Dalby*, 1 Peake, 12; *Rex v. Hulme*, 7 C. & P., 8; 3 Greenleaf, Ev., § 202; *Rex v. Eden*, 1 Esp., 97.

³ In *Rex v. Hulme*, 7 Con. & P., 8, it was held, in the trial of an indictment for perjury committed by A, on the trial of an action against B and others, B was not rendered incompetent as a witness for the prosecution merely on the ground that he had not paid the debt and costs and had filed a bill in equity, but that if B expects A to be a witness against him in a similar action coming on for trial soon after the indictment, that was such an immediate interest in B as would disqualify him from being a witness.

⁴ 3 Greenleaf, Ev., § 202.

code, and the court, on the application of the accused, may continue the trial of a charge of perjury until after the trial of a civil action in which the parties are interested.¹

Subornation of Perjury.—If any person shall persuade, procure or suborn any other person to commit willful and corrupt perjury, every person so offending shall be imprisoned in the penitentiary not more than ten years nor less than one year.²

Subornation of perjury is defined to be the procuring of another to commit legal perjury, who, in consequence of the persuasion, takes the oath to which he has been incited.³ To complete the offense the false oath must actually be taken.⁴ At common law criminal solicitation to commit perjury although ineffectual, was a misdemeanor and punishable as such.⁵

An Essential Element in the crime of subornation of perjury is the knowledge or belief, on the part of the accused, not only that the witness will swear to what is untrue, but also that he will do so corruptly and knowingly.⁶ This guilty knowledge, on the part of the suborner, is a necessary element in the crime of subornation of perjury, and must therefore be averred in the indictment and proved on the trial. It is not enough to aver and prove that the accused had knowledge of the falsity of the testimony which the suborned witness was to give; he must also know or intend that the witness is to give the testimony corruptly or with a knowledge or belief of its falsity.⁷

Attempt.—In Iowa, Massachusetts, Michigan, Vermont and Wisconsin, and perhaps some other states, the attempt to

¹ "No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility." Cr. Code, § 473.

² Cr. Code, § 156.

³ 2 Bouv. Law Dict., 553.

⁴ Com. v. Douglas, 5 Metc. (Mass), 241.

⁵ Hawk. P. C., c. 69, § 10; 2 Chitty, Cr. L., 481.

⁶ Stewart v. State, 22 U. S., 477.

⁷ Id., 483.

suborn a witness is made a felony by statute, whether it succeed or not.¹

FOR SUBORNATION OF PERJURY.

That in a certain cause depending in the — court of — county, where A B was plaintiff and C D defendant, to recover damages for a breach of warranty of the soundness of a certain horse, before that time sold and delivered by C D to A B, one E F did appear in said court which was then and there open for the transaction of business, and was then and there duly sworn in said cause by the clerk of said court to testify the truth, the whole truth and nothing but the truth, and in a matter material to the issue in said cause did willfully, feloniously and corruptly depose and declare certain matters then and there to be fact, to wit, that he was present when said C D sold and delivered said horse to A B, and that said C D then and there warranted said horse to be sound in every respect; whereas, in truth and in fact, said E F was not present when said C D sold and delivered said horse to said A B, and said C D did not warrant said horse to be sound in every respect, or in any other manner, he, the said E F, then and there well knowing the matters so deposed and declared by him as aforesaid to be true, then and there to be false; and said A B, before the committing of said willful and corrupt perjury, to wit, on, etc., in said county, him, the said E F, willfully, corruptly and feloniously did persuade, procure and suborn to commit said willful and corrupt perjury as aforesaid.

SUBORNATION OF PERJURY AT COMMON LAW; FOR PROCURING THE MOTHER OF A BASTARD CHILD TO SWEAR THAT ONE J P WAS ITS FATHER.

That one J M, late of, etc., a single woman, on, etc., at — etc., was pregnant with child, and that said child was likely to be born a bastard, and so chargeable to — in the county aforesaid. And the jurors aforesaid, upon their oath aforesaid, further present that on, etc., aforesaid, at — etc., aforesaid, one W B, late of, etc., yeoman, being a person of an evil mind and a wicked disposition, and not having the fear of God before his eyes but being immoral and seduced by the instigation of the devil, and wickedly and maliciously contriving, devising and intending not only to deprive J P, late, etc., laborer, of his good name, fame and reputation, and to put him to great trouble and expense, and also to cause the said J P to be falsely charged with begetting the said J M with child, and with being the father of said child with which the said J M was then and there pregnant, did falsely, corruptly, knowingly, willfully and wickedly solicit, suborn and

¹ 2 Arch. Cr. Pl. & P., 1750.

procure the said J M to go before one J H, clerk, he, the said J H, being one of the justices, etc., and make oath that one J P of, etc., laborer, (*meaning the said J P*) was the father of the said child with which she was so pregnant. And the jurors aforesaid, upon their oath aforesaid, do further present that in consequence, and by the means, encouragement and effect of the said wicked and corrupt subornation and procurement of the said W B, she, the said J M, afterward, to wit, on the said day, did go in her proper person before the said J H, being such justice as aforesaid, and then and there having sufficient power and authority to administer an oath and take the examination of the said J M, hereinafter mentioned, and the said J M then and there was sworn and took the corporal oath before the said J H on the Holy Gospel of God. And the said J M, being so sworn as aforesaid, by the means and in consequence of said wicked solicitations, subornation and procurement of the said W B, did then and there, upon her oath aforesaid, before the said J H, being such justice as aforesaid, falsely, wickedly, willfully and corruptly say, depose and swear and give in her examination in writing as follows: County of —; the voluntary examination of J M, of H, in said county, single woman, taken on oath before me, J H, a justice of the peace in and for said county, this — day of —, who saith that she is now with child and that said child is likely to be born a bastard and to be chargeable to — in said county, and that J P, of K, aforesaid, in said county, laborer, (*meaning the said J P*) is the father of said child, as by the said examination, relation being thereunto had, may more fully and at large appear; whereas, in truth and in fact, the said W B, at the time of the soliciting, suborning and procuring the said J M corruptly and falsely to swear as aforesaid, well knew that the said J P was not the father of said child with which she was so pregnant as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say that the said W B, on the suit, etc., aforesaid, at —, etc., aforesaid, did falsely, corruptly, knowingly, willfully and wickedly suborn and procure the said J M to commit willful and corrupt perjury in and by her oath aforesaid,¹ etc.

Usurpation.—If any person shall take upon himself to exercise or officiate in any other office or place of authority in this state, without being legally authorized, the person so offending shall be fined in a sum not exceeding two hundred dollars, or imprisoned in the jail of the county and be fed on bread and water only, not exceeding ten days, or both, at the discretion of the court.²

The Appointment of a Clerk of Court at a regular session, by judges *de facto* although not judges *de jure*, is a valid appointment.³

¹The above is the form in 2 Chitty, Cr. L., 476, 477.

²Cr. Code, § 158.

³State v. Alling, 12 Ohio, 16.

To constitute the offense, a person must do something more than merely discharge the duties of an office without legal authority. He must "take upon himself" official functions in such a sense as implies an *assumption* of the office, without color of right. Therefore, to take upon himself the exercise of an office without being legally authorized within the meaning of the section, is such an assumption of official authority as imports a willful usurpation of office. This was what was intended to be punished. An officer *de facto*, acting in good faith under color of right, is not within the prohibition of the statute. Therefore, an officer legally appointed and qualified, who continues to act as such officer after the expiration of his term, in good faith, until his successor is qualified, is not guilty of usurpation.¹

Officer De Facto.—Where one C was appointed commissioner of insolvents, under a law of 1824 then existing, but was not thereafter re-appointed under the act of 1831, in 1832 one P applied to C, as commissioner of insolvents, gave in his schedule, made an assignment, took the oath and gave the bond required with sureties. The proceedings were then returned to the court of common pleas and there dismissed, and the bond forfeited. In an action by a surety on the bond, to recover back the money paid on the bond, it was held that he should have litigated the matter in the first suit. There is a strong intimation in the opinion that C was an officer *de facto*, and such must have been the holding, because, if the entire proceedings were void, no recovery could have been had on the bond.²

FOR USURPATION OF AN OFFICE.³

That A B, on, etc., in said county, unlawfully did then and there take upon himself to exercise and officiate in the office of justice of the peace, by

¹ Kreidler v. State, 24 O. S., 22.

² Job v. Collier, 11 Ohio, 422.

³ In Carpenter v. Titus, 33 Kas., 7, where the plaintiff had failed to qualify as treasurer of a school district within twenty days, as required by statute, but did thereafter qualify and exercise the duties of the office, the court held, that he was not a mere intruder, and that his right to the office could not be questioned by a mere intruder.

entering into said office without being duly elected or appointed to the same, or legally authorized to exercise or officiate in said office.

Barratry.—If any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, attorney or counselor at law shall encourage, excite and stir up any suit, quarrel or controversy between two or more persons, with intent to injure such person or persons, such judge, justice of the peace, clerk, sheriff, constable, attorney or counselor at law, shall be fined in any sum not exceeding five hundred dollars, and shall be answerable to the party injured in treble damages.¹

Barratry was an Offense at Common Law.—It signifies the habitual moving, exciting or maintaining suits and quarrels. All kinds of disturbances of the peace, spreading false rumors and calumnies, etc., came under this denomination.² A single act, however, did not constitute the offense.³ Nor was an attorney liable merely for maintaining another in a groundless action.⁴ It was unnecessary to charge any specific act, the reason being that the offense consists in habitual conduct and not in a single malfeasance.⁵ The prosecutor before the trial, however, was required to furnish the accused with a statement of the particular acts on which he would rely.⁶

An indictment charging one with being a common barrator was held sufficient,⁷ as the offense at common law consisted in being a general or common stirrer-up of strife,⁸ and a magistrate who excited prosecutions which were groundless, with an intention of exacting fees, and afterward suppressing them,

¹ Cr. Code, § 159.

² Coke, Lit., 368; 2 Chitty, Cr. L., 233.

³ 1 Hawk. P. C., c. 81, § 5; Rex v. Urlyn, 2 Saund., 308, n. 1.

⁴ Anon., 3 Mod. 97-8; 2 Chitty, Cr. L., 234.

⁵ Rex v. Urlyn, 2 Saund., 308, n. 1; 2 Hawk. P. C., c. 25, § 59.

⁶ 2 Chitty, Cr. L., 234; Rex v. Urlyn, 2 Saund., 308, n. 1.

⁷ Com. v. Davis, 11 Pick., 432; 1 Wharton, Cr. L., § 239; 2 Hale, P. C., 182. Hale, 2 P. C., 182, says it is not sufficient to charge a party with being a "common robber," because the charge is too general; but that the charge of a common barrator is sufficient, "because barratry is an offense known in law, and consists of divers particulars; and the rest that is added thereto are but the aggravations of the offense, for barratry itself is the crime."

⁸ Rex v. Hardwick, 1 Sid., 282; Rex v. Harmon, 6 Mod., 311.

was held to be liable.¹ In New York, in 1807, an act was passed prohibiting attorneys from purchasing or receiving, by way of pledge of security for money lent, any bond, note or other writing, with intent to commence a suit thereon. This act was re-enacted in 1813, and substantially again in 1818. The last statute was construed in *People v. Walbridge*.²

Rule under the Statute.—The common law rule does not appear to prevail under the statute, by requiring a party to be a common barrator to be liable, the language being, if any of the officers named “shall encourage, excite and stir up any suit, quarrel or controversy between two or more persons, with intent to injure such person or persons,” he shall be liable. The rule, therefore, in *People v. Walbridge*, that a single act will constitute the offense, applies.³

AGAINST A CLERK OF THE DISTRICT COURT FOR STIRRING UP A PROSECUTION.

That A B, on, etc., was clerk of the district court of — county, duly elected and qualified, and performing the duties of said office, and on said day, he, the said A B, in said county, did then and there unlawfully, willfully and corruptly encourage, excite and stir up a suit, quarrel and controversy between E F and G H, by inducing and causing said E F to institute a criminal prosecution against said G H, before L M, a justice of the peace of said county, upon an alleged charge of larceny; which charge was wholly false and unfounded, as said A B then and there well knew, with the intent of him, the said A B, unlawfully and maliciously to injure said E F.

AGAINST A SHERIFF FOR STIRRING UP A CONTROVERSY.

That A B, on, etc., was sheriff of — county, duly elected and qualified, and performing the duties of his office, and on said day, in said county, did then and there unlawfully, willfully and corruptly encourage, excite and stir up a suit, quarrel and controversy between C D and E F, by inducing and causing said C D to bring an action in the district court of — county against said E F, for an accounting in a partnership matter wherein said C D and E F were partners, with the intent of him, the said A B, unlawfully and maliciously to injure said E F.

¹ *State v. Chitty*, 1 Bailey, 379.

² 3 Wend., 120. The first section of the act of 1818 is copied in a foot note to the case: Savage, Ch. J., remarks (p. 128): “The object of the legislature undoubtedly was to prevent the officers of courts from purchasing notes, or loaning money upon them for the purpose of prosecution.”

³ *People v. Walbridge*, 3 Wend., 120.

AGAINST AN ATTORNEY FOR STIRRING UP A SUIT.¹

That A B, on, etc., was, and now is, an attorney and counselor at law, duly admitted to practice in the courts of record of the state; that on the day and year aforesaid, in said county, he, the said A B, then and there unlawfully, willfully and corruptly did encourage, excite and stir up a suit, quarrel and controversy between C D and E F, by inducing and causing said C D to bring an action for slander in the district court of — county, against said E F, for the words following, spoken by said E F of and concerning said C D, to wit: "He, said C D, is an old man in poor health," which words were not spoken maliciously, nor did they injure said C D, and were not actionable. Yet said A B, then and there well knowing that said words were not actionable, unlawfully and maliciously did stir up, encourage, excite and institute said action with the intent to injure said E F.

FOR BARRATRY AT COMMON LAW.

That C D, late of, etc., on, etc., and on divers other days and times, as well before as afterward, was and yet is a common barrator, and that he, the said C D, on the said, etc., and on divers other days and times at, etc., aforesaid, divers quarrels, strifes, suits and controversies among the honest and quiet liege subjects, etc., then and there did move, procure, stir up and excite to the evil example and common nuisance of the liege subjects, etc.²

Abuse of Power by Officer.—If any sheriff, coroner, constable, jailer, clerk, county recorder, county clerk, county treasurer or assessor, by color of or in the execution of his office, shall designedly, willfully or corruptly injure, defraud or oppress any person, such sheriff, coroner, constable, jailer, clerk, county recorder, county clerk, county treasurer or assessor shall, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and be answerable to the party so injured, defrauded or oppressed, in treble damages.³

¹ A distinction in the very nature of the case exists between an attorney bringing an action in good faith, and one of the officers named in stirring up strife. Such officers are prohibited from exciting controversies, without regard to the merits of the same, while an attorney who, in the line of his duty, in good faith, brings an action, is not liable, even if it fails. 1 Hawk. P. C., c. 81, § 11.

² The above is the form in 2 Chitty, Cr. L., 232, 233, and will be found sufficient in states where the common law rule prevails.

³ Cr. Code, § 160. The common law applied more particularly to judges, justices and other magistrates. Blackstone says: "There is yet another offense against public justice which is a crime of deep malignity, and so

AGAINST SHERIFF FOR AN UNLAWFUL IMPRISONMENT.

That A B, on, etc., was and now is the sheriff of — county, duly elected, qualified and performing the duties of said office; that on the day and year aforesaid, in said county, said A B, by color of his said office as said sheriff, without a warrant did arrest and take one C D into his custody, on suspicion that said C D had committed a felony in — county, and then and there without procuring a warrant for the arrest and detention of said C D, willfully, unlawfully, designedly and corruptly did imprison said C D in the jail of said county, and did thereby injure and oppress him.

AGAINST COUNTY TREASURER FOR AN EXCESSIVE LEVY.

That A B, on, etc., was and now is the treasurer of — county, duly elected, qualified and performing the duties of said office; that on the day and year aforesaid, in said county, said A B, by color of his said office as said treasurer of — county, did receive the tax roll of said county, which, among other things, required him to collect from the personal property of C D the sum of two dollars; that then and there, by color of his said office, said A B willfully, unlawfully, designedly and corruptly did levy upon all the beds, bedding and furniture of said C D, of the value of fifty dollars, and took the same into his possession, thereby depriving the said C D and his family of the necessary means to protect themselves from the inclemency of the season, said levy being grossly excessive, and was intended by said A B and did injure and oppress said C D.

Refusing to Assist Sheriff, etc.—If any person, having been called upon by the sheriff or other ministerial officer in any county in this state, to assist such sheriff or other officer in apprehending any person charged with, or convicted of, any offense against any of the laws of this state, or in securing such offender when apprehended, or in conveying such offender to the jail of the county, shall neglect or refuse to render such assistance, every person so offending shall be fined in any sum not exceeding fifty dollars.¹

The Authority of the Officer to make the arrest should be set out. It is not sufficient to allege that it was made by "lawful authority."²

much the deeper as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the oppression and tyrannical partiality of judges, justices and other magistrates in the administration and under the color of their office." 4 Bla. Com., 141.

¹ Cr. Code, § 161.

² State v. Shaw, 3 Ired., 20-22; State v. Hollon, 22 Kas., 580.

REFUSING TO AID OFFICER TO MAKE AN ARREST.

That on, etc., in said county, one C D was a justice of the peace, duly elected, qualified, and was then and there performing the duties of his office, and thereupon came E F before said justice and made complaint in writing and on oath, charging that on the — day of — in said county, one G H unlawfully and feloniously did steal, take and carry away one watch of the value of one hundred dollars, the property of said E F; that thereupon said C D, justice of the peace, as aforesaid, on said day, did issue his warrant in due form of law, directed to the sheriff or any constable of said county, commanding him to arrest the body of said G H and bring him before said C D, justice of the peace, or some other magistrate having jurisdiction in said case, to answer said complaint, which warrant on said day was duly delivered to said sheriff to execute; that on said day in said county, while said sheriff was endeavoring to apprehend G H, in pursuance of the requirements of said warrant, he, said sheriff, did then and there call upon one A B to assist him in apprehending and securing said G H; but the said A B then and there willfully and unlawfully neglected and refused to render said sheriff any assistance in apprehending and securing said G H.

Permitting Person in Custody to Escape.¹—If any sheriff, coroner, jailer, or other person whatsoever, having any offender in custody, charged with or convicted of any offense made punishable by the laws of this state, shall voluntarily suffer such offender to escape and go at large, every sheriff, coroner, jailer, or other person so offending, shall be fined in any sum not exceeding five hundred dollars, or be imprisoned not exceeding ten days, or both, at the discretion of the court.²

Must be Actual and Lawful Arrest.—There must be an actual as well as a lawful arrest, to make an escape criminal in an officer.³ It must also be for a criminal matter, and its continuance at the time lawful, or, though legal in its inception, an escape will not be an offense—as if one accused of crime be acquitted and discharged upon “paying his fees,” it is not an offense to permit him to go before they are satisfied.⁴

The **Indictment at Common Law** was required to state the crime for which the party was in custody, and not merely in

¹ At common law the escape of a party before he was actually in prison was a misdemeanor punishable with fine or imprisonment; but breaking prison, or conspiracy to do so, was felony. 2 Chitty, Cr. L., 158.

² Cr. Code, § 162.

³ 2 Hawk. P. C., c. 19, §§ 1, 2.

⁴ 1 Hale, P. C., 594.

general charge that it was a felony.¹ It must also be shown that the prisoner was actually in the defendant's custody upon the specific charge; for to say he was charged and in custody will not suffice, unless the charges are connected.² The same rule prevails under the statute. Where the information set out a copy of the sentence of the prisoner, and then stated that while he was "in the lawful custody of the sheriff, under and by virtue of the order and judgment aforesaid *as entered of record*, and while going to the place of confinement aforesaid, to wit, the penitentiary of the state of Kansas, "under and by virtue of said order and judgment aforesaid, the said Joseph Holton did, at Marion Centre," "then and there feloniously break such custody of the sheriff," "and did then and there escape therefrom," is not sufficient to show that the custody of the sheriff was lawful.³

INDIOTMENT AT COMMON LAW AGAINST JAILER, FOR PER-
MITTING AN ESCAPE OF ONE HELD ON THE
WARRANT OF A JUSTICE.

That on, etc., J D, Esq., then and there being one of the justices, etc., assigned to keep the peace, etc., in and for the county of B, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county, in due form of law did make his warrant of commitment under his hand and seal, to wit, at, etc., bearing date the same day and year aforesaid, directed to the keeper of the common jail in and for said county of B; by which warrant, etc., (*recite warrant*) as by said warrant more fully appears; by virtue of which said warrant of commitment, afterward, to wit, on the said day, at, etc., A B, then being the keeper of the said common jail of the said county of B, did receive the said W M into his custody in the said common jail there situate. And the jurors aforesaid on their oath do say, that the said A B, late of, etc., yeoman, so being keeper of the said common jail, and having the said W M in his custody in the said jail, on that occasion, afterward, to wit, on, etc., at, etc., unlawfully and negligently did permit and suffer the said W M to escape,

¹ 2 Hawk. P. C., c. 19, §§ 14-22; 3 P. Wms., 497; 2 Chitty, Cr. L., 173.

² 2 Chitty, Cr. L., 173; 2 Hawk. P. C., c. 19, § 14.

³ State v. Hollon, 22 Kas., 580. In the opinion (p. 584), the court say: "The 'lawful custody,' mentioned in the information, is shown to have been founded upon nothing but the general authority given by law to sheriffs with proper papers to hold criminals in custody, and the judgment as rendered against the defendant on the records of the district court."

and go at large from and out of the custody of him, the said A B, out of said prison, wheresoever he would, whereby the said W M did then and there escape out of said prison, and go at large whithersoever he would, to the great hindrance and obstruction of justice,¹

AGAINST THE KEEPER OF THE COMMON JAIL FOR A VOLUNTARY ESCAPE.

That heretofore, to wit, at the — term of the — court of — county, the grand jury of said county, duly impaneled and sworn and charged to inquire of and for the body of said county, did duly return into said court the following indictment:² (*here copy indictment, order of arrest thereon, plea, verdict of guilty*) whereupon it was considered and adjudged by the court, that said W D should be imprisoned in the jail of said county for three calendar months, commencing on Saturday, the tenth day of April next following, which sentence and judgment still remain in full force and effect; that afterward, to wit, on the tenth day of April next following, said W D, in pursuance of said judgment and sentence, was duly committed to the care and custody of E F, then and there still being the keeper of the jail of said county, there to be kept and imprisoned for the space of three months, a warrant of commitment in due form of law being then and there delivered to said E F for the imprisonment of said W D;³ that said E F, on the — day of —, and while said W D was in his lawful custody as such jailer, and before the expiration of the term for which said W D was so sentenced, unlawfully and voluntarily did permit and suffer the said W D to escape out of said jail, and go at large wheresoever he would.

Assisting Prisoner to Escape.—If any person shall aid or assist any prisoner, confined in any jail or other place of confinement, charged with or convicted of any offense against the laws of this state,⁴ to make his or her escape from such jail or place of confinement, although no escape be actually made, every person so offending shall be fined not more than five hundred nor less than fifty dollars, or be imprisoned in the

¹ The above is the form in 2 Chittv, Cr. L., 175, 176.

² If instead of an indictment the proceedings were by information, set out the preliminary steps generally, where an examination is required before filing an information. In Chitty's form, the proceedings are set forth at unnecessary length.

³ See *State v. Hollon*, 22 Kas., 580.

⁴ Courts take judicial notice of the general laws. A statement of the crime charged, therefore, is sufficient, without the further allegation that such offense is "against the laws of the state."

jail of the county not exceeding thirty days, or both, at the discretion of the court.¹

FOR AIDING A PRISONER TO ESCAPE WHERE NO ESCAPE IS MADE.

That C D, on, etc., in said county, willfully and unlawfully did aid and assist one G H, then and there a prisoner and confined in the jail of — county, charged with the offense of feloniously stealing, taking and leading away one horse, the property of L M, of the value of — dollars, to make his escape from said jail, although no escape was actually made.

FOR AIDING A CONVICTED PRISONER TO ESCAPE.

That A B, on, etc., in said county, willfully and unlawfully did aid and assist one C D, then and there being a prisoner and confined in the jail of said county on a judgment of — court of — for the felonious stealing of one watch, the property of E F, of the value of twenty-five dollars, to make his escape from said jail.

Attempt to Corrupt or Influence Jurors, etc.—If any person shall attempt to corrupt or influence any juror or witness, either by promises, threats, letters, money or other undue means, either directly or indirectly, every person so offending shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the jail of the county not exceeding thirty days.²

FOR ATTEMPTING TO INFLUENCE A JUROR.

That on, etc., in an action pending in the — court of — county, wherein one C D was plaintiff and G H defendant, being a cause in which said court had jurisdiction, and said cause coming on for trial, a jury was called and duly impaneled and sworn, and afterward, and before the rendition of the verdict in said cause, said C D, in said county, willfully and unlawfully did attempt to influence and corrupt one E F, one of said jurors, by saying to him, "Hold them D, and I will not forget it," meaning thereby that if said C D would prevent a verdict against him, said G H, that he could compensate him, said C D, therefor.

¹ Cr. Code, § 163.

² Cr. Code, § 164.

FOR ATTEMPTING TO INFLUENCE A WITNESS IN A CRIMINAL CASE.

That on, etc., in an action pending in the — court of —, wherein the state of — was plaintiff and E F defendant, charged with the homicide of one G H in said county, one L M was a material witness on the part of the state in said cause against said E F, as he, said E F, then and there well knew, and on the — day of —, in said county, said E F willfully and unlawfully did attempt to influence and corrupt said L M, witness as aforesaid, by threatening to prosecute him, said L M, for — if he testified against him, said E F, in said case.

In an indictment for attempting to corrupt a witness in a judicial proceeding, it need not be alleged that such witness had been sworn, recognized or subpoenaed. The word "witness" is used in the statute in a broad sense, and includes all persons who may testify in the case.¹

Juror or Witness Receiving a Bribe.—If any juror or witness shall corruptly take and receive any money, goods, chattels or other reward, either directly or indirectly, in any action or suit instituted before any court having jurisdiction thereof,

¹ *Chrisman v. State*, 18 Neb., 107. The indictment in that case, omitting the commencement and conclusion, was as follows: That J C, etc., being then and there charged with a criminal offense and duly indicted under lawful authority by the grand jury of said county, of the December term of the district court of said county, in the year, etc., for the crime of cutting one C R W, with the intent to kill him, the said C R W, in the county of —, and he, the said J C, being then and there held to bail under said charge to appear at the February term of the said district court, said court having jurisdiction of said offense, unlawfully did then and there attempt to corrupt and influence, and did corrupt and influence one C R W, then and there being, by offering to and paying to him, the said C R W, the sum of fifty dollars, with the further offer and promise to the said C R W of the further sum of five hundred and twenty-five dollars, to corruptly and unlawfully influence and procure him, the said C R W, to leave the said county of —, and go beyond the jurisdiction and process of said district court and secrete himself, so that the said C R W could not be obtained as a witness on the part of the state of Nebraska in the said action against the said J C, the said C R W being a very important [witness] in said action, etc.

The indictment was held to be sufficient. It would seem to be unnecessary to set out the steps by which the action was instituted, it being sufficient to allege the actual fact, the pendency of the action, and that a party named as a witness therein was corrupted or influenced, or an attempt made for that purpose.

such juror or witness so offending shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the jail of the county not exceeding thirty days.¹

WITNESS RECEIVING A BRIBE.

That on the — day of —, etc., in a certain action pending in the — court of — county, wherein C D was plaintiff and E F defendant, in an action instituted in said court wherein it had jurisdiction, one G H was a material witness duly subpoenaed in said cause on behalf of C D, and said E F, corruptly devising and intending to prevent a just and lawful trial of the issues joined in said cause, did then and there unlawfully and willfully offer and give to said G H, said material witness in said cause, one silver watch of the value of twenty-five dollars for the purpose of influencing and causing said G H to testify in his favor in said action; and the said G H, then and there well knowing the purpose of said gift, as aforesaid, then offered to him by said E F, then and there in said county, unlawfully, willfully and corruptly did take and receive said watch of and from the said C D for the purpose aforesaid.

JUROR RECEIVING BRIBE.

That on the — day of — etc., in a certain action then pending in the — court of — county, being a suit instituted in said court, in which it had jurisdiction, and wherein E F was plaintiff and G H defendant, and said cause coming on for trial in said court, a jury was duly called, impaneled and sworn to try the issue joined between the parties, whereupon one L M, corruptly and unlawfully devising and intending to prevent a just, fair and lawful trial of said issue, did then and there offer and give to S T, one of the jurors duly impaneled and sworn in said cause, the sum of fifty dollars for the purpose of corruptly influencing and inducing said juror, S T, to give his influence and decision in said action in favor of said E F; and the said S T, then and there well knowing the purpose of said gift as aforesaid, then offered to him by said L M, then and there in said county, unlawfully, willfully and corruptly did take and receive said money of and from said L M, for the purpose aforesaid.

Bribery is What.—The offense may be committed by giving a sheriff money to induce him to summon such jurors as the defendant should name;² by a justice of the peace, even though the action is not yet instituted;³ by agreeing to pay money to

¹ Cr. Code, § 165.

² Com. v. Chapman, 1 Va. Cas., 138.

³ Barefield v. State, 14 Ala., 608.

a member of a corporation in case he will cast his vote for a certain person for mayor ;¹ by paying money to a voter and taking his note therefor, but giving a counter note to deliver up the first in case the voter cast his vote as desired.² It is probably unnecessary either to allege or prove the exact amount of money given, as the offense consists in receiving any sum for the purpose named.³ Where, however, the amount named is known it should be alleged and proved.

And it has been held that there is no difference between offering and promising a reward to a voter ;⁴ but the mere fact that a candidate had private interviews with several friends on the day of election is not of itself proof of bribery.⁵ The least tendency to corruption, either in the court, any of its officers, or in any department of government, is just cause of alarm, and nothing in the nature of a gift should be given or accepted by any one having ought to do with the administration of justice, from any person who then has or is about to have a case in court, or by any one holding a public office. Paying money to a member of a committee of the legislature to induce him to make a favorable report as to the affairs of a certain bank then under consideration by such committee, is bribery.⁶ So an attempt by a consideration to influence the action of a commissioner of the revenue in letting a contract for building a lighthouse, is punishable.⁷

Bribing a Ministerial Officer.—If any person shall by bribery, persuasion, seduction, or any other arts or means whatever, attempt to prevail upon any ministerial officer or other person charged with the safe keeping of any person accused or convicted of any offense against the laws of this state, to permit such person to escape from the custody of such officer or other person, any person so offending shall be fined in any

¹ *Rex v. Pollman*, 2 Camp., 229; *Walsh v. People*, 65 Ill., 58.

² *Sulston v. Norton*, 3 Burr., 1235.

³ *Com. v. Chapman*, 1 Va., Cr. Cases, 138.

⁴ *State v. Harker*, 4 Harring (Del.), 559.

⁵ *Russell v. Com.*, 3 Bush., 469.

⁶ *Lewis*, Cr. L., 126.

⁷ *U. S. v. Worrall*, 2 Dall., 384.

sum not more than five hundred nor less than twenty-five dollars.¹

FOR BRIBING A SHERIFF TO PERMIT AN ESCAPE.

That on, etc., one G H was sheriff, being a ministerial officer of — county, duly elected, qualified and performing the duties of said office; that at the — term of the — court of said county, one T J was indicted for, duly tried in said court, and found guilty of the offense of burglary, and was thereupon, by the judgment of said court, sentenced to imprisonment in the penitentiary for the term of three years, and on the day aforesaid was lawfully placed in the safe keeping of said G H, under said judgment and sentence, awaiting transportation to the penitentiary at —; that on said day, in said county, and while said T J was in the safe keeping of said G H under said judgment and sentence, one E J offered said G H a horse, of the value of one hundred dollars, the property of said E J, as a bribe, with the intent and for the purpose then and there willfully, unlawfully and corruptly, by bribery, persuasion and corruption, to prevail upon said G H, who was then and there charged with the safe keeping of said T J, to permit him to escape from the custody of such officer.

Giving or Accepting Bribes.—If any person shall directly or indirectly give any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security for the payment of money, present or reward, or any other thing, to any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, prosecuting attorney, member of the legislative assembly, or other officer, ministerial or judicial, but such fees as are allowed by law, with the intent to induce or influence such officer to appoint or vote for any person for office, or to execute any of the powers in him vested, or perform any duty of him required, with partiality or favor, or otherwise than is required by law, or in consideration that such officer hath appointed or voted for any person for any office, or exercised any power in him vested, or performed any duty of him required, with partiality or favor, or otherwise, contrary to law, the person so giving and the officer so receiving any money, bribe, present, reward, promise, contract, obligation, or security, with the intent or for the purpose or consideration aforesaid, shall be deemed guilty of bribery, and

¹ Cr. Code, § 166.

shall be punished by confinement in the penitentiary not less than one nor more than five years.¹

Where the Indictment Charges a System or Plan of Receiving Bribes, as for a city marshal to promise, upon the payment of a certain sum per month, not to disturb such gambling houses as have paid the sum required, it is competent for the state, after introducing evidence tending to show bribery by the payment of such money, to prove other acts of bribery than those set forth in the indictment, for the purpose of corroborating the principal witness upon material facts involved in the *contract of bribery*, and also for the purpose of showing the system, plan and design of the parties giving and receiving the bribes.²

Construing Agreement for Payment of Bribes.—In the case of *Guthrie v. State*, the agreement, as shown from the evidence, was a continuing one, and contemplated a system of payments to be made in the future, the payments not being made directly to the marshal, but to another for his use.

FOR GIVING BRIBES TO A CITY MARSHAL NOT TO SUPPRESS GAMBLING.

That A B, in the city of O, on the day of etc., and from that time continuously until the — day of — in the year — was then and there a ministerial officer, to wit, the city marshal of the city of O, duly and legally appointed, confirmed, qualified and sworn to discharge the duties of that office, it being an office of trust concerning the administration of public justice, law and order, within said city, and contriving and intending the powers and duties of his said office and the confidence and trust thereby reposed in him to violate, betray and prostitute, and contriving and intending, then and there, the powers and duties of said office to discharge and perform with partiality and favor and contrary to law, and then and there, with the intent aforesaid, unlawfully, knowingly, corruptly and feloniously did take, accept and receive from C B and others, whose names are to the jurors unknown, the sum of — dollars in money, of the value of + — dollars, as a bribe and pecuniary reward offered and given by C B and others, and by

¹ Cr. Code, § 175.

² *Guthrie v. State*, 16 Neb., 667, 668; *State v. Bridgman*, 49 Vt., 202; *Thayer v. Thayer*, 101 Mass., 111; *Kramer v. Com.*, 87 Penn. St., 299; *Rex v. Hough, R. & R.*, Cr. Cas., 120; *Rex v. Ball*, Id., 132; *Com. v. Price*, 10 Gray, 472; *Rex v. Francis*, 12 Cox, C. C., 612; *Rex v. Garner*, 4 F. & F., 346; *Wharton, Cr. Ev.*, § 348.

the said A B taken, accepted and received, with the intent and purpose to induce him, the said A B, in his office aforesaid, to permit, authorize and allow certain gamblers, to wit, C G H, S C B, H B K, G B, J M, W S, and C B, and others, to the jurors unknown, to keep, use and occupy buildings and rooms for the purpose of and devoted to gambling, to exhibit gaming tables, gaming establishments, gaming devices, and other apparatus to win and gain money, and to carry on, conduct, and prosecute the habit, practice and profession of gambling, in the corporate limits of the city of O, and to induce and influence him, the said A B. then and there and thereafter not to arrest nor cause to be arrested the said gamblers, and to keep and protect them from arrest and punishment, and free, clear and exempt from municipal or police molestation, interference or attack, while engaged in the business, practice and profession of gambling, as aforesaid.¹

FOR BRIBING A MEMBER OF THE LEGISLATURE.

That A B, on, etc., was a member of the legislative assembly of the state of —, to wit, of the House of Representatives of said state, duly elected, qualified and sworn according to law to perform the duties of said office; that on the day and year aforesaid, in — county, one C D fraudulently, unlawfully and corruptly did offer and give to said A B the sum of — dollars in money as a bribe, with the intent to induce and influence him, the said A B, to perform the duty required of him, as such member, with partiality and favor, and otherwise than is required by law in this, to wit, by holding back, voting against and preventing the passage of House Roll No. —, entitled, "A bill for an act, etc."

AT COMMON LAW RECEIVING A BRIBE.

That J L, being then and there an officer of the customs, etc., did serve and arrest, as forfeited, certain goods and merchandises, to wit, divers bandana handkerchiefs, which said last mentioned goods and merchandises were then and there by law liable to forfeiture, and it was then and there the duty of the said J L, as such officer of the customs as aforesaid, to detain keep and secure the said last mentioned goods and merchandises in order to the condemnation of the same by due course of law, and, * * the said J L, well knowing, etc., but having no regard, etc., and unlawfully and corruptly devising, etc., and wholly disregarding his duty in the behalf last aforesaid, after the said, etc., to wit etc., on, etc., at, etc., did unlawfully, corruptly and indirectly take and receive of an from one D J a certain gratuity, recompense and reward, of a certain large sum of money, to wit, the sum of eight pounds, not to perform the duty of him, the said J L, in sc

¹ The above is the indictment in *Guthrie v. State*, 16 Neb., 667.

detaining, keeping and securing the last mentioned goods and merchandises so seized and arrested as aforesaid and so liable to forfeiture as aforesaid, and contrary to and in violation of the duty of his said office to relinquish the possession of the same goods and merchandises, so that the same, although seized and arrested as aforesaid, should not be secured in order to the condemnation thereof as aforesaid.¹

Attempting to Bribe.—Every person who shall offer or attempt to bribe any member of the legislative assembly, judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, prosecuting attorney or other ministerial or judicial officer in any cases mentioned in the last preceding section, and every member of the legislative assembly, judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, prosecuting attorney or other ministerial or judicial officer, who shall propose or agree to receive a bribe in any of the cases mentioned in the said preceding section, shall be fined in a sum not exceeding five hundred dollars, nor less than three hundred dollars.²

An attempt to bribe was an offense at common law, although nothing was done in consequence of such attempt.³

FOR AN ATTEMPT TO BRIBE A MEMBER OF THE LEGISLATURE.

That A B, on, etc., was a member of the legislative assembly of the state of —, to wit, of the House of Representatives of said state, duly elected, qualified and sworn according to law, to perform the duties of said office; that on the day and year aforesaid, in — county, one C D fraudulently, unlawfully and corruptly did offer and attempt to bribe said A B, by offering him the sum of — dollars in money as a bribe, with the intent then and there to induce and influence him, the said A B, to perform the duty required of him as such member, with partiality and favor and otherwise than is required by law in this, to wit, by supporting and voting for House Roll No. —, “A bill for an act,” etc.

Offer to Pay Traveling Expenses.—In *Packard v. Collins*,⁴ it was held, that an offer to a voter to pay his traveling expenses, with the intention thereby to induce him to come and vote as desired, was bribery; and in *Cooper v. Slade*,⁵ where an agent

¹ 2 Chitty, Cr. L., 692.

² Cr. Code, § 176.

³ 2 Chitty, Cr. L., 584.

⁴ 54 L. T. Rep., N. S., 619.

⁵ 6 H. L. Cas., 647.

had written to a voter, asking him to attend and vote for a certain person—naming him—promising to pay his railway expenses, the court held this to be bribery; that it was equivalent to saying: “If you will come and vote for me I will give you money for paying the expenses of your coming to vote.” These decisions were made under the English statute to prevent corrupt practices, and with other notes are referred to in the 3 Kansas Law Journal, 392–394.

Permitting Jail to Become Foul.—If any sheriff, or jailer, or any other person having the care and custody of any jail, shall suffer the same to become foul and unclean, so that the health of any prisoner may be endangered, such sheriff, jailer, or other person shall be fined in any sum not exceeding one hundred dollars.¹

AGAINST JAILER FOR SUFFERING JAIL TO BECOME FOUL.

That A B, on, etc., and from that time continuously until the — day of —, etc., being then and there the jailer in — county, duly and lawfully appointed and employed as such, and having then and there the care and custody of the jail of said county, did then and there knowingly, willfully and unlawfully suffer and permit said jail to become foul and unclean, so that the health of certain persons confined in said jail, to wit, G H and M B, was endangered thereby.

Officer Failing to Execute Warrant.—When any warrant legally issued by any magistrate of this state, in any criminal case, shall be delivered into the hands of any constable or other officer to be executed, whose duty it shall be to execute such warrant, it is hereby made the duty of such officer to serve the same immediately; and if such constable or other officer shall neglect or delay to serve any such warrant delivered to him as aforesaid, when in his power to serve the same, either alone or by calling upon assistance according to law, such constable or other officer shall, if the offense charged for which the warrant issued be a felony, be fined in any sum not exceeding five hundred dollars, or imprisoned in the jail of the county ten days, or both, at the discretion of the court.²

¹ Cr. Code, § 166.

² Cr. Code, § 168.

The above Section is merely Declaratory of the Common Law, which required an officer to whom a warrant was directed to proceed as soon as possible, and with secrecy find out and actually arrest the party, not only in order to secure him, but also to subject him and other persons to the consequences of escape or rescue; and if the officer neglect or refuse to execute the warrant he will be punishable for his disobedience or neglect.¹ This rule does not appear to have been applied very strictly in cases of minor offenses, such as common assaults, as Chitty states that at some of the police offices it was the common practice for one of the constables to go around to the parties accused and state the time when they must go before a magistrate, in order that they could provide sureties.² It will be observed that this section of the statute does not apply to cases of misdemeanor.

FOR FAILURE OF AN OFFICER TO EXECUTE A WARRANT.

That A B, on, etc., was sheriff of — county, duly elected, qualified and performing the duties of said office, and on said day one E F made complaint in writing and upon oath before G H, a justice of the peace of said county, wherein he charged one J K with the crime of murder in said county, by purposely and of his deliberate and premeditated malice killing one L M therein, whereupon said justice legally issued a warrant for the arrest of said J K, directed to said A B, and delivered the same into the hand of said A B to be executed, and it was thereby the duty of such officer to execute said warrant immediately, but said A B did unlawfully and willfully delay and neglect to serve said warrant or to arrest said J K, when in his power to serve the same and make said arrest.

For Neglect in Cases of Misdemeanor.—If any constable or other officer shall be guilty, as specified in the preceding section, of neglect or delay in serving any warrant when the offense charged, for which such warrant issues, may be an offense not punishable with death or imprisonment in the penitentiary, such constable or other officer shall be fined in any sum not exceeding one hundred dollars, or imprisoned not exceeding ten days, or both, at the discretion of the court.³

¹ Chitty, Cr. L., 47.

² Id.

³ Cr. Code, § 169. The form of indictment under this section will be substantially the same as under section 168.

Forfeiture of Office.—A conviction of any officer of either of the offenses specified in the two last preceding sections, shall be a forfeiture of his office, and the same shall immediately become vacant.¹

Leniency of Officer to Prisoner.—If any sheriff or jailer or any other person having the care and custody of any jail, shall suffer any person, sentenced to imprisonment therein for any offense, to be dealt with in a manner less severe than is required by law, such sheriff or jailer shall be fined in any sum not exceeding one hundred dollars.²

The statute is not to be understood as requiring the officer to treat prisoners harshly or cruelly. He may and should be kind to them, but he is a mere ministerial officer, whose duty it is to carry out the sentence of the court. The presumption is that the sentence is right, and both prisoner and officer must comply with its terms. It is better, however, to err on the side of humanity than against it.

AGAINST JAILER FOR LENITY TO PRISONERS.

That at a term of the — court of — county, begun and held at —, in the county aforesaid, one E F was duly and lawfully convicted of the offense of [assault and battery upon one G H], and it was thereupon considered and adjudged by said court that the said E F be imprisoned in the cell of the jail of said county for the period of ten days from and after the — day of —; that in pursuance of said judgment and sentence said E F was committed to C D, at that time having the care and custody of said jail as the jailer of said county, together with a mittimus showing the term of imprisonment and that the said E F was to be imprisoned in the cell of said jail for ten days from and after the — day of —, yet said C D, having the care and custody of said jail and said E F during the term of his imprisonment in said jail, knowingly and unlawfully did suffer said E F to be dealt with in a manner less severe than was required by law, in this, to wit, by neglecting and refusing during all of said imprisonment to imprison him, the said C D, in the cell of said jail.

Rescue of Person Convicted of Crime.—If any person or persons shall set at liberty or rescue any person who shall have been found guilty of a crime the punishment of which is

¹Cr. Code, § 170. See *State v. Wilson*, 30 Kan., 662, where the doctrine of forfeiture of an office is discussed.

²Cr. Code, § 172.

death, or shall aid in the escape of such convict, such person shall be punished by confinement in the penitentiary for a term not less than one year nor more than fourteen years; and if any person or persons shall set at liberty or rescue any person who shall have been found guilty or convicted of a crime the punishment of which is confinement in the penitentiary, whether such person be in the custody of an officer or in the penitentiary, or shall aid in the escape of such convict, the person so offending, on conviction thereof, shall be sentenced to the same punishment that would have been inflicted on the person so set at liberty or rescued.¹

FOR RESCUING CONVICTED PRISONERS.²

That on the — day of —, etc., one A B was duly and legally convicted of the crime of murder in the first degree in the — court of — county, and it was thereupon by said court considered and adjudged that he, the said A B, be hanged by the neck until he was dead on the — day of — then next ensuing, and until the day of such execution the said A B was ordered by said court to be and was placed in the care and custody of one G H, then and there being the sheriff of said county; that on the — day of — while said judgment and sentence were in full force and effect and before the time for the execution of said A B, one E F, unlawfully and feloniously, in said county, did rescue and set at liberty said A B from the custody of said G H, sheriff, he, the said E F, well knowing of the conviction and guilt of said A B as aforesaid.

Furnishing Arms or Tools to Aid an Escape.—Every person who shall convey into a state prison, jail, or other place of confinement any disguise, instrument, arms, or other thing proper or useful to aid any prisoner in his escape, with the intent thereby to facilitate the escape of any prisoner committed to or detained in such prison, jail, or place of confinement, charged with or convicted of any offense against the laws of this state or of the United States, whether such escape be effected, or attempted, or not, shall be fined not more than five hundred

¹ Cr. Code, § 173.

² It must be averred that the person set at liberty was in the custody of the officer for the offense charged. 2 Hawk. P. C., c. 19, § 26; *Rex v. Fell*, 1 Ld. Raym., 424; 1 Russ. on Cr., 422. It must also be alleged that the person rescuing knew of the conviction of the party rescued. 2 Bish. Crim. Proc., § 945.

nor less than fifty dollars, or be imprisoned in the jail not exceeding three months, or both, at the discretion of the court.¹

FOR CONVEYING TOOLS, ETC., TO AID A PRISONER TO ESCAPE.

That at a term of the — court of — begun and holden in — county on the — day of — one C D was duly charged with the crime of burglary, and thereafter, on the — day of — in said court in said county, was duly and legally convicted of said charge; and thereupon it was considered and adjudged by said court that he be imprisoned in the — for the term of — and said C D was then and there committed to the care and custody of —, there to be kept by said — in safe custody, a copy of the commitment being duly delivered to said — as authority for said imprisonment; that while said judgment and sentence were in full force and effect, and while said C D was in the care and custody of said — in pursuance thereof, one E F unlawfully, knowingly and willfully did convey into said prison one small saw and a case knife, being instruments proper and useful to aid said C D in his escape from said prison, without the consent or privity of said — with the intent of him, the said E F, unlawfully and purposely thereby to facilitate the escape of said C D from said prison.

Compounding Criminal Offenses.—If any person shall take money, goods, chattels, lands, or other reward, or promise thereof, to compound any criminal offense, such person shall be fined in double the sum or value of the thing agreed for or taken; but no person shall be debarred from taking his goods or property from the thief or felon, or receiving compensation for the private injury occasioned by the commission of any such criminal offense.²

The Compounding of a Felony was an offense at common law. This is mentioned in the books as *theft bote*, which is where the party from whom the goods are stolen not only knows the thief, but also takes his goods again, or other amends, upon an agreement not to prosecute. This was formerly held to make the party compounding an accessory, but at the time Blackstone wrote the offense was punished only by fine and imprisonment.³

The Offense Consists in the Agreement not to Prosecute.—The agreement and acceptance of the consideration not to prosecute

¹ Cr. Code, § 174.

² Cr. Code, § 177.

³ 4 Bla. Com., 133.

complete the offense.¹ The statute, however, authorizes a party to recover his own goods which have been stolen, and all the remedies known to the law are open to him for that purpose, provided that he enters into no agreement to compound the felony. He may also recover compensation for the private injury he has sustained without violating the statute.

Not Compounding.—At common law, where a party was convicted of a misdemeanor, which principally and more immediately affected some individual—as a battery, imprisonment or the like, it was not uncommon for the court to permit the defendant to speak with the prosecutor before judgment was pronounced, and if the prosecutor declared himself satisfied, to inflict but a nominal punishment. This was done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuitry of a civil action.² An agreement of that kind was not considered as compounding the offense. The statute, however, has changed the rule of the common law.

And where a party accused his cashier of stealing funds, and the cashier thereupon gave him his note for the deficiency, there being no agreement not to prosecute nor any prosecution instituted, there was no compounding of the offense;³ nor does the receiving of money by the owner of stolen property, to reimburse him for expenses incurred by him in searching for the stolen property, constitute compounding a felony.⁴

What is.—But accepting a promissory note from one charged with larceny as a consideration for not prosecuting, renders the party liable.⁵

The Indictment.—Where a person charged another with the embezzlement of his funds, and threatened to prosecute him therefor, whereupon the party charged gave a note for the deficiency, in an action on the note, it was held that an answer alleging that “at the time the note was executed, he promised and agreed to and with the maker thereof to com-

¹ *State v. Duhamm*, 2 Har. (Del.), 532.

² 4 Bla. Com., 363.

³ *Catlin v. Henton*, 9 Wis., 476.

⁴ *Taylor v. Cottrell*, 16 Ill., 94; *Bothwell v. Brown*, 51 Id., 234.

⁵ *Wallace v. Hardacre*, 1 Camp., 45; *Com. v. Cony*, 2 Mass., 534; *Com. v. Pease*, 16 Mass., 94.

pound and adjust the matter between them, to wit, the matter of which said charge of embezzlement was made against the said maker," stated no defense, there being no direct averment that the payee in the note agreed to conceal the felony and abstain from prosecution.¹

In prosecutions for this offense it is not necessary to aver in the indictment, or prove on the trial, that a crime had actually been committed by the party charged.²

The object of the statute evidently is two-fold: first, to prevent the suppression of prosecutions of actual crimes by private barter, and second, to prevent the prostitution of the criminal laws of the state to purposes of private gain by the instituting of groundless prosecutions. All that is necessary, therefore, as to the offense compounded, is to aver and prove that the prosecution was for what appeared by the charge to be a crime; but the actual commission of such crime need not be averred or proved.³

FOR COMPOUNDING A CRIME.

That on the — day of —, etc., one C D made complaint in writing and on oath before one J P, a justice of the peace of said county, duly elected, commissioned and qualified, and did then and there, upon his oath, in said complaint, charge one E F, in said county, with feloniously stealing, taking and carrying away one gold watch, the property of said C D, of the value of seventy-five dollars; upon which complaint the said J P, then and there, in due form of law issued his warrant for the taking and apprehension of said E F, to answer and be examined for said felony; which warrant was delivered to G H, sheriff of said county, to execute, and who thereupon on said day arrested said E F by virtue of said warrant, and carried him before said J P, justice of the peace, to answer said charge. when the hearing on said cause was continued until the — day of —; that on the — day of —, and while said charge of larceny was pending against said E F, he, said C D, in said county, well knowing that said criminal charge of

¹ Hoover v. Wood, McCahon, R., 79.

² Fribly v. State, 42 Ohio St., 205. The court say: "The indictment shows that a prosecution for an alleged crime had been commenced, and that while it was pending the defendants below received from the accused a note and a sum of money in consideration of the compounding and agreement to abandon such criminal prosecution." This was held sufficient.

³ Fribly v. State, 42 O. S., 206.

felony was pending against said E F, unlawfully and willfully did take and receive from said E F the sum of seventy-five dollars to compound said criminal offense.¹

AT COMMON LAW FOR COMPOUNDING A FELONY.²

That on, etc., at, etc., one W D, in his own proper person, came before J P, esquire, then and there being one of the justices, etc., assigned to keep the peace, etc., in and for the said county of — and also to hear and determine divers felonies, trespasses and other misdemeanors in said county committed, and then and there, upon his oath, did charge and accuse one M, the wife of P J, with feloniously stealing, taking and carrying away one silver spoon and two silk handkerchiefs, of the goods and chattels of said W D; upon which the said J P then and there issued his warrant under his hand and seal, made in due form of law for the apprehending and taking the said M to answer and be examined of and concerning the felony aforesaid, on her as aforesaid charged, and that afterward, to wit, on, etc., the said M etc., aforesaid, for said felony and by virtue of said warrant was taken and arrested, and then and there was brought before the said J P, the justice aforesaid, and then and there before the same justice, of and concerning the same felony, was examined, upon which the said J P, the justice aforesaid, did then and there make a certain warrant under his hand and seal, in due form of law, directed to the keeper of Newgate or his deputy, thereby commanding the aforesaid keeper or his deputy to receive into his custody the body of the said M, so charged with such felony as aforesaid, and her in custody safely to keep, until she should be discharged by due course of law. And the jurors aforesaid, upon their oath aforesaid, do further present: That the said W D, late of, etc., and J D, late of, etc., well knowing the premises, and each of them well knowing the same, but contriving and intending unlawfully and unjustly to prevent the due course of law in this behalf, and to cause and procure the said M, for the felony aforesaid, to escape with impunity, afterward, to wit, on, etc., aforesaid, at, etc., aforesaid, unlawfully and for wicked gain's sake, did take upon themselves to compound the said felony on behalf of the said M, and then and there did exact, receive and have of the said P J, the husband of the said M, twenty-six shillings in money, numbered, for and as a reward for compounding the said felony, and desisting from all further prosecution against the said M for the felony aforesaid, to the great hindrance of justice, etc.³

¹ Where the offense of compounding was charged to have been committed on a day prior to that on which the crime alleged to be compounded was committed, the complaint was held insufficient. *State v. Dandy*, 1 Brev., 395.

² The above is the form in 2 Chitty, Cr. L., 220-222.

³ 1 Chitty, Cr. L., 5; 4 Blac. Com., 363; Bac. Abr., Trespass, E, 2; 1 Hale, P. C., 546.

The common law, in cases of felony and treason, suspended the civil remedy of the party injured until he had endeavored to bring the offender to justice. The civil right, however, was neither destroyed nor merged, for after the party suspected had been either convicted or acquitted without collusion, the owner of the goods could bring a civil action for the same cause as that upon which the criminal prosecution was founded.

Conspiracy.—If any two or more persons shall conspire or agree, falsely and maliciously, to charge or indict, or cause or procure to be charged or indicted any person for any criminal offense, each of the persons so offending shall be fined in any sum not exceeding one thousand dollars and imprisoned not exceeding one year.¹

While the law favors the punishment of crime it will not allow its forms to be made an engine for the oppression of the innocent. Therefore, before an accusation is made against a party the accuser should have sufficient evidence in his possession to justify him in making the charge. By the statute, 13 Edw. I, c. 12, it was provided that if the appellee were acquitted, the appellor should suffer a year's imprisonment and pay a fine, besides compensation to the party whose life had been put in peril by the accusation.² And the ancient remedy for the malicious prosecution of an indictment was a writ of conspiracy, or an action on the case in the nature of conspiracy.³ The writ of conspiracy, however, could only be granted where more than one was accused of conspiring.⁴ These remedies afterward gave place to others.

The offense of conspiring together to charge an innocent person with the commission of a crime is a very serious one, and when fully established should be punished to the full extent of the law.

The Indictment.—It is unnecessary at common law to allege in the indictment that the party conspired against was innocent

¹ Cr. Code, § 178.

² 1 Chitty, Cr. L., 835.

³ Id.

⁴ Id., 836.

of the crime.¹ Such an averment, however, is necessary under the statute, the necessity for a negative of the party's guilt being implied by the words "falsely and maliciously to charge," etc. For evidence in cases of conspiracy see chapter on Trial.

FOR FALSELY CONSPIRING TO CHARGE ANOTHER WITH CRIME.

That on, etc., in said county, A B, C D and E F unlawfully did conspire and agree together falsely and maliciously to indict one G H of a criminal offense, to wit: for feloniously, violently, forcibly and against her will ravishing one S J, he, the said G H, being wholly innocent and guiltless of the said criminal offense, as said A B, C D and E F then and there well knew.

Willfully Mutilating Records.—If any person shall willfully and maliciously alter, deface, mutilate, destroy, abstract or conceal any record or part thereof authorized to be made by any law of this state, of or pertaining to any court, justice of the peace, or any state, county, district or municipal office or officer, or any other public record so authorized, or any paper or writing duly filed with, in or by any such court, justice of the peace, office or officer, every such person shall be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding three hundred dollars, or be imprisoned in the county jail not exceeding three months, or both, at the discretion of the court.²

FOR MUTILATING A RECORD OF DEEDS.

That A B, on, etc., in said county, unlawfully, willfully and maliciously did alter, deface, mutilate and destroy a certain record of deeds of — county, to wit, book E of the record of deeds of said county, by unlawfully, willfully and maliciously cutting out of said record ten pages thereof, on which deeds were recorded. [Said record being authorized to be made by the laws of this state.]³

¹ Reg. v. Spragg, 2 Burr, 993; Reg. v. Best, 2 Ld. Raym., 1167; Johnson v. State, 2 Dutch., 313.

² Cr. Code, § 179.

³ This allegation is probably unnecessary, as the courts take judicial notice of what records are authorized by law.

FOR ABSTRACTING A PLEADING FROM THE RECORDS OF A
COURT.

That A B, on, etc., in said county, willfully, unlawfully and maliciously did abstract and take a petition (*state name of paper*) duly filed with the clerk of the — court of — county, and in his office, thence out of said office, and conceal the same, the filing of said petition with said clerk and in his office being so authorized by the laws of this state.

CHAPTER XXXII.

OFFENSES AGAINST ELECTION LAWS.¹

If any person shall vote in any precinct or in any ward of a city in this state, in which he has not actually resided ten days, or such length of time as is required by law, next preceding the election, or into which he shall have come for temporary purposes merely, shall be fined in any sum not exceeding five hundred dollars, nor less than fifty dollars, and be imprisoned in the jail of the proper county not more than six months.²

FOR VOTING IN A PRECINCT OR TOWNSHIP WHERE THE PARTY HAS NOT RESIDED TEN DAYS.³

That A B, on, etc., not having actually resided in the township of —, in — county, for ten days next preceding the election held in said township on said day, unlawfully and willfully did vote in said township, said election being then and there duly authorized by the laws of the state.

Voting in Wrong County.—Any person being a resident of this state, who shall go or come into any county and vote in such county, not being an actual resident thereof for forty days next preceding the election, or for such time as may be required by law, shall, on conviction thereof, be imprisoned in the penitentiary not more than three years.⁴

¹ Sec. 181 provides that "the provisions of this chapter shall apply to all elections authorized by the laws of this state."

² Cr. Code, § 182.⁴

³ Where it was alleged that A B was a male person over twenty-one years of age, a citizen of the United States, and had resided in Kansas for six months next preceding the election, it was held that to entitle him to vote it must also appear that he had resided in the ward or township where he desired to vote at least thirty days next preceding the election. *Anthony v. Halderman*, 7 Kas., 50.

⁴ Cr. Code, § 183. An unmarried man left his father's residence in one township on the Sunday preceding an election, and went into another town-

FOR VOTING IN A COUNTY WHERE THE PARTY HAD NOT RESIDED FORTY DAYS.¹

That A B, on, etc., being then and there a resident of the state of —, did come into — county, in said state, and not being an actual resident thereof for forty days next preceding the election, willfully, unlawfully, and feloniously did vote at the [general] election held in said county, said election then and there being duly held and authorized by the laws of this state.

Voting more than Once.—Any person who shall vote more than once at the same election shall be imprisoned in the penitentiary not more than five years nor less than one year.²

FOR VOTING MORE THAN ONCE AT AN ELECTION.

That A B, on, etc., in said county, at an election then and there duly held at —, and authorized by the laws of this state, unlawfully, willfully and feloniously did vote more than once at the same election, to wit, twice, by voting again at said — in said county.

ship, where he remained and voted, and returned the next morning after the election, having in the meantime quit work; a verdict of illegal voting was held to be sustained by the proof. *State v. Minnick*, 15 Iowa, 123. In such a case, however, the question of the actual residence of the voter is involved, and a legal voter should not be debarred of his right to vote at the place where he may lawfully exercise the right.

¹ In *State v. Griffey*, 5 Neb., 161, the question arose as to the right of certain persons employed at a military post in Valley county to vote, and it was held that persons not in the regular army, although in the employ of the general government, will not for that reason be deprived of their votes, if they otherwise possess the statutory qualifications of electors. It is said (page 172), "A man who depends upon his work as a laborer or mechanic, often changes his residence *sine animo revertendi*, in order to live at the place of his employment. * * And it is said that a man can only have one domicile at the same time, and every man must have a domicile somewhere. A person being at a place is *prima facie* evidence that he is domiciled there, but it may be explained and the presumption may be rebutted." 2 Kent, Com., 430 n.; *Putnam v. Johnson*, 10 Mass., 501. Residence means a fixed place of abode. A canal boatman, therefore, without other place of abode than his boat, does not acquire the right to vote at a particular place by merely lying at the wharves of the canal with his boat. *Esker v. McCoy*, 6 Rec., 694. The rule probably would be different if the place where he sought to vote was his actual residence, to which he intended to return when away.

² Cr. Code, § 184.

FOR VOTING MORE THAN ONCE AT DIFFERENT PLACES.

That A B, on, etc., did then and there vote in the first ward in the city of O, in said county, at an election then and there duly held and authorized by the laws of this state, and afterward, on the same day, unlawfully and feloniously did vote more than once at the same election, to wit, twice, by voting again in the second ward of said city in said county.

Resident of another State.—Any resident of another state who shall vote in this state shall, on conviction thereof, be imprisoned in the penitentiary not more than five years.¹

RESIDENT OF ANOTHER STATE VOTING.

That A B, on, etc., then and there being a resident of another state, to wit, the state of — unlawfully, willfully and feloniously did vote at an election duly held in said county in this state, on, etc., said election being authorized by the laws of this state.²

Voting before a Residence has been Acquired.—Any person who shall vote, who shall not have been a resident of this state for six months, or such time as is required by law immediately preceding the election, or who, at the time of the election, is not twenty-one years of age, knowing that he is not twenty-one years of age, or who is not a citizen of the United States, and has not filed his declaration of intention to become such according to the laws of the United States, knowing that he is not such citizen, and that he has not filed such declaration, or who, being disqualified by law, by reason of his conviction of some infamous offense, shall not have been pardoned and restored to all the rights of a citizen, shall be imprisoned in the county jail of the proper county not more than six months.³

Good Faith.—It will be observed that the words, “knowing that he is not twenty-one years of age,” etc., are found in the section quoted. The question, therefore, on a trial under the

¹ Cr. Code, § 185.

² The language of the statute is “authorized by the laws of this state.” This language, no doubt, may be employed in the indictment or information and is equally as effective as the words “authorized by the laws of the state of —.”

³ Cr. Code, § 186.

second and third provisions of the section named, becomes one of good faith,¹ and probably so under the first.

FOR VOTING UNDER TWENTY-ONE YEARS OF AGE.

That A B, on, etc., at an election, then and there duly held in said county, authorized by the laws of this state, unlawfully and willfully did vote at said election, he, the said A B, at the time he so voted not being twenty-one years of age, he, the said A B, then and there knowing that he was not then and there twenty-one years of age.

FOR VOTING, NOT BEING A CITIZEN OR HAVING DECLARED HIS INTENTION TO BECOME SUCH.

That A B, on, etc., at an election then and there duly held in said county, authorized by the laws of this state, unlawfully and willfully did vote at said election, he, the said A B, when he so voted, not being a citizen of the United States, and not having filed his declaration to become such, according to the laws of the United States, he, the said A B, then and there well knowing that he was not such citizen, and that he had not filed such declaration.

Procuring or Aiding Another, Not a Voter, to Vote.—Any person who shall procure, aid or assist, counsel or advise another to give his vote, knowing that such person has not been a resident of this state six months, or such time as is required by law, immediately preceding the election; or, that at the time of the election he is not twenty-one years of age; or, that he is not a citizen of the United States, and that he has made no declaration, according to law, to become such citizen; or, that he is not duly qualified, from other disabilities, to vote at the place where and the time when the vote is given, shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the county jail not more than six months.²

PROCURING OR AIDING AN ILLEGAL VOTER TO VOTE.³

That A B, on, etc., at an election then and there duly held in said county, authorized by the laws of this state, unlawfully and willfully did vote at

¹ Gordon v. State, 52 Ala., 308; S. C., 23 Am. R., 575.

² Cr. Code, § 187.

³ As under the statute the attempt to vote is not made an offense as in some of the states, the offense of voting illegally must be complete before

said election, he, the said A B, at the time he so voted, not being twenty-one years of age, and then and there well knowing that he was not then and there of the age of twenty-one years; that C D, well knowing that said A B was not twenty-one years of age at the time of said election, unlawfully and willfully did procure, counsel and advise him, the said A B, to give his vote at said election as aforesaid.

Procuring a Person to go into Another County to Vote.—Any person who shall procure, aid, assist, counsel, or advise another to go or come into any county for the purpose of giving his vote in such county, knowing that the person is not qualified to vote in such county, shall be imprisoned in the penitentiary not more than five years nor less than one year.¹

PROCURING A PERSON TO GO OR COME INTO ANOTHER COUNTY TO VOTE.

That on the — day of —, etc., an election was duly held in the several voting places in the state, said election being authorized by the laws of the state of — to be so held; that on said day one C D, a resident of E county, in said state, willfully, unlawfully and feloniously did come from said E county into F county, for the purpose of unlawfully and feloniously giving his vote in such last named county at said election, he, the said C D, not being a resident of F county; that one G H, well knowing that said C D was not a resident of F county, but was then and there a resident of E county in said state, unlawfully, willfully and feloniously did procure, aid, assist, counsel and advise said G H to come into F county for the purpose of giving his vote in said county at such election.

Bribery, etc.—Any person who shall by bribery attempt to influence any elector of this state in giving his vote or ballot, or who shall use any threat to procure any elector to vote contrary to the inclination of such elector, or to deter him from giving his vote or ballot, shall be fined in any sum not exceeding five hundred dollars, and be imprisoned in the county jail not more than six months.²

one who counsels, procures, etc., the casting of such vote will be liable. It is necessary, therefore, to set forth the particular disqualification of the voter, as not being twenty-one years of age, not a resident of the precinct, ward, township, county, etc., not a citizen of the United States, etc., or disqualified by reason of the conviction of a crime and no pardon granted.

¹ Cr. Code, § 188.

² Cr. Code, § 189.

FOR BRIBING AN ELECTOR.¹

That on, etc., an election was duly held at —, authorized by the laws of this state, at which election C D and E F were severally candidates for the office of member of congress from the — district of this state; that one G H, then and there, on the day aforesaid, in said county, and before S T, who was then and there an elector and entitled to vote had voted at said election, unlawfully and corruptly did offer to said S T the sum of one hundred dollars as a bribe, gift and reward to corrupt and influence said S T in giving his vote for C D instead of E F, at said election.²

FOR THREATENING AN ELECTOR TO CAUSE HIM TO VOTE CONTRARY TO HIS INCLINATION.

That on, etc., an election was duly held at —, authorized by the laws of this state, at which election G H and I J were severally candidates for the office of senator for the — district of said state; that one L M, then and there, on the day aforesaid, in said county, and before C D, who was then and there an elector and entitled to vote at said election, had voted thereat, then and there unlawfully and corruptly did threaten said C D [to institute criminal proceedings against him, said C D, for, etc.], unless he would vote for said G H for senator, at said election, and against the said I J; which threat was then and there unlawfully and willfully made by said L M, unlawfully to procure said C D to vote for said G H, and contrary to his inclination to vote for I J.

Deceiving Electors Unable to Read.—Any person who shall furnish an elector who can not read with a ticket, informing him that it contains a name or names different from those which are written or printed thereon, with an intent to induce him to vote contrary to his inclination, or who shall fraudulently or deceitfully change a ballot of any elector, by which such elector shall be prevented from voting for such candidate or candidates as he intended, shall be imprisoned in the penitentiary not more than three years.³

¹ The statute contains two provisions: first, an attempt by bribery to influence an elector in giving his vote. In this the offense is complete by the bribery for the purpose named. Under the second, however, it must be alleged that the threat was to procure the elector to vote contrary to his inclination, or to deter him from voting.

² Under the statute of Kansas, a candidate who gives or offers a voter any money or property for his vote, will be denied the office. Comp. Laws of 1879, p. 403; *State v. Elting*, 29 Kas., 397.

³ Cr. Code, § 190.

DECEIVING AN ELECTOR UNABLE TO READ.

That on the — day of —, etc., at — in — county, an election was duly held for the election of county officers of said county, said election being duly authorized by the laws of this state; that C D and E F were candidates at said election for the office of [register of deeds] of said county; that one G H, then and there being an elector and resident of — in said county, and lawfully entitled to vote thereat at said election, but being blind, was unable to read, whereupon he, the said G H, then and there desiring to and being inclined to vote for said E F for said office, and one S T well knowing the premises, and that said G H by reason of blindness was unable to read, then and there well knowing the inclination of said G H to vote for said E F, then and there willfully, unlawfully and feloniously, with the intent to induce said G H to vote contrary to his inclination, furnished said G H with a ticket, informing him, said G H, that it contained the name of said E F for said office of register of deeds of said county, whereas, in truth and in fact, the name of C D and not E F was written on said ticket for said office of register of deeds, with the intent then and there to induce him, the said G H, to vote for said C D, contrary to his inclination.

FOR FRAUDULENTLY OR DECEITFULLY CHANGING A BALLOT.

That on the — day of —, etc., at —, in — county, an election was duly held for the election of governor of the state of —, etc., (*state in full the various officers to be elected*) said election being duly authorized by the laws of the state; that one G H, then and there being an elector and resident of —, in said county, and lawfully entitled to vote thereat at said election, did then and there have a ballot in his possession with the name of O P M printed thereon, for the office of governor, (*state the names of the candidates with the office for which each was a candidate*) which ballot he, the said G H, intended and desired, then and there, to give and cast at said election; that one M L, well knowing that said G H intended to give and cast said ballot at said election, then and there unlawfully, fraudulently, deceitfully and feloniously did change said ballot of the said G H, and in its stead did substitute, furnish and give to said G H another ballot, on which was printed for the office of governor O P Q, (*give all the names on the substituted ballot*) by which fraudulent and deceitful change of the ballot aforesaid said G H was prevented from voting for such candidates as he had intended and desired.

Misconduct of Judges and Clerks of Election.—If any judge of the election shall knowingly receive, or sanction the reception of a vote, from any person not having all the qualifications of an elector prescribed by the laws of this state; or shall receive or sanction the reception of a ballot from any person

who shall refuse to answer any question which shall be put to him in accordance with the requirements of the laws of this state; or who shall refuse to take the oath prescribed by the laws of this state; or who shall refuse or sanction the refusal by any other judge of the election board to which he shall be long to administer any oath or affirmation required by the laws of this state, and in such case required to be administered; or if any judge of the election shall refuse to receive, or shall sanction the rejection of a ballot from any person, knowing him to have the qualifications of an elector under the provisions of the laws of this state, at the place where the elector offers to vote, or if any judge or clerk of the election, on whom any duty is enjoined by the laws of this state, shall be guilty of any willful neglect of any such duty, or of any corrupt conduct in the execution of the same, such judge or clerk shall be fined in any sum not more than one thousand dollars nor less than three hundred dollars, and be imprisoned in the jail of the county not more than six months nor less than three months. Provided, that so much of the provisions of this section as may be superseded by any registration laws in force, shall not be operative where such laws are in force.¹

AGAINST JUDGES OF AN ELECTION FOR KNOWINGLY RECEIVING AN ILLEGAL VOTE.

That on, etc., an election duly authorized by the laws of this state was held at —, in — county, at which election E F, G H and I J were duly appointed, qualified and acting judges thereof; that one A B, who was then but nineteen years of age, appeared in person before said judges at the polls of said election on said day, while said polls were open for the reception of votes as required by law, and then and there offered his vote to said judges at said election, who unlawfully, fraudulently and knowingly received the same and deposited it in the ballot box, said E F, G H and I J then and there well knowing that said A B was but nineteen years of age,² and not then and there having all the qualifications of an elector prescribed by the laws of this state.

¹ Cr. Code, § 191.

² The indictment or information must show wherein the voter was disqualified. A general allegation that the person voting did not have "the legal qualifications of a voter" is bad. *State v. Moore*, 3 Dutch., 105; *Quinn v. State*, 35 Ind., 485; *Pearce v. State*, 1 Sneed, 487; *State v. Minnick*, 15 Iowa, 123.

**AGAINST JUDGES OF ELECTION FOR RECEIVING BALLOT OF VOTER
WHO REFUSES TO BE SWORN.**

That on, etc., an election duly authorized by the laws of this state was held at —, in — county, at which election E F, G H and I J were duly appointed, qualified and acting judges thereof; that one A B appeared in person before said judges at the polls of said election on said day, while said polls were open for the reception of votes as required by law, and then and there offered his vote to said judges, whereupon one S T challenged said A B as not possessing the necessary qualifications to vote at said election. The said A B was thereupon duly sworn to answer all such questions as should be put to him touching his qualifications as an elector, and being so sworn as aforesaid the following questions were put to him (*copy*) each of which [or according to the fact] he refused to answer. But notwithstanding such refusal of said A B to answer the questions aforesaid touching his qualifications as an elector, said E F, G H and I J, judges as aforesaid, fraudulently, unlawfully and knowingly did receive said ballot from said A B and deposit the same in the ballot-box, then and there well knowing that said A B had refused as aforesaid to answer questions touching his qualifications as an elector, put to him in accordance with the requirements of the laws of this state.¹

**AGAINST JUDGES OF ELECTION FOR REFUSING TO RECEIVE VOTE
OF QUALIFIED ELECTOR.**

That on, etc., an election, duly authorized by the laws of this state, was held at —, in — county, at which election E F, G H, I J were duly appointed, qualified and acting judges thereof; that one A B, who was then and there a qualified elector and entitled to vote at —, then and there appeared in person before said judges, at the polls of said election, on said day, while said polls were open for the reception of votes, and then and there offered his ballot as required by law, but said judges unlawfully and maliciously refused to receive said ballot of said A B, and sanctioned the rejection of the same, although well knowing him, the said A B, to have the qualifications of an elector, under the provisions of the laws of this state.

Fraudulently Putting Ballots in the Ballot Box.—Any person or persons who shall, either before or after proclamation is made of the opening of the polls, fraudulently put a ballot or ticket

¹ It is evident from the language of the statute that the questions to be answered are to be such as may properly be asked, tending to show either that the person challenged is a voter at the place where he offers his vote, or that he is not. The refusal to answer irrelevant questions will form no basis for a prosecution.

into the ballot box, shall be imprisoned in the penitentiary not more than three years nor less than one year.¹

FOR FRAUDULENTLY PUTTING BALLOTS IN BALLOT BOX.

That on, etc., an election, duly authorized by the laws of this state, was held at —, in — county; that one E F, before proclamation of the opening of the polls was made, secretly, unlawfully, fraudulently and feloniously, put a ballot and ticket into the ballot box at said election.²

Against a Judge of Election for Fraudulently Putting a Ballot in Ballot Box.—Any judge or judges of the election who shall, after proclamation made of the opening of the polls, put a ballot or ticket into the ballot box, except his or their own ballot or ticket, or such as may be received in the regular discharge of his or their duties as such judge or judges, or who shall knowingly permit any ballot or ticket, fraudulently placed or deposited in such ballot box by any other person or persons, to remain therein, or to be counted with the legal votes cast at said election, shall be imprisoned in the penitentiary not more than three years nor less than one year.³

AGAINST JUDGE OF AN ELECTION FOR FRAUDULENTLY DEPOSITING BALLOT IN BALLOT BOX.

That on, etc., an election, duly authorized by the laws of this state, was held at —, in — county, at which election one C D was one of the judges, duly appointed, qualified and acting as such judge thereat; that said C D, after proclamation made of the opening of the polls at said election, secretly, fraudulently, unlawfully and feloniously did put a certain ballot and ticket into the ballot box at said election, said ballot not being his own ballot and ticket, or such as he received in the regular discharge of his duty as such judge.

AGAINST JUDGE OF ELECTION FOR KNOWINGLY PERMITTING A FRAUDULENT BALLOT TO BE PLACED IN OR REMAIN IN THE BALLOT BOX.

That on, etc., an election, duly authorized by the laws of this state, was

¹ Cr. Code, § 192.

² The statute does not require a statement of the names on the ticket; in many cases it would be impossible to give them.

³ Cr. Code, § 193.

held at —, in — county, at which election one E F was one of the judges, duly appointed, qualified and acting as such judge; that said E F, after proclamation made of the opening of the polls of said election, secretly, knowingly, fraudulently and feloniously did permit one G H fraudulently and unlawfully to place and deposit a ballot and ticket not his own in such ballot box, said ballot and ticket not being so placed and deposited in said ballot box by said G H in the regular discharge of his duty as judge of said election.

Fraud in Election Returns.—Any judge or clerk of any election under the laws of this state, or any other person or persons who shall at any time willfully, knowingly and with fraudulent intent, inscribe, write, or cause to be inscribed or written in or upon any poll book, tally sheet, tally list, in or upon any book or paper purporting to be such, or upon any election returns under the laws of this state, or upon any book or paper containing the same, the name of any person or persons not entitled to vote at said election, or not voting thereat, or any fictitious name, with intent to defeat, hinder or prevent a fair expression of the will of the people at such election, shall be imprisoned in the penitentiary not more than three years, nor less than one year.¹

FOR FRAUDULENTLY CHANGING POLL BOOK, TALLY SHEET, ETC.

That on, etc., an election, duly authorized by the laws of this state, was held at —, in — county, at which election C D, E F and G H were the judges, and I J and K L were clerks of said election, duly appointed, qualified and acting as such; that on said day said K L willfully, knowingly, feloniously and with fraudulent intent did inscribe, write, and cause to be inscribed and written in and upon the poll books, tally sheets and tally lists of said election, the following fictitious names of persons (*copy names*), no such persons having voted at said election, with the intent of him, the said K L, unlawfully and feloniously to defeat, hinder and prevent a fair expression of the will of the people at said election.

Counterfeit Poll Book, etc.—Any person or persons who shall at any time have in his or their possession any falsely made, altered, forged or counterfeited poll book, tally sheet, tally list or election returns of any election under the laws of this state, knowing the same to be falsely made, altered, forged or counterfeited, with intent to hinder, defeat or prevent a

¹ Cr. Code, § 194.

fair expression of the popular will at any such election, shall be imprisoned in the penitentiary not more than three years nor less than one year.¹

FOR HAVING IN POSSESSION A FALSELY MADE OR COUNTERFEIT POLL BOOK, TALLY SHEET, TALLY LISTS, ETC.

That on, etc., an election, duly authorized by the laws of this state, was held at —, in — county, at which election G H, I J and K L were the judges, duly appointed, qualified and acting as such, and M N and O P were the clerks of said election; that after the close of said election and the canvass of the votes cast thereat, the poll books, tally sheets and tally lists and said returns, duly sealed up, were delivered to O P for delivery to the county clerk, and one copy of each for retention by himself; and said O P thereupon, while said poll books, tally sheets and tally lists were in his possession as aforesaid, unlawfully and feloniously permitted the same to be changed, by adding to said poll books, tally sheets and tally lists two hundred names of fictitious voters, and unlawfully and feloniously retained said falsely made, altered and forged poll books, tally sheets and tally lists in his possession, knowing the same to be falsely made, altered and forged, with the intent of him, the said O P, to hinder, defeat and prevent a fair expression of the popular will at such election.²

Obtaining Ballot Box by Force or Fraud.—If any person or persons, at any election held by virtue of any laws of this state in any ward of any city, or in any village or election precinct in any county of this state, shall unlawfully, either by force, violence, fraud or other improper means, obtain possession of any ballot box, or any ballot or ballots therein deposited, while the voting at said election is going on, or before the ballots shall have been duly taken out of such ballot box by the judges of election, according to law, such person or persons shall be imprisoned in the penitentiary not more than three nor less than one year, at the discretion of the court.³

FOR FORCIBLY OR FRAUDULENTLY OBTAINING POSSESSION OF BALLOT BOX.

That on, etc., an election, duly authorized by the laws of this state, was

¹ Cr. Code, § 195.

² Cases of this kind have occurred in one or two instances in this state, although none of them have yet been submitted to the court of last resort, and cases somewhat similar seem to have occurred in Chicago and Cincinnati.

³ Cr. Code, § 196.

held at — in — county, at which election I J, K L and M N were judges, duly appointed, qualified, and acting as such, and O P and Q R were clerks of said election ; that proclamation was duly made of the opening of the polls of said election, and a large number of votes were cast thereat, to wit, about three hundred ; that while the voting at said election was still going on, and before the ballots were duly taken out of the ballot box by the judges of said election, according to law, C D and E F, then and there unlawfully and violently did make an assault in and upon the judges and clerks of said election as aforesaid, and unlawfully, by force and violence, and feloniously, did obtain possession of said ballot box, and carried the same away with the ballots therein deposited.

Destruction of Ballot Box and Ballots, etc.—If any person or persons shall unlawfully destroy any ballot box used, any ballot or vote deposited, any poll book kept at any election held by virtue of any law of this state, such person or persons shall be imprisoned in the penitentiary not less than one nor more than five years, at the discretion of the court.¹

FOR DESTRUCTION OF BALLOT BOX, ETC.

That on, etc., an election, duly authorized by the laws of this state, was held at — in — county, at which election K L, M N and O P were judges, duly appointed, qualified, and acting as such, and R S and U V were clerks of said election; that proclamation was duly made of the opening of the polls of said election, and a large number of lawful votes and ballots cast and duly deposited in said ballot box, to wit, four hundred; that while the voting at said election was still going on, and while said ballots were so deposited in said ballot box, A B and C D, then and there, unlawfully and feloniously and by violence, did destroy said ballot box and the ballots therein contained.

Attempt to Destroy Ballot Box.—If any person or persons, at any election held by virtue of any law of this state, in any ward of any city, or in any village or election precinct of any county in this state, shall unlawfully, either by force, violence, fraud or other improper means, attempt to obtain possession of any ballot box, or any ballot or ballots therein deposited, while the voting at such election is going on, or before the ballots shall all have been duly taken out of such ballot box by the judges of such election, according to law; or if any person or persons shall unlawfully attempt to destroy any ballot box used, any ballot or vote deposited, any poll book

¹ Cr. Code, § 197.

kept at any election held by virtue of any law of this state, such person or persons shall be imprisoned in the penitentiary not less than one nor more than three years, at the discretion of the court.¹

FOR ATTEMPTING UNLAWFULLY TO OBTAIN POSSESSION OF BALLOT BOX.

That on, etc., an election was held at — in — county, by virtue of the laws of this state, at which election A B, C D and E F were judges duly appointed, qualified and acting as such, and G H and I J were clerks of said election; that proclamation was duly made of the opening of the polls of said election, and a large number of lawful votes and ballots were cast and duly deposited in said ballot box, to wit, five hundred; that while the voting at said election was going on, and before the ballots so as aforesaid deposited in said ballot box were taken out of the same by the judges of said election, according to law; K L and M N, unlawfully and feloniously and by force and violence, did attempt to obtain possession of said ballot box and the ballots deposited therein.

FOR ATTEMPTING TO DESTROY THE BALLOT BOX USED, ETC.

That on, etc., an election was held at — in — county, by virtue of the laws of this state, at which election C D, E F and G H were judges, duly appointed, qualified and acting as such, and I J and K L were clerks of said election; that proclamation was duly made of the opening of the polls of said election, and a number of lawful votes and ballots cast and deposited in the ballot box used at said election; that while said ballot box was being used at said election for the reception of votes, M N and O P unlawfully and feloniously did attempt to destroy said ballot box so used, and the ballots and votes deposited therein.

Sale of Liquors on Election Days Prohibited.—It shall be unlawful for any person in this state to sell or give away, or dispose of with intent to evade the law, any intoxicating liquors on the day of any general or special election. Any person offending against this section shall be guilty of a misdemeanor and be punished by fine not less than twenty-five dollars, nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days, or both such fine and imprisonment.²

¹ Cr. Code, § 198.

² Cr. Code, § 199. In a number of the states acts have been passed prohibiting the sale or giving away of intoxicating liquor on an election day.

FOR SELLING LIQUOR ON ELECTION DAY.

That on, etc., an election, duly authorized by the laws of this state, was duly held in — county and on said day, one A B, in the county aforesaid, unlawfully and willfully did sell intoxicating liquors to one C D, then and there being.

The Indictment.—It must appear that the election was lawfully held. This usually should be alleged in the words of the statute, but words conveying the same meaning will be sufficient.¹ Thus, an averment that a town meeting was duly holden, without stating by what authority, is sufficient.² So where the allegation was “that the inhabitants were convened according to the constitution and laws of the state in legal town meetings for the choice of town officers.”³ And where it was averred that at a time and place named the defendant voted at an election authorized by law, it was held that it was implied that the election was held by the proper officers.⁴

The Place must be Alleged.⁵—If, however, the offense is not local—committed before or by some particular election board, it is probably sufficient to aver that the offense was committed in the county. Statutes like that relating to elections not unfrequently read “authorized by the laws of this state.” The words “of this state” in that connection are surplusage, and the failure to insert them would not be fatal.⁶

Laws of Indiana, 1877, 92, § 1; *Ohi o*, Act of March 10, 1864; *Hoskey v. State*, 9 Tex. Ap., 202; *State v. Cady*, 47 Conn., 44; *State v. Kidd*, 74 Ind., 554; *State v. Powell*, 3 Lea, 164; *Haines v. State*, 7 Tex. Ap., 80; *Manis v. State*, 3 Heisk., 315; *English v. State*, 7 Tex. Ap., 171; *State v. Stamey*, 71 N. C., 202; *State v. Irvine*, 3 Heisk., 155. Such legislation is of a highly beneficial character and could be adopted with advantage by every state in the Union.

¹ *Whitman v. State*, 17 Neb., 224.

² *State v. Marshall*, 45 N. H., 231.

³ *State v. Bailey*, 21 Me., 62.

⁴ *State v. Douglas*, 7 Iowa, 413.

⁵ *Com. v. Desmond*, 122 Mass., 12; *State v. Bruce*, 5 Oregon, 68; *Gallagher v. State*, 10 Tex. Ap., 469; *Wilson v. State*, 52 Ala., 299.

⁶ *Com. v. Shaw*, 7 Met., 52; *Butler v. Davis*, 5 Neb., 521; *Harding v. Strong*, 42 Ill., 149. The two cases last cited were in relation to the conveyance of real estate, the state not being named in the deed; but it was held that the conveyance of the real estate designated in the deed, in the state where they were executed and delivered, was intended. The same principle applies in a criminal case.

Double Voting.¹—Where the party is accused of voting in two or more different places, each must be set out;² but it is unnecessary to name the person or persons voted for or the offices to be filled.³ The offense consists in voting twice or more, without regard to the persons for whom the votes were cast.

Evidence.—The burden of proof is on the state to prove an election authorized by law on the day named, and that the accused voted thereat. The presumption of law being in favor of innocence, the state must prove the negative averment that the accused was not a qualified elector.⁴ If the person voting in good faith believed he was a qualified elector, he will not be liable even if it should appear that he did not possess the necessary qualification.⁵

¹ Under the California statute, which makes it penal to "vote more than once at any election," it was held in *People v. Harris*, 29 Cal., 678, that if a person was unconscious that he had already voted—being too drunk to know—he was not punishable for voting a second time; a dangerous doctrine. *Contra State v. Welch*, 21 Minn., 22.

² *State v. Fitzpatrick*, 4 R. I., 269.

³ *State v. Minnick*, 15 Iowa, 123; *Wilson v. State*, 52 Ala., 299.

⁴ *Com. v. Bradford*, 9 Met., 268.

⁵ *Gordon v. State*, 52 Ala., 306; S. C., 23 Am. R., 575.

Ordinarily the question of good faith is one of fact, to be determined by the jury from the evidence. *Com. v. Wallace*, Thach. Cr. Cas., 592.

CHAPTER XXXIII.

OFFENSES AGAINST PUBLIC HEALTH AND SAFETY.

If any butcher, or other person, shall knowingly sell any unwholesome flesh of a diseased animal, or other unwholesome provision, he or she shall be fined in any sum not exceeding fifty dollars.¹

At Common Law, it was a misdemeanor knowingly to give any person injurious food to eat, whether the offender was excited by malice or from a desire of gain; nor was it necessary that the offender should be a public contractor, or that the injury should be done to the public service, to render him liable.² Thus, if a baker should direct his employe to make bread containing a certain quantity of alum, which, when mixed with other ingredients, is said to be innoxious, but in the execution of the orders the drugs were mixed in an unskillful way, and the bread rendered unwholesome, it was held that the master was liable to be indicted.³

FOR SELLING UNWHOLESOME PROVISIONS.

That A B, on, etc., in — county willfully, unlawfully and knowingly did sell for a consideration⁴ to one C D a quantity, to wit, twenty pounds, of

¹ Cr. Code, § 227. This was an offense at common law. Blackstone says: "A second, but much inferior species of offense against public health, is the selling of unwholesome provisions, to prevent which, the statute, 51 Hen. III. St. 6, and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious and unwholesome flesh, or flesh that is bought of a Jew, under pain of amercement for the first offense, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth." 4 Bla. Com., 162.

² 2 Chitty, Cr. L., 557; 2 East, P. C., 822.

³ 2 Chitty, Cr. L., 557; Rex v. Dixon, 3 M. & S., 110; 4 Camp., 12.

⁴ The amount of the consideration would not seem to be material if the articles mentioned as being diseased were sold for food; and the law im-

pork for food, of the unwholesome flesh of a diseased swine, he, the said A B, then and there well knowing that said flesh was diseased and unsound.

AT COMMON LAW, FOR FURNISHING A HOSPITAL WITH UNWHOLE-SOME BREAD.

That A B, late of, and for the space of six months now last past at — etc., has been employed and intrusted to make and deliver for the use of the — asylum there, the same being an institution for the bringing up certain children of —, belonging to which asylum there were divers, to wit, twelve hundred, of the said children, certain loaves of good household bread for the use and supply of said children, at and for a certain price to be therefor paid to the said A B for the same, and that said A B, being so employed and intrusted, but being an evil disposed person and not regarding the laws, etc., with force and arms, etc., unlawfully, falsely, fraudulently and deceitfully, and for his own lucre in the course of the said employ, did in breach of his trust and duty, deliver and cause to be delivered unto J H and J G, being respectively officers or servants belonging to the said asylum, divers, to wit, two hundred and ninety-seven loaves of bread as and for loaves of good household bread, for the use and supply of said asylum and the children belonging to the same, whereas in truth and in fact, the said loaves of bread were not good household bread, but on the contrary contained divers noxious and unwholesome materials, not fit or proper for the food of man, and the said A B well knew that the said loaves of bread were not good household bread, but that the same did contain such noxious materials.¹

Stagnant Water.—If any person shall build, erect, continue or keep up any dam, or other obstruction, in any river or stream of water in this state, and thereby raise an artificial pond, or produce stagnant waters, which shall be manifestly injurious to the public health and safety, every person so offending shall be fined in any sum not exceeding five hundred dollars, at the discretion of the court; and the court shall, moreover, order every such nuisance abated or removed.²

poses the penalty for selling the diseased meat or provisions without regard to the price. In some of the states the selling of diseased meat or unwholesome provisions without notifying the buyer is felony. Rev. Stat. of Me. c. 63, § 1. And a misdemeanor in others. S. & C. Stat. of Ohio, 433; Rev. Stat. of Mich., c. 159; Rev. Stat. of Wis., c. 140; Rev. Stat. of Mass., c. 131; Rev. Stat. of Vt., c. 109; Iowa Code, c. 146; Hatch, Stat. Law of Ga., 747; 2 Arch. Cr. Pl. & P., 1773.

¹ The above is the form in 2 Chitty, Cr. L., 559. omitting certain words. See form, § M. & S., 11; 4 Camp., 10.

² Cr. Code, § 228. In *Thomas v. Woodman*, 23 Kas., 217, where an ac-

There is no Prescription for a Public Nuisance.—As against the public it is said that there is no prescriptive right to maintain a public nuisance. And if the damming up of water, even if in pursuance of a prescriptive right, causes the formation of noxious and unwholesome gases, thereby producing sickness and disease in the vicinity, the dam may be abated.¹

Where a stream is known by different names in different places it may be described by the name by which it is generally known.²

FOR KEEPING UP A DAM WHICH PRODUCES STAGNANT WATER.

That A B, in — county, on, etc., and from thence continuously until the — day of — did and now does unlawfully keep up a dam across a stream of water in said county, commonly called [Prairie Creek], and thereby raised and now raises, by means of the keeping up of said dam an artificial pond, and produces stagnant waters, which during all of said time have been and now are manifestly injurious to the public health and safety.

Offensive Matter not to be Placed in a Spring, etc.—Any person or persons who shall put any dead animal, carcass, or part thereof, or other filthy substance, into any well, or into any spring, brook, or branch of running water of which use is made for domestic purposes, every person so offending shall be fined in any sum not less than two nor more than forty dollars.³

FOR PUTTING OFFENSIVE MATTER IN A WELL OR SPRING.

That A B, on, etc., in said county, willfully and unlawfully did put a certain dead animal, to wit, a dead rat, into a certain spring then and there

tion in equity was brought to abate and remove a certain dam across the Little Arkansas river, and to fill up a race course, diverting the water above said dam into a stream called Chisholm creek, it appeared that the right to build the dam had been obtained by condemnation proceedings, and that the plaintiff, without objection, had permitted the owners to expend large sums of money in the erection and repair of the dam and of the mill and machinery without objection, and had waited for several years before bringing the action; therefore he was not entitled to the relief.

¹ *Regina v. Brewster*, 8 Up. C. (C. P.), 208; *Mills v. Hall*, 9 Wend., 815; *Rhodes v. Whitehead*, 27 Tex., 304; *People v. Cunningham*, 1 Denio, 524; *Com. v. Upton*, 6 Gray, 475; *Morton v. Moore*, 15 Id., 573; *Cross v. Morristown*, 18 N. J. Eq., 305; *Weld v. Hornsby*, 7 East, 199; *Elkins v. State*, 2 Humph., 543; *Wood on Nuisances*, 743-745.

² *Bossert v. State*, Wright, R., 113.

³ Cr. Code, § 229.

situate, the property of C D, the water of which spring was used by said C D [and family] for domestic purposes, the said A B then and there well knowing that said C D and family used said water for domestic purposes as aforesaid.¹

Offensive Matter not to be Placed Where.—If any person or persons shall put the carcass of any dead animals, or the offals from any slaughter house or butcher's establishment, packing house, or fish house, or any spoiled meats, or spoiled fish, or any putrid animal substance, or the contents of any privy vault, upon or into any river, bay, creek, pond, canal, road, street, alley, lot, field, meadow, public ground, market space, or common, or if the owner or owners, occupant or occupants thereof, shall knowingly permit the same to remain in any of the aforesaid situations, to the annoyance of the citizens of this state, or any of them, or shall neglect or refuse to remove or abate the nuisance occasioned thereby within twenty-four hours after knowing of the existence of such nuisance upon any of the above described premises, owned or occupied by him, her, or them, or after notice thereof in writing from the street commissioner, supervisor, constable, any trustee or health officer of any city or precinct in which said nuisance shall exist, every such person shall be fined in any sum not less than one nor more than fifty dollars. And if said nuisance be not abated within twenty-four hours thereafter, it shall be deemed a second offense against the provisions of this section, and every like neglect of each twenty-four hours thereafter shall be considered an additional offense against the provisions of this section.²

¹ It is probable that this allegation is unnecessary. If a person unlawfully puts a dead animal in the spring or well of another person, it devolves on him to inquire whether or not some person is using water from that well or spring for domestic purposes. The liability of the wrongdoer does not depend on his knowledge or the want of it, that the water of the well or spring is being used for domestic purposes, but upon the fact that it is so used.

² Cr. Code, § 230.

FOR PUTTING THE CARCASS OF A DEAD ANIMAL IN A RIVER,
BAY, CREEK, POND, CANAL, ROAD, ETC.

That A B, on, etc., in — county, willfully and unlawfully did put the carcass of a certain dead animal, to wit, a dead horse, into a river commonly called the —, and knowingly and unlawfully permitted the same to remain for a long period of time, to wit, — days, to the annoyance of the citizens of this state.

Private Right to the Use of a Stream.—It is a clear principle of the common law that the owner of land is entitled to the use of a stream of water which from time immemorial has flowed through his land, and the law gives him ample remedy for the diversion or obstruction of the stream.¹

And this right extends to the quality as well as the quantity of water. As is said in one of the cases, "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion or *pollution*."² And where there is an invasion of the plaintiff's right the law presumes damage, and an action may be maintained.³ It is evident that this remedy applies only to cases of private nuisance, and protects only the parties whose property in the water is injured.

Public Nuisance.—The statute applies to all cases named therein, and prohibits the placing of the carcass of a dead animal, the offal from a slaughter house, packing house, fish house, or spoiled meats, spoiled fish, or any putrid animal substance, or the contents of a privy vault, "upon or into any river, bay, creek, pond, canal, road, street, alley, lot, field, meadow, public ground, market space, or common." The second offense is for knowingly permitting the same to remain in any of the aforesaid places, to the annoyance of the citizens of the state, or any of them. The statute declares any of the acts named a public nuisance and directs how it shall be punished.

Unclean Distillery, Stables and Sties.—If any owner or owners,

¹ Gardner v. Newburgh, 2 Johns. Ch., 162.

² Holsman v. Boiling Spring Bl. Co., 14 N. J. Eq., 335; Union Trust Co. v. Cuppy, 26 Kas., 754.

³ Turtle v. Clifton, 22 O. S., 247.

lessee or lessees, occupier or occupiers, foreman or superintendent of any distillery in this state, who shall keep any hogs or other animals, shall suffer or permit such distillery, or the place or places where such hogs or animals shall be kept, to remain unclean between the first day of April and the first day of October of any year, to the annoyance of the citizens of this state, or any of them, every person so offending shall pay for such offense not less than five dollars nor more than fifty dollars. And if such nuisance be not removed and abated within five days after the institution of the prosecution, the continuance of such nuisance shall be deemed a second offense against the provisions of this section, and every like neglect of each succeeding period of five days shall be considered an additional offense against the provisions of this section.¹

FOR PERMITTING THE STIES OR STABLES AT A DISTILLERY TO BECOME FILTHY.

That on, etc., and from that time continually until the — day of —, A B has been and now is the owner and occupier of a certain distillery situate in — county; that said A B, during all of said time, at said distillery, has had and now has a great number, to wit, three hundred head of hogs; that said A B negligently and unlawfully, between the first day of April and the first day of October, in the year 18—, did permit the place where such hogs were kept to become and remain unclean, to the annoyance of the citizens of this state, caused by the noxious and unhealthy smells and vapors arising from such unclean place.

Filthy Stock Cars.—That from and after the first day of June, A. D. 1877, it shall be unlawful for any railroad company, operating its road in this state, to bring or cause to be brought into this state from an adjoining state any empty cars used for transporting hogs or sheep, or any empty combination car used for carrying grain and stock, that has any filth of any kind whatever in the same, but the said railroad company shall, before it allows said car or cars to pass into this state, cause the same to be thoroughly cleared and cleansed. Any person or persons or corporation violating any of the above provisions, and on conviction thereof, shall be fined in any sum not exceeding one hundred dollars.²

¹ Cr. Code, § 231.

² Cr. Code, § 231 a.

AGAINST RAILROAD COMPANY FOR FAILING TO CLEAN STOCK CARS.

That the — railroad company, on, etc., in — county, being a railroad company duly incorporated under the laws of the state of —, and operating its road in this state, unlawfully did bring and cause to be brought from an adjoining state, to wit, the state of Kansas, ten empty cars, used for transporting hogs and sheep; which cars, when brought into this state by said — railroad company, contained a large quantity of filth which said company unlawfully did not cause to be cleared and cleansed before allowing the same to pass into this state.

What will Constitute a Nuisance.—Every person who shall erect, keep up, or continue and maintain any nuisance, to the injury of any part of the citizens of this state, shall be fined in any sum not exceeding five hundred dollars, at the discretion of the court,¹ and the court shall, moreover, in case of conviction for such offense, order such nuisance to be abated or removed. And the erecting, continuing, using or maintaining any building, structure or other place for the exercise of any trade, employment, manufacture or other business, which by occasioning noxious exhalations, noisome or offensive smells, becomes injurious and dangerous to the health, comfort or property of individuals or the public; the obstructing or impeding, without legal authority, the passage of any navigable river, harbor or collection of water; or the corrupting or rendering unwholesome or impure any watercourse, stream, or water; or unlawfully diverting any such watercourse from its natural course or state to the injury or prejudice of others; and the obstructing or incumbering by fences, buildings, structures, or otherwise, any of the public highways or streets or alleys of any city or village, shall be deemed nuisances; and every person or persons guilty of erecting, continuing, using or maintaining, or causing any such nuisances, shall be guilty of a violation of this section, and in every such case the offense shall be construed and held to have been committed in any county whose inhabitants are or have been injured or aggrieved thereby.¹

¹ Cr. Code, § 232. The right to prosecute a party on a criminal charge in a county other than that in which the wrongful act was actually committed, is very doubtful.

Description of Public Road.—The construction of this section, so far as public roads is concerned, was considered by the supreme court of Ohio, in 1874, and it was held that in an indictment for obstructing a public road it was sufficient to describe it as being situated in a certain township within the county, without naming the point of commencement or termination, or stating the particular part of the road obstructed.¹

Fishing between the First Day of June and the First Day of September.—That it shall be unlawful to catch any fish for the purpose of selling and packing the same for market, in this state, at any time between the first day of June and the first day of September. Provided, that should it be impracticable to take up or remove any stationary nets on the first day of June, it shall be lawful for the owner, or the person having the same in charge, to take up and remove the same at the earliest practicable day thereafter, and all fish therein at the time may be lawfully taken out, salted and packed for market; but no more than one haul shall be taken from any net between the first day of June and the first day of September; and any person violating the provisions of this section shall pay for every such offense a fine of not less than fifty nor more than one hundred dollars.²

¹ *Mathews v. State*, 25 O. S., 536. The indictment was as follows, omitting the formal parts: "That Chester C. M., and B. B., late of said county, on the thirteenth day of November, in the year of our Lord one thousand eight hundred and sixty-nine, and from that day until the commencement of the proceedings herein, to wit, on the twenty-eighth day of March, A. D. 1870, with force and arms, at Jackson township, in said county of Ashland and state of Ohio, knowingly and unlawfully did obstruct and incumber the public highway, to wit, a certain county road, duly, lawfully and regularly laid out, opened, worked and used as a public highway by the people and citizens of the state of Ohio, and which said public highway is situated in the township of Jackson, and in said county of Ashland and state of Ohio, by then and there causing and permitting to stand and remain in said public highway a fence of rails, which said fence the said Chester C. Mathews and Benjamin Buzzard placed and caused to be placed in said public highway, knowingly and unlawfully, and with the intent to obstruct and incumber the same, to the great damage and common nuisance of the citizens and people of the county of Ashland, and the citizens and people of the state of Ohio."

² Cr. Code, § 233.

FOR UNLAWFULLY CATCHING AND PACKING FISH.

That A B, on, etc., in — county, unlawfully did catch fish in the [Platte river] to wit, ten pickeral, for the purpose of salting and packing the same for market in this state. Said fish were so caught between the first day of June and the first day of September, to wit, on the — day of July, and were not caught in a stationary net, set before the first day of June.

Diluted and Adulterated Milk.—Whoever shall knowingly sell to any person or persons, or sell, deliver or bring to be manufactured, to any cheese or butter manufactory in this state any milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as “skimmed milk,” or shall keep back any part of the milk known as “strippings,” with intent to defraud, or shall knowingly sell the product of a diseased animal or animals, or shall knowingly use any poisonous or deleterious material in the manufacture of cheese or butter, shall be fined in any sum not less than twenty dollars, nor more than one hundred dollars, and be liable in double the amount of damages to the person or persons upon whom such fraud shall be committed.¹

Posting Notice.—The above section is substantially a copy of the act of the Ohio legislature, of March 14, 1871. The second section of the Ohio act required each manufacturer of cheese or butter to keep a copy of the act posted up in a conspicuous place in the receiving room of his manufactory, during the season of manufacturing. The supreme court of that state, in construing the statute, held that the failure of the manufacturer to post the notice required would not exculpate the offender, under the first section of the act, and that the requirement to post a copy of the act was directory merely.²

Evidence—Guilty Knowledge.—Upon the trial of an indictment for knowingly delivering skimmed or adulterated milk to a factory to be manufactured into cheese, with intent to defraud, evidence of transactions of the same kind other than that relied upon for a conviction, near the same time, is admissible for the purpose of showing guilty knowledge, on the part of the

¹ Cr. Code, § 234.

² Bainbridge v. State, 30 O. S., 264.

accused, that the milk for the delivering of which a conviction was sought was skimmed or adulterated milk.¹

FOR SELLING ADULTERATED MILK.

That A, B, on, etc., in — county, unlawfully and knowingly did sell to one C D a great quantity, to wit, twenty gallons of milk, as and for new milk, to which a great quantity of skimmed milk, to wit, ten gallons, had been added, with the intent to defraud said C D, he, the said A B, then and there well knowing that said skimmed milk had been added to said milk, and that the milk so by him sold as new milk was adulterated as aforesaid.

Transportation of Nitro Glycerine.—It shall be unlawful to transport or carry the substance or material generally known and called nitro glycerine into, out of, within, through, or across this state, except as herein provided. Every wagon, cart or other vehicle used in carrying nitro glycerine, shall have printed upon both sides and ends thereof, in plain and distinct letters, large enough to occupy a space of two inches wide by eighteen inches long, the words "Nitro Glycerine" —"Dangerous," and every package, can, cask, barrel or box containing nitro glycerine, shall have written or printed thereon, upon two sides thereof, in plain and distinct letters, the words "Nitro Glycerine"—"Dangerous."²

Carriers of Passengers Prohibited from Carrying.—Every railroad, stage coach, steamship, vessel, or other water craft, within this state, whose business it is to carry passengers, are hereby prohibited from carrying, or having on board thereof,

¹ *Bainbridge v. State*, 30 O. S., 264. The court says (pp. 274, 275): "It (the evidence) was admitted for the purpose of showing guilty knowledge on the part of the accused, and was confined to proof of that fact only. It was incumbent on the state to prove such guilty knowledge. Proof of repeated deliveries of skimmed milk to the factory by the defendant, about the same time with that on which this conviction is sought, tended to show his guilty knowledge in that transaction; and in accordance with the well established rule as to the admissibility of circumstantial evidence of that character, as evidence of such knowledge, it was admissible for that purpose. *Hess v. State*, 5 Ohio, 9; *Reed v. State*, 15 Ohio, 223; *Griffin v. State*, 14 O. St., 62; *Shriedly v. State*, 23 O. S., 138; *Com. v. Stone*, 4 Met., 43; *Com. v. Price*, 10 Gray, 472; 1 Wharton, Cr. L., §§ 649, 631 *et seq.*; 3 Greenl. Ev., Sec. 15.

² Cr. Code, § 236.

nitro glycerine; and it shall be unlawful for any person, persons, or company, to permit any passenger to ride on any conveyance as aforesaid, that has on board thereof any of the substance or material aforesaid.¹

Manufacture and Storage of Nitro Glycerine.—It shall be unlawful for any person or persons to manufacture nitro glycerine within this state, within a distance of one hundred and sixty rods of any occupied dwelling or public building, or to store the same, in any quantity exceeding one hundred pounds, within the limits of any city or incorporated village, or in any other place within one hundred and sixty rods of any occupied dwelling or public building.²

Punishment.—Any person or persons knowingly offending against any of the provisions of either of the last three preceding sections, shall pay a fine not exceeding one thousand dollars, or be imprisoned in the county jail not more than three months, or both, at the discretion of the court.³

FOR STORING NITRO GLYCERINE WITHIN THE LIMITS OF A CITY.

That A B, on, etc., in — county, willfully and unlawfully did store in a certain warehouse, situate therein, more than one hundred pounds, to wit, one thousand pounds of nitro glycerine, said warehouse being within the limits of the city of —, a municipal corporation.

FOR MANUFACTURING NITRO GLYCERINE WITHIN ONE HUNDRED AND SIXTY RODS OF A DWELLING HOUSE.

That A B, on, etc., in — county, willfully and unlawfully did manufacture nitro glycerine within one hundred and sixty rods of a certain occupied dwelling house, to wit, the dwelling house in which C D and his family then and there did reside, as said A B then well knew.

FOR TRANSPORTING NITRO GLYCERINE WITHOUT HAVING INSCRIBED ON THE VEHICLE THE WORDS “ NITRO GLYCERINE,” ETC.

That A B, on, etc., in — county, unlawfully and willfully did transport from the city of Omaha in this state, across and through said state to the

¹ Cr. Code, § 237.

² Cr. Code, § 237.

³ Cr. Code, § 238.

city of Denver, in Colorado, two thousand pounds of the substance and material generally known and called nitro glycerine, and did not have printed upon both sides and ends of the vehicle used in carrying such nitro glycerine, in plain and distinct letters, the words, "Nitro Glycerine,"—"Dangerous."

AGAINST PARTY TRANSPORTING NITRO GLYCERINE FOR ALSO CARRYING PASSENGERS.

That A B, on, etc., in — county, while engaged in transporting nitro glycerine from the city of Lincoln to David City in a vehicle, unlawfully and willfully carried one C D as a passenger in said vehicle from Ulysses to said David City, said A B then and there having on board said vehicle a large quantity, to wit, — pounds, of nitro glycerine.

Destroying Canada Thistles.—Every owner or possessor of land shall cut or mow down all Canada thistles growing thereon, or in the highway adjoining the same, so often as to prevent them from going to seed, and if any owner or possessor of land knowingly shall suffer any such thistles to grow thereon, or in any highway adjoining the same, and the seed to ripen so as to cause or endanger the spreading thereof, he shall forfeit and pay a fine not less than ten dollars nor more than forty dollars; and any person may enter on the land of another, who shall neglect or refuse to cut or mow down such thistles, for the purpose of cutting or mowing the same down, and shall not be liable to be sued in an action of trespass therefor.¹

FOR FAILING TO CUT DOWN CANADA THISTLES.

That A B, being the owner and in possession of certain real estate in — county, to wit, (*describe*) on which Canada thistles were then and there growing, unlawfully and willfully failed and neglected to mow the same down and prevent them from going to seed, but has knowingly suffered such thistles to grow thereon and the seed to ripen so as to cause and endanger the spreading thereof.

Grass Seed Containing Thistle Seed.—If any person shall knowingly vend any grass or other seed in which there is any seed of the Canada thistle, such person shall for every such offense be fined in the sum of twenty dollars.²

¹ Cr. Code, § 239.

² Cr. Code, § 240.

FOR KNOWINGLY VENDING SEED CONTAINING CANADA THISTLE
SEED.

That A B, on, etc., in county, — unlawfully, willfully and knowingly did vend a certain quantity of grass seed, to wit, one bushel of timothy seed, which contained seeds of the Canada thistle, he, the said A B, then and there well knowing that said timothy seed contained seed of said thistles.

CHAPTER XXXIV.

MISCELLANEOUS OFFENSES.

Sabbath Breaking.—If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing or shooting, he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. And if any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted) he or she shall be fined in any sum not exceeding five dollars, nor less than one dollar. Provided, nothing herein contained in relation to common labor on said first day of the week, commonly called Sunday, shall be construed to extend to those who conscientiously do observe the seventh day of the week as the Sabbath, nor to prevent families emigrating from traveling, watermen from landing their passengers, superintendents or keepers of toll bridges or toll gates from attending and superintending the same, or ferrymen from conveying travelers over the water, or persons moving their families on such days, or to prevent railway companies from running necessary trains.¹

Ordinary Labor was punished by the municipal law of England, and in this country generally, by statute, persons are prohibited from following their ordinary avocation on Sunday, and contracts entered into on that day are in most of the states held to be void.²

¹ Cr. Code, § 241.

² 4 Cooley's Blackstone Com., 63 and notes; Com. v. Wolf, 3 S. & R., 50; Com. v. Leshar, 17 Id., 155; Shover v. State, 10 Ark., 259; State v. Amba, 20 Mo., 214; Cincinnati v. Rice, 15 Ohio, 225.

Among the Advantages Claimed for the Observance of the Sabbath are, that the keeping of one day in the seven as a day of rest and refreshment, as well as for public worship, is of admirable service to the state as a civil institution. That it humanizes, by the help of conversation and society, all persons who enjoy its benefits. That its observance enables all who labor to regain their strength and vigor, and pursue their various avocations during the ensuing week with health and cheerfulness. That it imprints on the minds of all that sense of their duty to their Creator so necessary to their highest welfare.¹

Not Void.²—Under the statute of Ohio, contracts entered into on Sunday are not void, as at common law. Common labor, however, is prohibited, and one whose business it is to buy and sell can not engage in his ordinary avocation on that day.³ The statute of that state being adopted by this, the same construction was given to it as by the highest court of that state.⁴

In Kansas, under a statute similar to that of Ohio, it is held that the statutes of most of the states prohibit labor and business, but that the statute of Kansas merely prohibits *labor*,⁵ and that a contract to sell cattle, though made on Sunday, was valid.⁶

Legal Advertisements in Sunday Newspapers.—The publication of the preliminary and other ordinances, with respect to a street improvement, in a newspaper of general circulation, in accord-

¹ 4 Bla. Com., 63.

² Johnson v. M. P. R. Co., 18 Neb., 691. Where a railroad company finds it necessary to run its trains on Sunday, and also that it is necessary for its employes to labor on that day, in keeping its track in proper repair for the use of its trains, and while so engaged the employe is injured through the negligence of the company, it will be liable.

³ Bloom v. Richards, 2 O. S., 387, 388.

⁴ Horacek v. Keebler, 5 Neb., 358; Fitzgerald v. Andrews, 15 Id., 55. In Horacek v. Keebler the court says: "In the case of Bloom v. Richards, 2 Ohio State, 388, it distinctly adjudged, under a statute of which ours is a copy, that the simple making of a contract was not embraced in the prohibition of common labor."

⁵ Johnson v. Brown, 13 Kas., 531.

⁶ Birks v. French, 21 Kas., 238.

ance with the terms of the statute, is a valid and legal publication, although such newspaper is published only on Sunday.¹

City Ordinance.—Where a municipal corporation has power to prohibit the sale of intoxicating drinks on Sunday, an ordinance of such municipality, declaring it unlawful to open on Sunday any place, within the city limits, where intoxicating liquors are sold, is valid.²

To Ride or Drive for Pleasure Merely, on the Sabbath, is not unlawful under the statute.³

The Indictment—Observing Saturday.—A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment or information, unless the matter of such exception or proviso enters into or becomes a part of the description of the offense, or a qualification of the language defining or creating it. Therefore, the proviso in the statute excepting from its operation those persons who conscientiously observe the seventh day of the week as the Sabbath instead of the first, need not be referred to. The reason is, the proviso is not a part of the description of the offense, but is in the nature of a personal privilege—to keep the seventh day of the week as the Sabbath in place of the first; but whether the defendant is entitled to the benefit of the proviso must be determined from the evidence.⁴

A different rule prevails, however, where the matter of the proviso points directly to the character of the offense, and is made a material qualification of the statutory description of it, as in an indictment for selling liquor, where the proviso was “That nothing contained in this section shall be so construed as to make it unlawful to sell any spirituous liquors for medicinal and pharmaceutical purposes.” In such case the indictment or information must contain the negative averment that the sale of the liquor was not for medicinal or pharmaceutical purposes.⁵

¹ *Hastings v. Columbus*, 42 O. St., 585.

² *Piqua v. Zimmerlin*, 35 O. S., 507.

³ *Nagle v. Brown*, 37 O. S., 7.

⁴ *Billigheimer v. State*, 32 O. S., 435.

⁵ *Hern v. State*, 1 O. St. 16; *Billigheimer v. State*, 32 Id., 435.

But One Offense.—In an early case, one Crupps was found guilty of four offenses for exercising the trade of a baker on the Sabbath. In construing the statute, Lord Mansfield said: "The offense is exercising his trade on the Lord's day, and that without any fractions of the day, hours or minutes, it is but one entire offense."¹

FOR PERFORMING COMMON LABOR ON SUNDAY.

That A B, on, etc., in — county, being a person of the age of fourteen years and upward, to wit, of the age of — years, on the first day of the week, commonly called Sunday, unlawfully was found at common labor, to wit, (*state generally*) such common labor not being a work of necessity or charity.

FOR SPORTING, HUNTING AND SHOOTING ON SUNDAY.

That A B, on, etc., in — county, being a person of the age of fourteen years and upward, to wit, of the age of — years, on the first day of the week, commonly called Sunday, was found then and there unlawfully sporting, hunting and shooting.

AT COMMON LAW, AGAINST A BUTCHER FOR SELLING MEAT.

That C D, late of, etc., butcher, on, etc., and continually afterward, until the day of the taking of this inquisition, at, etc., was, and yet is a common Sabbath breaker and profaner of the Lord's day, commonly called Sunday, and that the said C D, on the said, etc., being the Lord's day, and on divers other days and times being the Lord's days, during the time aforesaid, at, etc., in a certain place there called Clare market, did keep a common public and open shop, and in the same shop did then and there, and on the said other days and times, being the Lord's days, there openly and publicly sell and expose to sale, flesh meat, to divers persons to the jurors aforesaid as yet unknown, to the evil example of all others in the like case offending.²

Evidence.—The state must prove that the acts complained of were done on the particular Sunday named in the information or indictment, but the negative averments are a matter of defense to be proved by the defendant.³ A single act consti-

¹ *Crepps v. Durden*, Cowp., 640; Maxw. Pl. and P., (4 Ed.), 147.

² *Chitty*, Cr. L., 19, 20.

³ *Crocket v. State*, 33 Ind., 416; *Com. v. Knox*, 6 Mass., 76.

tutes a violation of the statute.¹ Where a witness testified as to the age of the accused—"I don't know defendant to be over fourteen years of age, of my own knowledge; don't know when he was born—it's only my opinion that he is; defendant and a woman live together as husband and wife; the defendant has a mustache," it was held sufficient to show age.²

Vagrants.—All idle persons, not having visible means of support and maintenance, and who live without employment, and all persons wandering abroad and living in taverns, groceries, beer houses, market places, sheds, barns, or in open air, and not giving a good account of themselves, and all persons wandering about and begging, or who go about from door to door, or from place to place, or occupy public places for the purpose of begging and receiving alms, and all prostitutes, and all keepers, occupants, lessees, tenants and pimps of houses used for prostitution or gambling, shall be deemed and are hereby declared to be vagrants, and upon conviction thereof shall be fined not exceeding fifty dollars, or imprisoned in the jail of the county not exceeding three months, and be subjected to hard labor in said jail or elsewhere in the county, as the court may order. Provided, that any person so convicted, who shall be disqualified for manual labor by physical inability, and shall be a proper object for relief, shall be sent to the alms house of the proper city or county, or otherwise cared for according to law.³

FOR BEING A VAGRANT.

That A B, on, etc., and from that day until the filing of this complaint in — county, was and now is unlawfully an idle person, not having visible means of support and maintenance, and who lives without employment and is a vagrant.

FOR KEEPING A HOUSE OF PROSTITUTION.

That A B, on, etc., and from that day until the finding of this indictment [or filing this complaint] in — county, unlawfully and willfully did keep

¹ *Voglesong v. State*, 9 Ind., 112; *Wetzler v. State*, 18 Id., 35.

² *Crockett v. State*, 23 Ind., 215.

³ Cr. Code, § 242.

and maintain a certain house used for prostitution, resorted to for the purpose of lewdness and prostitution.

FOR BEING A PIMP AND THEREFORE A VAGRANT.

That A B, on, etc., and from that day until the finding of this indictment, [or filing this complaint] in — county, did then and there, being a pimp, unlawfully procure certain lewd females, to wit, C D, E F and G H, to become inmates of a certain house of prostitution kept by one L M.

Vagrancy.—The subject of vagrancy has acquired an additional interest from the great increase of the tramp nuisance within a few years. Idleness in any person is a high offense against the public economy. The civil law expelled all sturdy vagrants from the city, and at common law all idle persons or vagabonds, whom the ancient statutes describe as “such as wake on the night and sleep on the day, and haunt customable taverns and alehouses and routs about, and no man wot from where they come or whither they go.” The statute, 17 Geo. II, c. 5, divided them into three classes: First, idle and disorderly persons; second, rogues and vagabonds; third, incorrigible rogues. All these were regarded as offenders against good order, and blemishes in the government.¹ Experience has shown that while many persons are vagrants from indolent habits, discouragement, want of force of character, etc., yet that a very considerable proportion of the criminal classes are vagrants, living in idleness on what has been robbed or stolen from others. Hence the necessity of enforcing the law against idle persons not having visible means of support and maintenance, and who live without employment, etc. If such persons do not obtain a livelihood by honest industry, it is but reasonable to suppose that they obtain it in ways that will not bear investigation.

Known Thief.—In the application of this rule the supreme court of Ohio sustained an ordinance under a statute providing for the punishment of a known thief found in the municipality.²

¹ 4 Bla. Com., 169.

² *Morgan v. Nolte*, 37 U. S., 23.

A Tramp.—Any person going about from place to place and asking or subsisting on charity, shall be taken and deemed to be a tramp.¹

Any tramp who shall ask and receive from any person of any precinct, town, village or city within the state, any food, clothing, lodging, or other assistance, may be requested by such person, in his or her discretion, to perform a reasonable amount of labor therefor; and any such tramp who shall refuse to perform any such labor when so requested shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than three nor more than twenty dollars, and cost of prosecution, and shall stand committed until the same is paid, but not exceeding one day for each dollar of fine; or may be imprisoned in the county jail at hard labor, not less than three days nor more than twenty days, in the discretion of the court; but no such tramp shall be required to perform any such labor before six o'clock in the morning or after six o'clock in the evening.²

Persons Excepted.—This act shall not apply to any minor under the age of sixteen years, nor to any female, nor to any blind person.³

FOR BEING A TRAMP AND REFUSING TO PERFORM REASONABLE SERVICE FOR FOOD, CLOTHING, ETC., GIVEN IN CONSIDERATION THEREOF.⁴

That A B, on, etc., and from that date until the finding of this indictment [or filing of this complaint] in — county, being then and there, during all of said time, a tramp, unlawfully did go about from place to place asking and subsisting on charity; that during said time, to wit, on the — day of —, said A B, in order to procure certain clothing, to wit, (*describe*) of C D, of the value of — dollars, then and there promised to perform a reasonable amount of labor therefor, on request; that upon the terms and conditions aforesaid said C D delivered said clothing to said A B, and

¹ Cr. Code, § 242 *a*.

² Cr. Code, § 242 *b*.

³ Cr. Code, § 242 *c*.

⁴ All prosecutions under this statute may be brought before any magistrate having jurisdiction in the premises. No special procedure would seem to be necessary. The offense is a species of vagrancy, but is to be punished under the special penalties provided in the act.

thereupon requested him to perform a reasonable amount of labor therefor, as he had promised, but said A B then and there unlawfully refused to perform such labor when so requested, said request not being made before six o'clock in the morning nor after six o'clock in the evening, and said A B not being a minor under the age of sixteen years, nor a female, nor a blind person.

Malicious Injury by Tramps.—Any tramp who shall willfully and maliciously do any injury to any person, or to the property, real or personal, of any person, or who shall procure food, clothing or other property from any person by threats or by force, shall be deemed guilty of a felony, and on conviction thereof shall be punished by confinement at hard labor in the state prison, for a term not exceeding three years and not less than one year.¹

FOR MALICIOUS INJURY BY TRAMPS.

That A B, on, etc., and from that time until the finding of this indictment [or filing this complaint], being then and there during all of said time a tramp, unlawfully did go from place to place, asking and subsisting on charity; that during said time, to wit, on the — day of —, in — county, said A B willfully, unlawfully, maliciously and feloniously did do an injury to the property of one C D, situate therein, of the value of — dollars, to wit, (*state the injury*) he, the said A B, not then and there being a minor under the age of sixteen years, nor a female, nor a blind person.

AGAINST TRAMP FOR PROCURING FOOD OR CLOTHING BY THREATS OR FORCE.

That A B, on, etc., and from that time until the finding of this indictment [or filing this complaint], being then and there, during all of said time, a tramp, unlawfully did go from place to place, asking and subsisting on charity; that during said time, to wit, on the — day of —, in — county, said A B willfully, unlawfully, maliciously and feloniously did make an assault, and then and there certain goods and chattels, the property of C D, of the value of — dollars, by threats and violence, and against the will of the said C D, unlawfully, forcibly, willfully and feloniously did steal, take and carry away.

Puppet Show, Juggling, etc.—If any person or persons shall exhibit any puppet show, wire dancing or tumbling, juggling

¹ Cr. Code, § 242 c.

or sleight of hand, within this state, without first having obtained a license, as may be required by law or by municipal ordinance, and shall ask and receive any money or other property for exhibiting the same, every person so offending shall forfeit and pay for every such offense the sum of ten dollars.¹

FOR EXHIBITING A PUPPET SHOW, TUMBLING, SLEIGHT OF HAND, ETC., FOR MONEY OR PROPERTY.

That A B, on, etc., at —, in — county, unlawfully did exhibit a puppet show, [wire dancing or tumbling, juggling or sleight of hand,] and did ask and receive money [or property] for exhibiting the same, to wit, the payment by each person admitted thereto of the sum of twenty-five cents, without first obtaining a license to exhibit said puppet show, as required by law [or the ordinances of said city or village of —].

Wrongfully Disinterring the Dead.—If any person or persons shall open the grave or tomb where the body or bodies of any deceased person or persons shall have been deposited, and shall remove the body or bodies or remains of any deceased person or persons from the grave or place of sepulture for the purpose of dissection, or any surgical or anatomical experiment, or for any other purpose, without the knowledge and consent of the near relations of the deceased, or shall in any way aid, assist, counsel or procure the same to be done, every such person or persons so offending shall, on conviction, be fined not less than one hundred dollars, nor more than five hundred dollars.²

At Common Law the stealing of a dead body, though a matter of great indecency, was not felony unless some of the grave clothes were stolen with it.³ It was a misdemeanor, however, to take up a dead body, even for the purpose of dissection.⁴ The refusal or neglect to bury a dead body was also a misdemeanor.⁵ And to prevent a dead body from being interred was also an indictable offense. Many if not all of the states

¹ Cr. Code, § 243.

² Cr. Code, § 244.

³ 4 Blacks. Com., 236, 237.

⁴ Rex v. Lynn, 2 T. R. 733.

⁵ Andrews v. Cawthorne, Willes, 537.

have passed laws for the protection of the bodies of the dead, and if the courts would hold those liable who directly cause the desecration of graves, by, in effect, offering a reward for dead bodies without inquiring where they were obtained, the practice would soon cease.

FOR REMOVING A DEAD BODY FROM THE GRAVE.¹

That A B, on, etc., in — county, willfully and unlawfully did open the grave where the body of one C D, deceased, had lately before been deposited, and did then and there unlawfully take out and remove the same without the knowledge or consent of the near relations of the deceased.

FOR PROCURING THE DISINTERMENT OF A DEAD BODY.

That A B, on, etc., in — county, willfully and unlawfully did aid, assist, counsel and procure the opening of the grave where the body of one C D, deceased, had lately before been deposited, and did then and there in said county aid, assist, counsel and procure the removal of said body from out said grave, without the knowledge or consent of the near relations of the deceased.

AT COMMON LAW, FOR DIGGING UP AND CARRYING AWAY A DEAD BODY.

That C D, late of, etc., on, etc., with force and arms, etc., at, etc., aforesaid, the churchyard of and belonging to the parish church of the same parish there situate, unlawfully, voluntarily and willfully did break and enter, and the grave there in which one A B, deceased, had lately before then been interred, and then was, with force and arms unlawfully, voluntarily, willfully and indecently did dig, open, and afterward, to wit, on the same day and year aforesaid, with force and arms, at the parish aforesaid, unlawfully, voluntarily, willfully and indecently did take and carry away, to the great indecency of Christian burial, and to the evil example of all others in the like case offending.²

¹ The words of the statute "for the purpose of dissection, or any surgical, or any anatomical experiment, or for *any other purpose*," seem to make an allegation of the purpose unnecessary. And this meaning is borne out by the succeeding section, which authorizes relatives or intimate friends to change the place of burial.

² 2 Chitty, Cr. L., 37.

Three Card Monte.¹—Whoever shall, in this state, deal, play and practice, or be in any manner accessory to the dealing, playing or practicing of the confidence game or swindle known as three card monte, or of any such game, play or practice, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, and by confinement in the penitentiary not less than two nor more than five years.²

FOR PRACTICING THE CONFIDENCE GAME OF THREE CARD MONTE.³

That A B, on, etc., in — county, unlawfully and feloniously did deal, play and practice the confidence game and swindle known as three card monte, and unlawfully and feloniously did, by the use and means thereof, obtain from one C D the sum of — dollars.

Prize Package.—Whoever shall, in this state, on any railroad car, coach or train, practice any confidence game not mentioned in the preceding section, or shall sell any prize packages or other prize, or offer the same for sale, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding three months.⁴

FOR SELLING A PRIZE PACKAGE ON A RAILWAY TRAIN.

That A B, on, etc., on a railway train, in — county, willfully, knowingly and unlawfully did sell to one C D [or offer to sell] a package known as a prize package, which package purported to contain a prize.

Power of Conductor, Brakeman or Passenger.—It is hereby made the duty of railroad conductors, brakemen on railroad trains, and all other persons cognizant of the act, to immediately arrest the person so offending, without warrant or other process,

¹ Where the game was played with five cards instead of three, it was held to come within the words of "any such game."

² Cr. Code, § 245 a.

³ A few years since the manager of a leading railway in this state, whose road at that time was troubled with this class of miscreants, by vigorous prosecutions secured the conviction of a number and the flight of the remainder.

⁴ Cr. Code, § 245 b.

and call upon all bystanders or others for assistance, when the same may be necessary to make such arrest; and when such offense is committed on any railroad car, coach or train, the venue shall lie, and the person may be tried in any county through which the railroad may run, any law to the contrary notwithstanding; and the employes of any such railroad company shall have the power and authority to eject any such person or persons by force from the cars of such company, whenever such persons shall be found practicing or attempting to practice any such game thereon.¹

The Crime against Nature.—That the infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year, and may extend to life.²

¹ Cr. Code, § 245 c. The eleventh section of Art. 1 of the constitution, provides, that in all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel; to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy trial, by an impartial jury of the county or district in which the offense is alleged to have been committed. The proper construction of this section was before the supreme court, in *Olive v. State*, 11 Neb., 1, and it was held that the accused was entitled to be tried in the county where the offense was alleged to have been committed. Hence, that part of the statute authorizing a trial anywhere on the line of railroad is invalid. The law, however, is a good one, and should be enforced.

² Cr. Code, § 245 d. Blackstone, in speaking of this offense (4 Com., 215), says: "A crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out, for if false it deserves a punishment inferior only to that of the crime itself." In Ohio it has been held that words spoken charging a man with sodomy are not actionable without alleging special damage, as the act is not made a crime under the statutes of that state. *Davis*, by his next friend, *v. Brown*, 27 O. S., 326; *Melvin v. Weiant*, 36 O. S., 184. In *Davis v. Brown* it is said (p. 330): "Wherever such a statute exists (making the offense a felony) the charge is actionable, but in the absence of legislation upon the subject it would savor of judicial legislation to make any further innovation on the rule. In this conclusion we are supported by *Coburn v. Harwood*, Minor (Ala.), 98; *Estes v. Carter*, 10 Iowa, 400. In view of the injurious consequences of such a shocking charge we confess to being strongly tempted to make one further innovation."

Evidence.—As the offense consists in carnal knowledge of man with man, or by man in the same unnatural manner with woman, or by either a man or woman with a beast, any testimony tending to show these facts is competent. The court should require clear and unmistakable proof, in the first instance, that the crime has actually been committed by some one, before receiving proof tending to cast a cloud on the accused.¹ Penetration must be proved as in case of rape, but it is unnecessary to prove emission. At common law it was held that a party consenting to the commission of the offense was an accomplice, and as such must be corroborated. A different rule prevails however, it seems, where the wife testified that she resisted as much as she could.² If committed on a boy under fourteen years of age the man alone can be convicted.³

FOR COMMISSION OF THE CRIME AGAINST NATURE WITH A BEAST.

That A B, on, etc., in — county, willfully and feloniously, with a certain —, and against the order of nature, had a certain carnal and venereal intercourse, and then and there feloniously, wickedly, and against the order of nature, carnally knew said —, and did then and there feloniously and wickedly, with the said —, commit and perpetrate the infamous crime against nature.

FOR COMMISSION OF THE CRIME AGAINST NATURE WITH A MAN.

That A B, on, etc., in — county, unlawfully and feloniously, in and upon one C D, a male person of the age of — years, did make an assault, and then and there wickedly and feloniously and against the order of nature did carnally know and had a venereal affair in the fundament of the said C D, and him, the said C D, then and there wickedly and feloniously and against the order of nature, in the said fundament of him, the said C D, then and there did carnally know, and did then and there, with said C D, wickedly and feloniously perpetrate and commit the infamous crime against nature.

¹ In all cases of this kind the natural order of proof should be adhered to: first, proof of the offense charged having been actually committed by some one; second, testimony to establish the guilt of the accused.

² *Reg. v. Jellyman*, 8 C. & P., 604.

³ *R. v. Allen*, 2 C. & K., 869; 1 Hale, P. C., 670.

AT COMMON LAW, FOR THE COMMISSION OF THE CRIME AGAINST NATURE WITH A BOY.¹

That J K, late of, etc., not having the fear of God before his eyes, nor regarding the order of nature, but being moved and seduced by the instigation of the devil, on, etc., with force and arms at, etc., in and upon one T L, a youth about the age of — years, then and there being, feloniously did make an assault, and then and there feloniously, wickedly, diabolically and against the order of nature had a venereal affair with the said T L, and then and there carnally knew the said T L, and then and there feloniously, wickedly and diabolically and against the order of nature, with the said T L, did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians), to the great displeasure of Almighty God; to the great scandal of all human kind.

False Pedigree of Stock.—If any person shall knowingly and with intent to deceive, furnish to any purchaser of stock a printed or written false pedigree of the same, whereby such purchaser shall be induced to buy said stock, the person so offending shall be guilty of a misdemeanor, and on conviction thereof be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than three nor more than six months or by both fine and imprisonment, as the court may direct.²

FOR SELLING STOCK WITH A FALSE PEDIGREE.

That A B, on, etc., in — county, being the owner of certain stock therein, to wit, ten head of cows, called "Jerseys;" that knowing said cows not to be Jerseys, and with the fraudulent intent to deceive one C D, he, the said A B, on the day aforesaid, in said county, unlawfully and knowingly did furnish said C D a written and printed pedigree of said cows as follows: (*copy*) stating therein that said cows were Jerseys, whereby said C D was induced to buy said cows for the sum of — dollars, whereas in truth and in fact said cows were not Jerseys, or known as Jerseys, and said pedigree was false and untrue.

Persons Dealing in Soda and Mineral Water, etc.—That all persons engaged in the manufacture, bottling or selling of soda, mineral water, or other beverages, in casks, barrels, kegs, bottles or boxes, with their names or other marks of ownership stamped

¹ 2 Chitty, Cr. L., 48, 49.

² Cr. Code, § 245 e.

or marked thereon, may file in the office of the county clerk of the county in which such articles are manufactured, bottled or sold, a description of the name or marks so used by them, and cause the same to be printed for two successive weeks in a weekly newspaper, printed in the English language, and in counties where such articles are manufactured, bottled or sold.¹

It shall be unlawful for any person or persons hereafter, without the written consent of the owner or owners thereof, to fill with soda, mineral water or other beverages, or any other articles of merchandise, medicine, compound or preparation for sale, or to be furnished to customers, any casks, barrels, kegs, bottles or boxes so marked or stamped, or to sell, dispose of, buy or traffic in, or wantonly destroy any such cask, barrel, keg, bottle or box so marked or stamped by the owner or owners thereof, after such owner or owners shall have complied with the provisions of the first section of this act. Any person or persons who shall violate any provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof, before any justice of the peace or police judge in this state, shall be fined five dollars for each and every cask, barrel, keg or box, and fifty cents for each and every bottle so by him, her or them, filled, bought, sold, used, trafficked in or wantonly destroyed, or by him, her or them, caused to be filled, bought, sold, used, trafficked in or wantonly destroyed, together with the cost of suit for the first offense, and ten dollars for each and every cask, barrel, keg, or box; one dollar for each and every bottle so filled, bought, sold, used, trafficked in or wantonly destroyed, or caused to be so filled, bought, sold, used, trafficked in, or wantonly destroyed, together with the costs for each subsequent offense.²

The using by any other person than the rightful owner thereof, without such written permission, of any such cask, barrel, keg, bottle or box, for the sale therein of soda, mineral water or other beverage, or any other article of merchandise, medicine, compound or preparation, or to be furnished to

¹ Cr. Code, § 245 *f*.

² Cr. Code, § 245 *g*.

customers, or the buying, selling or trafficking in any such barrel, cask, keg, bottle or box by any person other than the owner, without such written permission; or the fact that any junk dealer or dealers in casks, barrels, kegs, bottles, or boxes, shall have in his or her possession any such cask, barrel, keg, bottle, or box so marked or stamped and registered as aforesaid, without such written permission, shall and is hereby declared to be *prima facie* evidence that such use, buying, selling, trafficking in, or having in possession any such cask, barrel, keg, box or bottle, is unlawful within the meaning of this act, and any person or persons found guilty of any such use, buying, selling, trafficking in, or having in possession any soda cask, barrel, keg, box, or bottle, without such written permission, shall be liable to be arrested and fined as provided in the second section of this act; and it is hereby declared to be the duty of any justice of the peace or police judge within this state, upon oath having been made in writing before him by any owner, or by the agent of any owner or owners, that any person has violated the provisions of this act, to immediately issue his warrant and cause such person or persons so accused to be brought before him, and proceed to try such accused party as in cases of misdemeanor; and in case such accused party shall be found guilty of having violated any of the provisions of this act, shall assess the fine as provided in the second section of this act, such fine and costs to be collected as provided by law in other misdemeanors.¹

In case the owner or owners of any cask, barrel, keg, bottle or box, so marked, stamped and registered as aforesaid, shall, in person or by agent, make oath in writing before any justice of the peace or police judge, that he has reason to believe, and does believe, that any manufacturer or bottler of soda, mineral water, or other beverage, or any other person using, in any manner by this act declared to be unlawful, any of the casks, barrels, kegs, bottles or boxes of such person or his principal, or that any junk dealer or dealers in casks, barrels, kegs, bottles or boxes, or any other dealer, manufacturer or bottler has any such cask, barrel, keg, bottle or box secreted in, about or

¹ Cr. Code, § 245 A.

upon his, her or their premises, the said justice of the peace or police judge shall issue his search warrant, and cause the premises designated to be searched, as in other cases where search warrants are issued, as is now provided by law; and in case any such cask, barrel, keg, bottle or box, duly marked or stamped, and registered as aforesaid, shall be found in, upon or about the premises so designated, the officer executing such search warrant shall thereupon arrest the person or persons named in such search warrant, and bring him, her, or them before the justice of the peace or police judge who issued such warrant, who shall thereupon hear and determine such case, and if the accused is found guilty, he, she, or they shall be fined as provided in the second section of this act.¹ All costs incurred in the enforcement of the provisions of this act shall be assessed and collected in the same manner as in criminal cases, and all fines collected by virtue of this act shall be turned over by the justice of the peace or police judge collecting the same, in the same manner, and for the same purpose, as fines in cases of misdemeanor are now by law disposed of.²

FOR FILLING KEGS, BOTTLES, ETC., OF SODA OR MINERAL WATER, ETC., IN FALSELY MARKED KEGS, BOTTLES, ETC.

That A B, in — county, being engaged in the manufacture of soda water in casks, barrels, kegs, bottles and boxes, etc., with the name as follows: "A B. Pure Soda Water," marked on such casks stamped and marked thereon, did, on the — day of —, etc., file in the office of the county clerk of said county a description of the name and marks so used by him as aforesaid, and did cause the same to be duly printed for two successive weeks in a weekly newspaper, to wit, the Tribune, printed in the English language in said county. That afterward, to wit, on the — day of —, in the year, etc., in said county, one C D, unlawfully and without the written consent of said A B, did fill — of said casks, etc., with soda water, for sale and to be furnished to customers, said soda water so put in casks by said C D being adulterated and greatly inferior to that placed therein by said A B, and was so placed in said casks by said C D for the purpose of unlawfully selling said inferior article as for the superior manufactured by said A B.³

¹ Cr. Code, § 245 *i*.

² Cr. Code, § 245 *j*.

³ This statute no doubt may be applied to all liquid substances named, sold in the manner indicated in the statute by casks, kegs, etc.

Oleomargarine—Butterine.—That any person, company, or corporation who shall manufacture for sale any article, or who may offer or expose for sale any article or substance in semblance of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which any vegetable oil, or the oil or fat of animals not produced from milk, enters as a component part, or into which melted butter or any oil thereof has been introduced to take the place of cream, shall distinctly and durably stamp, brand, or mark upon every tub, firkin, box or package of such article or substance the word "Oleomargarine" or "Butterine" in plain Roman letters, not less than half an inch square, placed horizontally in proper order, and in case of retail sales of such articles or substances in parcels, the seller shall in all cases deliver therewith to the purchaser a written or printed label bearing the plainly written or printed word, "Oleomargarine," or "Butterine," in type or letters as aforesaid, and every sale of such article or substance, not so stamped, branded, marked or labeled, shall be void, and no action shall be maintained for the price thereof.¹

Any person, company or corporation who shall sell, or offer to sell, or have in his or her possession with intent to sell contrary to the provisions of this act, any article not so stamped, marked or labeled, or, in case of retail sale, without delivery of the label required by section one of this act, shall for each such offense forfeit and pay a fine of one hundred dollars, to be recovered in any court of competent jurisdiction.²

That any person, company or corporation who shall sell, or offer or expose for sale, or shall cause or procure to be sold, any article required by the first section of this act to be marked, branded, stamped or labeled, not so marked, branded, stamped or labeled, shall be guilty of a misdemeanor, and on the trial of such misdemeanor, proof of the sale, or offer, or exposure alleged, shall be presumptive evidence of knowledge of the character of the article so sold or offered.³

¹ Cr. Code, § 245 *k*.

² Cr. Code, § 245 *l*.

³ Cr. Code, § 245 *m*.

FOR FAILING TO MARK A TUB, FIRKIN, BOX OR PACKAGE CONTAINING OLEOMARGARINE OR BUTTERINE WITH THE WORD, "OLEOMARGARINE" OR "BUTTERINE."

That A B, on, etc., in — county, was engaged in the manufacture of an article and substance in semblance of butter, not the legitimate product of the dairy and not made exclusively of milk and cream, but of which oil and the fat of animals not produced from milk was a component part, and into which melted butter had been introduced, to take the place of cream, unlawfully on said day did put up, sell and deliver to one C D a firkin of said substance in semblance of butter, without distinctly and durably, or in any other manner, stamping, branding or marking on said firkin the word "Oleomargarine" or "Butterine."¹

Seats to be Provided to Female Workers.—It shall be the duty of every agent, proprietor, superintendent or employer of female help in stores, offices or schools, within the state of Nebraska, to provide a chair, stool or seat for each and every such employe, upon which the female workers shall be allowed to rest when their duties will permit, or when such position does not interfere with the faithful discharge of their incumbent duties.²

Any neglect or refusal to provide a chair, stool or seat for every female worker in the employ of any agent, proprietor, superintendent or employer in the state of Nebraska, shall be deemed a misdemeanor, and upon conviction thereof shall be fined in a sum not less than ten dollars and not over five hundred dollars; and this fine shall be paid to the female worker whose health has been injured by this neglect of her employer to provide said chair, stool or seat as required by the act.³

FOR FAILURE OF EMPLOYER TO PROVIDE SEAT FOR FEMALE EMPLOYE.

That A B, on, etc., in — county, and from that time until the filing of this complaint, employed one C D, a female, as help in his store, in said

¹ If the complaint is for selling, offering or exposing for sale, the above form can readily be changed.

² Cr. Code, § 245 *o*. The section preceding this in the statute is omitted as the remedy given in that case is by a civil action.

³ Cr. Code, § 245 *p*. Section 5, Art. 8 of the constitution provides that "all fines, penalties and license moneys arising under the general laws of the state, shall belong to and be paid over to the counties respectively," etc.

county; that said A B, during all of said time, unlawfully neglected and refused to provide a chair, stool or seat for said C D, upon which she could rest when her duties in said store permitted and it did not interfere with her incumbent duties.

Tobacco not to be Furnished to Minor.—That hereafter no person or persons in this state shall sell, give or furnish any cigarette or cigarettes, or tobacco in any of its forms, to any minor under fifteen years of age.¹

That if any person or persons in this state shall violate the provisions of this act, he, she or they, shall, on conviction, forfeit and pay for each and every such offense the sum of twenty-five dollars.²

FOR SELLING OR GIVING TOBACCO TO PERSON UNDER FIFTEEN YEARS OF AGE.

That A B, on, etc., in — county, willfully and unlawfully did give [or sell] to one C D, a minor, under the age of fifteen years, to wit, of the age of fourteen years, two cigarettes for the use of said C D.

¹ Cr. Code, § 245 *q*.

² Cr. Code, § 245 *r*.

CHAPTER XXXV.

FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY—ACCESSORIES IN FELONY.

Selling Mortgaged Personal Property.—That any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer or in any manner dispose of the said personal property, or any part thereof, so mortgaged to any persons or body corporate, without first procuring the consent of the mortgagee of the property to such sale, transfer or disposal, shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary for a term not exceeding ten years, and be fined in a sum not exceeding one thousand dollars.¹

FOR DISPOSAL OF MORTGAGED PERSONAL PROPERTY WITHOUT THE CONSENT OF MORTGAGEE.

That A B, on, etc., in — county, in due form of law, did mortgage to one C D the following personal property, to wit: (*describe*) that afterward to wit, on the — day of —, in said county, and during the existence of the lien of said mortgage, said A B unlawfully, fraudulently and feloniously did sell, transfer and dispose of the said personal property without first procuring the consent of said C D, mortgagee, to such sale, transfer and disposal.²

¹ Comp. Stat., 100.

² All that seems to be required in an indictment for selling and transferring mortgaged personal property, without the consent of the mortgagee, is to set forth the facts required by statute. On principle it would seem that there must be a fraudulent design on the part of the mortgagor to authorize a conviction. The statute, in this state at least, has not been in existence many years, and but few decisions have been made, either here or elsewhere construing it. It is unsafe, therefore, to express an opinion as to the proper construction to be given to the statute; but as it is exceedingly stringent in its provisions, the mortgagor should, as a precaution, obtain the consent of the mortgagee to the sale or transfer. *State v. Hurds*, 19 Neb., 316.

Removal of Mortgaged Personal Property.—That any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, remove, permit, or cause to be removed, said mortgaged property, or any part thereof, out of the county within which such property was situated at the time such mortgage was given thereon, with the intent to deprive the owner or owners of such mortgage of his security, shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary for a term not exceeding ten years, and be fined in a sum not exceeding one thousand dollars.¹

FOR REMOVING MORTGAGED PROPERTY OUT OF COUNTY WITH INTENT TO DEFRAUD.

That A B, on, etc., in — county, did duly mortgage to one C D the following personal property, to wit: (*describe*) and that afterward, to wit, on the — day of —, during the existence of the lien and title created by said mortgage, unlawfully, willfully and feloniously did remove, permit and cause to be removed said mortgaged property out of — county, where such property was situated at the time such mortgage was given thereon, with the fraudulent intent of him, the said A B, unlawfully and feloniously to deprive said C D. the owner of said mortgage, of his security.

Abetting a Felony.—If any person shall aid, abet or procure any other person to commit any felony, every person so offending shall, upon conviction thereof, be imprisoned in the

¹ Comp. Stat., 100. In *State v. Ruhnke*, 27 Minn., 309, the words of the statute were: "That if any person, having conveyed any article of personal property by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, conceal, take, drive or carry away, or in any manner dispose of said property, or any part thereof, with intent to defraud, or to cause the same to be done without the written consent of the mortgagee of said property, he shall be deemed guilty of a misdemeanor and shall be liable to indictment." It was held that it must be the intent to defraud the mortgagee and not a third party. The court, in discussing the indictment, say: "In the case at bar the only intent to defraud alleged in the indictment is an intent to defraud—not the mortgagee, or any assignee of him—but one O'Neill, to whom the mortgagor is alleged to have sold the mortgaged property. * * It is evident that the intent to defraud the mortgagee being an indispensable ingredient of the offense, the indictment is fatally defective."

penitentiary for any time between the respective periods for which the principal offenders could be imprisoned for the principal offense; or if such principal offender would on conviction be punishable with death, or be imprisoned for life, then such aider, abettor, or procurer shall be punished with death, or be imprisoned for life the same as the principal offender would be.¹

Accessories after the Fact.—An accessory after the fact is a person who, after full knowledge that a felony has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime.

Any person found guilty of being an accessory after the fact, shall be imprisoned in the jail of the county for a term not exceeding two years, and be fined in a sum not exceeding five hundred dollars, in the discretion of the court, to be regulated by the circumstances of the case and the enormity of the crime.²

AGAINST PRINCIPAL AND ACCESSORY BEFORE THE FACT.

That A B, on, etc., in — county, in and upon one C D, then and there being, unlawfully, feloniously and forcibly and by violence, did make an assault, and him, the said C D, did put in bodily fear, and from the person and against the will of him, the said C D, then and there, forcibly and by violence and feloniously, did steal, take and carry away one pocket book, of the value of one dollar, and one piece of the current gold coin of the United States called a double eagle, of the value of twenty dollars, of the property, goods and chattels of said C D; and before said robbery and felony were committed by said A B, to wit, on the — day of —, one E F unlawfully, purposely and feloniously did procure, incite, abet and aid the said A B in the perpetration of said robbery in the aforesaid manner and form.

AGAINST ACCESSORY AFTER THE FACT.

That A B, on, etc., in — county, in and upon one C D, then and there being, forcibly, purposely, and of his deliberate and premeditated malice did make an assault, and that the said A B, a certain cord about the neck of the said C D, then and there feloniously, voluntarily, purposely, and of his deliberate and premeditated malice did put and fasten with the intent, then and there, him, the said C D, unlawfully, feloniously, purposely and of deliberate and premeditated malice to kill and murder; and that the said A B,

¹ Cr. Code, § 1.

² Cr. Code, § 2.

with the cord aforesaid by him so about the neck of the said C D put and fastened, then and there him, the said C D, feloniously, voluntarily, and of his deliberate and premeditated malice did choke and strangle, with the intent aforesaid, of which said choking and strangling of him, the said C D, by the said A B in manner and form aforesaid done and perpetrated, he the said C D, then and there instantly died.¹ And that E F on the — day of —, in the year —, with full knowledge that said A B is guilty of said crime as charged herein, unlawfully harbors and protects said A B.

The Offense of Aiding, Abetting or Procuring the Commission of a Felony is a substantive and independent offense only in the sense that the offender may be tried and convicted without the aid or conviction of the principal offender. They are not distinct or separate offenses in the sense that both may not, as at common law, be charged in the same indictment, and in the same count thereof, and both offenders be arraigned and tried thereon, as in cases where the defendants are jointly indicted for the same crime or offense.²

The statute, while it authorizes the charging of a person who counsels, aids, abets or procures another to commit a felony, nevertheless requires that, in order to convict the accessory, it must be shown that the principal had, in fact, committed the crime charged. This may be proved by the record of the conviction of the principal, which is *prima facie* evidence of that fact, but not conclusive as against the person charged with aiding and abetting. Other evidence as to the commission of the crime is admissible.³

A Person Indicted as Principal may be convicted as accessory, on proof that he aided and abetted the commission of the crime.⁴

¹ As heretofore stated, the conclusion of an indictment for murder, "And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A B, him, the said E F, in the manner and by the means aforesaid, feloniously, willfully, and of his deliberate and premeditated malice did kill and murder." adds nothing to the charge. The tendency at the present is to use, so far as possible, simple forms, and while they must contain sufficient to charge the accused with the commission of the crime, all surplusage should be rejected.

² Hartshorn v. State, 29 O. S., 635.

³ State v. Mosley, 31 Kas., 355; Levy v. People, 80 N. Y., 327; Arnold v. State, 9 Tex. Ap., 435.

⁴ Hanoff v. State, 37 O. S., 178.

CHAPTER XXXVI.

ARREST AND ITS INCIDENTS AFTER INDICTMENT OR INFORMATION FILED.

A warrant may be issued in term time, or in vacation of the court, on an indictment found or presentment made in any county, and when directed to the sheriff of the county where such indictment was found or presentment made, it shall be lawful for such officer to pursue and arrest the accused named in such warrant, in any county of the state where he may be found, and commit him to jail or hold him to bail, as provided in this code.¹

WARRANT WHEN ISSUED TO SHERIFF OF THE COUNTY WHERE THE INDICTMENT WAS FOUND.

The State of —, — County.²

To the sheriff of said county:

Whereas, at the [October], 18—, term of the — court of — county, an indictment was duly found by the grand jury of said county [or an information duly filed by the prosecuting attorney of said county] against one C D for (*insert the name or a description of the offense.*)

Now, therefore, you are hereby commanded to pursue after and arrest said C D, in any county of this state where he may be found, and him safely keep so that you have his body before the — court on the first day of the next term thereof, (*or forthwith, as the case may be,*) to answer concerning the crime charged in said indictment, and have you then and there this writ, and a return thereon of the manner of executing the same.

Given under my hand and official seal, this — day of — A. D. 18—. G H, Clerk. [SEAL.]

¹ Cr. Code, § 426.

² The clerk, in issuing a warrant on an indictment where the court has fixed the amount of bail, should indorse the amount thereof on the warrant.

Where the Accused is a Non-resident of County.—Where the party accused shall reside out of the county in which said indictment was found, it shall be lawful to issue a warrant thereon, directed to the sheriff of the county where the accused shall reside or may be found ; and it shall be the duty of such officer to arrest the accused and convey him to the county from which such writ was issued, and then commit him to the jail of said county, or hold him to bail.¹

WARRANT WHERE THE ACCUSED RESIDES OUT OF COUNTY.

The State of —, — County.

To the sheriff of — county :

Whereas, at the [October] 18—, term of the — court of — county, an indictment was duly found by the grand jury of said county [or an information duly filed by the prosecuting attorney of said county] against one C D, for, (*insert the name or description of the offense*) and it appearing that said C D is a resident of — county in said state;

Now, therefore, you are hereby commanded to arrest said C D, if found in said county, and him safely convey to the jail of — county, so that you have his body before the — court on the first day of the next term thereof, (*or forthwith as the case may be*) to answer concerning the crime charged in said indictment [or information], and have you then and there this writ and a return thereon showing the manner of executing the same.

Given under my hand and official seal, this — day of — A. D., 18—.

G H, Clerk. [SEAL.]

Recognizance to be Taken by Sheriff.—When any sheriff or other officer shall be charged with the execution of a warrant issued on any indictment for a misdemeanor, he shall, during the vacation of the court from which the writ issued, have authority to take the recognizance of the person so indicted, together with sufficient sureties, resident and freeholders in the county from which such writ issued, in a sum not less than fifty nor more than five hundred dollars, conditioned for the appearance of such person on the first day of the next term of such court.²

¹ Cr. Code, § 427.

² Cr. Code, § 428. While the language of the section is that the officer holding the warrant "shall * * have authority to take the recognizance" of a person charged with a misdemeanor, the requirement is, nevertheless, compulsory. It is the duty of the officer, in every such case, to

Writ to be Returned.—The sheriff, or other officer, shall return the said writ, according to the command thereof, with the name of the surety or sureties, together with a recognizance taken, as aforesaid, and the recognizance so taken and returned shall be filed and recorded by the clerk of the court to which the same was returned, and may be proceeded on in the same way as if such recognizance had been taken in said court during term time.¹

Court to Fix the Amount of Recognizance in Felonies.—When any person shall have been indicted for a felony, and the person so indicted shall not have been arrested or recognized to appear before the court, the court may, at their discretion, make an entry of the cause on the journal, and may order the amount in which the party may be recognized for his appearance by any officer charged with the duty of arresting him.²

The Clerk Issuing a Warrant on such indictment, shall indorse thereon the sum in which the recognizance of the accused was ordered, as aforesaid, to be taken.³

ORDER OF COURT FIXING THE AMOUNT OF RECOGNIZANCE.

Title of Cause.

The defendant herein being charged with felony, and not having been arrested or recognized to appear before the court, it is hereby ordered that he may be recognized in the sum of ——— dollars, for his appearance at the ——— term of court.

fix the amount of the recognizance at a reasonable sum, within the amounts named in the statute, and permit the accused to furnish a recognizance in the amount named.

¹ Cr. Code, § 429.

² Cr. Code, § 430. In all bailable cases the court should at once fix the amount of bail.

³ Cr. Code, § 431. The Kansas statute authorizes the clerk to fix the amount of bail when the court has failed to do so and there is no judge in the county. *State v. Schweiter*, 27 Kas., 505. Such a provision is to be commended, and could be adopted with advantage by other states. Where an offense is bailable, the whole policy of our law is to admit to bail, and every facility should be extended to a person accused of crime to enable him to give the required recognizance.

FORM OF RECOGNIZANCE TO APPEAR AT ——— TERM OF COURT.

The State of ——— }
 ——— County. }

Be it remembered that on the ——— day of ———, 18—, C D and E F, of ——— county, personally appeared before me, E F, [sheriff] of said county, and acknowledged themselves jointly and severally indebted to the state of ———, in the sum of ——— dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following. The condition of the recognizance is such, that if the said C D shall personally appear at the next term [the time at which the writ is returnable] of the ——— court, in and for ——— county, to answer a certain indictment [or information] pending in said court against said C D for the crime of [larceny], and abide the judgment of the court and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and effect.

C D. [SEAL.]

E F. [SEAL.]

The foregoing was taken, signed and acknowledged before me, this ——— day of ———, 18—, and by me approved.

S T, [Sheriff] of ——— County.

Recognizances Taken by a Judge or Officer must be Signed.—

All recognizances taken during vacation of any court, by any judge or other officer thereof authorized to take them, shall be signed and sealed by the parties, and certified to by the officer taking the same.¹

The officer charged with the execution of the warrant aforesaid shall take the recognizance of the party accused, in the sum ordered, together with good and sufficient sureties conditioned for the appearance of the accused at the return of the writ before the court out of which the same issued; and such officer shall return such recognizance to the said court to be recorded, and proceeded on as provided in this code.²

RETURN OF OFFICER WHERE A RECOGNIZANCE IS TAKEN.

Oct. 1, 18—. Writ received, and on the same day I arrested C D, named therein, and he having entered into a recognizance before me, conditioned for his appearance before the court at the return day of said writ, to wit, ——— 18—, with E F as surety, a resident and freeholder in said county, I therefore released said C D upon said recognizance which is herewith returned.

S T, [Sheriff] of ——— County.

¹ Cr. Code, § 433.

² Cr. Code, § 432.

RETURN WHERE A RECOGNIZANCE IS NOT GIVEN.

Oct. 1, 18—. Writ received, and on the same day I arrested C D, named therein, and he having failed to enter into a recognizance, I committed him to the jail of — county, with the jailer of which I left a certified copy of this writ.

S T, [Sheriff] of — County.

Procedure in Case of Felony where the Court Fails to fix Bail.— Where any person charged with any bailable offense shall be confined in jail, whether committed by warrant under the hand and seal of any judge or magistrate, or by the sheriff or coroner, under any warrant, upon indictment found it shall be lawful for any judge of the supreme court, judge of the district court, within his district, or probate judge, within his county, or police judge, within the city of his jurisdiction, to admit such person to bail, by recognizing such person in such sum and with such securities as to such judge shall seem proper, conditioned for his appearance before the proper court, to answer the offense wherewith he may be charged.¹

No Formal Petition to the Judge² seems to be necessary under

¹ Cr. Code, § 346. In a bailable case, before trial, no person should be committed to jail who is able to give a sufficient recognizance for his appearance. The law still presumes such person to be innocent, and this presumption will remain as evidence in his favor until the jury, by their verdict, shall declare him guilty. In the common law warrants, when issued by a judge, the command was "to apprehend and take the body of the said A B, and bring him before me or some other of the judges of king's bench, if taken within or near the cities of London or Westminster; if elsewhere, before some justice of the peace near to the place, where he may be hereafter taken, to the end that the said A B may become bound with sufficient sureties for his personal appearance in the court of king's bench at Westminster," etc. 4 Chitty, Cr. L., 1263.

² No petition seems to have been necessary at common law to admit to bail. Chitty says, "It appears that if a party be not ready with bail at the time he is apprehended, and the offense is bailable, he may at any time before conviction be released from imprisonment on finding sureties. And after the recognizances have been entered into, the justice before whom the transaction takes place will issue his warrant, called a *liberate*, to the jailer to discharge him. And it is said that justices of the peace will sometimes send a prisoner to some private person, for a short time, to afford him an opportunity of procuring bail before he is committed for trial; but this practice has been disapproved of as inconvenient, and not agreeable to law." 1 Chitty, Cr. L., 101, 102.

this section but merely a copy of the warrant under which the party is held, or in case the parties voluntarily appear, the original.¹ The object is not to secure the prisoner's absolute discharge but merely to be admitted to bail. It is an application of the common law rule of taking the prisoner before certain magistrates named, who, perceiving from the warrant the nature of the offense, fix the amount of the recognizance and recognize the prisoner. No warrant is necessary to take the prisoner before the judge if the officer having him in custody voluntarily takes him before the judge. The judge, however, may issue his warrant.² If the party is compelled to resort to formal proceedings other than the procuring of a warrant to secure the fixing of bail, he may do so by a writ of habeas corpus.³

RECOGNIZANCE TAKEN BEFORE COUNTY [PROBATE] JUDGE, ETC.

State of ——— }
County of ——— }

On this ——— day of ——— personally appeared before me, G H, county judge of ——— county, one A B, who is defendant in the case of *The State v. A B*, pending in the ——— court of ——— county; and it appearing that said offense is bailable, it is therefore ordered by me that said A B be admitted to bail, by entering into a recognizance in the sum of ——— dollars, with two sufficient sureties conditioned for his appearance at the term of the ——— court of ——— county.

FORM OF RECOGNIZANCE TAKEN BEFORE JUDGE.

The State of ———, }
——— County. }

Be it remembered, that on the ——— day of ———, 18—, A B, C D and E F, personally appeared before me, G H, county judge of ——— county, and acknowledged themselves jointly and severally indebted to the state of ——— in the sum of ——— dollars, to be levied on their goods and chattels, lands, and tenements, if default be made in the condition following:

The condition of this recognizance is such that if the said A B shall personally appear at the ——— term of the ——— court, in and for ——— county, to

¹ State v. West, 3 O. S., 509.

² Cr. Code, § 347.

³ For procedure in obtaining the writ and admission to bail, see Maxwell's Pl. & Pr. (4 Ed.), 751-761.

answer the offense of larceny, wherewith he stands charged in said court, on an indictment, [or information], pending therein, wherein the state of — is plaintiff and said A B defendant, and abide the order and judgment of said court and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and effect.

A B. [SEAL.]

C D. [SEAL.]

E F. [SEAL.]

Taken, signed, acknowledged and approved by me this — day of —, A. D. 18—. G H, County Judge.

Special Warrant of Judge.—For taking such bail the judge may, by his special warrant, under his hand and seal, require the sheriff or jailer to bring such accused before him at the *court house* of the proper county, at such time as in such warrant the judge may direct.¹

In Fixing the Amount of Bail the judge admitting to the same shall be governed, in the amount and quality of bail required, by the direction of the district court, in all cases where such court shall have made an order or direction in that behalf.²

Recognizance to be Returned.—In all cases where the judge of an examining court shall recognize a prisoner under the provisions of the four preceding sections, he shall forthwith deposit with the clerk of the proper court the recognizance so taken, and also a warrant, directed to the jailer, requiring him to discharge the prisoner.³

SPECIAL WARRANT OF JUDGE TO ADMIT TO BAIL.⁴

The State of —, — County.

To the sheriff [or jailer] of said county:

Whereas, it has satisfactorily been made to appear to me that A B, now confined in the jail of said county under a charge for the commission of the crime of larceny, is desirous of being admitted to bail;

Now, therefore, you are required forthwith, [or on the — day of —, 18— at — o'clock — M.] to bring said A B before me, at the court house of — county. Hereof fail not.

Given under my hand and official seal, this — day of —, A. D. 18—.

M S, Judge of the County Court. [SEAL.]

¹ Cr. Code, § 347.

² Cr. Code, § 348.

³ Cr. Code, § 349.

⁴ The warrant is to be under the hand and *seal* of the judge. This probably refers to the seal of the court of which he is judge, as private seals are abolished in this state.

WARRANT TO SHERIFF OR JAILER TO DISCHARGE PRISONER.

The State of —, — County.

To the sheriff [or jailer] of said county:

Whereas, upon the application of A B, in your custody, charged on an indictment [or information] pending in the — court of — county, with the commission of larceny, I have admitted said A B to bail, as required by law;

You are therefore, if said A B is in your custody for no cause but this, required, immediately on the receipt of this warrant, to discharge said A B.

Given under my hand and official seal, this — day of — A. D. 18—.

G H, County Judge.

Surrender of Principal by Sureties.—When any person who is surety in a recognizance for the appearance of the defendant before any court in this state, desires to surrender the defendant, he shall, by delivering the said defendant in open court, be discharged from any further responsibility on said recognizance, and the said defendant shall be committed by the court to the jail of the county, unless he shall give a new recognizance, with good and sufficient sureties, conditioned as the original recognizance.¹

In all cases of bail for the appearance of any person or persons charged with a criminal offense, the security or securities of such person or persons, may, at any time before judgment is rendered, upon *scire facias* to show cause why execution should not issue against such security or securities, seize and surrender such person or persons, charged as aforesaid, to the sheriff of the county wherein the recognizance shall be taken.²

Duty of Sheriff.—And it shall be the duty of such sheriff on such surrender, and the delivery to him of a certified copy of the recognizance by which such security or securities are bound, to take such person or persons so charged, as aforesaid, into custody, and, by writing, acknowledge such surrender; and thereupon the security or securities shall be discharged from any such recognizance, upon payment of all costs occasioned thereby.³

¹ Cr. Code, § 350.

² Cr. Code, § 351.

³ Cr. Code, § 352.

SURRENDER OF PRISONER BY SURETIES IN OPEN COURT.

Title of Cause.

Now, on this day, come C D and E F, sureties on a recognizance for the appearance of said defendant before the court, and deliver the defendant in open court, and desire to be discharged from any further liability on said recognizance. It is therefore ordered that said sureties be discharged from further responsibility on said recognizance, and that said defendant be committed to the jail of the county, unless he shall give a new recognizance in the sum of \$ —, with good and sufficient sureties.

SURRENDER OF PRINCIPAL BY SURETIES TO THE SHERIFF.

Title of Cause.

Now, on this day, came C D and E F and surrendered to me the body of A B, and also delivered a certified copy of the recognizance, on which said sureties are bound for the appearance of said A B before — court, and ask to be discharged from said recognizance. I have therefore taken said A B into my custody, and said sureties, having paid all costs to date, are discharged from further liability on such recognizance.

Oct. 10, 18—.

G H, Sheriff.

The Right of Bail to Surrender their Principal.—In the language of the books, the sureties are said to have their principal always on the string, which they may pull whenever they please, and surrender at their discretion.¹

They may arrest him even on Sunday, and confine him until the next day, and then surrender him. The arrest on Sunday is not a service of process, but in the nature of an arrest for an escape.² Lord Hardwick says, it is the constant language of the courts that bail are the principal's jailers, and that as the principal is at large only by permission and indulgence of the bail they may take him up at any time.³

In another case it was said that bail are but jailers *pro tempore*, and, in case a man absconds and his bail can not find him, they shall have a warrant to take him out of any pretended place of privilege in order to surrender him, because

¹ Nicolls v. Ingersoll, 7 Johns., 154.

² Id.

³ *Ex Parte Gibbons*, 1 Atk., 237; Nicolls v. Ingersoll, 7 Johns., 155.

he is a prisoner to the court, and they may call him at pleasure.¹

Bail may Depute Another to Take and Surrender their Principal.—This was the rule at common law and no doubt the right continues,² and an executor of bail may surrender the principal.³

APPOINTMENT OF AGENT BY BAIL TO TAKE AND SURRENDER PRINCIPAL.

Know all men by these presents, that we, C D and E F, of — county, in the state of —, being the persons named as sureties in the certified copy of the recognizance hereto annexed, do hereby appoint, depute and authorize G H, of said county, in our name, place and stead to arrest, take and surrender to the sheriff of — county, A B, the principal in said recognizance with a certified copy of said recognizance, in order that we may be discharged from liability on such recognizance.

Given under our hands this — day of —, A. D. 18—.

C D.
E F.

The Right of Bail to Take the Principal, if Found without the State.—At common law the bail could arrest their principal wherever found and carry him away, the principal being regarded as standing in the situation of a prisoner who has escaped;⁴ and it is said they may break doors, if necessary, to make the arrest.⁵

Where bail has been given to abide the action of the grand jury, and an indictment is found against the principal, the bail may procure a *capias* to be issued upon the indictment, and cause the principal to be arrested and surrendered.⁶

Forfeiture of Recognizance.—When any person, under recognizance in any criminal prosecution, either to appear and answer, or testify, in any court, shall fail to perform the condi-

¹ Anonymous case, Shower, 214. The valuable notes to Book III, Cooley's Blackstone's Com., 292.

² Brandman v. Fowler, 1 Johns. Cas., 413.

³ Meddowscroft v. Sutton, 1 Bos. & Pull., 62; Fisher v. Fallows, 5 Esp. Cas., 171; Nicolls v. Ingersoll, 7 Johns., 155.

⁴ Nicolls v. Ingersoll, 7 Johns., 146; Anon., Show, 214; Parker v. Bidwell, 3 Conn., 84; Harp v. Osgood, 2 Hill, 216.

⁵ Read v. Case, 4 Conn., 166; Nicolls v. Ingersoll, 7 Johns., 155.

⁶ People v. Phelps, 17 Ill., 201.

tions of such recognizance, his default shall be recorded, and the recognizance forfeited in open court.¹

Action to be Brought Thereon.—Wherever such recognizance shall have been forfeited as aforesaid, it shall be the duty of the prosecuting attorney of the county in which the recognizance was taken, to prosecute the same by civil action for the penalty thereof, and such action shall be governed by the code of civil procedure, so far as the same may be applicable.²

Want of Jurisdiction a Defense.—Where the court, before which the accused was examined and required to enter into a recognizance, had no jurisdiction in the premises, a recognizance executed by the prisoner to obtain his release is of no validity, and no action can be maintained thereon.³

Indefiniteness.—In the condition of the recognizance to appear and answer a criminal charge, all that is required is a compliance by the principal with the letter of his obligation, because a recognizance has no spirit or power beyond its letter. If, therefore, the condition of the recognizance is impossible to be complied with—as by requiring an appearance before a court which has no existence, or is ambiguous, leaving it doubtful before which of the courts the defendant shall appear, the recognizance is void.⁴

Mere Irregularities do not Invalidate.—Where a recognizance is in proper form, except certain words indorsed thereon, as, “Taken and acknowledged before me this 3d day of August, 1880, Webb McNall, notary public. Approved by me this

¹ Cr. Code, § 384.

² Cr. Code, § 385.

³ *State v. Davis*, 26 Kas., 205. *Davis* was arrested on a charge of grand larceny, alleged to have been committed in the county of Lyon, but outside of the corporate limits of Emporia. He was brought before the police judge of Emporia for examination. The defendant moved to dismiss the proceedings against him on the ground that the police judge had no jurisdiction to examine him for the offense charged. The motion was overruled, and afterward the police judge held an examination of the defendant upon the charge of larceny, and in default of bail committed him to jail. He thereupon executed a recognizance, upon which, default being made, an action was brought. The court held, properly, we think, that the police judge had no jurisdiction in cases arising without the limits of the city, and that the recognizance was void.

⁴ *State v. Johnson*, 13 Ohio, 176.

4th day of August, 1880, Jerry Brisbin, sheriff; Benjamin C. Clossom, under-sheriff," and it is alleged in the petition that it was approved by the sheriff and the prisoner released, it will be sustained.¹ So where a recognizance was signed by the surety alone he was held to be liable thereon, although the recognizance itself did not show in definite and explicit terms the nature of the offense, but indefinitely, obscurely and inferentially only.² And where a party was examined on a criminal charge, and it was found by the examining court that an offense had been committed, and that there was probable cause to believe that the accused committed it, and the court thereupon fixed the amount of bail for the appearance of the accused for trial, and without issuing a warrant of commitment or taking bail permitted the accused to return home with his father, upon the latter's promise to execute a good bond, which a few days afterward was given and approved, it was held that the instrument was valid and that the court had not lost jurisdiction.³

RECOGNIZANCE FORFEITED.

Title of Cause.

On this day comes the prosecuting attorney of — county, and exhibits to the court the recognizance of A B, defendant, executed on the — day of —, 18—, with C D and E F as sureties for the appearance of said defendant at the — term of the court; and thereupon said defendant, being three times solemnly called in said court to answer the charge of —, pending against him therein, and failing to appear, his sureties, C D and E F, were three times solemnly called to come into court and bring the body of the said A B to answer said charge; and said C D and E F still failing to appear and bring the body of said A B, it is ordered by the court that said recognizance be and the same is hereby forfeited absolutely.

¹ State v. Kurtz, 27 Kas., 223.

² Tillson v. State, 29 Kas., 452.

³ State v. Terrill, 29 Kas., 563. The court say (page 566): "By the understanding of the parties he [the accused] was, until giving the recognizance, under the control and order of the justice, and therefore, while not in the manual custody of an officer, was technically in the custody of the law."

MOTION TO VACATE AND SET ASIDE ORDER OF FORFEITURE.

Title of the Cause.

Now come the defendants in the above entitled cause and move the court to vacate and set aside the order of forfeiture, heretofore entered by this court, for the following reasons:

First. (*State reasons showing an excuse for the failure of the prisoner to be present when the case was called.*)

Second, etc.

M S, Attorney for Defendants.

FORFEITURE SET ASIDE.

Title of the Cause.

On motion of the defendant the forfeiture of the recognizance heretofore entered in this case is hereby set aside, and said defendant, A B, with C D and E F as sureties, now enter into a recognizance for the appearance of said A B before said court, at the — term thereof, to answer said charge.

Court may Reduce Penalty.—The court in which the action is brought for the penalty of any forfeited recognizance, may remit or reduce any part, or the whole, of such penalty, and may render judgment thereon according to the circumstances of the case and the situation of the party, and upon such terms and conditions as to such court shall seem just and reasonable.¹

Court has Power to Remit Judgment, when.—Whenever any judgment shall have been rendered against the defendants for the whole or any part of the penalty of a forfeited recognizance, as aforesaid, the court rendering said judgment shall have power to remit or reduce the amount thereof, when it shall be made to appear that after the rendition thereof the accused had been arrested and surrendered to the proper court to be tried on said charge.²

Action not Defeated, when.—No action brought on any recognizance, shall be barred or defeated, nor shall judgment thereon be reversed by any neglect or omission to note or record the default, nor by reason of any defect in the form of the

¹ Cr. Code, § 386.

² Cr. Code, § 387.

recognizance, if it sufficiently appear, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or officer before whom it was taken was authorized by law to require and take such recognizance.¹

PETITION TO VACATE JUDGMENT RENDERED ON FORFEITURE OF RECOGNIZANCE.²

Title of Cause.

Your petitioners, C D and E F, respectfully represent that on the — day of — they entered into a recognizance in the sum of \$ —, for the appearance of one A B at — term of the — court, to answer the charge of [larceny], then pending against him in said court; that afterward, at the — term of said court, said A B failed to appear, and your petitioners being unable to produce him, said recognizance was declared forfeited absolutely, and afterward, at the — term, judgment was rendered against your petitioners on said recognizance for the sum of — dollars; that since the rendition of said judgment, to wit, on the — day of —, A. D. 18—, said A B was arrested by your petitioners and by us surrendered to the [sheriff] of — county, and he is now in the custody of said officer. Your petitioners therefore pray that the court will remit the amount of said judgment, and for such other relief as justice may require.

ORDER REMITTING THE AMOUNT OF THE JUDGMENT.

Title of Cause.

This cause came on for hearing upon the petition herein and the evidence, and was submitted to the court, on consideration whereof the court finds that at the time of the forfeiture and when judgment was rendered, the sureties, C D and E F, were unable to produce the body of A B in said court, and that since the rendition of said judgment of forfeiture they have arrested and surrendered said A B to the [sheriff] of — county. It is therefore ordered by the court that the sum of — dollars be remitted from said judgment [or that said judgment be remitted and satisfied of record].

The Omission to Enter the Default, or any defect in the form of the recognizance, will constitute no defense if it show at what court the party or witness was required to appear, and that the recognizance was lawfully taken.³

¹ Cr. Code, § 888.

² See Proceedings to Vacate and Modify Judgments. Maxwell, Pl. & Prac. (4 Ed.), 744-750.

³ Cr. Code, § 888.

Discharge from Custody.¹—Any person held in jail, charged with an indictable offense, shall be discharged if he be not indicted at the term of the court at which he is held to answer, unless such person shall have been committed to jail on such charge after the rising and final report of the regular grand jury for said term, in which case the court, in its discretion, may discharge such person or order a new grand jury, or require such person to enter into recognizance, with sufficient surety for his appearance before said court to answer such charge at the next term thereof. Provided, that such person, so held in jail without indictment, shall not be discharged, if it appears to the satisfaction of the court that the witnesses on the part of the state have been enticed or kept away, or are detained and prevented from attending, caused by sickness or some inevitable accident.²

Not Brought to Trial.—If any person, indicted for any offense and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment is found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on application of the prisoner.³

Where Accused has Given Bail.—If any person, indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen on his application, or be occasioned by the want of time to try such cause at such third term.⁴

Cause may be Continued, when.—If, where application is

¹ *Ex parte* T. C. 11 Neb., 221. Where the witnesses on the part of the state have not been prevented from attending court, and no indictment is found against a party accused of crime at the term at which he is held to answer, he should be discharged.

² Cr. Code, § 389.

³ Cr. Code, § 390.

⁴ Cr. Code, § 391.

made for the discharge of a defendant under either of the last two sections, the court shall be satisfied there is material evidence on the part of the state, which can not then be had, that reasonable exertions have been made to procure the same, and that there is just ground to believe that such evidence can be had at the succeeding term, the cause may be continued and the prisoner remanded or admitted to bail as the case may be.¹

Habeas Corpus—The Remedy.—The remedy of a party unlawfully restrained of his liberty for any of the causes stated, is by habeas corpus.² If evidence against a party has not been procured within the time named in the preceding sections, the court should discharge the accused. He is entitled to a trial or his liberty. It must not be forgotten that the habeas corpus act of 1679 was the outgrowth of delay in the trial of causes. The preamble of that act recites that "Whereas great delays have been used by sheriffs, jailers and other officers, to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out on *alia* or *pluries* habeas corpus, and sometimes more, and by other shifts to avoid yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been and hereafter may be long detained in prison in such cases, where by law they areailable, to their great damage and vexation, for the prevention whereof and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters" the act was necessary. This is a severe arraignment, but history attests that its statements are true. Courts can not be too careful in guarding the rights of prisoners from the abuse of power.

Convict in Penitentiary.—Whenever any convict in the penitentiary shall be indicted for any offense while confined therein said convict shall remain in the custody of the warden of said penitentiary subject to the order of the district court of

¹ Cr. Code, § 392; See *Johnson v. State*, 42 O. S., 207.

² Maxwell Pl. & P. (4 Ed.), 754 and cases cited.

the county where the penitentiary in which such convict is confined is situated.¹

ORDER TO WARDEN OF PENITENTIARY TO PRODUCE CONVICT.

Title of Cause.

It appearing to the court that an indictment has been found [or information filed] in the — court of — county, against one A B, for an offense committed by him while confined in such penitentiary, and that said A B is now in the custody of the warden thereof, it is therefore ordered that said warden produce said A B in open court, on the — day of — A. D. 18— (*state the purpose*).

Duties of the Clerk.—Whenever a transcript or recognizance shall be returned to the clerk it shall be his duty to enter the cause upon the appearance docket of the court, together with the date of filing of the transcript and recognizance, the date and amount of the recognizance, the names of the sureties and the costs, wherenpon the same shall be considered as of record in such court, and proceeded on by process issuing out of said court, in the same manner as if such recognizance had been entered into before such court. And when any court having cognizance of a crime shall take a recognizance, it shall be a sufficient record thereof on the journal of such court to enter upon the journal the title of the cause, the crime charged, the name of the party and his sureties thereto, the amount of such recognizance, and the time therein required for the appearance of the accused; and the same shall be considered as of record in such court.²

¹ Cr. Code, § 494.

² Cr. Code, § 383.

CHAPTER XXXVII

MOTIONS AND ISSUES UPON THE INDICTMENT.

If there be at any time pending against the same defendant two or more indictments for the same criminal act, the prosecuting attorney shall be required to elect upon which he will proceed, and upon trial being had thereon, the remaining indictment shall be quashed.¹

Where an Indictment Charges two or more Distinct Offenses differing in their nature, or arising out of distinct and different transactions, the court will compel the prosecutor to elect upon which charge he will proceed. Such election will not be required to be made, however, when the several charges in the indictment relate to the same transaction, and are simple variations or modifications of the *same* charge with a view of meeting the proof.² Thus, in the case of *Com. v. Webster*,³ for the murder of Dr. Parkman, there were four counts in the indictment, the first of which alleged the crime to have been committed by stabbing with a knife; the second by a blow on the head with a hammer; the third by striking, kicking, beating, and throwing on the ground, and the fourth "by some means, instruments and weapons to the jurors unknown." In such case as the charge was for the killing of the same person and the different counts merely a statement of the means by which the death was effected, no election can be required. The rule would be different, however, if two separate and distinct offenses were charged.

No Election Required.—Where several articles are stolen at

¹ Cr. Code, § 435.

² *Bailey v. State*, 4 O. S., 442.

³ 5 Cush., 295.

the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offense.¹

So, where a party accused of embezzlement has received the money alleged to have been embezzled in several sums, at different times, and from different persons, the prosecutor can not be required to elect on which sum he will rely for a conviction.² The reason is the collection of the money was lawful, but the wrongful act, the conversion, was a single transaction.

Burglary and Larceny, when each constitutes a part of the same transaction, may be charged in the same count and the accused found guilty of but one offense.³

Election Required.—Where, for the purpose of proving the charge made in a single count in a criminal information, evidence is introduced tending to prove several separate and distinct offenses, it is the duty of the court, on motion of the defendant, before the defendant is put upon his defense, to require the prosecutor to elect upon which transaction he will rely for a conviction.⁴

¹ *State v. Hennessy*, 23 O. S., 339. The reason for the rule is stated in the opinion as follows (p. 346): "The particular ownership of the property which is the subject of larceny does not fall within the definition, and is not of the essence of the crime. The gist of the offense consists in feloniously taking the property of another; and neither the legal nor the moral quality of the act is at all affected by the fact that the property stolen, instead of being owned by one, or by two or more jointly, is the several property of different parties. The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense."

² *Gravatt v. State*, 25 O. S., 162.

³ *State v. Brandon*, 7 Kas., 106.

⁴ *State v. Crimmins*, 31 Kas., 376. The reason for this rule is very clearly stated by Valentine, J. (pp. 379, 380), as follows: "Where the state has offered evidence tending to prove several distinct offenses, it is the duty of the court, upon the motion of the defendant, to require the prosecutor before the defendant is put upon his defense, to elect upon which particular transaction the prosecutor will rely for a conviction. *State v. Schweiter*, 27 Kas., 500-512. Any other rule would often work injustice and hardship to the defendant. If any other rule were adopted, the defendant might be

The Rule Seems to be that where but a single offense is charged—one act, the court will not permit the prosecutor to give evidence of more than one transaction.¹

Where a Former Conviction or Acquittal has been Pleaded, though the offense charged in the second indictment might have been proved, and a conviction had under the first, the state may prove that on the former trial it elected what transaction it would rely upon for a conviction in that case, and that such transaction was different from that elected and solely relied on for a conviction in the second case.²

ORDER REQUIRING AN ELECTION BETWEEN TWO INDICTMENTS.

Title of Cause.

It having been made to appear to the court that there are two indictments pending against the defendant for the same criminal act, it is therefore ordered that the prosecuting attorney elect upon which he will proceed, and upon such election being made, the remaining indictment will be quashed.

ELECTION OF INDICTMENTS BY PROSECUTING ATTORNEY.

Title of Cause.

And now comes S I, prosecuting attorney of — county, and in compliance charged with the commission of one offense, tried for fifty, compelled to make defense to all, be found guilty of an offense for which he had made no preparation and had scarcely thought of, and found guilty of an offense which was really not intended to be charged against him; and in the end, when found guilty, he might not have the slightest idea as to which of the offenses he was found guilty." In this case the prosecutor was required to elect upon the sale of intoxicating liquor to a particular person, but leaving the date somewhat indefinite, being "in November or December, 1882;" the court held this, under the evidence in the case, to be sufficiently definite. *State v. O'Connell*, 31 Kas., 383.

¹ *Stockwell v. State*, 27 O. S., 563; *People v. Jurness*, 5 Mich., 305; *Lovell v. State*, 12 Ind., 18; *People v. Hopson*, 1 Denio, 574; *Elam v. State*, 26 Ala., 48; *Kinchelow v. State*, 5 Humph., 9; *State v. Bates*, 10 Conn., 372; 1 Bish. Cr. P., § 460.

² *Bainbridge v. State*, 30 O. S., 265. Where the defendant was charged with robbery, and with murder while in the commission of the robbery, it being alleged that the blows which caused death were struck by the defendant with a piece of iron, a sledge, and a shovel, the state can not be required to elect, being but one transaction. *Jackson v. State*, 39 O. S., 37.

ance with the order of this court requiring him to elect upon which indictment he will prosecute the defendant, elects to proceed to trial against said defendant, upon the indictment [or information], filed in this case [October 10th], A. D. 18—.

Certified Copy of Indictment to be Served on the Accused.—The clerk of the district court shall, upon the filing of any indictment with him, and after the party indicted is in custody or let to bail, cause the same to be entered of record on the journal of said court, and, in case of loss of the original, such record or a certified copy thereof shall be used in place thereof on the trial of the cause. And within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, for the defendant and his attorney, a copy of the indictment, and the sheriff, on receiving a copy, shall serve the same upon the defendant; and no one shall be without his assent arraigned or called on to answer to any indictment, until one day shall have elapsed after receiving in person, or by counsel, or having an opportunity to receive, a copy of such indictment as aforesaid.¹

Copy of Indictment.—While the statute requires the service of a copy of the indictment on the accused, or his counsel, before pleading to the indictment, yet this is a matter that may be waived. Therefore, to be available on error, it should appear from the bill of exceptions that a demand for such copy was made before pleading, and that it had not been served the requisite time.²

The Court Required to Appoint Counsel, when.—The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel, not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours; and it shall not be lawful for the county clerk or county commissioners of any county in this state to credit or allow any account or claim hereafter presented by an attorney or counselor at law for services per-

¹ Cr. Code, § 436.

² McKinney v. People, 2 Gilm., 540; Fouts v. State, 8 O. S., 98.

formed under the provisions of this section, until said account, bill or claim shall have been examined and allowed by the court before whom said trial is had, and the amount so allowed for such services certified by said court. Provided, that no such account, bill or claim shall in any case, except in cases of homicide, exceed one hundred dollars.¹

Proof of Poverty.—Where the accused asks for the appointment of counsel to make his defense, on the ground that he has not the ability to procure such counsel, the court may examine him under oath as to his ability, or may permit him to file an affidavit setting up the fact. If the prosecuting attorney denies the statements in the affidavit of the accused, as to his ability to employ counsel, he may file a counter affidavit or affidavits showing such ability, and no doubt the court may permit the accused to file additional affidavits in support of his motion.

AFFIDAVIT OF ACCUSED OF WANT OF ABILITY TO PROCURE COUNSEL.

Title of Cause and Venue.

I, A B, do solemnly swear that I am defendant in an action pending in said court, wherein The State of — is plaintiff, and A B, the affiant herein, is defendant, the charge being for —; that I have not the ability to procure counsel to make my defense, and respectfully ask the court to appoint — for that purpose.²

Subscribed and sworn to, etc.

ORDER APPOINTING ATTORNEY TO DEFEND.

Title of Cause.

It appearing to the court from the affidavit of A B [or the evidence] that said A B has not the ability to procure counsel, and that the offense with

¹ Cr. Code, § 437. At common law no counsel was allowed a prisoner upon his trial upon the general issue, for any capital offense, unless some point of law arose proper to be discussed. 4 Bla. Com., 355.

² While the court, no doubt, has a discretion in making the appointment, it is but reasonable to allow the accused to make a selection from the attorneys in the county where the case is brought, if such attorneys will accept the appointment. No one should be compelled to accept.

which he is charged is a felony, it is therefore ordered that E F be, and he hereby is, appointed counsel to defend said A B in said cause.

The Court shall Allow the Accused a Reasonable Time to examine the indictment, and prepare exceptions thereto.¹

Exceptions to Indictment.—The accused may except to an indictment by, first, a motion to quash; second, a plea in abatement; third, a demurrer.²

A Motion to Quash may be made in all cases where there is a defect apparent on the face of the record, including defects in the form of the indictment, or in the manner in which an offense is charged.³

A Defect in the Manner of Stating the Offense will be waived, if, on being arraigned, the defendant pleads guilty to the charge, provided the indictment clearly charges an offense. Therefore, under an act to prevent games, an indictment, charging "that C did unlawfully play at a certain game called *draw poker*, for a sum of money, to wit, for the sum of six dollars, by means of a certain gaming device, to wit, a pack of cards," is sufficient to sustain a plea of guilty *as charged*.⁴

¹ Cr. Code, § 438. No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected—first, by the omission of the words, "with force and arms," or any words of similar import; or, second, by omitting to charge any offense to have been contrary to the statute, or statutes; or, third, for the omission of the words, "as appears by the record;" nor for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense; nor for stating the time imperfectly; nor for the want of a statement of the value, or price of any matter or thing, or the amount of damages or injury, in any case where the value, or price, or the amount of the damages or injury, is not of the essence of the offense; nor for the want of an allegation of the time or place of any material fact, when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for an omission to allege that the grand jurors were impaneled, sworn or charged; nor for any surplusage, or repugnant allegation, when there is sufficient matter alleged to indicate the crime, or person charged; nor for want of an averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Cr. Code, § 412.

² Cr. Code, § 439.

³ Cr. Code, § 440.

⁴ *Carper v. State*, 27 O. S., 572.

A defect mentioned in the statute which appears upon the face of the indictment, or any count thereof, must be taken advantage of by a motion to quash.¹

The Motion must Distinctly Specify the Grounds upon which it is Made.—That is, must specifically point out wherein the indictment is defective.² A motion to quash is the proper remedy where the names of the witnesses on whose testimony the indictment was found are not indorsed on the indictment,³ and where the allegations in a count contradict each other, or the count is bad for duplicity,⁴ and any other defect or omission which appears on the face of the indictment of some matter required by statute.

MOTION TO QUASH INDICTMENT.⁵

Title of Cause.

Now comes the defendant and moves the court to quash the indictment in this case for the following reasons:

First. Because said indictment is not indorsed, "A true bill," and subscribed by the foreman.

Second. Because the names of the witnesses are not indorsed on said instrument.

Third. [State.]

S I, Attorney for Defendant.

ORDER QUASHING INDICTMENT.

Title of Cause.

This cause came on for hearing on the motion to quash the indictment heretofore filed, and was submitted to the court, on consideration whereof

¹ *Dutell v. State*, 4 G. Greene, 125; *State v. Rickey*, 4 Halst., 293; *Wickwire v. State*, 19 Conn., 477; *Com. v. Church*, 1 Barr, 105; *Holloway v. Freeman*, 22 Ill., 201; *Broward v. State*, 9 Fla., 422.

² *State v. Maurer*, 7 Iowa, 406.

³ *McKinney v. People*, 2 Gilm., 540.

⁴ *State v. Brown*, 8 Humph., 89; *Shafer v. State*, 26 Ind., 191; *Simons v. State*, 25 Id., 331; *People v. Shotwell*, 27 Cal., 394; *Com. v. Tuck*, 20 Pick., 361.

⁵ Care must be taken not to ask too much in the motion, and it must be in a form that the court can sustain or overrule. The court may sustain the motion upon any one of the grounds thereof, they being in the nature of separate assignments.

the court finds the [first] ground of the motion well taken. It is therefore ordered that said motion be sustained and said indictment quashed.

The Court on its own Motion may in Certain Cases Quash an Indictment, as where the judge perceives that the cause can not be proceeded in with advantage to public justice, or without doing a wrong to the defendant.¹ It is said that even an *amicus curiæ* may move to quash an indictment.² At common law, where prosecutions were conducted by private prosecutors who did not possess the power as public prosecutors, as in this country, to enter a *nolle prosequi*, a motion to quash was sometimes made on the part of the prosecution. In such case the court would not quash the indictment as a matter of course, unless it appeared to be clearly insufficient; nor even then, after the defendant had pleaded, unless another good indictment had been found against him.³

The Grounds of the Motion to Quash no doubt are limited by the statute to defects apparent on the face of the record, defects in the form of the indictment and defects in the manner in which the offense is charged.⁴ These defects, however, must be considered in connection with section 412 already referred to.

Motion, when to be Made.—The motion should be made before pleading to the indictment, and it is generally held that after plea, but particularly after issue joined, it can not be made.⁵ In some of the courts, however, leave is given to withdraw

¹ Reg. v. Wilson, 6 Q. B., 620.

² Rex v. Vaux, Comb., 13.

³ 1 Chitty, Cr. L., 299. "And the courts usually refuse to quash, on the application of the defendant, where the indictment is for a serious offense, unless upon the clearest and plainest ground, but will drive the party to a demurrer, or motion in arrest of judgment, or writ of error." 1 Chitty, Cr. L., 300.

⁴ State v. Rickey, 4 Halst., 293; Wickwire v. State, 19 Conn., 477; Bell v. State, 42 Ind., 335; Broward v. State, 9 Fla., 422; Com. v. Church, 1 Barr, 105.

⁵ 1 Stark. Cr. Pl., 299; Wilder v. State, 47 Geo., 522; People v. Walters, 5 Park., 661; State v. Burlingham, 15 Me., 104; Reg. v. Carruthers, 1 Cox, C. C., 138; Nicholls v. State, 2 South., 539; Rex v. Freth, 1 Leach, 10, 11.

the plea, and make the motion.¹ The question probably is to a great extent in the discretion of the trial court to be exercised as justice may seem to require.

A Plea in Abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto.²

What may be Pleaded.—As where the indictment assigns to the accused a wrong Christian name or surname.³ In such case the plea should state the name of the defendant.⁴ The prosecuting attorney, however, may deny the plea or allege that the defendant was known by the Christian name or surname by which he was indicted as well as the other.⁵

A plea to an indictment that one of the jurors had not the statutory qualifications, is a good plea in abatement.⁶

The plea must state facts, not mere legal conclusions,⁷ and it must be certain in its averments.⁸

In Nebraska when a grand jury is called it must be selected in the manner provided by law, and a failure to do so is good cause to abate the indictment.⁹

A Competent Juror.—In Ohio it was held by the supreme court commission that where a member of a grand jury,

¹ *Nicholls v. State*, 2 Southard, 539; *Morton v. People*, 47 Ill., 468; *Mentor v. People*, 30 Mich., 91; *Hensche v. People*, 16 Id., 46.

² Cr. Code, § 441.

³ *Scott v. Soans*, 3 East, 111; *Com. v. Fredericks*, 119 Mass. 199; *Lynes v. State*, 5 Port., 236; *Com. v. Dedham*, 16 Mass., 146.

⁴ *R. v. Granger*, 3 Burr., 16, 17; *Com. v. Sayers*, 8 Leigh, 722; *O'Connell v. R.*, 11 Cl. & Fin., 155.

⁵ 2 Leach, 476; 2 Hale P. C., 237. If the court finds the plea of misnomer to be true it will enter such finding on its minutes, and the proceedings will thereafter be conducted against the defendant by his true name. The indictment will not be quashed.

⁶ *Doyle v. State*, 17 Ohio, 222; *Huling v. State*, 17 O. S., 583. In the last case cited it is said that mere irregularities in selecting and drawing the grand jurors which do not relate to their personal qualifications, is not good cause for a plea in abatement. That will depend upon the statute. If that requires the jurors to be selected in equal proportions from all parts of the county, the failure to comply in a material respect would seem to be sufficient cause for the abatement of the indictment. *Bohannon v. State*, 15 Neb., 209; *Polin v. State*, 14 Id., 540.

⁷ *Burley v. State*, 1 Neb., 395; *Priest v. State*, 10 Id., 396.

⁸ *Barton v. State*, 12 Neb., 261.

⁹ *Jones v. State*, 18 Neb., 401.

which found the indictment, was a nephew of the person who was murdered, the indictment was not therefore invalid.¹

What not a Good Plea.—It is not a good plea in abatement that another prosecution is pending for the same offense,² or that there was no evidence before the grand jury on which to find the indictment,³ nor that the offense for which the indictment was found is not the same as that for which the accused is being tried.⁴ It is no objection to an indictment that some of the grand jurors were above sixty years of age. This is a mere personal privilege in favor of the juror, which, if he does not claim, he will not on that account be an incompetent juror.⁵ A plea that jurors were not "reputable" freeholders, or that the persons composing the jury had no authority to act when the indictment was found, is not sufficient, as it states mere conclusions, not facts.⁶ In *Priest v. State* the plea in abatement, after stating certain formal matters, alleged "that the grand jury that found said indictment were not legally chosen and impaneled."⁷ This was held insufficient, because it did not state facts, viz., in what particulars the jury was not legally chosen and impaneled.

¹ *State v. Easter*, 30 O. S., 542. At common law a plea in abatement is founded either on some defect apparent on the face of the indictment, without reference to any extrinsic fact, or is founded upon some matter of fact outside of the record which renders the indictment insufficient. Thus, if the indictment do not describe the defendant by any addition of place or degree it is defective on the face of it, and the defendant may plead in abatement. So if the defendant be misnamed, or his addition or degree be misstated, which is an extrinsic objection not apparent on the face of the indictment, the defendant may plead this also in abatement, but for objections apparent on the face of the indictment itself, without reference to any extrinsic fact, it is more usual to move to quash it or to demur. 1 Chitty, Cr. L., 445. All mistakes in the name or addition must be pleaded if any advantage is to be taken of them, for they will form no ground of error or arrest of judgment. *Id.*, 447.

² 1 Chitty, Cr. L., 446. The remedy in such case is to require the prosecutor to elect as heretofore stated.

³ *Creek v. State*, 24 Ind., 151; *Stewart v. State*, *Id.*, 143.

⁴ *Rocco v. State*, 37 Miss., 357; *Spratt v. State*, 8 Mo., 247.

⁵ *State v. Miller*, 2 Blackf., 35.

⁶ *Hardin v. State*, 22 Ind., 347; *State v. Newer*, 7 Blackf., 307.

⁷ *Priest v. State*, 10 Neb., 393.

FORM OF PLEA IN ABATEMENT.

Now comes A B, in his own proper person, and prays judgment that said indictment may be quashed for the following reasons:

First. Because one G H, a member of the grand jury that found said indictment, was not at the time of finding the same twenty-one years of age.

Second. Because I J, one of said grand jurors that found said indictment, was not at the time of finding the same of "sound mind and discretion."

Third. (*State.*)

S J, Attorney for Defendant.

State of —, }
 — County. }

I, A B, being first duly sworn, depose and say that the facts stated in the foregoing plea of abatement are true [as I believe.]¹

A B.

Subscribed in my presence and sworn to before me this — day of —, 18—.

C D, Clerk.

REPLICATION TO PLEA IN ABATEMENT.²*Title of the Cause.*

Now comes N I, the prosecuting attorney for said county, and in reply to the plea in abatement of said defendant, says, (*state matters in confession and avoidance, denial, etc.*)

PLEA IN ABATEMENT SUSTAINED.

Title of Cause.

This cause came on for hearing upon the plea in abatement of the defendant, the reply thereto of the prosecuting attorney on behalf of the state [and the evidence], and was submitted to the court, on consideration whereof said plea is * sustained and said indictment quashed. It is further ordered that said defendant be placed in the custody of the sheriff [or where the offense is bailable say] It is further ordered that the defendant give bail in the sum

¹ At common law it was necessary to add an affidavit to the plea averring that it was true: 1 Chitty, Cr. L., 448; and probably the common law still prevails, the allegations being positive.

² The prosecuting attorney may demur to the plea if it constitutes no defense to the indictment, or he may deny the facts stated therein. If an issue of fact is raised it must be determined as other issues of that kind are.

of § —, for his appearance to answer said charge on the first day of the next term of this court.

If the plea is overruled, follow the preceding form to the *, then say "overruled."

PLEA IN ABATEMENT FOR MISNOMER.

Title of Cause.

Now comes A B, indicted as C D, and alleges that his name is A B, and not C D, and that he now is, and from his earliest childhood has been known by the name of A B and not C D. A B.

State of —, }
— County. }

I, A B, defendant herein, do solemnly swear that the facts stated in the foregoing plea are true.

A B.

Subscribed in my presence and sworn to, etc.

NAME CORRECTED ON PLEA IN ABATEMENT.

Title of Cause.

This cause came on for hearing on the plea in abatement of the defendant, [the reply of SO, prosecuting attorney for said county,] and was submitted to the court, on consideration whereof the court finds the true name of said defendant is A B. It is therefore ordered that A B, the true name of the defendant, be entered on the minutes of the court, and that all further proceedings be conducted against him in that name.

The Statute Valid.—This statute was held by the supreme court of Ohio not to be in conflict with the constitution of that state, when an indictment for grand larceny was presented against Henry Lasure, who pleaded in abatement that his name was not Henry Lasure, but William H. Lasure, and the plea was found by the court to be true, and the name thereupon entered on the minutes of the court, and the trial, and further proceedings conducted in that name.¹ At common

¹ *Lasure v. State*, 19 O. S., 43. The reasons are very clearly stated by the court as follows: "The accused does not deny that he is the *person* accused of the crime named in the indictment. In effect he admits that he is the person. He thereby raises no question in respect to whether he is or is not the person named in the indictment of the crime charged therein,

law the entry of the plea of misnomer upon the roll must be special: "that A B, who is indicted by the name of C D, comes and says that whereas in the indictment it is supposed that one C D, with force and arms, etc., his name is A B and not C D;" for it is said that if he should style himself *the said* C D, he would conclude himself and can not thereafter plead the misnomer.¹

The Accused may Demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged, when proof of it is necessary to make out the offense charged.²

DEMURRER TO AN INDICTMENT.

Title of the Cause.

Now comes the defendant and demurs to the indictment [or to the first, etc. count thereof], for the following reasons:

First. Because the facts stated therein do not constitute an offense punishable by the laws of this state.

Second. Because the intent is not alleged, proof of such intent being necessary to make out the offense charged.

S J, Attorney for Defendant.

ORDER SUSTAINING DEMURRER.

Title of Cause.

This cause came on for hearing, upon the demurrer of the defendant to the indictment, and was submitted to the court, on consideration whereof the court doth sustain the demurrer. The proceeding is therefore dismissed and the defendant discharged.

NOR does the finding of the truth of the plea determine any such question. The plea and the finding thereon relate only to the name as a matter of personal description. True, a person accused of crime, indicted under a wrong name, had and has, alike under the former and under the present system of criminal procedure, the right to plead the misnomer, and disclose his true name, and for this sole reason: in order that for a subsequent prosecution for the same crime he may have the benefit of the record of the first prosecution in support of a plea of former acquittal or conviction."

¹ Chitty, Cr. L., 448.

² Cr. Code, § 442.

DEMURRER OVERRULED.

Title of Cause.

This cause came on for hearing, upon the demurrer of the defendant to the indictment, and was submitted to the court, on consideration whereof the court doth overrule the same.

Accused Committed or Held to Bail.—When a motion to quash, or plea in abatement, has been adjudged in favor of the accused, he may be committed or held to bail in such sum as the court may require for his appearance at the first day of the next term of said court.¹

Defects Waived, when.—The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment, or pleading in bar, or the general issue.²

Name to be Corrected.—If the accused shall plead in abatement that he is not indicted by his true name, he must plead what his true name is, which shall be entered in the minutes of the court, and after such entry the trial, and all other proceedings on the indictment, shall be had against him by that name, referring also to the name by which he is indicted in the same manner, in all respects, as if he had been indicted by his true name.³

May Demur to Plea.—To any plea in abatement, the prosecuting attorney may demur if it is not sufficient in substance, or he may reply, setting forth any facts which may show there is no defect in the record as charged in the plea.⁴

¹ Cr. Code, § 443.

² Cr. Code, § 444. Where an indictment did not have the name of the witness on which it was found indorsed thereon as required by the statute, but the accused, without making any objection on that ground, plead guilty, the objection was held to be waived. *Picket v. State*, 22 O. S., 405. So, where an indictment was not signed by the prosecuting attorney, the court held that the defect—if it was a defect—was waived by pleading the general issue without objection. *Rifemaker v. State*, 25 O. S., 395. And defects in form of an information, or in the manner of charging the offense, must be reached by a motion to quash, and can not be raised for the first time on error. *Bartlett v. State*, 28 O. S., 669; *Carper v. State*, 27 Id., 572.

³ Cr. Code, § 445.

⁴ Cr. Code, § 446.

May Plead.—After a demurrer to an indictment has been overruled, the accused may plead “not guilty” or in bar.¹

DEMURRER TO PLEA IN ABATEMENT.

Title of Cause.

Now comes S I, prosecuting attorney of — county, and demurs to the plea in abatement of the defendant, for the following reasons: First, the facts stated in said plea are not sufficient in substance to affect the validity of the indictment.

S I, Prosecuting Attorney.

Plea in Bar.—The accused may then offer a plea in bar to the indictment, that he has before had judgment of acquittal, or been convicted, or been pardoned for the same offense; and to this plea the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon; and on the trial of such issue to a jury, the accused must produce the record of such conviction or acquittal, or the pardon, and prove that he is the same person charged in the record or mentioned in the pardon, and shall be permitted to adduce such other evidence as may be necessary to establish the identity of the offense.²

No plea in bar or abatement shall be received by the court unless it be in writing, signed by the accused and sworn to before some competent officer.³

The Plea of *Autrefois Acquit* is founded on the principle that no person shall be put in peril of legal penalties more than once for the same accusation.⁴ To entitle the defendant to the benefit of this plea, it is necessary that the crime

¹ Cr. Code, § 447. At common law, in misdemeanor, a judgment against the accused on his plea of abatement was final; but in case the charge was felony, he was allowed to plead. 1 Chitty, Cr. L., 451. The rule is stated by Chitty as follows: “If a plea in abatement be found against the defendant in a case of felony, he shall have judgment of *respondias ouster* [that he answer over]; but on such a finding by a jury in cases of misdemeanors the judgment shall be final against the defendant. If, however, judgment be given against the defendant, either on demurrer to his plea in abatement, or on demurrer to the prosecutor’s replication to such plea, the judgment is *respondias ouster*, and not final.” 1 Chitty, Cr. L., 451.

² Cr. Code, § 449.

³ Cr. Code, § 450.

⁴ 1 Chitty, Cr. L., 452; 4 Bla. Com., 335; 4 Co. R., 40.

charged be precisely the same, and that the former indictment as well as the acquittal was sufficient. If the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, an acquittal of one will not bar a prosecution for the other.¹

If, however, the charge is in fact the same, though the indictments differ in immaterial circumstances, the defendant may plead his previous acquittal as a complete defense, as the prosecutor can not, by varying the day or other immaterial allegation, thereby subject the defendant to a second trial.²

It is not necessary in all cases that the two charges be precisely the same in point of degree, for it is sufficient if an acquittal of the one will show that the defendant could not have been guilty of the other, as where the greater crime includes the less—such as a general verdict of acquittal on a charge of murder, which is also an acquittal of manslaughter.

The *Plea of Autrefois Convict* is based on the same principle as that of *autrefois acquit*, viz.: that no person shall be more than once in peril for the same offense. This plea must always be pleaded after a conviction, and can not be taken advantage of as a plea in abatement, that there is another indictment for the same cause then pending.³

A *Pardon* may be either special—that is, limited to the particular individual, or it may be a general act of amnesty. In the latter case the defendant may show that he is within its terms.⁴

A *Particular Pardon* must be under the great seal; therefore a mere promise of pardon, articles of surrender, or the sign manual were not sufficient at common law unless confirmed by the seal,⁵ and the same rule seems to prevail now. The pardon is supposed to be in the defendant's possession and must be brought into court. If, however, he is unable imme-

¹ 1 Chitty, Cr. L., 453.

² 1 Chitty, Cr. L., 453.

³ 1 Chitty, Cr. L., 463.

⁴ 1 Chitty, Cr. L., 456, 468.

⁵ 1 Chitty, Cr. L., 468.

diately to produce it, the court will indulge him in further time in order to procure it.¹

Not a Bar.—A party who has been indicted, tried and acquitted in one county, on a charge of burglary and larceny committed therein, can not plead such acquittal against a charge of burglary alleged to have been committed by him in a different county.²

Where, after a jury had been impaneled and sworn, a juror arose in open court and stated that he had been one of the grand jurors that found the indictment, proper inquiries had been made of the juror as to his qualifications, before he was sworn, to which he failed to respond, the attorney for the prisoner thereupon objected to the court proceeding further and the jury was discharged, this was held not to bar a second prosecution.³ So where the jury, after long deliberation, were unable to agree and were discharged.⁴ The record, however, in such case, should show that the jury were discharged after long deliberation, because they were unable to agree.⁵

Where a Case is Submitted to the Court on an Agreed Statement of Facts, and the court upon such statement finds for the defendant, such finding is equivalent to a verdict of "not guilty," and is conclusive in that case.⁶ So where upon a plea

¹ 1 Chitty, Cr. L., 468, 2 Hawk., c. 37, § 65. In case of variance, Chitty states the rule as follows: "If there be any variance between the denomination of the party in the indictment and in the pardon, or in his addition, he may show by proper averments of identity that the same person is intended. And, therefore, if a man be indicted as a "yeoman" and pardoned as a "gentleman," or the addition of place is different, he may show his identity by averment. So, also, if in an indictment for homicide the time of the death is stated differently, the variance may be thus explained and rendered harmless. And if these explanatory averments be omitted, the court will, in their discretion, defer the proceedings in order to give time for the defendant to perfect his plea, or to obtain a more effectual pardon."

² Methard v. State, 19 O. S., 363.

³ Stewart v. State, 15 O. S., 155.

⁴ Dobbins v. State, 14 Id., 493.

⁵ Id.

⁶ Olathe v. Adams, 15 Kas., 391.

of not guilty the jury sustains the plea and judgment is rendered accordingly, it is a complete bar.¹

Distinct Offenses.—Where two complaints were filed against a party for violations of the ordinances of a city, the first of which charged the defendant with disturbing the peace of J and others and the city, by drawing a revolver and pointing the same at J, and threatening to blow his brains out, and by being guilty of other violent conduct and language, but did not charge any battery upon any person, and did not charge an assault upon any person except J; the second charged the defendant with committing an assault and battery upon F, and did not charge any other breach of the peace. The defendant pleaded guilty to both charges, and was sentenced to pay a fine in each case; afterward he took an appeal in the first case to the district court, and there pleaded a former conviction, claiming that the two prosecutions were for the same offense, and that the prosecution and sentence in the second case were a bar to any further prosecution in the first case. The evidence upon this point showed that all the matters charged in the two complaints grew out of the same difficulty, and occurred at the same time, but that the matters charged did not constitute one and the same offense, but that two offenses were committed.²

For Selling Liquor.—For distinct successive sales there may be separate indictments if the evidence required to establish the later sales is not a part of the proof of the first.³

A complaint was filed against one K. for willfully selling intoxicating liquors in the month of January. A trial was had in the February following, and the defendant was acquitted. In May next a second complaint was filed, charging, in general terms, the unlawful selling of liquor in April of that year.

¹ *State v. Crosby*, 17 Kas., 396.

² *Olathe v. Thomas*, 26 Kas., 233.

³ *Wharton, Cr. Pl. & Pr.*, § 472; *Morey v. Com.*, 108 Mass., 493. In this case Gray, Ch. 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."

On the first trial the prosecuting attorney was not required to elect, and did not elect, to rely upon any particular sale. On the second trial he elected to rely upon a sale to one V. There was some evidence tending to prove that the sale to V. occurred in the preceding January. The court held that this fact alone did not constitute a bar to the second prosecution.¹

Continuous Offenses, as a rule, may be laid as having been committed on a single day, and when time is not material may be sustained by proof of acts committed on one day, or several, as in case of a nuisance in a public street. In such case the offender may be prosecuted for the simple act of placing it there and also for its continuance.²

A Charge of Shooting with Intent to Kill is not barred by an acquittal of the charge of maliciously shooting and wounding a horse, even where it is alleged that the shooting in the two prosecutions was one and the same.³

Where the Jury is Discharged without Sufficient Cause.—After a jury is impaneled and sworn, and particularly after they have retired to consult on their verdict, if the court, without the assent of the prisoner, and without the existence of any of

¹ *State v. Kuhuke*, 30 Kas., 462. The court say (p. 464): "Not only was no testimony produced tending to show that the act for which the defendant was convicted was the alleged offense of which he was acquitted, but the evidence introduced established that he was not prosecuted or acquitted prior to the last trial for any sale to Vassar." See also *State v. Shafer*, 20 Kas., 226, where two sales were proved on different days, and a conviction of selling on the first day was held not a bar to a prosecution for the second.

² 1 Bish. Cr. Pro., §§ 293, 297. A different rule seems to prevail in Massachusetts. In one case it is said: "Where the offense consists of but a single act the day on which it is alleged to have been committed is immaterial, if it appears to have been a day on which the offense charged could have been committed; but when, on the other hand, the offense charged is continuous in its nature and requires a series of acts for its commission, the time within which the offense is alleged to have been committed is material and must be proved as alleged. So, when a person is charged with an offense continuous in its nature and requiring for its commission a series of acts, and such offense is alleged to have been committed upon a single day, evidence of facts tending to establish the offense at any other time than the day named is inadmissible." *Com. v. Armstrong*, 7 Gray, 49; *Morey v. Com.*, 108 Mass., 433; *Com. v. Robinson*, 126 Mass., 259.

³ *State v. Horneman*, 16 Kas., 452.

the causes for which they might lawfully be discharged, discharges them, the prisoner can not be again tried for the same offense.¹

No court has the power arbitrarily to discharge a jury for disagreement, until a sufficient time has elapsed to preclude all reasonable expectation that they will agree. The county should not be subjected to the expense of a second trial where there is a reasonable probability that a verdict may be reached on the first, while the accused is entitled, as a matter of right, to a verdict in his favor, if, after a full and careful consideration of all the testimony, and on comparison of views, the jury should find that the charge was not established by the proof.²

Reversal on Error.—After a verdict of guilty, where the judgment is reversed because of error in the proceedings, the prisoner is not protected from a second trial before a jury. The reversal necessarily puts an end to the verdict and the judgment founded thereon, and the case stands precisely the same as if no trial had ever been had in the case.³

Nolle Prosequi.—A plea to an indictment of *autrefois acquit*, which alleges simply a *nolle prosequi*, is insufficient, and a

¹ Poage v. State, 3 O. S., 229; State v. Shuchardt, 18 Neb., 454. The opinion in Poage v. State was delivered by Thurman, J., who says (p. 239): That the power to discharge is a most responsible trust, and to be exercised with great care, is too obvious to require illustration. It is a discretion, said Mr. Justice Story, to be exercised only under very extraordinary and striking circumstances. 2 Gall., 363. The power, said the same judge, ought to be used with the greatest caution under urgent circumstances, which would render it proper to interfere. U. S. v. Perez, 9 Wheat., 580. I am of opinion, said Ch. J. Spencer, that although the power of discharging a jury is a delicate and highly important trust, yet it does exist in cases of *extreme and absolute necessity*. People v. Goodwin, 18 John., 187.

² State v. Shuchardt, 18 Neb., 457; Mount v. State, 14 Ohio, 295; Dobbins v. State, 14 O. S., 493.

³ Sutcliffe v. State, 18 Ohio, 469; Bohanan v. State, 18 Neb., 57. In the able opinion of Reese, J., in Bohanan v. State, it is said (p. 69): "So long as that verdict (of guilty) and the judgment stand unreversed, there is an adjudication that the act or crime was committed, and also fixing the character or quality of the act. Now it is very clear and easily understood that this judgment and verdict will protect the accused from another prosecution. But suppose a new trial is granted, there is no adjudication that any person has been killed, or that any crime has been committed."

demurrer thereto should be sustained.¹ The entry of a *nolle prosequi* does not put an end to the case except as hereafter stated. Therefore, with the exception named, the entry of a *nolle prosequi* is no bar to a subsequent indictment.²

If a Jury has been Impaneled and Sworn, a *nolle prosequi*, entered by the prosecuting attorney by leave of court and without the consent of the prisoner, is a good bar to a second indictment for the same offense.³ If the rule were otherwise, every criminal trial would be subject to numerous exigencies which might arise during its progress, either from defect of preparation, insufficiency of testimony, or the unexpected absence or impeachment of a witness on the part of the state, and a second, third or more trials might be the result, and the defendant harassed and financially ruined, even if acquitted. After the jury is impaneled and sworn, therefore, the entry of a *nolle prosequi* operates as a bar to a future prosecution for that offense.⁴

PLEA OF FORMER ACQUITTAL OF THE SAME OFFENSE.

Title of the Cause.

Now comes A B, in his own proper person, into court here, and having heard the indictment read, says, that the state of — ought not further to prosecute said indictment against him, because at the October, 18— term of the — court of — county, held at — in said county he, the said A B, was indicted by the grand jury of said county on said charge, and being afterward duly tried in said court on said indictment, was lawfully acquitted of the offense charged in said indictment [or information]. He therefore prays that he may be by the court dismissed and discharged from the said premises in the present indictment specified.⁵

A B.

¹ State v. Ingram, 16 Kas., 14.

² Wharton, Cr. Pl., § 447, and cases cited.

³ Mount v. State, 14 Ohio, 295.

⁴ Baker v. State, 12 O. S., 214; Mount v. State, 14 Ohio, 295. In State v. Jennings, 24 Kas., 655, it is said: "Jeopardy always commences, in all cases, at least as early as the final submission of the case to the jury."

⁵ At common law it was necessary to copy the indictment on the plea, presumably to enable the judges to determine the identity of the offenses. This, however, does not seem necessary under the statute. See authorities cited page 537.

State of ——— }
 ——— County. }

I, A B, defendant herein, do solemnly swear that the facts stated in the foregoing answer are true.

A B.

Subscribed in my presence, and sworn to before me this ——— day of ———
 18—.

E F, Clerk [District Court].

**FORMER ACQUITTAL BY THE DISCHARGE OF THE JURY WITHOUT
 THE CONSENT OF THE PRISONER.**

Title of Cause.

Now comes A B, in his own proper person, into court here, and having heard the indictment read, says, that the state of ——— ought not further to prosecute said indictment against him, because at the July term, 18—, of the ——— court of ——— county, the grand jury of said county, duly impaneled and sworn, presented their indictment against him for the same offense with which the defendant is charged in the present indictment; that said defendant was duly arraigned in said court on said indictment, and pleaded not guilty thereto. That thereupon a jury was duly impaneled and sworn in said cause in said court, and evidence heard in said case, when S J, the prosecuting attorney of said county, entered a *nolle prosequi* on said indictment, without the consent of the defendant, and said jury was thereupon discharged by the court without a verdict. The defendant therefore prays judgment that by the court he may be dismissed and discharged from the premises in the present indictment specified.

**WHERE THE JURY WERE DISCHARGED WITHOUT CAUSE BE-
 FORE AGREEMENT ON A VERDICT.**

The said A B, in his own proper person, now comes into court, and having heard the indictment read, says, that the state of ——— ought not further to prosecute said indictment against him, because at the May term, 18—, of the ——— court of ——— county, the grand jury of said county, being duly impaneled and sworn, presented their indictment against him, the said A B, for the same offense with which said A B, defendant, is charged in the present indictment. That said defendant was duly arraigned in said court, on said indictment, and pleaded not guilty thereto. That thereupon a jury was duly impaneled and sworn in said cause in said court, and evidence heard, when said jury were discharged by the court without agreeing on a verdict, and without disagreeing or other special cause, there being no special necessity for the discharge of the said jury. Wherefore the defendant prays judgment of the court that he may be dismissed and discharged from the premises in the present indictment specified.¹

¹Robinson v. Com., 32 Gratt., 866; Grant v. People, 4 Park., C. C., 527; State v. Wilson, 50 Ind., 487; McCreary v. Com., 5 Casey, 323; Lyman v.

PLEA OF AUTREFOIS ACQUIT AT COMMON LAW.

And the said J V and J A, protesting that they were not guilty of the premises charged in the said indictment, and all and every part thereof, they having heretofore, by a jury of the country, in due form of law been acquitted and discharged of the premises in the said indictment above specified and charged on them, and for plea to the said indictment, say that our said lord, the king, ought not further to prosecute them by reason of the premises in the said indictment mentioned, because they say that heretofore, to wit, at this now present delivery of the king's jail of Newgate, now holding for the county of Middlesex at Justices' Hall, in the Old Bailey in the suburbs of the city of London, they, the said J V and J A stood indicted by the names and descriptions of J V, late of, etc., and J A, late of etc., for that, etc., (*copy the entire indictment*) as by the said indictment now here remaining, as filed of record in the said court of the delivery of said jail, etc., at Newgate, more fully and at large appears, on which indictment they, the said J V and J A, afterward, to wit, at the same session of jail delivery, now holding for the county of Middlesex, as aforesaid, in due form of law, were tried by a jury of the country then and there in due form of law chosen, tried and sworn to speak the truth of and concerning the premises in the said indictment last above mentioned, specified then and there in due form of law, were acquitted and found not guilty of the premises in the last mentioned indictment, specified and charged on them, as they, the said J V and J A, in their plea to the last mentioned indictment in that behalf, have alleged; whereupon it was considered and adjudged by the last mentioned court, then that they, the said J V and J A, of the premises in the last mentioned indictment, should be acquitted thereof, and the said J V and J A further say that they, the said J V and J A, now here pleading, and the said J V and J A in the indictment aforesaid named, and thereof acquitted as aforesaid, are the same identical persons, and not other or different, and that the said burglary in the said dwelling house of M N and A N, in the indictment aforesaid pleaded, specified and supposed to be done and committed by them, the said J V and J A, is the same identical and individual burglary as in said indictment to which they, the said J V and J A, are now here pleading, is supposed and is alleged to have been done and committed by them, the said J V and J A, and not other or different, to wit, at, etc., aforesaid, and this they are ready to make appear. Wherefore they pray judgment of the court here, whether, etc., ought further to prosecute, impeach or charge them on account of the premises in the said indictment to which they, the said J V and J A, are now here pleading, contained and specified, and whether they ought further to answer thereto, and that they may be dismissed from the court without delay.¹

State, 47 Ala., 686; *White v. State*, 49 Id., 344; *Com. v. Farrell*, 105 Mass., 189; *Reg. v. Davison*, 8 Cox, C. C., 360; *Conway v. Reg.*, 1 Id., 210; *Bish. D. & F.*, § 1044, and cases cited.

¹ The above is the form in 4 Chitty, Cr. L., 528, 529, and although lengthy, will repay a careful examination.

DEMURRER TO PLEA IN BAR.¹*Title of the Cause.*

Now comes S J, prosecuting attorney of — county, and demurs to the plea in bar of the defendant for the following reasons:

First. The matters therein contained are not sufficient to bar the state from prosecuting said indictment.

S J, Prosecuting Attorney.

JUDGMENT SUSTAINING DEMURRER TO PLEA IN BAR.

Title of Cause.

This cause came on for hearing on the demurrer of S J, prosecuting attorney, to the plea in bar of the defendant, and was submitted to the court, on consideration whereof the court does sustain said demurrer [to which ruling the defendant duly excepted].²

JUDGMENT OVERRULING DEMURRER.

Title of Cause.

This cause came on for hearing on the demurrer of S J, prosecuting attorney to the plea in bar of the defendant, and was submitted to the court, on consideration whereof the court does overrule said demurrer; and said prosecuting attorney not desiring to reply to said plea, it stands admitted to be true. It is considered, therefore, that the defendant be discharged and go hence without day.

REPLICATION TO PLEA IN BAR.³*Title of the Cause.*

Now comes S J, prosecuting attorney for said county, and in reply to the plea in bar of said defendant denies each and every fact stated therein.

S J, Prosecuting Attorney of — County.

Verification.

¹ A plea in bar which is insufficient in matter of substance, is subject to demurrer. *Gormley v. State*, 37 O. S., 120; *State v. Ingram*, 16 Kas., 14.

² An exception probably is unnecessary. Still, in states where the highest court has not passed upon the question, it is well to except.

³ The issue is to be tried by a jury. 2 *Leach*, 541. Where the only issue was the identity of the offenses, it was held that a technical difference between the description of the property in the first and second indictments will be disregarded. *People v. McGowan*, 17 *Wend.*, 386.

Plea of "Guilty" or "Not Guilty."—If the issue on the plea in bar be found against the defendant, or if, upon the arraignment, the accused offer no plea in bar, he shall plead "guilty" or "not guilty;" but if he plead evasively, or stand mute, he shall be taken to have plead "not guilty."¹

If the Accused Plead "Guilty," the plea shall be recorded on the indictment, and the accused shall be placed in the custody of the sheriff until sentence.²

If the Accused Plead "Not Guilty," the plea shall be entered on the indictment, and the prosecuting attorney shall, under the direction of the court, designate a day for trial, which shall be a day of the term at which the plea is made, unless the court for good reasons continue the case to a subsequent term.³

How Arraigned.—The accused shall be arraigned by reading to him the indictment, unless, in cases of indictments for misdemeanors, the reading shall be waived by the accused by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged.⁴

A Formal Arraignment is Proper, but is not essential to the power of the court to convict when it is expressly waived by the accused, especially since there is no longer the same reason for the formalities of an arraignment that there was under the ancient practice, when legal proceedings were conducted in the Latin language, and the accused could not appear with counsel, and after a plea of not guilty, was moreover required to elect whether he would be tried by a jury, ordeal or wager of battle.⁵

An Arraignment at Common Law consists of three parts, viz.: Calling the prisoner to the bar by his name, and requiring him to hold up his hand.

Second. Reading the indictment distinctly to him in English.

¹ Cr. Code, § 451.

² Cr. Code, § 452.

³ Cr. Code, § 453.

⁴ Cr. Code, § 448.

⁵ Goodin v. State, 16 O. S., 346.

Third. Asking him whether he is guilty or not guilty.¹

What Sufficient.—The arraignment is nothing more than to call the prisoner to the bar of the court to answer the matter charged against him in the indictment,² and where the accused has been furnished with a copy of the indictment or information, and thereafter with his counsel voluntarily comes into court and personally waives the arraignment and enters a plea of not guilty, it will constitute in substance an arraignment.³

ARRAIGNMENT—PLEA OF NOT GUILTY.

Title of Cause.

Now, on this day, S J, prosecuting attorney of — county, on behalf of

¹ 2 Hale, P. C., 219. Chitty states the reasons for this procedure as follows: "The first of these ceremonies is intended the more completely to identify the prisoner as the person named in the indictment, because, by holding up his hand when his name is called, he acknowledges himself to be properly described under that appellation. But this ceremony is not absolutely necessary; for if the prisoner obstinately refuse to hold up his hand, the same purpose is answered by any admission that he is the person intended. * * The intention of reading the indictment to the prisoner is that he may fully understand the charge to be produced against him. This is to be done in English, by a very ancient statute, long before the proceedings in general were in our own language, and when all the written parts of the accusation were scrupulously framed in Latin. And it seems that the indictment is to be read, although the defendant has had a copy delivered to him. The mode in which it is read is after saying, 'A B hold up your hand,' to proceed, 'You stand indicted by the name of A B, late of, etc.,' and then to read the whole indictment." 1 Chitty, Cr. L., 414, 415. After the reading the clerk says to the prisoner: "How say you, A B, are you guilty or not guilty?" Id.

² 4 Bla. Com., 322; Goodin v. State, 16 O. S., 345.

³ State v. Cassady, 12 Kas., 551. Where the accused appeared in person and by counsel, and announced himself ready for trial upon the information, it is too late, after verdict, to plead that he had not been arraigned.

A party who personally and by his consent voluntarily goes into court, practically on a plea of not guilty, should not, after verdict, be permitted to assign as a reason for setting aside the verdict that he was not asked to say whether he was guilty or not guilty before the trial. He has had the benefit of the plea of innocence in his favor, and has been prejudiced in no right. Those cases that hold that this right can not be waived, overlook the difference between the procedure at common law where the accused was not allowed a copy of the indictment as a *right*, nor counsel to make his defense; where, in fact, all the machinery of the courts was brought to bear to secure, if possible, his conviction.

the state, and also the defendant accompanied by G H, his counsel, came into court, and said defendant, being arraigned upon said indictment, and being asked whether he is guilty or not guilty of the offense charged, saith he is "not guilty."

ARRAIGNMENT—PLEA OF GUILTY.

Title of Cause.

Now, on this day, S J, prosecuting attorney of — county, on behalf of the state, and also the defendant accompanied by G H, his counsel, came into court, and said defendant, being arraigned upon said indictment, and being asked whether he is guilty or not guilty of the offense charged, saith that he is guilty of —.¹

PLEA OF NOT GUILTY WITHDRAWN AND PLEA OF GUILTY OF — ENTERED.

Title of Cause.

Now on this day came S J, prosecuting attorney of — county, and also the defendant herein, accompanied by his counsel, into court, and said defendant thereupon withdraws his plea of "not guilty," heretofore entered, and for plea to said indictment says, that he is guilty of the larceny of goods of less value than thirty-five dollars; which plea said prosecuting attorney accepts. The said defendant is therefore remanded to the custody of the sheriff.

PLEA OF GUILTY WITHDRAWN AND PLEA OF NOT GUILTY EN- TERED.²

Title of Cause.

Now on this day comes S J, prosecuting attorney of — county, and the defendant, accompanied by his counsel, into court, and the defendant thereupon asks leave of the court to withdraw his plea of guilty, heretofore en-

¹ State the offense to which the party pleads guilty. Not unfrequently such pleas are arranged between the prosecuting officer and the counsel for the accused with his consent; such as a plea of guilty of murder in the second degree, or manslaughter, and in other cases, where the offense charged includes less offenses, as assault with intent to kill, robbery, etc. Where the prosecuting attorney has doubt of the sufficiency of the proof to establish the offense charged, he is justified in accepting a plea of guilty of a less offense.

² Cases frequently arise where courts permit the plea of "guilty" to be withdrawn, and "not guilty" pleaded in its place. *State v. Cotton*, 4 Fost. (N. H.), 143; 1 Bish. Cr. Pro., § 798; 1 Bish. Cr. Pro., § 747, and cases cited. A prisoner can not claim the privilege of withdrawing a plea of guilty and substituting another as an absolute right, but the court will permit such withdrawal wherever justice or humanity seem to require it.

tered, and to enter a plea of not guilty to said indictment; and the court being fully advised in the premises, permits said defendant to withdraw said plea of guilty, and said plea is withdrawn; and thereupon said defendant, for plea to said indictment, says he is not guilty, and puts himself upon the country.¹

ENTRY OF NOLLE PROSEQUI.

Title of Cause.

Now on this day came S J, prosecuting attorney of — county, on behalf of the state, and enters a *nolle prosequi* on said indictment.

A Person that Becomes a Lunatic or Insane, after the commission of a crime or misdemeanor, ought not to be tried for the offense during the continuance of the lunacy or insanity. If, after verdict of guilty, and before judgment pronounced, such person shall become lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person shall become lunatic or insane, then, in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the insanity or lunacy. In all such cases it shall be the duty of the court to impanel a jury to try the question whether the accused be at the time of impaneling insane or lunatic.²

Verdict that Prisoner is Sane.—Where a verdict is rendered, finding the prisoner to be sane, error will not lie to review the proceedings before the prisoner is convicted of the crime with which he stands charged.³

Where, before the commission of the crime, the accused, while under indictment for another offense, was adjudged insane on an inquest of lunacy, such adjudication is so far con-

¹ At common law, to the plea of "not guilty," the clerk of arraignment replies that the prisoner is guilty, and that he is ready to prove the accusation. 1 Chitty, Cr. L., 416. No reply is necessary at the present time to the plea of not guilty.

² Cr. Code, § 454.

³ *Inskeep v. State*, 35 O. S., 482. It was afterward held by the same court that error in such proceedings would not lie after conviction. *Inskeep v. State*, 36 O. S., 145.

clusive upon the state as to shift the burden of proof upon it to show that the prisoner was sane when he committed the second offense.¹

¹ State v. Browsher, 3 Bull., 187.

CHAPTER XXXVIII

CHANGE OF VENUE.

All criminal cases shall be tried in the county where the offense was committed, unless it shall appear to the court, by affidavits, that a fair and impartial trial can not be had therein; in which case the court may direct the person accused to be tried in some adjoining county.¹

A Change of Venue from One Judicial District to Another, which is granted on the application of the prisoner, is not void, although the application is not in writing, and sufficient facts therefor were not shown.² Such a change of venue is erroneous, but the error is against the state, not the prisoner.³

Where the proceedings in the court granting a change of venue are not void, but merely voidable, although irregular, the question as to their validity must be raised at the earliest convenient opportunity. A party can not take part in and treat the proceedings as valid until a jury has been impaneled, and then challenge the jury as not of the county or district where the offense was alleged to have been committed.⁴

Where no Notice of the Motion is Given to the district attorney, but he appears and argues the motion on the merits, the notice will be considered as waived.⁵

Where Parties are Jointly Indicted, the court has power, upon good cause shown, to order a change of venue as to either of the defendants upon his motion alone. Such motion and or

¹ Cr. Code, § 455.

² *State v. Potter*, 16 Kas., 80.

³ *Id.*

⁴ *Id.*

⁵ *Smith v. State*, 1 Kas., 365. See also *State v. Horne*, 9 Kas., 119; *State v. Bohan*, 15 Kas., 407.

der necessarily involve and include a motion and order for a separate trial of the party making the motion, and have all the force and effect of a motion and order for both purposes.¹

The Court in the County where the Offense was Committed has power, upon proper application being made, to change the venue to an adjoining county, but the exercise of that power is confined to the jurisdiction of the county where the offense was committed.²

What Must be Shown.—Before a court is justified in sustaining an application for a change of venue, on account of the prejudice of the inhabitants of the county, it must affirmatively appear, from the showing, that there is such a feeling and prejudice pervading the community as will reasonably prevent a fair and impartial trial.³

On an Application for a change of venue, a number of newspaper articles were submitted containing statements of facts substantially as disclosed on the trial, and denouncing, in strong and severe language, the defendant; also the affidavit of a single witness that he was one of the party engaged in the search for the defendant immediately after the shooting, and that he heard bitter and threatening language in every direction against him. Opposed were the affidavits of twenty-one citizens of different parts of the county denying any general prejudice, or any feeling which would prevent a fair trial. It was not shown that there was any difficulty in obtaining a

¹ *Brown v. State*, 18 O. S., 496.

² *State v. McGehan*, 27 O. S., 280. The court, after quoting the section of the statute above given, say: "This section is appropriate legislation to enforce the bill of rights upon the question of venue, and confers jurisdiction upon the court in the county where the offense was committed, to make an order that the accused may be tried in an adjoining county. Where a statute directs the time when, the manner, and court that shall have jurisdiction over a subject-matter, and no provision is made for a rehearing in the same court, jurisdiction once exercised is exhausted, and a court of co-ordinate power could not, at another time and place, take jurisdiction of the same subject-matter." In this case the offense was committed in Butler county, and on motion of the defendant, the venue was changed to Warren county, where the jury failed to agree, when on motion of the defendant, the cause was transferred to Montgomery county.

³ *State v. Furbeck*, 29 Kas., 532; *Simmerman v. State*, 16 Neb. 615.

jury, or any reason to suspect the candor and fairness of the jurors impaneled; it was held that there was not sufficient cause shown for a change of venue.¹

An Application for a Change of Venue, made before the trial, was held not too late, on the facts stated in a late case in Kansas, where the district judge had been counsel, and a judge was elected *pro tem*, without, so far as appeared, the participation of the defendant or his counsel.²

Affidavits to be made by Whom.—An affidavit for a change of venue on the ground of bias or prejudice of the people of a county, should be made by one knowing the facts he swears to. An affidavit made by a non-resident who shows no means of knowledge, is not sufficient.³ General allegations of persons residing at a distance from the county, and whose knowledge is derived alone from a casual visit or from newspaper articles, are of very little value in determining whether or not a fair trial may be had in that county.⁴

Where the trial took place soon after the commission of the alleged offense, and the accused filed affidavits of leading citizens showing a strong bias and prejudice against him, so that a fair trial could not be had in that county, which statement the affidavits on behalf of the state did not deny in clear and direct language, it was held that a change of venue should have been granted.⁵ In the case cited the offense was committed at the county seat, and it was shown beyond question, by the affidavits of leading business men, that the excitement was too great to obtain a jury that would calmly and dispassionately weigh the evidence.

AFFIDAVIT FOR A CHANGE OF VENUE.⁶

Title of Cause — Venue.

I, J W M, do solemnly swear that I have been a resident of —, in —

¹ State v. Rhea, 25 Kas., 576.

² Hegwer v. Kiff, 31 Kas., 636.

³ Simmerman v. State, 16 Neb., 615.

⁴ Id. In this case the procedure is stated where a party is unable to obtain affidavits of residents of the county in support of his motion.

⁵ Richmond v. State, 16 Neb., 388.

⁶ See Richmond v. State, 16 Neb., 390.

county for — years last past; that I am engaged in the business of —, at —, and am well acquainted with the people of [said city] and county; that said people generally are strongly prejudiced against the defendant, the belief in his guilt being entertained by a large number of said citizens; that by reason of the bias and prejudice of the people aforesaid, a fair and impartial trial of the said cause can not be had in said county as affiant believes.

J W M.

Subscribed in my presence, and sworn to before me, this — day of —, 18—.

G H, Clerk of the [District Court.]

AFFIDAVIT FOR A CHANGE OF VENUE.

Title of Cause— Venue.

I, J M P, being first duly sworn, depose and say that I reside at —, and have resided in — county for — years last past, and am engaged in the business of —; that I am well acquainted in said [city and] county, and know of my own knowledge that a strong bias and prejudice exists against the defendant in said [city and] county, and that a fair and impartial trial of said cause can not be had in said county as I verily believe.

J M P.

Subscribed, etc.

Counter Affidavits may be filed on behalf of the state. These should deny clearly and explicitly, the grounds upon which a change is sought, and may allege affirmatively that a fair and impartial trial can be had in that county. The court should then weigh the evidence, and if it plainly appears that a fair and impartial trial can not be had in the county where the prosecution is pending, should grant a change of venue.¹

ORDER GRANTING A CHANGE OF VENUE.

Title of Cause.

This cause came on for hearing on the motion of the defendant and affi-

¹ In many cases it will be found that a change of venue is a positive disadvantage to the accused. Not unfrequently, an impression is created unfavorable to the defendant, from the fact that he felt it necessary to ask for a change, and this impression accompanies the case into the county to which the change is made. The remedy, in many cases, is a continuance, and a thorough sifting of the jury—not a change of venue. Still there are cases where a change of venue is absolutely necessary.

davits for and against a change of venue, and was submitted to the court; and it appearing to the court, by said affidavits, that a fair and impartial trial of this cause can not be had in — county, it is directed and ordered that the venue thereof and place of trial be, and the same hereby is changed to the adjoining county of —.

It is also ordered that the clerk of this court make out a certified transcript of all the proceedings in the case, which, together with the original indictment, he shall transmit to the clerk of the — court of — county.

It is also ordered that the witnesses on the part of the state enter into recognizance, each in the sum of \$ —, to appear before the — court of — county.

RECOGNIZANCES OF WITNESSES TAKEN ON BEHALF OF THE STATE.

Title of the Cause.

Now on this day came L M and N O, witnesses on the part of the state in this case, and each entered into a recognizance, in the sum of \$ —, conditioned for his appearance before the — court of — county, on the — day of —, 18—, to testify in said cause.

ORDER OVERRULING MOTION FOR A CHANGE OF VENUE.

Title of Cause.

Now on this day this cause came on for hearing on the motion of the defendant for a change of venue, together with the affidavits in support of and against said motion, and was submitted to the court, on consideration whereof said motion is overruled. [To which ruling the defendant excepts.]¹

Transcript, what to Contain.—When the venue is changed to an adjoining county, the clerk of the court in which the indictment was found shall make out a certified transcript of all the proceedings in the case, which, together with the original indictment, he shall transmit to the clerk of the court to which the venue is changed, and the trial shall be conducted

¹ If the defendant intends to have the ruling reviewed on error, after the final judgment against him, he must embody the affidavits and other evidence used on the hearing in a bill of exceptions. Affidavits, although filed with the clerk, are but evidence, and are not a part of the record, unless made so by a bill of exceptions.

in all respects as if the offender had been indicted in the county to which the venue has been changed. The costs accruing from a change of venue shall be paid by the county in which the indictment was found, and the clerk of the trial court shall make a statement of the costs, containing, first, names of witnesses and fees of each; second, sheriff's fees for summoning witnesses and jurors especially for said case; third, clerk fees in said case; fourth, the names of jurors and fees of each who were called especially for said case. And such statement he shall certify to be correct, and transmit the same to the clerk of the district court where the indictment was found, to be by him entered upon his docket, and collected and paid as if a change of venue had not been had.¹

Removal of Prisoner.—When a court has ordered a change of venue a warrant shall be issued by the clerk, directed to the sheriff, commanding him safely to convey the prisoner to the jail of the county where he is to be tried, there to be kept by the jailer thereof until discharged by due course of law.²

FORM OF WARRANT FOR REMOVAL OF PRISONER ON CHANGE OF VENUE.

The State of —, — County.

To the sheriff of said county:

Whereas, at the — term of the — court, of said county, an indictment was duly found by the grand jury of said county against one A B, for the crime of murder in the first degree, committed in said county, and afterward, on his motion, the court has ordered a change of venue in said cause to the — court of — county.

Now, therefore, you are hereby commanded, him, the said A B, safely to convey to the jail of — county, there to be delivered to the jailer thereof, and by him safely kept, until he, the said A B, shall be discharged by due course of law. You will make due return of this writ, with your doings thereon.

Given under my hand and official seal this — day of —, A. D. 18—.

[SEAL.

E F, Clerk of the — Court.

While the statute makes no provision for a return to the warrant, still such return is necessary and should be made im-

¹ Cr. Code, § 456.

² Cr. Code, § 457.

mediately after the execution of the warrant. It is probable that a certified copy of the warrant should be delivered to the jailer in the county to which the prisoner is removed, and also a certified copy of the mittimus.¹

Court to Recognize Witnesses.—When a change of venue is allowed, the court shall recognize the witnesses on the part of the state, to appear before the court in which the prisoner is to be tried.²

¹ The statute requiring the removal of the prisoner, and his confinement in the jail of the county to which the venue is changed, can apply only in those cases where the offense is not bailable, or where the prisoner is unable to give bail; in other words, where the prisoner is confined in the jail of the county where the indictment was found. The court granting the change of venue has authority to take the recognizance of the defendant, to appear for trial in the court to which the venue has been changed. *Stebbins v. People*, 27 Ill., 241.

² Cr. Code, § 453.

CHAPTER XXXIX.

PREPARATION FOR EVIDENCE.

In all criminal cases it shall be the duty of the clerk, upon a precept being filed, to issue writs of subpoena for all witnesses named therein, directed to the sheriff of his county, or of any county of the state where the witnesses reside or may be found, which shall be served and returned as in other cases; and such sheriff, by writing indorsed on such writs, may depute any disinterested person to serve and return the same.¹

Right to Compulsory Process.—Where material and necessary witnesses are duly subpoenaed on behalf of the accused in a criminal prosecution, and such witnesses are within the jurisdiction of the court, the accused should not be forced to trial against his protest before the return of the compulsory process issued to bring the disobedient witnesses into court, in the absence of any reason for it not being executed and returned.²

Where a Witness for the State Removes out of the State—Mileage Fees.—Where an important witness in a criminal case, who resided within seventeen miles of the place where the trial was subsequently to be had, entered into a recognizance to testify as a witness on behalf of the state, and afterward and before the next term of the court removed out of the state to a place at least 1,600 miles from the place of trial—he attended at

¹ Cr. Code, § 459.

² *State v. Roark*, 23 Kas., 147. Ch. J. Horton, in delivering the opinion of the court, said (p. 153): "No court has the right to limit or deny this constitutional guaranty (the right to have compulsory process issued to bring into court witnesses in his behalf) against the protest of the accused. If a defendant uses due diligence in asking for compulsory process, in having such process issued against a disobedient witness the trial ought not to be concluded before the return of such process, or a reasonable showing made for its non-return."

the next term of the court and was a witness for the state, it was held that he was entitled to receive mileage fees for the distance necessarily and actually traveled in going from the state line to the place of trial, and returning to the state line, and no more.¹

At Common Law the usual mode of compelling the attendance of witnesses for the prosecution was by requiring them to enter into a recognizance to appear and testify on the trial. In case of the failure to recognize the witness a subpoena was issued by the clerk of the peace of the sessions, the clerk of the assizes, or the crown office. The writs by the two former were, until the close of the last century, compulsory only in the county where they were granted. The prosecutor would not include more than four persons in the subpoena, and as the writ itself was retained by the officer he was required to deliver to each person subpoenaed a ticket containing the substance of the subpoena. Later, however, the usual mode of serving the subpoena was by copy.²

The Witnesses on the Part of the State must be Personally Present in Court.—In other words, a person accused of any crime has a right, both at common law and by the constitution, to meet the witnesses against him face to face, so that the accusing testimony shall be given in his presence, and that he may have an opportunity to cross-examine them.³

Testimony of Deceased Witness.—When, however, the accused has been allowed to confront or meet, face to face, the witnesses on the part of the state, and cross-examine them, if he so desired, the constitutional requirement has been complied with; therefore, in case of the death of any such witness, the testimony of the deceased witness, if relevant, may be given in evidence in a second or other trial of said case.

It is essential to the competency of the witness called to give this kind of evidence: first, that he heard the deceased person testify on the former trial, and second, that he has such accurate knowledge of the matter stated that he will, on his oath, assume or undertake to narrate in substance the mat-

¹ *Coms. v. Chase*, 24 Kas., 774.

² 1 *Chitty, Cr. L.*, 608-610.

³ *Summons v. State*, 5 O. S., 325; *People v. Restell*, 3 Hill, 289.

ter sworn to by the deceased person in all its material parts, or that part thereof that he is called on to prove.

It is Essential to the Competency of the Evidence, first, that the matter stated on the former trial by the witness, since deceased, should have been given on oath; second, between the same parties and touching the same subject-matter, where opportunity for cross-examination was given the person against whom it is now offered; and third, that the matter sworn to by the person, since deceased, be stated in all its material parts, and in the order in which it was given, so far as necessary, to a correct understanding of it.

It is not essential that all the testimony of the deceased person be proved by a single witness. Thus, if one witness heard all the testimony of the deceased witness on his direct examination, and no more, while another heard all the testimony on the cross-examination, both may be called to prove all that the deceased witness testified to.¹

PRECIPE FOR WITNESSES.

Title of the Cause.

To the clerk of — court:

You will issue a subpoena in this case for L M, N O, P Q, R S, and T U, witnesses on behalf of the state [or the defendant,] to appear in said court on

¹ *Summons v. State*, 5 O. S., 326. The court say (p. 342): "If the right secured by the bill of rights applies to the subject-matter of the evidence instead of the witness, it would exclude, in criminal cases, all narration of statements or declarations made by other persons heretofore received as competent evidence. * * This construction would exclude all declarations *in articulo mortis*, by confounding the identity of the dying man with that of the witness called upon in court to testify to such declarations. Precisely the same objection would exclude all declarations by co-conspirators, statements made in the presence of the accused in a criminal case and not denied by him, and the statements of the prosecutrix, in prosecutions for rape, made immediately after the commission of the offense. And by a parity of reasoning the admissions or confessions of the accused, and in prosecutions for perjury, the very testimony of the accused on which the perjury may be assigned, would be excluded by the provision in the bill of rights forbidding that any person shall be compelled, in a criminal case, to be a witness against himself."

the — day of —, A. D. 18—, at — o'clock in the forenoon, to testify in said cause.

S J, Prosecuting Attorney of — County,
 Oct. 1, 18— [or, J B, Attorney of Defendant.]

FORM OF SUBPENA.

The State of —, — County.

To the sheriff of said county: ¹

You are hereby commanded to subpoena L M, N O, P Q, R S and T U, to appear before the [district] court of — county, at the court house therein, on the — day of —, 18—, at — o'clock in the forenoon of said day, as witnesses to testify in a certain action pending therein, wherein The State of — is plaintiff and A B defendant. You will make due return of this writ on or before the — day of —, A. D. 18—.²

Given under my hand and official seal this — day of —, A. D. 18—.

[SEAL.]

E F, Clerk of the District Court.

APPOINTMENT OF DISINTERESTED PERSONS TO SERVE [*to be Indorsed on the Writ*].

I hereby depute and appoint G H, a disinterested person, to serve the within subpoena.

Dated —, 18—.

J J, Sheriff.

Return, how Made.—If the subpoena be served by such special deputy it shall be his duty, after serving the same, to return thereon the manner in which the same was served; and also make oath or affirmation to the truth of said return before some person competent to administer oaths; which shall be indorsed on such writ, and the same shall be returned according to the command thereof, by the person serving the same, through the post office or otherwise.³

RETURN OF SERVICE BY THE SHERIFF.⁴

Oct. 1, 18—, received writ, and on the same day as commanded therein I served this subpoena on L M, N O, P Q, R S and T U, by delivering to each of

¹ The subpoena may be directed to the sheriff of any county in the state. The return may be made through the post office or otherwise.

² The return day should be prior to the time the witnesses are required to appear, so that in case they were duly served and fail to attend, compulsory process may be issued.

³ Cr. Code, § 460.

⁴ As the statute does not prescribe the mode of service, no doubt the com-

said persons a certified copy of this writ [or by leaving a certified copy of this writ at his usual place of residence.]

G H, Sheriff of — County.

FORM OF RETURN IF SERVED BY A PERSON APPOINTED.

Venue.

I, G H, being first duly sworn, depose and say, that I served the within subpoena on L M, N O, P Q, R S and T U, by delivering to each of said persons a certified copy of this writ, etc. [as in preceding form.]

G H.

Subscribed in my presence and sworn to before me this — day of — 18—.

E F, Justice of the Peace.

Compulsory Process in Favor of Accused.—Any person accused of crime amounting to felony, shall have compulsory process to enforce the attendance of witnesses in his behalf, and they shall be paid for their mileage and per diem the same fees as are now or may hereafter be allowed by law to witnesses for the state in the prosecution of such accused person, and in case such accused person is convicted and is unable to pay such mileage and per diem to his witnesses, they shall be paid out of the county treasury of the county wherein such crime was committed; and in case such accused person is acquitted upon the trial, the fees of his witnesses shall likewise be paid out of the county treasury. Provided, however, that in no case shall the fees of such witnesses be so paid unless before the trial of such accusation such accused person shall make and file his affidavit stating the names of his witnesses, and that he has made a statement to his counsel of the facts he expects to prove by such witnesses, and has been advised by such counsel that their testimony is material on the trial of such accusation; and shall also file an affidavit of such counsel that he deems the testimony of such witnesses necessary and material on behalf of such accused person; whereupon the court or judge shall

mon law is to be followed, viz., service by a copy of the writ itself. 1 Chitty, Cr. L., 609. Chitty says, "This service should be done a reasonable time before the trial to enable the witness to attend with as little inconvenience as possible." Id.

make an order directing that such witnesses, not exceeding fifteen in number, be paid out of the county treasury of the county in which such accusation shall be made.¹

Depositions on behalf of the Accused.—Where any issue of fact is joined on any indictment, and any material witness for the defendant resides out of the state, or, residing within the state, is sick, or infirm, or is about to leave the state, such defendant may apply in writing to the court in term time, or the judge thereof in vacation, for a commission to examine such witness upon interrogatories thereto annexed; and such court or judge may grant the same, and order what, and for how long a time, notice shall be given the prosecuting attorney before the witness shall be examined.²

The Proceedings on taking the examination of such witness and returning it into court, shall be governed in all respects as the taking of depositions in civil cases.³

APPLICATION TO COURT OR JUDGE FOR THE APPOINTMENT OF A COMMISSION TO TAKE DEPOSITIONS.

Title of the Cause.

The petition of A B, defendant, respectfully shows that an indictment [or information] is pending against him in the — court of — county, where in he is charged with the offense of —; that one, G H, who resides at — in the state of —, [or resides at —, in this state, but is sick, or infirm, or about to leave the state,] is a material witness for defendant. The defendant therefore prays that a commission may be issued to L M [or some suitable person] at — to examine said G H upon interrogatories.

W H M, Attorney for Defendant.

ORDER GRANTING COMMISSION TO TAKE DEPOSITION.

Title of the Cause.

This cause came on for hearing upon the application of the defendant for a commission to examine one G H, a witness for the defendant, who resides at

¹ Cr. Code, § 461.

² Cr. Code, § 462.

³ Cr. Code, § 463.

—, in the state of —, upon interrogatories, and sufficient cause being shown for the granting of said application, it is therefore ordered that a commission be granted to issue to L M, of the county of —, and state of — authorizing and requiring him to examine, on oath, one G H, upon the written interrogatories and cross-interrogatories annexed to said commission, and return the same into this court without delay. It is also ordered that said defendant give S J, prosecuting attorney of — county, a copy of his interrogatories and — days notice before said G H shall be examined as aforesaid.

S M, Judge.

COMMISSION TO TAKE DEPOSITIONS.

The State of —, — County.

To L M, of —:

Know ye that the — court of — county does hereby authorize, empower and commission you to examine, on oath, one G H, upon interrogatories and cross-interrogatories, hereto annexed, and reduce such examination to writing, and cause the same to be subscribed by said witness in your presence, and to certify, seal up and forward the same to the clerk of this court without unnecessary delay.

In witness whereof I have hereunto set my hand and affixed the seal of said court, this — day of —, A. D. 18—.

[SEAL.]

E F, Clerk of the — Court.

INTERROGATORIES TO BE ANNEXED TO COMMISSION.

Title of the Cause.

Interrogatories to be propounded to G H in pursuance of the commission annexed hereto.

Int. 1. State your name, age, occupation and place of residence.

Int. 2. State, etc.

Cross-Interrogatories.

Cross-int. 1.

Cross-int. 2.

CERTIFICATE TO DEPOSITIONS TAKEN BY COMMISSION.

State of —, }
— County. }

I, L M, do hereby certify that in pursuance of the commission hereto annexed and to me directed, I caused said G H to come before me on the — day of —, A. D. 18—, at —, who was then and there by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in

said cause, and was then examined upon the interrogatories and cross-interrogatories annexed to said commission, and said examination was reduced to writing by me, and was by said witness subscribed in my presence, which examination and all of the same is herewith returned.

In witness whereof I have hereunto set my hand [and affixed seal] this — day of —, A. D. 18—.

[SEAL.]

L M, Commissioner.

The deposition is to be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the court from which the commission was issued.¹

INDORSEMENT OF COMMISSIONER TAKING DEPOSITIONS.

Title of the Cause.

Depositions in said cause sealed up, addressed and transmitted by me, L M, commissioner. To E F, clerk of the — court of — county, Columbus, Ohio.

When the State Elects to Admit the Affidavit as a Deposition.— In a criminal case, where a motion is made on behalf of the accused for a continuance, to enable him to procure the deposition of a witness who resides out of the state, and whose testimony he has not been able to obtain, the court may require the applicant to set out in his affidavit, filed in support of his motion for a continuance, the facts he expects to prove by such witness; and in case the prosecution elects to admit upon the trial that the witness would so testify, treat the statement of facts as set out in the affidavit as the deposition of the witness, and overrule the motion for a continuance.²

Can not be Impeached.— Where, in the trial of a defendant charged with the commission of a felony, an affidavit for a continuance is filed by such defendant on account of an absent witness, and the prosecution consents that on the trial the facts alleged in the affidavit shall be read and treated as a deposition of an absent witness, such affidavit can not afterward

¹ The proceedings in taking the examination and returning it into court are to be the same as in the taking of depositions in civil cases. Cr. Code, § 463.

² *Comerford v. State*, 23 O. S., 599.

be impeached for want of diligence, on the part of the defendant, in procuring the attendance of such witness, or in taking his deposition as prescribed by law; nor by showing that the defendant had good reason to believe if the witness were present and gave such testimony it would be untrue; nor by proving the non-existence of the witness therein named. Such deposition should be read, and treated in all respects as the deposition of the absent witness.¹

¹ *State v. Roark*, 28 Kas., 147. The opinion states the law on these points as follows (pp. 151-2): "To the ruling of the court that the evidence in the affidavit could be impeached on the ground that the witnesses were unworthy of credit, we perceive no objection, if the testimony in reference thereto was confined within proper rules; but the permission to impeach the affidavit for other reasons given by the court was erroneous, and greatly prejudicial to the rights of the defendant. * * * To permit the defendant's belief as to what an absent witness would testify to if present, or the actual existence of said alleged witness to be put in issue, would bring new and independent matters before the court for trial, which would have the effect to extend the testimony outside of the points in issue, in the case of a plea of not guilty to the charge of the information, and would require a defendant to be prepared to answer to particular facts of which he had no notice." *Insurance Co. v. Wright*, 33 O. S., 533.

CHAPTER XL.

TRIAL OF INDICTMENTS AND INFORMATIONS.

No person indicted for 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. Such request shall be in writing, and entered on the journal of the court.¹

Presence of Accused in Cases of Felony.—On the trial of a felony, it is error to proceed, at any stage of the trial, during the enforced absence of the accused, save only in the matter of the secret deliberations of the jury, and perhaps in the hearing of motions after verdict and before judgment.²

REQUEST OF ACCUSED IN CASE OF MISDEMEANOR TO BE TRIED IN HIS ABSENCE.

Title of Cause.

The defendant herein respectfully requests the court to permit said defendant to be put on trial in said case in his absence.

Dated —, 18—.

A B.³

LEAVE OF COURT THAT DEFENDANT BE PUT ON TRIAL WHILE ABSENT.

Title of Cause.

Now on this day came the defendant, and made request in writing that he, the said defendant, be put on trial in his absence; and it appearing to the court that the charge against him is for a misdemeanor, said request is granted.

¹ Cr. Code, § 464.

² Jones v. State, 26 O. S., 208; Dodge v. People, 4 Neb., 223.

³ The request must be signed by the defendant. The authority of an attorney to waive the right of being personally present, for his client, during the trial, is not clear.

When Two or More Persons are Indicted for Felony, each person so indicted shall, on application to the court for that purpose, be separately tried, and every person charged with felony shall be furnished, previous to his trial, with a copy of the indictment, and, at his request, with a list of the witnesses upon whose testimony the indictment was found.¹

The Right of Separate Trials, where two or more are jointly indicted for a felony, may be waived by the parties. Such waiver may be made in express terms, or it may be implied from the conduct of the parties. It will be implied where the parties proceed, without objection, to impanel a jury and exercise the right of challenge.²

An order for a change of venue as to one defendant, jointly indicted with others, has the effect to grant a separate trial as to him.³

A Continuance.—It frequently becomes necessary for one of the parties, particularly at the first term after the accusation is filed, to apply for a continuance of the cause until the succeeding term, in order to procure material testimony, not then available, unless the cause is continued by agreement, or for want of time to try it; the general rule is, that the party desiring the continuance must file an affidavit setting forth the absence of a material witness, naming him, and what the affiant expects to prove by him, and allege some cause for the failure to procure his testimony. The absence of or inability to procure the attendance of witnesses may not be known until the case is reached for trial, and the showing may then

¹ Cr. Code, § 465.

² *Hullinger v. State*, 25 O. S., 441-2. In *Hullinger v. State*, the case came on for trial upon a plea of not guilty; a jury was called without objection; thereupon the prisoners proceeded to exercise the right of challenge for cause, and upon their joint challenge three of the jurors called were discharged by the court, and also, upon their joint peremptory challenge, three other jurors, called upon the panel, were dismissed by the court. The panel being full the court inquired of the accused, as well as the state, if they had any further objection to the jury, "and the parties answered, none." Afterward the parties demanded separate trials. The court say (p. 443): "We think the application for separate trials must be made before exercising the right of challenge."

³ *Brown v. State*, 18 O. S., 496.

be made, unless in conflict with some rule of court.¹ It should be made to appear: 1. That the witness is material. 2. That the party applying for the continuance has been guilty of no neglect. 3. That the witness, or his testimony, can be had before the term to which it is sought to have the cause continued.²

If a party is surprised by the withdrawal of his witnesses, without his knowledge or consent, after the trial has commenced, he should apply for a continuance upon that ground.³ He can not continue the trial and take the chances of a verdict in his favor, and after a verdict against him assign for the first time, as error, the absence or unauthorized withdrawal of witnesses.

At Common Law a continuance would not be granted where the absent testimony was outside of the boundaries of the state. This was placed upon the ground that the process of the court could not extend beyond its jurisdiction. This rule, so far at least as the defendant is concerned, has no application under the statute which authorizes the taking of testimony on behalf of the accused wherever the witnesses may be.

The affidavit must show due diligence—not by an allegation of due diligence, but by a statement of what was done in endeavoring to procure the attendance of witnesses, or the grounds for expecting their presence at the term to which a continuance is sought.⁴

¹ In case of emergency, as where a material witness, duly subpoenaed, fails to attend and can not be procured, or where a party has been diligent, but failed to obtain material testimony, no rules of court should prevent a continuance in a proper case.

² *State v. Files*, 3 Brev., 304; *Mull's case*, 8 Gratt., 695.

³ *Cotton v. State*, 4 Tex., 260.

⁴ *State v. Whitton*, 68 Mo., 91; *Murray v. State*, 1 Tex. Ap., 417. In *State v. Rhea*, 25 Kas., 576, the defendant was arrested on July 15th, on a charge of shooting with intent to kill, and bound over to await trial. The first regular term of court thereafter, in the county in which the offense was committed, commenced October 25th. The information was filed October 22d, and the case placed on the trial docket for trial October 25th, the first day of the term. On October 20th defendant caused a subpoena to be issued for several witnesses in a county other than that in which the information was pending, which subpoena was returned, served upon one and

A Sufficient Statement of Facts.—Where the prisoner stated in his affidavit for a continuance that he was arrested on or about November 1st and committed to the jail of Wilson county, and that he there employed counsel to defend him; that he remained in said jail until December 3d, when he was removed to Franklin county jail, where he remained until the commencement of the term in the succeeding February, when he was returned to Wilson county jail; the information was filed February 7th, and the trial had February 15th; during the time of his confinement in Franklin county he had no opportunity to consult with his counsel and was destitute of means; since the filing of the information he has applied for and received a commission to take the testimony of the absent witnesses, some of whom reside in Missouri and some in Nebraska; that immediately after his arrest he wrote to a party named in Nebraska, where he resided, asking him to ascertain the names of parties who would testify to his good character, and also the name of some one to take the depositions; and also wrote to a party named at Joplin, Mo., requesting him to go to Baxter Springs, in the vicinity of which he claimed to have bought the horse, and make inquiry for the person of whom he claimed to have made the purchase; that he also gave to his attorney the name of the last person addressed and all information he possessed as to his residence and probable whereabouts;

only one witness. Want of time prevented service on the others. On October 25th the defendant applied for a commission to take the testimony of said witnesses. There was no suggestion of the inability of the witnesses to attend the trial on account of sickness or otherwise. Their testimony was sought simply to show defendant's character as a quiet and peaceable citizen. The application was overruled. Defendant then filed an application for a continuance on account of the absence of these witnesses, and also on account of the absence of a witness who, he said, resided in Morris county, but was temporarily absent, and for whom he had caused a subpoena to be issued on October 25th. The state consenting that the statement in his affidavit should be received as the testimony of these absent witnesses, the application was overruled. It was held that the defendant had had ample time to secure his testimony, and that there was no error in overruling the applications for commission and continuance; that a case is triable at the first term after the arrest, and that both the state and the defendant are charged with the duty of making preparations for such trial.

and that, as he is informed and believes, his attorney wrote several letters to parties, making inquiry about said witness, but without receiving any information therefrom; that he himself received no answers to the letters he had written, and that within one week after his removal to Franklin county he wrote to the sheriff of Gage county, Nebraska, who he believed, was acquainted with the party to whom he had written at Joplin, and to other parties in Nebraska, to ascertain the whereabouts of said party, and that within two weeks thereafter he received a letter from said sheriff stating that he did not exactly know said party's address, but believed he was at the lead mines in Kansas; that immediately he addressed a letter to said party at Empire City, Kansas, and, soon after, another to Joplin, Missouri, requesting him to make inquiries previously named; that within two weeks of the sitting of the court he received a letter from said party stating that one John N. B., living near West Point, Missouri, was the man who sold defendant the horse, and that one George S., living near Joplin, would testify to material facts, as specified, corroborating the sale; expecting to return to Wilson county in a few days he did not communicate this information to his attorney until he was brought down to Wilson county for trial, as before stated; this was held sufficient under the circumstances to entitle the prisoner to a continuance.¹

Due Diligence depends somewhat on the circumstances of a case. Thus, if the accused is out on bail, and able, with reasonable effort, to search for and procure his evidence, or if he has sufficient financial ability to enable him to employ others to look up such testimony, he is in a much more favored situation than one who is in jail and without means. This distinction is very clearly drawn in *State v. Hagan*.²

¹ *State v. Hagan*, 22 Kas., 490-492.

² 22 Kas., 492. The court say: "The defendant was in jail and without means. He had to rely upon letters and friends for information. He wrote without delay and continued to write. He could not compel answers, and he could not go himself to make inquiries. His situation was very different from that of one out on bail and able to go in search of testimony, or of one with ample means to employ assistance. Reasonable diligence was of course essential, but what more could defendant do? Counsel for the state say the

Where the Evidence Sought is Incompetent, the court may deny the application for a continuance.¹ So, where the allegations of the affidavit are general and indefinite, and no connection is shown between the testimony sought and the crime charged.²

Where a Witness is Absent from the State, and an affidavit for a continuance is filed on that ground, and the prosecuting attorney consents that the affidavit may be read in evidence as the testimony of such absent witness, the court may overrule the application, and require the trial to proceed.³

Where a Witness on Behalf of the State Absconds.—Where, on the trial of a criminal case, a witness, attending court under a subpoena on behalf of the state, departs without leave after the trial has commenced, it is competent for the court to suspend the progress of the trial for the purpose of enforcing the attendance of such witness. The time proper to be allowed for that purpose must be determined by the sound discretion of the court in view of all the circumstances of the case. Where there is no reason to believe that the prisoner has been prejudiced thereby or deprived of a fair trial, a delay of three days will not invalidate a verdict against him.⁴

Affidavit Made on Information.—An affidavit of the prisoner to the effect that he had been *informed* that a person absent from the state would swear to certain material facts, is not sufficient

whole defense was a sham, and that it was apparent to the district court. But how could the court say from the affidavit that it was a sham, or that the efforts of defendant were not in good faith? The defendant swears that the witnesses would testify to facts, and that he believes the facts to be true. There was nothing impossible or even improbable in such testimony, and the defendant ought to have had an opportunity to obtain it if possible. * * * The defendant was presumed to be innocent. His efforts were apparently made in good faith, and the testimony he sought was very material. It will not do to say that such testimony was false, or his efforts to obtain it a mere pretense. If the witnesses sought should testify as stated, it will be for the jury to say whether such testimony is true. It can not be pronounced false in advance."

¹ McLean v. State, 28 Kas., 372; State v. Plowman, 28 Id., 569.

² McLean v. State, 28 Kas., 372.

³ State v. Dickson, 6 Kas., 209; Thompson v. State, 5 Kas., 159; Adams v. State, 20 Kas., 311; Comerford v. State, 23 O. S., 599; State v. White, 17 Kas., 487.

⁴ Griffin v. State, 18 O. S., 438.

to warrant a continuance. If the information came from the proposed witness, it should be so stated; but if from a third party, who knows he would so testify, then the affidavit of that person should be procured.¹ Where a person, to procure a continuance, swears that he "learned" certain material facts in relation to his case but recently before filing his affidavit, he must state from whom he learned such facts.²

The Statement of Facts in an Affidavit for a continuance should be specific of acts done, or of excuses for not doing them, and given with such particularity that an indictment for perjury would lie in case of its being false.³

Counter Affidavits not Admissible.—For the purpose of obtaining a continuance, the facts stated in the affidavits therefor will be taken as true, and the court will not permit counter affidavits to be filed denying the truth of those in support of the application, as it will not, in that unsatisfactory manner, determine a side issue as to the truthfulness of the affidavits. That can be determined in another way.⁴

While the general rule is, that if the state will admit the statements made in the affidavit for a continuance, as the deposition of the witness, the court will overrule the application, yet circumstances may, and frequently do exist when, even with such admissions, the court will, in the interest of justice, grant a continuance,⁵ as ordinarily the deposition itself has more

¹ *Williams v. State*, 6 Neb., 334; *Comstock v. State*, 14 Neb., 205.

² *Comstock v. State*, 14 Neb., 205.

³ *Ingalls v. Nobles*, 14 Neb., 272. In *Ingalls v. Nobles* the allegations as to diligence were general, and in commenting on this it is said (p. 273): "In regard to the efforts put forth to ascertain Tull's whereabouts and get his testimony, all that is shown is this, that 'affiant has made diligent inquiry to ascertain the place to which he has removed, by asking persons who are supposed to know, and by writing to witnesses at points where it was supposed he had gone.' * * He says he 'made diligent inquiry,' but when and of whom did he inquire? He 'wrote to witness at points where it was supposed he had gone.' To what 'points,' or places did he address his letters? Who 'supposed he had gone' there? and were the letters returned to him? The question of diligence is for the court to determine from the sworn statement of what has been done."

⁴ *Williams v. State*, 6 Neb., 334; *Hair v. State*, 14 Neb., 503.

⁵ *Goodman v. State*, 1 Meigs, 195; *People v. Dodge*, 28 Cal., 445; *Wasels v. State*, 26 Ind., 30; *DeWarren v. State*, 29 Tex., 464.

weight with a jury than an admission that the witness will so testify.

The Severe Illness of the Defendant, so that he is unable to attend court, is good cause for a continuance;¹ so where the defendant has been suddenly and without notice abandoned by his counsel,² and the death of counsel so suddenly as to prevent the engagement of another, may be sufficient cause.³ In cases requiring time for preparation, the sudden death of the prisoner's counsel, or his abandonment of the case, would seem to require a sufficient delay to enable new counsel to prepare for trial.

Undue Means to Create Prejudice.—Where undue means have been resorted to, by parties hostile to the accused, to prejudice the jury or the public at large against him, so that a fair trial can not be had, a continuance in certain cases may be granted. Ordinary newspaper articles, however, are not sufficient, nor where the excitement is the result of the prisoner's own action.⁴

AFFIDAVIT FOR A CONTINUANCE.

Title of Cause — Venue.

A B, defendant herein, being first duly sworn, deposes and says, that he can not be ready for trial at the present term of this court, for want of the testimony of one G H, a material witness for defendant, which he has been unable to procure; that the indictment [or information] in this case, was filed in said court on the — day of —, 18—, and the defendant was arrested and committed to jail [or entered into a recognizance, etc.], on the — day of —, 18—; that G H was a resident of — (*state what efforts have been made to find the witness; the acts done; if by correspondence, state to whom, etc., or if sufficient time has not elapsed to take the deposition so state, or other cause of inability*); that (*here state in full what the affiant believes the witness will swear to; it is well to set this out in full, as the state may elect to admit the affidavit as the deposition*); that affiant

¹ *People v. Logan*, 4 Cal., 188; *Brown v. State*, 38 Tex., 482; *Loyd v. State*, 45 Ga., 57.

² *Wray v. People*, 78 Ill., 212.

³ *Hunter v. Fairfax*, 3 Dall., 305.

⁴ *Wharton, Cr. Proc.*, § 598, and cases cited.

knows of no other witness by whom he can prove these facts, and that he can not safely proceed to trial without said testimony.

A B.

Subscribed in my presence and sworn to before me this — day of —, A. D. 18—.

E F, Clerk of the — Court.

ORDER CONTINUING CAUSE.

Title of Cause.

This cause came on for hearing on the motion of the defendant, supported by affidavit, for a continuance of this cause to the next term of this court, and was submitted to the court, on consideration whereof the court does sustain said motion, and said cause is continued to the next term of this court. [If the case is bailable, and bail has not been given add,] the defendant to give bail in the sum of \$ —.

ORDER OVERRULING APPLICATION.¹

Title of Cause.

This cause came on for hearing on the motion of the defendant, supported by affidavit, for the continuance of this case to the next term of this court, and was submitted to the court, on consideration whereof the court does overrule said motion [to which ruling the defendant excepted].

A continuance will not be granted to enable a party to procure testimony, merely to impeach the prosecuting witness, nor ordinarily, on account of the absence of a witness, as to the character of the accused.² In both classes of cases, however, such testimony may become very material, and where such is the case a reasonable time should be given to procure it.

A Fair Trial.—The constitution provides that in all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel

¹ If the defendant desires to have the ruling reviewed in the appellate court, he must preserve the affidavits and evidence, used on the hearing, in a bill of exceptions.

² Wharton, Cr. Pr., § 592, and cases cited.

the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.¹

A Fair Tribunal.—A fair trial implies a fair tribunal to administer the law. Justice is defined by Justinian as the constant and perpetual disposition to render to every man his due.² Hence, Justice is represented as being blind, and constantly holding the scales in equipoise. In entering upon the investigation of the facts, showing the guilt or innocence of the accused, the court should divest itself of all feeling or bias. The case is not to be affected or influenced by the clamor of the crowd, the pressure of public sentiment, or upon the thousand or more rumors that almost invariably attend every case of notoriety. There is no nobler spectacle than that of a judge who quietly but firmly, in the face, it may be, of public sentiment and popular clamor, goes forward and does his duty, and his whole duty; nor is there a more revolting one than that of a judge prostituting his high office to gain applause. To the credit of the bench, but few such are to be found.

The Officers of the Court.—Next in importance to a fair-minded, capable, impartial, independent judge, is the necessity that all the officers of the court shall be alike unbiased and fair-minded. It is especially important that the clerk, sheriff and bailiffs be free from bias, and that they say or do nothing calculated to prejudice the accused. This is particularly true of the sheriff and clerk, who together draw the jury from the list of names, and of the sheriff in selecting talesmen. The importance of requiring the sheriff to remain entirely free from bias is stated very fully by a late writer on that subject.³

¹ § 10, Art. 1, of the constitution. This is, in substance, article VI of the amendments to the constitution of the United States, and in substance is embodied in the constitutions of a large number of the states.

² Jus. Inst., b. 1, tit. 1; Coke, 2 Inst., 56; 1 Bouv. L. Dict., 773.

³ Murfree on Sheriffs, Ch. IX. In *Quinebaug Bank v. Tarbox*, 20 Conn., 510, it is said: "It being indispensable to the purer administration of justice in trials by jury that the jurors should be selected with the utmost fairness and integrity, courts have always deemed it good cause of challenge to them that the officer was guilty of any partiality or misconduct in their

It is to be feared that in the case of sheriffs, more particularly, the requirement that they shall remain unbiassed is frequently, perhaps unintentionally, violated. Where a warrant is placed in the hands of a sheriff it is his duty to execute it, and to perform in a fair, impartial manner all business that comes into his hands. But he is not to hunt for business nor become officious in setting traps for prisoners in his care, and obtaining confessions from them. The tendency of such a course of conduct is to prostitute the machinery of the law, and to bring it into disrepute. It is a fragment of the inquisition, and the officer should either abandon such methods or let another perform the duties of the office.

The accused, notwithstanding the information or indictment against him, is in the eyes of the law innocent until the jury shall render a verdict of guilty. His guilt is to be determined from the evidence alone. Suspicion, however strong, is not proof, nor should it be permitted to have any weight with either the court or jury. If the evidence establishes the defendant's guilt beyond a reasonable doubt, the jury have a plain duty to perform—to render a verdict of guilty. But this conclusion must not be reached by preconceived opinions, insinuations or conjectures. A fair trial involves a patient, careful examination of the facts, keeping in view the presumption of innocence and that the guilt must be shown alone from the proof.

Special Venires.—When two or more persons shall have been charged together, in the same indictment or information, with a crime, and one or more shall have demanded a separate trial and had the same, and where the court shall be satisfied, by reason of the same evidence being required in the further trial of parties to the same indictment or information, that the regular panel and bystanders are incompetent, because of having heard the evidence, to sit in further causes in the same indictment or information, then it shall be lawful for the court to require the clerk of the court to write the names of sixty elect-

selection and so careful and jealous are they on this subject that the objection on this ground goes not only to the jurors returned under the influence of such improper motives or conduct but extends to the whole panel.”

ors of the county wherein such cause is being tried, each upon a separate slip of paper, and place the same in a box, and after the same shall have been thoroughly mixed to draw therefrom such number as in the opinion of the court will be sufficient from which to select a jury to hear said cause, and the electors whose names are so drawn shall be summoned by the sheriff to forthwith appear before the court, and after having been examined such as are found competent and shall have no lawful excuse for not serving as jurors shall constitute a special venire, from which the court shall proceed to have a jury impaneled for the trial of the cause, and the court may repeat the exercise of the power until all the parties charged in the same indictment or information shall have been tried.¹

SPECIAL VENIRE.

The State of —, — County.

To the sheriff of said county:

You are hereby commanded to summon (*give the names of all the persons required*) to be and appear before the — court of — county forthwith, to serve as petit jurors in said court, in the case of The State of — v. A. B, on an indictment [or information] for the crime of —. You will make due return of this writ on the — day of —, A. D. 18—.

In witness whereof I have hereunto set my hand and affixed the seal of said court this — day of —, A. D. 18—.

[SEAL.]

E F, Clerk of the — Court.

The service is made by reading or delivering a copy of the same to the person summoned, or by leaving a copy at his residence, except that the copy shall contain only the name of the person served.²

RETURN TO SUMMONS.

October 1, 18—, received writ, and as therein commanded I on the — day of —, A. D. 18—, summoned the within named persons by (*state manner of service.*)

G H, Sheriff.

Fees (*give items*).

¹ Cr. Code, § 465 a.

² Code of Procedure, § 662. The statute says: "by reading or delivering a copy," etc. This evidently requires a copy in all cases unless it is waived by the person summoned. It is not left to the discretion of the officer.

Need not be Entitled.—It is not requisite that a venire for a special jury should be either entitled as of a case pending, or state the name of the person against whom the crime was committed.¹

A return by the sheriff as to some of the jurymen named in a *venire facias*, that they “can not be found in the county,” is equivalent to a return that they are absent from the county.²

A Challenge to Array applies to all the jurors as arrayed or set in order by the officer upon the panel.³ Thus, at common law, if the sheriff be the actual prosecutor of the party aggrieved, the array may be challenged. So if the sheriff be of actual affinity to either of the parties, and the relationship existed at the time of the return, or if he return any individual at the request of the prosecutor or defendant, or a person whom he believes to be more favorable to one side than the other, the array may be quashed on the presumption of partiality of the officer. So if the sheriff has any pecuniary interest in the event, or is counsel, attorney, servant or arbitrator in the same cause, a principal challenge will be admitted.⁴ It must not be forgotten, however, that at common law the writ was issued to the sheriff to summon a jury. The selection was made by himself or his subordinates of not less than forty-eight nor more than seventy-two persons.⁵

The common law method of selecting jurors seems to prevail in but one of the states of the union (New Jersey), although in two others the sheriff is a member of the board to select suitable persons to serve.⁶ In this state, however, and some others, the sheriff and clerk of the district court draw by lot out of the receptacle, from the names furnished by the county board, twenty-four names to serve as petit jurors.⁷ The consanguinity or affinity of the officer summoning the jury, within the ninth degree, was good cause of challenge at com-

¹ *Loeffner v. State*, 10 O. S., 599.

² *Davis v. State*, 25 O. S., 369.

³ 1 Bouv. Law Dict., 253.

⁴ Chitty, Cr. Law, 536.

⁵ Thompson & Merriam on Juries, § 44; Murfree on Sheriffs, § 380.

⁶ Thompson & Merriam on Juries, § 45; Murfree on Sheriffs, § 382.

⁷ Code of Civil Pro., § 660.

mon law,¹ and notwithstanding the limitations and restrictions placed upon sheriffs in selecting and returning jurors, the courts of this country have generally adhered to the common law doctrine where there was the least suspicion of partiality, as where the sheriff that summoned the jury was a son of one of the parties.²

Mere Irregularity in Drawing Jury not Sufficient.—A challenge to the array of jurors ought not to be sustained on account of mere irregularities in the drawing of the jurors, or mere informalities on the part of the officers charged with the drawing of the same; yet where the statute specially prescribes the class or list of persons from which the jurors are to be selected, the failure on the part of the officers to draw the jurors from the class or list prescribed is a sufficient ground to sustain a challenge to the array.³

No Ground of Challenge.—Where a challenge to the array is sustained on the ground of some irregularity in drawing the jurors, if otherwise competent they are not thereby personally disqualified to serve as jurors, and it is no ground of challenge if subsequently called to serve as such.⁴

Where Part of Jurors Fail to Appear.—Where four of the thirty-six electors summoned failed to appear, it was held no cause for setting the array aside.⁵

CHALLENGE TO THE ARRAY.

Title of the Cause.

The defendant objects to the panel of petit jurors drawn for the — term, A. D. 18—, of the — court of — county, for the following reasons:

First. Because (*state any fact showing partiality or non-compliance*

¹ Murfree on Sheriffs, § 385; *Vernon v. Manners*, 3 Dyer, 319 a; *Goodman v. Franklin*, 5 Coke, 36 b; *Morrison v. West*, 1 Leon., 89.

² Murfree on Sheriffs, § 385, and cases cited. See note to *Cain v. Ingham*, 7 Cowen, 478.

³ *State v. Jenkins*, 32 Kas., 477.

⁴ *State v. Yordi*, 30 Kas., 221; *Thompson & M. on Juries*, § 147.

⁵ *Warden v. State*, 24 O. S., 146; *Wareham v. State*, 25 Id., 604.

with the law on the part of the officers preparing the original lists, or in drawing the names).

Second. Because, etc.

Wherefore said defendant prays that said panel may be quashed.

A B, by S J, his Attorney.

The challenge must be verified or accompanied by an affidavit stating the facts. Mere irregularities in selecting the jurors will not be sufficient cause of challenge, but it is otherwise where the essential provisions of the statute have been disregarded; in such case the challenge should be sustained.¹

CHALLENGE TO THE ARRAY SUSTAINED.

Title of the Cause.

This cause came on for hearing upon the challenge of the defendant to the array of the [petit jury] and the evidence, and was submitted to the court, on consideration whereof the court finds that the grounds of said challenge are sustained, and that said panel should be quashed. It is therefore ordered that the panel of said jurors be quashed, and said persons excused from service.

CHALLENGE TO THE ARRAY OVERRULED.

Title of the Cause.

This cause came on for hearing upon the challenge of the defendant to the array of the [petit jury] and the evidence, and was submitted to the court, on consideration whereof said challenge is overruled. [To which ruling the defendant excepts.]

In all [crimnal], cases except as may be otherwise expressly provided, the jury summoned and impaneled, according to the provisions of the laws in force relating to the summoning and impaneling of juries in other cases, shall try the accused.²

The Following shall be Good Causes for Challenge to any person called as a juror on the trial of an indictment. First, that he was a member of the grand jury which found the indictment. Second, that he has formed or expressed an opinion as to the guilt or innocence of the accused. Provided, that if a juror

¹ Thompson and Merriam on Juries, § 143. For a very full statement of causes of challenge to the array, see Thompson & M. on Juries, pp. 103-132.

² Cr. Code, § 466.

shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror, as to the ground of such opinion; and if it 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 transaction, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case. Third, in indictments for an offense, the punishment whereof is capital, that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death. Fourth, that he is a relation, within the fifth degree, to the person alleged to be injured or attempted to be injured, or to the person on whose complaint the prosecution was instituted, or to the defendant. Fifth, that he has served on a petit jury which was sworn in the same cause against the same defendant, and which jury either rendered a verdict which was set aside or was discharged after hearing the evidence. Sixth, that he has served as a juror in a civil case brought against the defendant for the same act. Seventh, that he has been in good faith subpoenaed as a witness in the case. Eighth, that he is an habitual drunkard. Ninth, the same challenges shall be allowed in criminal prosecutions that are allowed to parties in civil cases.¹

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.²

Twelve Names to be Drawn.—The civil code provides the mode of selecting ordinary jurors, and it is unnecessary to

¹ Cr. Code, § 468.

² Cr. Code, § 469.

refer to that procedure here. When a jury is required the clerk will draw, one at a time, twelve names from the box, calling each name as it is drawn. It is the duty of the persons thus drawn immediately to take their seats in the jury box. At common law, as a general rule, no challenge would be entertained until the appearance of a full jury, and the criminal code has not changed the rule. It is the duty of the court to determine the qualifications of each person presented as a juror, and as the character of the verdict will in all probability depend to a great extent upon the fairness and ability of the persons offered as jurors, the importance of care in making the selection will readily be seen. In another work the writer has questioned the right of the court to excuse a juror drawn in the manner provided by law and fill his place by a talesman, except in case of the serious illness of the juror or his family.¹ It is equally as important to have a fair jury as a fair judge, and the probabilities that a fair jury will be selected are certainly much greater, if the jury are selected from the body of the county than from the favorites of the sheriff at or near the county seat. It is not a matter of courtesy with the court but of duty, and let it perform its duty quietly but firmly by refusing to excuse any juror drawn as the law provides, except for the causes above mentioned. If courts will generally pursue this course, there will soon be less complaint of unsatisfactory verdicts.

OATH OF JUROR WHEN CHALLENGED.²

You do solemnly swear that you will answer truly all questions put to you touching your qualifications to serve as a juror in the case of The State of — v. A. B, so help you God.³

¹ Pleading and Practice (4 Ed.), 412.

² The usual course, so far as the writer has observed, has been to administer the oath to all the jurors called before their examination. The attorney for the state and then the attorney for the defendant will then alternately proceed to examine them as to their qualifications, additional names being drawn as jurors are excused.

³ This oath is administered, in this state at least, by requiring the proposed juror to stand up and raise his right hand when the clerk repeats the oath to him.

The English Language.—As proceedings in our courts are carried on in the English language, the inability of a juror to understand that language is a good cause of challenge. This rule, however, must not be carried to the extent of excluding one who understands what is said but speaks the language imperfectly.¹

Systematic Examination.—In the examination of a person offered as a juror, it will be found convenient to take the grounds of qualification up in their order. As the statute requires jurors to be electors of the county, the first inquiry should be whether or not the person offered is an elector of the county.²

The Law, However, Requires Jurors to be Electors, and where a person not having such qualifications is retained on the panel without the knowledge of the party or his counsel, after reasonable diligence and due inquiry of the juror at the time he is impaneled, to ascertain the fact of his competency, a new trial should be awarded.³

Second. That the Person Offered was a Member of the Grand Jury which found the indictment. The statute requires all challenges for cause to be made before the jury is sworn, and not afterward; therefore where no inquiry was made of one who had been a member of the grand jury when called as a petit juror, and no objection made till after verdict, it was held to be waived.⁴

Third. That the Person Offered has Formed or Expressed an Opinion as to the guilt or innocence of the accused.

Where a person called as a juror in a criminal case is challenged on the ground that he has formed and expressed an opinion as to the guilt or innocence of the accused, if it shall appear that such opinion was formed from reading what

¹ *Lyles v. State*, 41 Tex., 172; *Thompson & Merriam on Juries*, § 177.

² When a party, at the time a juror is impaneled, fails to make any inquiry of the juror as to his competency, he by such omission waives all objection to the competency of such juror that could have been ascertained by such inquiry, except such as the court is required to ascertain *sua sponte*. *Watts v. Ruth*, 30 O. S., 32; *Wilcox v. Sander*, 4 Neb., 581; *Hickey v. State*, 12 Neb., 492.

³ *Watts v. Ruth*, 30 O. S., 32.

⁴ *Beck v. State*, 20 O. S., 228.

purported to be a report of the testimony of witnesses of the transaction, he is not competent to serve as a juror in the case;¹ if, however, such opinion shall appear to be founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transaction, or reading reports of the testimony or hearing them testify, the person so challenged may, in accordance with the proviso of the section, be admitted to serve as a juror if he will 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.²

Not Competent.—Where a person who is called to serve as a juror on a criminal case shows by his own oath, upon his *voir dire*, that he has formed and entertains an opinion with reference to the guilt or innocence of the defendant, and that he has no doubt as to the correctness of his opinion, and that such opinion would remain until removed by evidence, such person is incompetent to sit as a juror in that case, notwithstanding that he states his opinion is founded on rumor, and that he has no bias or prejudice against the defendant, and that he would be governed entirely by the evidence in making up his verdict, and that he believes he could try the case impartially.³

¹ *Frazier v. State*, 23 O. S., 551; *Smith v. State*, 5 Neb., 181.

² *Frazier v. State*, 23 O. S., 551. In *Curry v. State*, 4 Neb., 548-549, the court say: "We think it is clear that where the ground of challenge is the formation or expression of opinion by the juror, before the court can exercise any discretion as to his retention upon the panel it must be shown by an examination of the juror on his oath, not only that his opinion was formed solely in the manner indicated in this proviso, but in addition to this, the juror must swear unequivocally that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence. If he express the least doubt of his ability to do so he should not, in the face of a challenge for cause, be retained. And even where, by his formal answers, the juror brings himself within the letter of the statutory qualifications, if the court shall discover the least symptom of prejudice or unfairness, or an evident desire to sit in the case, he should, in justice both to the state and himself, be rejected.

³ *State v. Miller*, 29 Kas., 44.

Not Competent.—If a juror have an opinion as to the guilt or innocence of the accused, based solely on newspaper reports, so fixed as to require evidence to remove it, he does not stand indifferent, and is subject to challenge, although he may believe that he can render a fair and impartial verdict on the evidence produced in court.¹

Not Competent.—Where the persons offered as jurors have formed an opinion from reading a report of the testimony of witnesses offered on a former trial of the case, they are not competent, although they may be able and willing to swear that they can render a fair and impartial verdict.²

Not Competent.—A person who shows on his examination that he is not impartial between the parties, is not rendered competent by saying that he believes himself able to render an impartial verdict, notwithstanding his opinion, although the court may be satisfied that he would render an impartial verdict on the evidence.³

Juror Competent.—Where one of the persons in a case of murder stated on his *voir dire* that he was convinced that the deceased was dead and that the defendant killed him, and that it would require a good deal of evidence to remove this conviction; it appeared from other questions asked by defendant's counsel, of other jurors, that the death of the deceased and the killing of him by the defendant were conceded; and immediately after the jury was impaneled the defendant's counsel stated to the jury that it would appear from the evidence that the defendant had killed the deceased, but that it

¹ *Olive v. State*, 11 Neb., 3. In *Curry v. State*, 4 Neb., 551, it is said: "In the exercise of a sound discretion, how would it be possible to reach the conclusion that a juror, who, without any qualification whatever, declares that he has a fixed and abiding conviction of the prisoner's guilt, which would require evidence to remove, can be fair and impartial between the state and the accused? Would it not rather be an abuse of judicial discretion to so hold?"

² *Erwin v. State*, 29 O. S., 186-190; *Smith v. State*, 5 Neb., 181.

³ *Palmer v. State*, 42 O. S., 596. In *McHugh v. State*, 42 O. S., 154, it was held that where the opinion of the juror is formed from newspaper reports, and not from reading or hearing the testimony of witnesses, or conversation with them, he is not necessarily incompetent, if he will swear that he believes he can render a fair and impartial verdict.

would be shown that the killing was done in self-defense; it was held that the court did not err in overruling the challenge for cause.¹

Jurors Competent.—Where persons called as jurors testify on their *voir dire* that they have heard or read of the matters charged against the accused, and have formed opinions thereon; but if it appears that such opinions are not settled or fixed, and that they will give full and fair consideration to all the testimony and be guided by it solely in their conclusions, a challenge for cause may be overruled.²

Not Error to Excuse Juror.—A trial court, in impaneling a jury to serve in a particular case, should have and has a very extensive and almost unlimited discretion in discharging a person called to serve on the jury, who might, in the opinion of the court, not make the fittest or most competent person to serve on that jury. But this rule should not be applied to retaining jurors.³

¹ *State v. Wells*, 28 Kas., 321.

² *State v. Spaulding*, 24 Kas., 1. The alleged bias of the jurors objected to is stated in the opinion as follows: "One juror testified that he had an opinion, founded upon rumor, that public money was missing; that he had no opinion as to the guilt or innocence of the defendant; that he believed defendant was city clerk. Another, that he had an opinion that public money was lost or stolen; that he had, on reading of the matter, made no inquiry whether it was true or false, and that his opinion would not influence him in any way in the trial of the case, and that he could give due consideration to the testimony. * * * Within the rule laid down in the *Medlicot* case, 9 Kas., 257, we think the challenges were properly overruled. It does not appear that either of these parties had such settled opinions or convictions as would prevent them from being impartial jurors. A matter of this kind always gets into the papers and is the subject of talk in the community, and it would be impossible to find an intelligent man in the county who had not read or heard of it." See also *Palmer v. People*, 4 Neb. 68.

³ *State v. Miller*, 29 Kas., 43. The court, after setting out the examination of the juror excused states the reasons for the decision as follows (pp. 45, 46.): "We do not think that the court below committed any substantial error as against the defendant, for although it may be that *Esthisbaum* (the juror excused) was not so absolutely incompetent to serve as a juror that the court below could have committed material error by permitting him to serve as a juror, yet it can not be doubted but that twelve men more competent could easily have been found and obtained to serve on the jury.

Rule as Stated by Ch. J. Marshall.—In the trial of Burr for treason, Marshall, Ch. J., said: "Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by this court is, that light impressions which may fairly be supposed to yield to testimony that may be offered, which leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to the juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him."¹

Judge Thompson, in commenting upon the above rule says, that in the application of the rule it must be closely watched; that much depends on the temperament of the individual juror; that when his mind has reached a conclusion, although from the slightest rumors, he is certainly disqualified; that people frequently form violent prejudices from hearsay alone, and a simple statement by such persons that their opinions are hypothetical is not sustained by the facts.² That the statement by the juror, "If what I have heard is true, I have formed an opinion, but if not true I have formed none," so often made by persons called as jurors, may designedly be used to cover the rankest prejudices.³ Every lawyer of experience knows that these observations are correct, and how necessary it is to exclude from the jury every man who has an impression so strong that it would require evidence to re-

* * * We can hardly see how the court could commit substantial error by discharging any person from the jury when twelve other good, lawful and competent men could easily be had to serve on the jury. *Stout v. Hyatt*, 13 Kas., 232; *A. T. & S. F. R. R. Co. v. Franklin*, 23 Kas., 74. There is an immense difference between discharging a juror and retaining him. To discharge him can seldom, if ever, do harm, while to retain him, if his competency is doubtful, may do immense injury to one party or the other."

¹ Trial of Burr, Vol. 1. p. 416; Thompson & M. on Juries, § 207.

² Thompson & M. on Juries, § 208.

³ Thompson & M. on Juries, § 209.

move it. A party to have a fair trial must be tried before a tribunal that has not prejudged the case—one that will be governed by the testimony alone, and not by the bias of its members.¹ Fair verdicts can only be expected from fair jurors, and these can be obtained only by the exclusion of persons who have already formed an opinion on the subject.

Fourth. Where the Punishment is Capital that the juror's opinions are such as to preclude him from finding the accused guilty.

Where a juror on his *voir dire* examination, in a case depending upon circumstantial evidence, answers that his convictions are such as would preclude him from returning a verdict of guilty where the punishment would be death, he may be challenged by the state for cause.²

The supreme court of Ohio, in discussing this question, say: "It can not be maintained that one is a suitable person to serve on any jury who has imbibed such strong prejudices on any matter to be litigated on the trial as would induce him to disregard the law and the facts governing the case. A man who would disregard his oath to save his conscience, is not fit to be trusted anywhere. One who has such strong prejudices that he can not do what he knows to be right, when it conflicts with his peculiar theories, or whose mind is so obscured by his own peculiar notions that he can with a conscience void of offense, make the laws of his country bend to his own will, and accommodate its provisions to his own visions of morality, ought never to be allowed to sit as a juror."³

Fifth. That he is a Relation within the Fifth Degree, to the

¹ The test so often applied to a person called as a juror, who has formed or expressed an opinion, by making the inquiry of him, "Do you feel able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence," is really no criterion to judge of the juror's fairness. But few persons, no matter how biased or prejudiced they may be, will answer that they can not render a fair verdict, and for the time being perhaps they intend to do so. In almost every case, however, the verdict will show that their previous opinions controlled.

² *Bradshaw v. State*, 17 Neb., 147; *St. Louis v. State*, 8 Neb., 405.

³ *Martin v. State*, 16 Ohio, 369.

person alleged to be injured, or attempted to be injured, or to the person on whose complaint the prosecution was instituted, or to the defendant.

The English Law of Descent is governed by the common law; but in the United States the English common law of descent in its most essential features has been rejected, and each state has established a law of descent for itself.¹ At common law the mode of computing the degrees of relationship was to begin "at the common ancestor and reckon downward and in whatever degree the two persons or the most remote of them is distant from the common ancestor, that is the degree in which they are related to each other."²

Degree, How Computed.—In computing the degrees of consanguinity the civil law, which is generally followed in this country, begins with the intestate and ascends from him to a common ancestor, and descends from him to the next heir, reckoning a degree for each person, as well in the ascending as the descending lines.³ By the common law an uncle and nephew stand related to each other in the second degree, but by the civil law they are related in the third, and cousins in the fourth. The wife's blood relations are in the same degree of affinity to the husband as they are of consanguinity to the wife.⁴

Sixth. That the juror has served on a petit jury which was sworn in the same cause against the same defendant, and which jury either rendered a verdict which was set aside or was discharged after hearing the evidence.

At Common Law—Trial on Joint Indictment.—A member of the grand jury which found the indictment was competent to sit as a petit juror in the same case if not objected to. And it was no ground of challenge that one of the panel had been on a former jury which convicted others upon the same indictment, because, as was said by Chitty, every man must be tried upon the evidence of his own guilt, without reference to that

¹ 4 Kent, Com., 374.

² 2 Bla. Com., 206; Thompson & M. on Juries, § 178.

³ 4 Kent, Com., 413.

⁴ Thompson & M. on Juries, § 178, and cases cited.

of his associates.¹ In some of the states it is a cause of challenge that the juror has an action pending in court for trial.²

Eighth. That he has Served as a Juror in a Civil Case, brought against the defendant for the same act.

Verdict not Essential.—To bring a juror within this ground of challenge, it is not essential that the case shall have been at such former time fully tried and a verdict returned, or the jury discharged because unable to agree. It is enough if the case has been partially tried and a portion of the testimony received. The idea is, that a juror, having once served, will have opinions more or less strongly settled from the testimony he has heard, and that he will have such opinions whether he has heard much or little testimony. The statute authorizes no inquiry as to the extent of the influence already exerted, or the strength of the opinions already formed from the testimony; but deems it safer to disqualify all such jurors by making it a cause of challenge.³

Ninth. That he has been in good faith subpoenaed as a witness.

Material Witnesses in a case, those upon whose testimony the event is essentially dependent, ought not to be permitted to sit as jurors in the case. However falsely or willfully such witnesses may testify, their truth and veracity can not be attacked without danger to the attacking party.⁴ The juror's oath requires him to be governed by the evidence and the law in the case, and he is absolutely prohibited from acting upon private information. The danger that he will do so, however, is always great, and the courts should, wherever practicable, excuse a party who is to be a witness in the case, even if not

¹ 1 Chitty, Cr. L., 543. The supreme court of Ohio, in a civil action, commenting on this rule say: "Ever since the trial of Charles Cranborne for high treason, in 1696, the rule at common law has been that it is no ground of challenge that one of the panel has been on a former jury which convicted others upon the same indictment. * * In Cranborne's case a juror was challenged because he was on a former jury which had convicted a prisoner jointly indicted with the defendant, and it was held to be no ground of challenge. 13 State Trials, 222.

² Plummer v. People, 74 Ill., 361; Riley v. Bussell, 1 Heisk., 294.

³ Weeks v. Medler, 20 Kas., 63; Famulener v. Anderson, 15 O. S., 473.

⁴ Hauser v. Com., 5 Am. Law Reg., N. S., 670.

summoned, from serving on the jury.¹ Still, where no challenge is interposed on that ground, it has been held, and no doubt is the law, that a juror may be called to testify in that case as a witness.²

Tenth. That he is an habitual drunkard.³

The statutory causes of challenge are not exclusive. Other causes may be assigned, as where the person called is an employe of the defendant, or has an interest in the controversy. The subject is very fully discussed in c. 11, of Thompson & M. on Juries, to which the reader is referred.

Peremptory Challenges.—Every person arraigned for any crime punishable with death shall be admitted on his trial to a peremptory challenge of sixteen jurors and no more; and every person arraigned for any offense that may be punishable for a term exceeding eighteen months, shall be admitted to a peremptory challenge of eight jurors, and in all other criminal trials the defendant shall be allowed a peremptory challenge of six jurors. The prosecuting attorney on behalf of the state shall be admitted to a peremptory challenge of six jurors in all cases where the offense charged is punishable with death, and of three jurors in all other cases.⁴

Peremptory Challenges—How Exercised.—In a prosecution for murder in the first degree the court established a rule for the impaneling of the jury, that the state should exercise one of its peremptory challenges, and then the defendant should exercise two of his peremptory challenges, and then the state should exercise one and the defendant two, and so on alternately, until all the peremptory challenges given by law to the parties should be exhausted, the state having six and the defendant twelve. This rule was sustained.⁵ The rule adopted by the court in this case seems to be just to all parties, and is worthy of commendation.

¹ *West v. State*, 8 Tex. App., 119; *Atkins v. State*, 60 Ala., 45; *Com. v. Joliffe*, 7 Watts, 585; *Commander v. State*, 60 Ala., 1; *State v. Underwood*, 2 Overton, 92.

² *Rex v. Perkins*, Holt, 403; *Hauser v. Conn.*, 5 Am. Law Reg., N. S., 668.

³ Upon the subject of furnishing intoxicating liquors to the jury, see Thompson & M. on Juries, § 378, and note.

⁴ Cr. Code, § 467.

⁵ *State v. Bailey*, 32 Kas., 83.

Not Required until after Challenge for Cause.—A party is not required to make his peremptory challenges before making his challenges for cause. This was the rule at common law as stated by Blackstone, he saying that “perhaps the bare questioning his (the juror’s) indifference may sometimes provoke resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.”¹ In a few cases a narrow view of the law has been taken, and it has been held that the right of peremptory challenge, if exercised at all, must be before the juror is examined for cause.² At common law each juror was presented to the parties separately, and if no challenge was interposed the juror was sworn.³ A different rule prevails in most of the states, the jurors being sworn in a body after all challenges have been made.

May Reserve Peremptory Challenges.—The supreme court of Ohio, in an early case, say, in the administration of criminal justice it is of the first importance to secure an impartial tribunal. For this reason the law gives to the party accused the right of challenge. This right may be exercised indefinitely upon cause shown, and to a limited extent, without cause or peremptorily. The question is, whether this right of peremptory challenge may be reserved by the party accused until after he has made all his challenges for cause. Prejudices often exist for which no cause can be assigned. The personal appearance of an individual often creates the most unaccountable prejudices. The mere challenge for cause may provoke resentment, if the reason assigned prove insufficient to set aside the juror. The trial of a juror challenged for cause may excite a prejudice which does not amount to a legal disqualification, but to the influence of which the party accused ought not to be compelled to submit. For these reasons the law has wisely provided that the right of peremptory chal-

¹ 4 Bla. Com., 353.

² *Com. v. Webster*, 5 Cushing, 295; *Com. v. Rogers*, 7 Met., 500; *Com. v. McElbaney*, 111 Mass., 439.

³ *Brandreth's case*, 32 Howell, St. Tr., 755, 771; *Sayer's case*, 16 Id., 135.

lunge ought to be held open for the latest possible period, to wit, up to the actual swearing of the jury.¹

The Ordinary Course in Exercising Peremptory Challenges is for the prosecuting attorney to challenge one on behalf of the state, then the accused or his attorney a due proportion of the whole number he is entitled to challenge, and so alternately until the challenges are exhausted or waived.

If Two or More Persons be Put on Trial at the Same Time, each must be allowed his separate peremptory challenge.² The statute is merely declaratory of the common law. Thus, where two defendants are jointly charged in one information with a misdemeanor, and being refused a separation are put on trial together, each is entitled to the same number of peremptory challenges he would be entitled to if tried separately.³

Waiving Challenge.—A failure to challenge in time, where the challenges were to be made one at a time alternately, has been held to be a waiver of a challenge for that time, and to be deducted from the whole number to which the party is entitled.⁴

¹ Hooker v. State, 4 Ohio, 350; Beauchamp v. State, 6 Blackf., 299-308; Wyatt v. Noble, 8 Id., 507; Munly v. State, 7 Id., 593; People v. Ah You, 47 Cal., 121; People v. Reynolds, 16 Cal., 123; Williams v. State, 3 Geo., 453-459; Edelen v. Gough, 8 Gill., 87; Drake v. State, 51 Ala., 30; City Council v. Kleinback, 2 Speers, 418; Thompson & M. on Juries, § 269, and cases cited.

² Cr. Code, § 470.

³ State v. Durein, 29 Kas., 688. The language of Story, J., in U. S. v. Marchant, 12 Wheat., 480, is quoted with approval (p. 69) as follows: "Upon a joint trial each prisoner may challenge his full number, and every juror challenged as to one is withdrawn from the panel as to all the prisoners on the trial, and thus, in effect, the prisoners in such a case possess the power of peremptory challenge to the aggregate of the numbers to which they are respectively entitled. This is the rule clearly laid down by Lord Coke, Lord Hale and Sergeant Hawkins, and indeed by all elementary writers." "In the case of The State v. Stoughton, 51 Vt., 362, it was held that one indicted with others does not waive his right to the statutory number of peremptory challenges by consenting to be tried with them. If one consenting to a joint trial does not waive this right, *a fortiori*, one who is compelled against his will to a joint trial ought not to be deprived of it." See also Cruce v. State, 59 Geo., 83; Smith v. State, 57 Miss., 822; Bixbe v. State, 6 Ohio, 86; Mahan v. State, 10 Ohio, 233.

⁴ Thompson & M. on Juries, § 269 and cases cited.

It should be clear that there was an intention to waive before such challenges are deducted.

Special Venire.—Where, however, a special venire had been issued for jurors, and the defendant, who was entitled to two peremptory challenges, had challenged one of the special venire and passed his second challenge, and the special venire was then exhausted, and a new juror called, it was held the defendant had the right to challenge the new juror.¹

Juror Discharged after being Accepted and Sworn.—For various causes, such as the misconduct of the juror, or where it is discovered that he is of kin to the person prosecuting the case within the prohibited degree, or other causes that would render the verdict erroneous, a juror may be discharged after he is sworn if no testimony has been offered.² The juror may also be discharged before testimony is introduced where it is apparent that he is physically unable to bear the fatigue of the trial.³

Peremptory Challenges when Jury is Discharged.—In the absence of any statute regulating the matter, where a juror is discharged after being accepted and sworn and another juror called in his stead, the prisoner is entitled to his peremptory challenges over again.⁴

¹ Koch v. State, 32 O. S., 352.

² Thompson & M. on Juries, § 273. In a case which came under the writer's observation a jury had been impaneled and sworn in a murder case immediately before the adjournment of court at night, but no testimony taken. The court directed the sheriff to provide comfortable quarters for the jury, and provide for their wants and keep them together. During the night one of the jurors separated from his fellow jurors, and going to a saloon commenced to drink and declared he would never find the accused guilty. The prosecuting attorney brought the matter before the court in the morning, when the court imposed a heavy fine on the delinquent juror, committed him until it was paid and discharged him from the panel.

³ Fletcher v. State, 6 Humph., 249; Silsby v. Foote, 14 How., 218.

⁴ Thompson & M., on Juries, § 273 and cases cited. A party should be required to use all reasonable means to procure the discharge of all objectionable jurors before the commencement of the trial, and the failure to do so will be considered a waiver of all known objections. A party should not be permitted to decline to exercise his peremptory challenges in discharging supposed objectionable jurors, and then object on that ground after a verdict against him. F. E., D. & W. V. R. R. Co. v. Ward, 29 Kas., 354. Therefore, where an objectionable juror is retained on the panel against the will of the defendant, it must appear that he did not thereafter waive the exercise

Oath of Jury.—When all challenges have been made, the following oath shall be administered:

You shall well and truly try and true deliverance make between the state of — and the prisoner at the bar, A B, so help you God.

FORM OF AFFIRMATION.¹

You do solemnly affirm that you shall well and truly try and true deliverance make between the state of — and the prisoner at the bar, A B, and this you do as you shall answer under the pains and penalties of perjury.

Procedure on the Trial.—After the jury has been impaneled and sworn, the trial shall proceed in the following order: First. The counsel for the state must state the case for the prosecution, and may briefly state the evidence by which he expects to sustain it. Second. The defendant or his counsel must then state his defense, and may briefly state the evidence he expects to offer in support of it. Third. The state must first produce its evidence; the defendant will then produce his evidence. Fourth. The state will then be confined to rebutting evidence, unless the court, for good reason, in furtherance of justice, shall permit it to offer evidence in chief. Fifth. When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court; which instructions shall be reduced to writing if either party require it. Sixth. When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury. Seventh. The court, after the argument is concluded, shall immediately, and before proceeding with other business, charge the jury; which charge, or any charge given after the conclusion of the argument,

of any of his peremptory challenges. *Palmer v. People*, 4 Neb., 68; *State v. Elliott*, 45 Iowa, 486; *State v. Davis*, 41 Id., 311; *Barnes v. Newton*, 46 Id. 567; *St. L., etc., R. R. Co. v. Lux*, 63 Ill., 523; *Tooney v. State*, 8 Tex. App., 452; *Thompson & M. on Juries*, § 276.

¹ Any juror shall be allowed to make affirmation, and the words, "this you do as you shall answer under the pains and penalties of perjury," shall be substituted instead of the words, "so help you God." *Cr. Code*, § 472.

shall be reduced to writing by the court if either party request it, before the argument to the jury is commenced; and such charge or charges, or any other charge or instruction provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jury in their retirement, and returned with their verdict into court, and shall remain on file with the papers of the case.¹

Prosecuting Attorney Occupies a Semi-judicial Position.—The law has committed to his care, for the time being, the good name and reputation of every person in his district accused of an offense against the laws of the state. He is a public officer clothed with power to enforce the law—not as a partisan, not to gratify the malice of particular persons, or to show his own ability, but because the law has been violated, and it is his duty to prosecute the offender. The utmost care should be taken by him to see that the charge is well founded before any prosecution is instituted. It is to be feared that, particularly in states where the grand jury system still prevails, from want of opportunity no doubt, this matter is overlooked. No greater wrong can be done an innocent person than to accuse him of an offense of which he is not guilty. In stating the case to the jury, the prosecuting officer should carefully keep within the proof that he expects to offer. Vituperation should be avoided. It too often is used as an element to create prejudice and supply the want of proof, and the court should not permit a resort to it. If there is sufficient evidence to establish the guilt of the accused it will be unnecessary, and if there is not sufficient evidence it can not supply the want of it, and should be omitted. Let the prosecuting attorney, in a calm, dignified manner, conduct the prosecution, because the proof in his possession shows the accused to be guilty. Let him make no rash statements to the court or jury, nor statements calculated to prejudice the accused in a promiscuous assembly, to reporters or on the streets, nor speak of the case except in open court, and convictions will be more likely to result in cases where the verdict should be guilty.

¹ Cr. Code, § 478.

The Statement for the Defense.—After the prosecuting attorney has made his statement, the attorney for the defendant will state the defense relied upon and the evidence by which he expects to sustain it. The defense may be a general denial or coupled with affirmative matter. The importance of keeping within the proof which he expects to offer is equally as great on the part of the defendant as on the part of the prosecution. A misstatement of a material fact is sure to be noticed by some or all of the members of the jury, and is construed to the disadvantage of the party making it. It is related of the great commoner, Charles Fox, that his great strength lay in his ability to state his opponent's argument fairly—equally as strongly as his opponent had done, and then, if it was unsound, attack it for its inconsistency or fallacy, while he proceeded to show that his own position was right. Every judge who has presided over a *nisi prius* court knows that the effect of making extravagant statements to the jury, which are not sustained by the proof, is, as a rule, to injure the cause of the party making them in the minds of the jury. If the proof corresponds with what was promised, the jury are not disappointed, and the attorney is looked upon with favor as a truthful, reliable man, and his after statements to the jury have much greater weight than they otherwise would have had.

Objections to Form of Oath to Jury.—Where the record shows that the jury were sworn to well and truly try, and true deliverance make, between the state of (*giving the name*) and the prisoner at the bar, it will be presumed that the statutory form was observed in administering the oath.¹

Must Incorporate Form of Oath Used.—Where the record states that certain persons, naming them, were impaneled and sworn to well and truly try and true deliverance make, but the form of oath administered is not given, nor does the record purport to give it, it will be presumed to be in the proper form. If the oath administered was insufficient or improper, it is the duty of the party to incorporate it in his bill of excep-

¹ *Wareham v. State*, 25 O. S., 601-602.

tions in order that the reviewing court may see whether it was the proper one or not.¹

Omission of Words, "So help me God," Immaterial.—Where the record shows that the jury for the trial of a criminal case was duly sworn to do the only thing required of its members by the statute—that is, to well and truly try and true deliverance make between the state and the accused, the fact that the record does not contain the invocation, "so help me God," which is provided for at the conclusion of such oath, affords no ground for reversal.²

FORM OF OATH TO WITNESSES.

You and each of you do solemnly swear that the testimony you shall give to the court and jury in the cause now on trial, wherein The State of — is plaintiff and A B defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God.

FORM OF AFFIRMATION.

You and each of you do solemnly affirm that the testimony you shall give to the court and jury in the case now on trial, wherein the state of — is plaintiff and A B defendant, shall be the truth, the whole truth, and nothing but the truth, and this you do under the pains and penalties of perjury.

OATH OF INTERPRETER.³

You do solemnly swear that you will faithfully and correctly interpret between the court and attorneys, and the witnesses in the case now on trial, wherein the state of — is plaintiff and A B defendant, so help you God.

¹ Bartlett v. State, 28 O. S., 673.

² Kerr v. State, 36 O. S., 615.

³ The services of an interpreter should, if possible, be dispensed with. If the witness understands what is said, although his answers may be broken and incoherent his testimony will be much more satisfactory to court, jury, and attorneys if given directly than through the medium of an interpreter, who not unfrequently is prejudiced or in sympathy with one side or the other. It will be found, too, that an interpreter is frequently asked for when there is no occasion for his appointment, because the witness is embarrassed in the presence of the court, jury and attorneys. In the use of the English language, cases of course arise where an interpreter is necessary. but the necessity should clearly exist before he is employed.

Not Disqualified as Witness.—No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon such neglect or refusal.¹

Conviction under City Ordinance.—The credibility of a witness can not be affected by showing his former conviction of an offense under a city ordinance against disorderly conduct. The conviction referred to in the statute is such, and such only, as before the enactment of this provision would have disqualified the person from testifying as a witness.²

Religious Belief.—While no person is rendered incompetent as a witness because of his religious belief, yet every person offered as a witness before testifying must take the oath or affirmation required by law.³

The Statute of Kansas contains this provision: "that the neglect or refusal of the person on trial to testify, or of the wife to testify on behalf of her husband, shall not raise any presumption of guilt, nor shall the circumstance be referred to by any attorney prosecuting the case." Under this statute, where the defendant had rested without testifying, the state introduced a witness to prove certain facts to which the defendant objected as not being proper rebuttal. The county attorney then said to the court: "We had a right to presume that the defendant would testify as a witness in his own behalf, in which case this evidence would have been proper rebuttal, and he having failed to do so we claim the right to introduce it now."

The court held that the statute is explicit, that when a

¹ Cr. Code, § 473.

² *Coble v. State*, 31 O. S., 100-102.

³ *Clinton v. State*, 33 O. S., 27.

defendant in a criminal case declines to testify in his own behalf absolute silence on the subject is enjoined on counsel in the argument on the trial, and that the courts will hold prosecuting attorneys to a strict observance of their duty in that respect;¹ yet that the incidental allusion to the court by the prosecuting attorney was not, under the circumstances, such misconduct as required the granting of a new trial.²

Friendship or Enmity of Witness.—Great latitude should be allowed on the cross-examination of a witness where it is claimed that his testimony is affected by the friendship or enmity he has toward either party in the action, and as a general rule the party against whom the witness is produced has the right to show everything which may in the slightest degree affect his credibility.³

The Admission by a Witness of Ill Feeling or prejudice against one of the parties to an action, does not preclude such party from inquiring into the degree or intensity of the hostile feeling, nor from cross-examining the witness as to the character and extent of the prejudice he may have against such party.⁴

Conviction of an Infamous Crime can not be proved by the

¹ *State v. Graham*, 17 N. W. R., 192; *Long v. State*, 56 Ind., 182; *Com. v. Scott*, 123 Mass., 239.

² *State v. Mosely*, 31 Kas., 356, 357.

³ *State v. Collins*, 33 Kas., 77. In *State v. Krum*, 32 Kas., 375, it is said: "The general rule is, that anything tending to show bias or prejudice on the part of the witness may be brought out on his cross-examination. The reason for this is, that such matters affect the credit due to the testimony of the witness, and therefore it is proper to indulge in this kind of an inquiry.

⁴ *State v. Collins*, 33 Kas., 77. The court quote with approval the language of the supreme court of Minnesota in *State v. Dee*, 14 Minn., 39, where it is said: "The object of this kind of testimony is to show bias or prejudice on the part of the witness, for the purpose of leading the jury to scrutinize and perhaps discredit the testimony. If testimony of this character is to be received, it should be received in its most effective form, so that the purpose for which it is introduced may be best accomplished. A mere vague and general statement that hostile feeling existed would possess but little force. It certainly must be proper to ask what the expression of hostility was, for the purpose of informing the jury of the *extent and nature* of the hostile feeling, so that they may determine how much allowance is to be made for it."

witness on his *voir dire*, as he is not required to answer, but the privilege is personal; he has his option.¹

Credibility of Witnesses.—The jury are to determine the degree of credit to be given to the testimony of a witness, and may disbelieve and entirely disregard such testimony.²

Where it is found impossible to reconcile and give full credit to all of the testimony, it is clearly within the province of the jury to determine what portions shall be believed and what rejected. The court may lay down the rules by which the credit of a witness may be properly tested, but the application of such rules must be left entirely to the jury.³ The jury, however, have no right arbitrarily and without cause to discredit the testimony of a witness; there must be a reason for disbelieving such testimony.⁴

Where the Evidence is Conflicting and it is impossible that all the witnesses have sworn to the truth, it is the duty of the jury to harmonize the testimony as far as possible, and where it can not be harmonized, to determine which of the witnesses is more worthy of belief.⁵ This is not to be done hastily or arbitrarily, but after a careful comparison of the testimony of the several witnesses on the point in dispute.

Wife Competent Witness.—Under a statute permitting a wife to testify in a criminal proceeding, for a crime committed by the husband against her, she is a competent witness against him.⁶

Under the provisions of the Ohio statutes, a husband and wife are competent witnesses for and against each other, ex-

¹ *People v. Herrick*, 13 John., 82.

² *U. S. v. Taylor*, 3 McCrary, 500; *Shellabarger v. Nafus*, 15 Kas., 547. In *Muscott v. Stubbs*, 24 Kas., 520, it is said, "Equally credible witnesses will often speak of a past event in a different manner, one with positiveness and assurance, and the other with doubt and hesitation; yet it does not follow that the jury must credit the former in preference to the latter, or that if they fail so to do a court is justified in setting aside the verdict as against the evidence."

³ *McCune v. Thomas*, 6 Neb., 490.

⁴ *King v. Bell*, 13 Neb., 412.

⁵ *King v. Bell*, 13 Neb., 412.

⁶ *Lord v. State*, 17 Neb., 526; *State v. Bennett*, 31 Iowa, 24; *State v. Sloan*, 55 Id., 219; *State v. Hozen*, 39 Id., 648; *Morrill v. State*, 5 Tex. Ap., 447; *Roland v. State*, 9 Id., 277.

cept as to communications between the parties, or acts done by one in the presence of the other, and not in the presence of a third party.

In Cases of Personal Injury Committed by the Husband against the Wife or the wife against the husband, the injured party is an admissible witness against the other. This was the general rule at common law,¹ and prevails in all the states where the statute has not changed the rule.

Particular Objection.—Where objection is made to the competency of a witness for a particular cause it will be presumed, unless the contrary appears, that no other ground of objection exists.²

Interest of Witness.—While it is proper for the court to call the attention of the jury to the interest that the accused has in the case, yet this must be done in such a manner as not to

¹ Whipp v. State, 34 O. S., 87. The court, after stating the general rule in civil cases, make a clear presentation of the law as follows: "At an early date, an exception, said to arise from necessity, was declared to exist in cases of personal injury to the wife, inflicted by the husband. The first reported case in which the point was adjudicated was that of Lord Audley, decided in 1631. He was accused of aiding and assisting another in the commission of a rape upon his wife; and upon the trial the question of the wife's competency to give evidence against him was submitted to the judges, who unanimously resolved, that being the party upon whom the crime was committed she was a competent witness. Excepting in a few cases at *nisi prius*, where the wife's testimony was rejected, (*Rex v. Griggs*, 1 Ld. Raym., 1,) the exception has uniformly prevailed, and is now as firmly established as the rule itself. *Rex v. Azire*, 1 Stra., 633, was a case of a simple assault by the husband upon the wife, and her testimony was admitted. Where the husband was indicted for shooting at his wife she was held a competent witness. *Roscoe's Cr. Ev.*, 125. In *Rex v. Jagger*, 1 East, P. C., 455, the husband was tried and convicted of an attempt to poison his wife, and she being admitted against him, the twelve judges, upon a point reserved, held that the evidence was properly received. *Rex v. Wasson*, 1 Crawf. & Dix, 197, was a similar case and decided the same way. In *Woodcock's case*, 1 Leach, C. C., 500, and in *Rex v. John*, 1 East, P. C., 357, the dying declarations of the wife were received against the husband upon the principle there asserted, that had she survived she would have been competent to establish the violence that resulted in death. The same principle prevails where the wife is called by the husband. In *Murphy v. Commonwealth*, 4 Allen, 491, it was held that on an indictment against the husband for an assault upon the wife she was a competent witness for him to disprove the assault."

² *Davenport v. Ogg*, 15 Kas., 363.

intimate that the witness is unworthy of belief. The court can not say, as a matter of law, that the evidence of an interested party is to be viewed with suspicion, nor as a matter of law, that relatives of one of the parties are more or less biased in favor of the accused or against the adverse party.¹

Falsus in Uno.—An instruction that “if the general character of a witness for truth is successfully impeached you are bound to disregard the whole of his testimony,” is erroneous.² The fact of perjury, even when admitted by the witness on the stand, without a legal conviction of perjury, does not render him incompetent, or necessarily and wholly unworthy of credit.³

Where a witness has made false statements, which, from their nature, might have been prompted by his consciousness of guilt, or by sinister motives, it is for the jury and not the court to say, from all the circumstances, to which motive it should be attributed.⁴

The maxim, *falsus in uno, falsus in omnibus*, is in a common law trial to be applied by the jury according to their own judgment for the ascertainment of the truth, and is not a rule of law in virtue of which the judge may withdraw the evidence from their consideration, or direct them to disregard it altogether.⁵

A Detective who, without felonious intent, enters into communication with violators of the law for the purpose of dis-

¹ Kas. P. Ry. Co. v. Little, 19 Kas., 267. There is reason to believe that this rule is frequently, unintentionally perhaps, disregarded, and that attention is called in such a manner to the interest of the accused and his immediate relatives who have testified as to destroy the effect of such evidence. Yet it may be true in every particular, and great care should be taken by the court to submit it fairly to the consideration of the jury. How can it be said that a party has had a fair trial if the court in any manner discredits his testimony or that of his witnesses. It is for the jury, not the court, to say what credence shall be given to such testimony.

² Sharp v. State, 16 O. S., 218.

³ Brown v. State, 18 O. S., 510.

⁴ Id.

⁵ Mead v. McGraw, 19 O. S., 55.

covering and exposing their crimes, and throughout acts with this intent, is not regarded in law as an accomplice.¹

The Testimony of Detectives should be received with caution and given no greater weight than the circumstances seem to entitle it to. And particularly is this true of such persons as under the guise of friendship have been able to obtain from the accused certain alleged confessions. But little credence can be placed upon the testimony of a witness who deliberately, for days or weeks, acts a false part by pretended friendship; who proffers his services and assistance, and in many cases incites the commission of crime only for the purpose of gaining the confidence of the accused and betraying him. No person of a high sense of honor or integrity will engage in such business. If confessions voluntarily made are to be received with caution, how much more should alleged confessions, made to persons who have shown their lack of principle by their conduct, be received. No conviction should be had on such testimony unless corroborated by such circumstances or other evidence as to establish the charge. And particularly is this true where the accused, in his testimony, fully and unequivocally denies the alleged confessions.

Sheriffs and Other Officers of the Court Acting as Detectives.—

Where a warrant is placed in the hands of a sheriff it is his duty to execute the same with reasonable diligence; and the same rule will apply if he is reliably informed that a felony has been committed and that some person within his bailiwick has committed the same. It is not the business of the sheriff or other officers of the court, however, to enter into any plot or to aid

¹ *Rex v. Despard*, 28 How. St. Tr., 346; *Com. v. Downing*, 4 Gray, 29; *State v. McKean*, 36 Iowa, 343. In *State v. Jansen*, 22 Kas., 498, a detective having disclosed to the police the place of an intended burglary, the proprietor of the building, a saloon, upon the direction of the police left the rear door, which was ordinarily fastened with a lock and bar, unlocked and unbarred, but closed, and at two o'clock at night the defendant, with the detective, entered through that door, the defendant lifting the latch and opening the door, and were arrested by the police and proprietor who were lying in wait. Upon the trial the court refused to instruct the jury that the lifting of the latch and opening of the door were under the circumstances no burglarious breaking, and left to the jury to say whether the proprietor consented to the entry by the defendant; and the supreme court sustained the instruction.

any scheme for the purpose of surrounding the accused with spies and informers, with a view to the procuring of testimony by confession or otherwise from him, for the purpose of securing his conviction. Leaving out of sight the questionable character of such evidence, it is apparent that a party can not have a fair trial where the officers of the court are practically in conspiracy against him, and doing all in their power to secure his conviction. Not unfrequently such testimony is sought at the behest of public clamor and to gain favor with those ever ready to believe an evil report. And where it is claimed that a confession has been obtained, its purport, in its most unfavorable phase, is spread broadcast to poison the public mind. No court, either directly or indirectly, should even tacitly permit such procedure. All public officers are required to be impartial in the performance of their duties, and any departure therefrom is cause for impeachment and removal.

Ancient English statutes forbid the sheriff to be a justice of the peace, knight of the shire, or to practice as an attorney while holding the office;¹ and in a number of the states the sheriff is prohibited from holding any other office while exercising his duties as sheriff. The evident purpose of the statutes is to prevent the sheriff from forming any associations which will interfere with the faithful and impartial discharge of his duty. It may be said that unless the officers of the court are permitted to evade and transcend the law, prosecutions will fail, in many cases, for want of evidence. The same argument may be used in favor of torture, the rack and inquisition, to force confessions that will afford a pretext for the infliction of punishment. The thousands of innocent victims from whom confessions were forced under that infamous system, is a sufficient answer to this objection.²

¹ 4 Edw. III, c. 67; 1 Rich. II, c. 11; 23 Hen. VI, c. 8; 8 Bacon, Abr., 668; Murfree on Sheriffs, § 7.

² The writer desires to call the attention of judges to the necessity of requiring the officers of the court to avoid "taking sides," or speaking, or exerting their influence in favor of or against either party to the action. The officers of the court are a part of it, and it is indispensable to the administration of justice that they shall remain impartial.

No system that has ever been devised will ferret out the guilty party in every case, but it is gratifying to know that at the present time the law for the punishment of crime is better enforced than at any previous time in our history.¹

Experts as Witnesses.—In cases involving questions of science, skill, trade and matters of that kind, persons of learning and skill in the particular department are allowed to give opinions. This rule, however, is confined mostly to cases in which, from their very nature, the facts disconnected from such opinions can not be so clearly presented to the jury as to enable them to pass upon the questions with the requisite knowledge and informed judgment.²

Thus a physician in many cases can not so explain to the jury the cause of death or other serious injury of an individual as to make the jury distinctly perceive the connection between cause and effect. He may therefore express an opinion that the wound given or the poison administered produced the death of the deceased, but in such case he must state the facts on which his opinion is founded. Where the question presented is one of fact and not a matter of science or skill, the jurors are as competent to decide as the experts, and opinions are *not admissible*.³

The Opinion of a Witness as to the Existence of Danger to Life, or Great Bodily Harm, when the defendant seeks to justify on

¹ In cases of homicide, where the testimony upon material matters in defense is conflicting, there are many acquittals, no doubt, where the verdict should be, guilty, of some of the degrees of murder. These verdicts result from the nature of the testimony, public sentiment, etc. The same may be said of verdicts of guilty, upon slight or insufficient evidence. Aside from homicide, a conviction almost invariably results where there is sufficient evidence to warrant the jury in so finding.

² *Ins. Co. v. Eshelman*, 30 O. S., 656.

³ *Jeff. Ins. Co. v. Cotheal*, 7 Wend., 72. Where the inquiry relates to a subject that does not require peculiar habits of study to enable the witness to understand it, his opinion is not admissible; as the opinion of a physician, that another physician had performed his duty to the medical profession by refusing to act with a third physician: *Rourge v. Ryan*, 23 Eng., C. L., 333; the opinion of a broker as to whether or not certain facts should have been disclosed by the insured: *Carter v. Buckner*, Burr., 1905; or an opinion to the effect of a clause in a policy of insurance: *Syers v. Bridge*, Doug., 527; *Starkie on Ev.*, 176.

the ground of self-defense, is not admissible, or that such danger might have been reasonably apprehended by the prisoner.¹

Facts Excluded.—Where the genuineness of a writing was in dispute, an expert, called as a witness, stated certain facts upon which he based his opinion, and the court withdrew the facts from the jury but refused to exclude the opinion; it was held to be error.²

Under the Statute of Kansas that “persons of skill, or experts, may be called to testify as to the genuineness of a note, bill, draft, certificate of deposit, or other writing, but three witnesses at least shall be required to prove the fact, except in case of larceny thereof, the single evidence of the president, cashier or teller of the bank purporting to have issued the same, or the maker thereof, may be received as sufficient,” it was held, that the provision requiring three witnesses “refers entirely to expert testimony.”³

Opinion, how Based.—Where the inquiry is as to the extent of certain alleged personal injuries, a physician may be called as an expert to testify concerning them, giving his opinion, based upon a personal examination of the party, as well as upon statements made by such party as to his present condition, feelings and pains.⁴

¹ *State v. Rhoads*, 29 O. S., 171. In this case the attorney for the prisoner inquired of a witness: “At the time you say you saw Samuel N. Glaze rush toward your brother [the defendant] with closed fist, in your opinion was your brother in danger of an attack from Samuel N. Glaze?” Also the following: “From your knowledge of the relative sizes of the two boys and the surrounding circumstances, when Samuel N. Glaze rushed in the manner you have stated toward your brother, in your opinion was your brother in danger of bodily harm at the hands of Samuel N. Glaze?” The trial court permitted the witness to answer each of these questions. The supreme court say: “The court below erred in allowing the opinions of the witness to be given in evidence. It was for the jury to determine whether or not the defendant was in danger from the facts and circumstances attending and surrounding the alleged assault, and not from the opinions of eye witnesses of the transaction.”

² *Koons v. State*, 36 O. S., 195.

³ *State v. Foster*, 30 Kas., 367.

⁴ *A. T. & S. F. Ry. Co. v. Frazier*, 27 Kas., 463; the court say: “It is insisted that the testimony of a physician, so far as it is expert testimony, must be based either upon personal examination or upon the facts as proved

Experts, how Selected.—Of experts as witnesses it may be said generally that they are intelligent and honest and intend to tell the truth in giving their testimony. The defect in the system, if such it may be called, is in the mode of selecting them, which, when done by the parties themselves, is about as follows: The party desiring the testimony of the expert calls upon him, states his version of the case and asks his opinion based upon such statement. Not unfrequently the sympathies or prejudices of the witness are aroused, and thus unconsciously he becomes more or less of a partisan and unable to avoid coloring his testimony in favor of the party calling him. This is often seen in trials where the experts for the defendant will deny or materially modify the statements of the experts who have testified on behalf of the plaintiff.¹

Examination of Witness—Direct Examination.—In the direct examination of a witness, it is not allowed to put to him questions which suggest the answer desired.² This rule, however, is not applied to that part of the examination which is introductory, or where the witness appears to be unwilling to give evidence, or is hostile to the party producing him, or in the interest of the adverse party.³ Questions which, embodying

before the jury, or else upon a hypothetical statement. Doubtless this proposition is correct. It is true that within what is meant by the phrase "personal examination," is properly included information derived from statements by the patient of *present* feelings and pain. In 1 Greenleaf, § 102, it is stated that "the representations by a sick person, of the nature, symptoms and effects of the malady under which he is laboring at the time, are received as original evidence." See also the case of *Bacon v. Charlton*, 7 Cush., 581, in which it is held that anything in the nature of an assertion or statement is to be carefully excluded, and the testimony confined strictly to such complaints, exclamations and expressions or groans as usually and naturally accompany and furnish evidence of a present *existing* pain or malady.⁴

¹ The ends of justice would be subserved if experts were selected by the court, persons of a high order of integrity and thorough skill in their profession alone being chosen. If this course was pursued generally expert testimony would be of greater value, and the conflict of views between those called to give an opinion upon the same state of facts would rarely occur. No one should be called who had been interviewed on behalf of either party.

² *Snyder v. Snyder*, 6 Binn., 483; *Parkin v. Moon*, 7 C. & P., 408; 1 Greenl. Ev., § 484.

³ *Clark v. Saffery, Ry. & M.*, 126; *R. v. Chapman*, 8 C. & P., 558; *R. v.*

a material fact, admit of an answer yes or no, are objectionable.¹

The inquiry, except in the case of experts, must be confined to facts within the knowledge and recollection of the witness. The witness may be permitted to refresh his memory by the use of an entry in a book, a memorandum, or the use of a written instrument, and no doubt the court may compel him to do so.²

The writing need not have been made by the witness himself, provided that after examining it he can testify to the facts from his own recollection. It is not necessary that the writing used by the witness to refresh his memory should be admissible in evidence. He may remember that the particular facts stated in the writing were considered by him to be correct, while his recollection was clear and distinct, and therefore they are recalled to his mind.³ Testimony of a witness who had forgotten the occurrence, and whose memory is refreshed by some entry, memorandum or writing, while admissible in evidence, is to be received and weighed with caution. If it relates entirely to matter contained in the instrument examined by the witness, which he at a former

Ball, Id., 745; *Bank of N. L. v. Davis*, 6 Watts & S., 285; *Towns v. Alford*, 2 Ala., 378; 1 Greenleaf, Ev., § 435. In *Moody v. Rowell*, 17 Pick., 498, it is said: "The court have no doubt that it is within the discretion of the judge at the trial, under particular circumstances, to permit a leading question to be put to one's own witness; as when he is manifestly reluctant and hostile to the interest of the party calling him; or where he has exhausted his memory without stating the particular required; where it is a proper name, or other fact which can not be significantly pointed to by a general interrogatory; or where the witness is a child of tender years, whose attention can be called to the matter required only by a pointed or leading question. So a judge may, in his discretion, prohibit certain leading questions from being put to an adversary's witness, where the witness shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to that party. The witness may have purposely concealed such bias in favor of one party, to induce the other to call him and make him his witness; or the party calling him may have been compelled to do so, to prove some single fact necessary to his case."

¹ 1 Greenl. Ev., § 434.

² *Reed v. Boardman*, 20 Pick., 441.

³ 1 Greenleaf, Ev., § 436, and case cited.

period had prepared, and therefore knew to be correct, or of a solemn instrument executed by another, which for some satisfactory reason he had previously critically examined, it is entitled to far greater weight than where the matter used by the witness to refresh his memory was such as to admit of uncertainty as to its correctness. There is great liability to mistake in this kind of testimony, from want of recollection, or rather a confused recollection, by reason of which the witness in many cases is unable to give a clear, connected and satisfactory account of the occurrence.¹

A Party's Own Witness, who has previously given one account of the matter, but when called on the trial gives another and different account, may be asked by the party in whose behalf he professedly appears if he has not made statements in regard to the matter different from those he has testified to.²

The fact that a witness is unwilling or adverse to the party calling him is to be ascertained from the nature of his testimony, the manner in which he answers questions, and by his demeanor; and unless such unwillingness or bias is shown, the court should permit the ordinary course of examination to continue.

The principal objection to leading questions is that they suggest the desired answer—what the answer expected is—so obviously that many witnesses will, to a greater or less extent, shape their answers so as to favor the party calling them. The question puts into the mouth of the witness the very answer

¹ In *Starkie on Ev.*, 177, 178, it is said: "Such evidence, though its reception is warranted by sound principles, is not in ordinary cases so strong and satisfactory as immediate testimony; for in such case the witness professing to have no recollection left as to the facts themselves, there is less opportunity for cross-examination, and fraud is more easily practiced."

A memorandum is admissible in evidence only when, after examination, the witness is unable to state the facts from memory, and where he testifies that he knew it to be correct when it was made. *Parsons v. Manf. Bank*, 82 Mass., 463; *Kelsea v. Fletcher*, 48 N. H., 282; *McKivitt v. Cone*, 30 Iowa, 455. The adverse party is entitled to an inspection of the memorandum before it is admitted, and may cross-examine the witness in regard to it. The memorandum must have been made about the time the events transpired. *Sandwell v. Sandwell*, Comb., 445; *Whitfield v. Aland*, 61 Eng. C. L., 1015.

² *Melhuish v. Collier*, 19 L. J. Q. B., 493.

he is desired to make, "thus supplying a forgetful witness with a false memory, and an artful witness with a prompt and conceited answer."¹

The court and jury can more readily arrive at the facts of a case if the witness, without prompting as to what is desired, gives his testimony in a narrative form, and not in response to questions which suggest the answer. This applies with particular force to criminal cases, where not unfrequently the witnesses are biased, to a greater or less extent, in favor of or against the accused. The court, therefore, as a means of arriving at the actual facts of a case, should require questions to be so framed as to require the witness to continue his narration of the facts without prompting. The witness, however, should not be permitted to testify to facts which are irrelevant, nor to hearsay.²

Cross-examination is said to afford one of the best securities against incomplete, false or garbled evidence. Great latitude therefore is allowed in the mode of asking questions. The rule is subject to certain limitations with reference to the direct examination and the relevancy of the questions to the matter in issue.³

¹ 3 Phillips, Ev., 894.

² While the rule prohibiting leading questions on the direct examination should be strictly enforced in every case, there are special reasons for its application in those cases where the criminal act complained of has caused the prosecuting witness to be hostile to the accused. If the accused is guilty of the offense charged there may be abundant cause for such hostility, but the fact that such hostility exists may lead an unscrupulous witness to state more than the truth, and one who intends to testify to facts unconsciously to color his testimony; hence the necessity of care in the examination.

³ 2 Phillips, Ev., 895. None of the duties of an attorney require greater care and skill than the proper cross-examination of witnesses. Indiscriminate questioning, without a purpose, is a dangerous practice, as also the asking of questions to show the ability in that regard of the examiner. Those familiar with the trial of causes well know that unskillful cross-examination, in many cases, by clearing up doubtful points in the direct examination, make manifest what was before in doubt and defeat the cause of the cross-examiner. If it is evident that the witness has told the truth, and the whole truth, a cross-examination as a rule will merely strengthen his testimony. No question should be asked without an object in view, and if the cross-examiner has no such object it will be well to waive the cross-examination.

Relevancy.—A witness can not be cross-examined as to any facts which, if admitted, would be collateral and wholly irrelevant to the matters in issue, and which would in no way affect his credit; nor can he be examined as to such facts for the purpose of contradicting him by other evidence and thus discrediting his testimony.¹

If a witness answers an irrelevant question before it is withdrawn or excluded by the court, evidence can not afterward be given to contradict the testimony on the collateral matter.² The reason for the rule is that such evidence does not relate to the case, and tends to draw away the minds of the jury from the matter at issue, and frequently to excite prejudice and mislead them. Besides, the adverse party, having no notice of such evidence, presumably would not be prepared to rebut it, and he should not be required to try as many collateral issues as could be raised in the case.³

Vindictive Expressions of the witness toward one of the parties may be shown by questions asked the witness on cross-examination.⁴ This is permitted for the purpose of showing the *animus* of the witness in order that the jury may judge of his sincerity and good faith, and give such weight and only such to his testimony as it seems to be entitled to.

Bias, Prejudice, etc.—As a general rule, any question may be asked a witness, on cross-examination, the answer to which may have a tendency to show his bias, prejudice,⁵ partiality, friendship, etc.

Contradictory Statements.—A witness may be asked whether on some previous occasion he has not made statements in conflict with the testimony he has given. The object of such inquiry is to excite doubt and distrust of the witness to the particular transaction, or to cast suspicion upon his entire testimony. To admit proof of contradictory statements, the witness, on cross-examination, must be asked as to *time, place, and*

¹ 2 Phillips, Ev., 899, 900.

² Smith v. State, 5 Neb., 181; Stokes v. People, 53 N. Y., 176.

³ 1 Greenleaf, Ev., §§ 52, 455.

⁴ 2 Phillips on Ev., 902.

⁵ State v. Krum, 32 Kas., 372; Wroe v. State, 20 O. S., 460.

person to whom the contradictory statements were made.¹ As the direct tendency of contradictory statements, made by a witness, is to impeach his veracity by contrasting his testimony with statements alleged to have been made by him out of court, the witness, before his credit is attacked upon that ground, must have an opportunity of declaring whether he ever made such statement to the person or persons named, and of explaining in the re-examination the particulars of the conversation, the circumstances under which it was made, the motives, design, etc.²

The Contradictory Statements must be Material to the issue. If the answer of the witness is of a nature that the cross-examining party would be allowed, on his part, to give it in evidence, then it is a matter in which the witness may be contradicted, and is deemed material. A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness' testimony given on the trial.³

Cross-examination as to Contents of Letter.—A party will not, on cross-examination, be allowed to represent in the statement

¹ If the witness on cross-examination admits the conversation imputed to him, there is no necessity for giving further evidence of it; but if he says that he does not recollect, that is not an admission, and evidence may be given to prove that the witness did say what is imputed, "provided the statement be relevant to the matter in issue." 2 Phillips, Ev., 960.

² 2 Phillips, Ev., 959. "The legitimate object of the proposed proof is to discredit the witness. Now the usual practice, to which we are not aware of any exception, is this—if it be intended to bring the credit of the witness into question by proof of anything that he may have said or declared touching the cause: the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. * * * If the witness denies the words or declarations imputed to him, the adverse party has an opportunity afterward of contending that the matter of the speech or declaration is such that he is not bound by the answer of the witness, but may contradict and falsify it; and if it be found to be such, his proof in contradiction will be received at the proper season." The Queen's Case, 2 Brod. & Bing., 313.

³ 2 Phillips, Ev., 970. In Stafford's case, 7 How. St. Tr., 1400, proof was admitted on behalf of the accused that one D, a witness for the prosecution, had endeavored to suborn witnesses to testify falsely in the case. This right is denied in some of the cases, but on principle such evidence would seem to be admissible. If the credit of a witness who has made contradictory statements may be impugned, a party who endeavors to establish a charge by false testimony is certainly unworthy of belief.

of a question the contents of a letter or other writing, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without first having shown the letter or other writing to the witness and asking him if he wrote it. The reason is the contents of every written instrument are to be proved by the writing itself.¹

The proper course is to ask the witness if the letter or instrument is in his handwriting. If he admits that the writing is his the cross-examiner may read the same in evidence—the whole being read. The cross-examiner, if he so desire, may show the witness only a part of a letter and ask him if he wrote such part. If he does not admit that he wrote such part he can not be cross-examined as to the contents of the instrument, but the letter or paper itself must be produced in order that the whole may be seen and examined. So if the witness admit that he wrote the letter or paper, still the witness can not be cross-examined as to its statements, but the letter or paper must be read to see if it contains such statements.²

When to be Read.—If the cross-examiner desires to found certain questions on the contents of the letter or paper, the court, on his suggestion, may permit the letter to be read when identified by the witness. The letter will then be considered as part of the evidence of the cross-examining attorney and subject to all the consequences of his having it so considered.³

Where the Writing is Lost, proof of the loss should be given and then the witness may be cross-examined as to the contents of the writing. He may then be contradicted by secondary evidence of its contents. Where this procedure is likely to occasion inconvenience, by disturbing the regular progress of

¹ Demont's case, 2 B. & B., 286.

² DeSailly v. Morgan, 2 B. & B., 286; 2 Phillips, Ev., 964; 1 Greenleaf, Ev., § 463.

³ The Queen's case, 2 Brod. & Bing., 289, 290; 2 Phillips, Ev., 964; 1 Greenleaf, Ev., § 433.

the trial, the judge may, if he see fit, postpone the examination on this point to a later stage of the trial.¹

Re-examination.—After a witness has been cross-examined in regard to a former statement made by him, the party calling him may re-examine him upon the same matter. On such re-examination the witness may be asked any question which may be proper to explain the testimony given by him on cross-examination, his motives by which he was induced to use such expressions, etc., but he will not be permitted to testify to new matter which does not tend to explain either the statements or the motives of the witness.²

Re-examination where Facts were not Admissible.—If a witness is cross-examined upon facts which were not admissible in evidence, the other party may re-examine him on the evidence so given.³

An adverse witness will not be permitted to testify to irrelevant matter in answer to a question not relating to it; if he do, the other party may either have the answer stricken out, or may cross-examine the witness upon it.⁴

Right of Party Calling Witness to Disprove his Statements.—If a witness, from mistake, ignorance or design, testifies unfavora-

¹ 1 Greenleaf, Ev., § 464; 2 Phillips, Ev., 964-966.

² 1 Greenleaf, Ev., § 467; 2 Phillips, Ev., 973; *F. & M. Bank v. Young*, 36 Iowa, 44. A witness who has been fully examined in chief and cross-examined, may be re-examined to explain the sense and meaning of any expression used in cross-examination; but he can not be examined concerning new matter not referred to in the cross-examination, as to which he might have been examined in chief. Any relaxation of the rule is but an exercise of discretion and reviewable. *Holtz v. Dick*, 42 O. S., 24. In *Queen Caroline's case*, 2 B. & B., 284-294, Abbott, Ch. J., stated the rule as follows: "Counsel has a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also the motive by which the witness was induced to use the expressions; but I think he has no right to go further and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness."

³ 2 Phillips, Ev., 973; *Blewett v. Legonning*, 3 Ad. & El., 554.

⁴ *Blewett v. Legonning*, 3 Ad. & El., 554-584. It is error to permit the state to prove by cross-examination of a witness, called by the defendant, that the accused stands indicted for other offenses. *Hamilton v. State*, 34 O. S., 83. The impeachment of the credit of a witness by showing that he

bly to the party calling him, such party is not restrained from calling other witnesses to prove facts different from those testified to by the witness. That is, a party may prove the facts as they actually exist without regard to the testimony of one or more of his witnesses, although such contradictory testimony may have the effect, indirectly, to impeach one or more of the witnesses called by him.¹ The impeachment of the credit of the witnesses contradicted is incidental and consequential only, the other witnesses not being called directly to discredit them.²

A Party can not Discredit his own Witness by General Evidence, because that would enable him to destroy the witness if he spoke against him. That is, a party after producing a witness can not prove him to be of such general bad character as to be unworthy of belief.³ There are some exceptions to this rule where the witness is not one of the party's own selection but one that the law requires him to call, as the subscribing witness to a will, deed, etc. In such case, as the party does not call the witness from choice but necessity, it is held that his character for truth may be generally impeached.⁴

Questions Degrading to Character.—Where a question is not relevant to the matters in issue, but the answer to it has a direct tendency to degrade the character of the witness,

has made statements, at other times, contradictory of his testimony given on the trial, does not lay the foundation for sustaining him by proof of his reputation for truth. *Webb v. State*, 29 O. S., 361. There is a conflict in the authorities on this question, the majority, however, supporting the above proposition.

¹ *Lawrence v. Barker*, 5 Wend., 301; *Jackson v. Leek*, 12 Id., 105; 2 *Evans' Pothier*, 206; *Roberts v. Gee*, 15 Barb., 449.

² The contradictory statement, introduced by adverse proof, has not necessarily the effect of overturning the whole of the former witness' testimony, as it would be very unjust to reject all of such testimony because another witness had set him right as to a single fact. No part of the evidence is to be stricken out for the reason that it is contradictory, but the whole is to be submitted to the consideration of the jury, who may believe and adopt a part, or disbelieve and reject the whole. 2 *Phillips, Ev.*, 984.

³ 1 *Bull., N. P.*, 297; *Ewer v. Ambrose*, 3 B. & C., 746; *Stockton v. Demuth*, 7 Watts, 89.

⁴ 1 *Greenleaf, Ev.*, § 443, and cases cited.

though it may not subject him to a criminal prosecution, he will not be compelled to answer.¹

The Cases may be Divided into Several Classes, as, first, where it appears that the answer will tend to expose the witness to a criminal charge, any kind of punishment or a penal liability. In such case he may claim the protection of the law at any stage of the investigation, whether he has already answered a part of the inquiry or not.² And if the subject of the inquiry forms but a single link in the chain of testimony which would show his guilt, he is protected, and it is the duty of the court to instruct him as to the effect of an answer to the inquiry.³

Second.—Where the answer of the witness will subject him to a forfeiture of his estate, as well as, in case of exposure, to a penalty or criminal prosecution, he will not be compelled to answer.⁴ Mere pecuniary liabilities probably are not sufficient to exempt him from answering in this country.

Third.—Where the answer has a direct tendency to degrade the character of the witness. Upon this point there is a direct conflict in the authorities. In some of the cases a distinction is made where the testimony is relevant and material to the issue, and where it is not strictly relevant, but is collateral, and is asked only under the latitude permitted on cross-examination. In the former cases it is held, that where the transaction about which the witness is interrogated forms

¹ 2 Phillips, Ev., 939; Republica v. Gibbs, 3 Yeates, 429; Jackson v. Humphrey, 1 John., 498; Smith v. Castle, 1 Gray, 108; People v. Gay, 3 Seld., 878; Pleasant v. State, 18 Ark., 960. Phillips states the common law rule to be, that if the transaction to which the witness is interrogated form any part of the issue, he will be obliged to give evidence, however strongly it may reflect on his character. 2 Phil. Ev. (4 Am. Ed.), 939, 940. This rule certainly is very much restricted in this country under constitutional provisions of a number of the states, "that no person shall be compelled in any criminal case to give evidence against himself."

² Southard v. Rexford, 6 Cow., 254; Paxton v. Douglass, 19 Ves., 225; Rex v. Pegler, 5 C. & P., 521; Dodd v. Norris, 3 Camp., 519; 1 Greenleaf, Ev., § 451. A different rule seems to prevail in Connecticut, where it has been held that if a witness disclose part of a criminal transaction in which he was concerned without claiming his privilege, he must testify as to the whole. Coburn v. Odell, 10 Fost., 540; Norfolk v. Gaylord, 28 Conn., 309. It is evident that those cases go beyond the law.

³ Close v. Olney, 1 Denio, 319; 1 Greenleaf, Ev., § 451.

⁴ 1 Greenleaf, Ev., § 453, and authorities cited.

part of the issue to be tried, the witness may be compelled to give evidence in regard to it.¹

Where the question is not material to the issue, but collateral and irrelevant, all the cases agree that the witness will not be compelled to answer. But it is said that the rule is different if the answer which the witness may give will not certainly and directly show his infamy, but only tend to disgrace him.²

It is doubtful if the law can be refined in this manner so as entirely to remove the protection of the statute and compel a party to furnish proof of his own guilt. The better rule seems to be, that a witness will not be compelled to answer in any case where the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy.

Former Conviction.—At common law a witness could not be compelled to answer any question which involved the fact of a previous conviction. In *R. v. Lewis*,³ the prosecuting witness was asked, on cross-examination, whether he had not been in the house of correction. Ellenborough, Ch. J., interposed, and said the question should not be asked, and referred to the rule laid down by Treby, Ch., J., in *Friend's case*,⁴ that a witness is not bound to answer any question the object of which

¹ 1 Greenleaf, Ev., § 454, and cases cited. Although the rule above stated is sustained by 2 Phillips, Ev., 946, and 1 Greenleaf, Ev., § 454, yet but few cases will be found in this country to sustain it. The case of *People v. Mather*, 4 Wend., 232, which is relied upon to sustain the proposition "that a witness can not be compelled to answer a question that criminate or has a tendency to criminate himself, means that he is not required to answer a question if by so doing he must disclose what will show, or has a tendency to show, that he is guilty of a crime for which he is yet liable to be punished" (page 254), it is believed is an incorrect statement of the law.

² 1 Greenleaf, Ev., §§ 455, 456. In *Rex v. Slaney*, 5 Carr. & Payne, 213, on the trial of an indictment for libel, the prosecution called the defendant's clerk and asked him if he wrote it. Tenterdon, Ch. J.: "He is not bound to answer." The question was then asked, "Do you know who wrote it?" The Ch. J.: "He must answer that." Answer: "I do." Counsel: "Name the person." The Ch. J.: "He is not bound to do that, because it may be himself; you not only can not compel a witness to answer that which will criminate him, but that which tends to criminate him."

³ 4 Esp., 225.

⁴ 11 How. St. Tr., 1331.

is to degrade or render him infamous. In *Coble v. State*,¹ a witness was asked, on cross-examination, "How many times have you been arrested?" The court held, that although the question was admissible on cross-examination; yet that the witness might decline to answer; but if he did answer the state would be bound by it. The rule seems to be, that while a question may be asked a witness as to his previous conviction of a crime, he may refuse to answer the question, in which case the only proof of the fact will be the record itself with proof of identity of the person. If he answers the question the state is bound by the answer.²

Where the Answer will Subject the Party to a Civil Action.—A witness can not refuse to answer a question relevant to the matter in issue on the ground that his answer might subject him to a civil action.³ In England, as the rule was sustained by a divided court, a statute was passed declaring that mere liability to a civil action would not justify a witness in refusing to answer a proper question.⁴ In this country this act is considered as merely declaratory of the common law, and the witness is required to answer. In some of the cases a distinction seems to be made in favor of a person interested in the cause as a party, though his name does not appear on the record. In such case it has been held that he will not be compelled to testify as a witness, nor disclose anything against his own in-

¹ 31 O. S., 102.

² 2 Phillips, Ev., 950-954. While evidence can not be given to prove an infamous crime against a witness, of which he has not been convicted, for the purpose of impeaching his credit, yet where the question as to whether the witness is guilty of such crime becomes the legitimate subject of inquiry on such trial, his reputation for truth may be proved, to rebut the imputation of guilt which the evidence makes against him. *Webb v. State*, 29 O. S., 351.

³ 2 Phillips, Ev., 937. Considerable doubt seems to have been entertained on this point in England, and the matter was referred to the court of last resort for an opinion. Four of the judges, Mansfield, Ch. J., Gross, Rooks and Thompson, JJ., were of the opinion that the witness was not compelled to answer, but the other judges, together with the chancellor and Lord Eldon, were of the opinion that a mere civil liability was no excuse. Phillips, Ev., 937, 938; Parl. Deb., Vol. 6, pp. 234-245; eight judges and the chancellor being of the opinion that civil liability was no excuse.

⁴ 46 Geo. III, c. 37; 2 Phillips, Ev. 937.

terest.¹ Whatever technical ground there may have been for this distinction under the common law rule that a party could not be permitted to testify in a case in which he was interested, it is swept away by the statutory provision that no person shall be disqualified as a witness by reason of his interest in the event. The general rule, therefore, is, that mere liability to a civil action will not excuse a witness from answering a pertinent question.²

Effect of Refusal to Answer.—There is no inference of law against a witness who refuses to answer a question which imputes discredit to him. In one case, where a witness had been asked if he had not been convicted of forging coal-meters' certificates, *Ellenborough*, Ch. J., told him that he need not answer, and afterward instructed the jury that the witness having availed himself of his privilege was not thereby discredited.³ And in another case where a witness refused to say whether he had published a certain libel, *Brougham* was proceeding to argue to the jury that he was therefore guilty, but *Abbott*, Ch. J., interposed and said that no such inference ought to be drawn; that there would be an end to the protection of the witness if a demurrer to the question could be taken as an admission of the fact inquired into.⁴

Answer Conclusive.—As heretofore stated, the answer of a witness to a question, the tendency of which is to degrade his character, is conclusive upon the party making the inquiry.

¹ *1 Greenleaf, Ev.*, § 452; *Mauran v. Lamb*, 7 Cow., 174; *Rex v. Woburn*, 10 East, 395; An examination of the case of *Mauran v. Lamb* will show that the decision is based on *Title v. Grevett*, 2 Ld. Raym., 1008, and *Appleton v. Boyd*, 7 Mass., 131, and that the distinction can not be sustained on principle.

² See note to *Mauran v. Lamb*, 7 Cowen (3 Ed.), 179, where the authorities are collected which sustain the text.

³ *Millman v. Tucker*, Peake Add. Cas., 222.

⁴ *Rose v. Bakemore*, 1 Ry. & Mood., N. P., 382; 2 *Phillips, Ev.*, 948. A different rule seems to have been adopted in North Carolina, where a question was asked a witness if he had not been convicted and punished for an infamous crime, which he refused to answer. It was held that his refusal might be insisted upon to the jury in support of the inference that he was unworthy of credit. *State v. Garrett*, Busbee, 357. *Starkie* states the effect of refusal in the same way. 1 *Stark. Ev.*, 144; but his views were overruled by the authorities cited.

The reason is, the party is calling upon the witness under the sanction of an oath to answer an inquiry which the law does not impose on him the duty of answering, and the court will not try a collateral question relating to the witness' alleged crime.¹

It is the Witness' Privilege to Object to a question the answer to which would tend to degrade his character. The party against whom he is called can not object to his giving evidence which tends to criminate himself.² The rule seems to be, that if the witness choose to answer any question, the answer to which is intended to degrade him, he may do so, and the answer will be received in evidence.³ In *Southard v. Rexford*,⁴ it is said: "The witness was not bound to answer the question so far as the answer would criminate himself, and it was the duty of the court to apprise him of his right in that respect. But if a witness, under such circumstances, thinks proper to waive his privilege, I do not understand it to be either the duty or the right of the court to force it upon him, and to deprive the party of the benefit of such disclosures as he may voluntarily make; it is a personal privilege only.

* * * No man shall be *compelled* to criminate himself, but if, from a sense of justice or any other consideration, he is willing to make disclosures which involve his own character, and may expose him to punishment, I know of no reason either of law or policy which should prevent him."

¹ In *Watson's case*, 32 St. Tr., 490, 2 Phillips, Ev., 950, Ellenborough, Ch. J., said: "You may ask the witness whether he has been guilty of such a crime, * but if, from a desire to exculpate himself from the imputation of crime, he gives an answer, it has been held by many of our judges, and I never knew it ruled to the contrary, that having put such question you must be bound by the answer."

There is an exception to the rule, where a witness, on his cross-examination, denies some fact relating to *his conduct* in that case, such as an attempt to suborn a witness. *Morgan v. Frees*, 15 Barb., 352; *Stafford's case*, 7 How. St. Tr., 1400; or to induce a witness to absent himself from the trial. *Atwood v. Welton*, 7 Conn., 66-72.

² *Com. v. Shaw*, 4 Cush., 594.

³ *Southard v. Rexford*, 6 Cowen, 254-260; *Torre v. Summers*, 2 Nott & McCord, 267; *Treat v. Browning*, 4 Conn., 408-9; *U. S. v. Craig*, 4 Wash. C. C., 729.

⁴ 6 Cowen, 259.

Who is to Determine Whether an Answer to the Question will Degrade.—There is some confusion in the decisions on this point which may, perhaps, be removed by classifying the cases. Thus, where a question is asked, a direct answer to which will probably furnish evidence against the witness, it is the duty of the court to apprise the witness of his rights and inform him that he will not be required to answer;¹ so if the court understands the situation of the witness. The purport of the criminating answer, however, may not be apparent to the court from the question, hence it can not determine that the witness need not answer, and in most cases the court will not be familiar with the situation of the witness. In such cases the witness himself must judge what his answer will be, and if he say, on oath, that he can not answer without accusing himself, he can not be compelled to answer. That is, that inasmuch as it is impossible for the court thoroughly to understand the situation of the witness, or to comprehend the bearing which his testimony may have on his past actions and conduct, the witness must necessarily be himself the judge of the effect of such testimony.² If the refusal of the witness be willful and the excuse false he will be liable.³

Impeaching by Proof of General Character.—Where it is sought to impeach the general character of a witness, the ordinary mode of procedure is to ask the impeaching witness if he knows the general reputation of the witness whom it is sought to impeach, for truth, among his neighbors. If the witness answer that he does not know what his general reputation is in that regard, no further inquiry can be made of him on that point. If he answer in the affirmative, he may be asked the further question as to what that reputation is; whether good or bad. In the English courts the further inquiry is permitted whether the witness would believe the person upon oath.⁴ This course is pursued to a considerable extent in this country, although there are objections to it as calling for an opinion of the witness upon a matter in respect to which he has no spe-

¹ Southard v. Rexford, 6 Cow., 254.

² Warner v. Lucas, 10 Ohio, 337.

³ Id.

⁴ 1 Greenleaf, Ev., § 461.

cial skill, and in which he may easily be mistaken. The witness may be cross-examined as to his means of knowledge, and the grounds on which he bases his opinion. The evidence is to be confined to the general reputation of the witness among his neighbors, and ordinarily the witness should himself come from the vicinity of the person whose character is drawn in question.¹ The party whose witness is attacked may attack the general character of the impeaching witnesses, and by new evidence support the character of his own.²

Where a witness testifies that he is acquainted with the general reputation of the witness in the neighborhood where he resides, and that he has never heard his reputation for truth called in question, this is evidence that his character is good.³ Such evidence is generally more satisfactory than that which shows that the character of the witness has been discussed. If no question has been raised as to the character of the witness for truth, it is safe to presume that there was no cause for reflections upon his character.⁴ The court should insist upon the observance of the rule that the impeaching witnesses shall know the *general* reputation of the person sought to be impeached before they are permitted to testify what that reputation is. In many cases it will be found that their alleged knowledge is based on dislike, or from hearing one or two persons speak on the subject.

Jury may View Place.—Whenever, in the opinion of the court, it is proper for the jury to have a view of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of the sheriff, to the place,

¹ 1 Greenleaf, Ev., § 461; *Matthewson v. Burr*, 6 Neb., 312.

² 1 Greenleaf, Ev., § 461. In *Bunnell v. Butler*, 23 Conn., 65, the court held that limiting the number of impeaching witnesses to six on a side was not erroneous. In such cases the court should give the parties notice beforehand of such intended limitation.

³ *State v. Lee*, 22 Minn., 407; *Matthewson v. Burr*, 6 Neb., 317; *Fisk v. State*, 9 Id., 66.

⁴ Unless the witness be of evil fame and entirely unreliable, an attempt to impeach him by proof of his bad reputation may be found a hazardous experiment, as a failure in that regard not unfrequently has the appearance of persecution, and excites sympathy in the minds of the jury, the effect of which is anything but favorable to the party attempting the impeachment.

which shall be shown to them by some person appointed by the court. While the jury are thus absent, no person other than the sheriff having them in charge, and the person appointed to show them the place, shall speak to them on any subject connected with the trial.¹

ORDER FOR JURY TO VIEW PLACE.

Title of Cause.

In the opinion of the court, it being proper for the jury to have a view of the place in which [any material fact] occurred, it is hereby ordered that the jury be conducted in a body, under the charge of the sheriff, to the place, which shall be shown to them by G H, who is hereby appointed for that purpose. It is further ordered that they return into court at — o'clock —. M.

Order of Introducing Proof.—The statute prescribes the order of the introduction of evidence, but it also provides that the court may for good and sufficient reasons, in furtherance of justice, permit evidence to be given out of the prescribed order. Any departure from the regular order is presumed to be correct, and will not be regarded as erroneous unless the record affirmatively shows that there were no sufficient reasons for such departure.²

The rule prescribed in the criminal code on the subject of the order of the evidence, although directory merely, should be observed in all criminal trials; but if the court permits evidence in chief to be given on the part of the state on cross-examination of the witnesses of the prisoner, the judgment will not be reversed on that ground unless it appears that there

¹ Cr. Code, § 479. In a great majority of the cases, it has been held that the jury may view the place where the crime is alleged to have been committed, in the absence of the prisoner; that the view is not the receiving of evidence in the absence of the accused. On principle it would seem that every fact placed before the jury, from which they were to find the accused guilty or not guilty, was evidence, and that the accused was entitled to be present when it was received. The view of the place in many cases is a material circumstance that may determine the finding, and it should be confined to the actual locality covered by the order of the court.

² Webb v. State, 29 O. S., 356.

has been such an abuse of discretion as to have deprived the prisoner of a fair trial.¹

During the progress of a trial, the question whether evidence will be admitted out of time is addressed to the sound discretion of the court, and where there is no abuse of that power the mere irregularity of the admission will not justify a reversal.²

The court may permit a criminal case to be opened during the closing argument for the defense, and permit the state to prove the county and state in which the alleged offense was committed;³ and it may in its discretion delay or refuse to delay the proceedings to enable the defendant to bring in additional testimony.⁴

Proof Required.—At common law it is necessary for the prosecution to prove every statement which enters into the substance of the charge, but it is unnecessary to prove averments which, without being repugnant, are merely formal and superfluous. If the averment is material, that is, if it is connected with the charge, it must be proved. In general the state must prove that the offense was committed in the county where the venue is laid, but the particular ville, time, number, quantity and value need never be accurately proved unless they enter into or are descriptive of the offense.⁵

Where an indictment charges that the defendant did and

¹ *Adams v. State*, 25 O. S., 586, citing *Evans v. State*, 24 O. S., 458; *Rea v. Missouri*, 17 Wall., 532.

² *Bean v. Green*, 33 O. S., 444.

³ *State v. Teissedre*, 30 Kas., 477.

⁴ *State v. Furbeck*, 29 Kas., 532.

⁵ 1 Chitty, Cr. Law, 557, 558. "The distinction between material and immaterial averments is perfectly well settled in criminal as well as in civil cases; and if the averment be material, that is, if it be connected with the charge, it must be proved; but if it be wholly superfluous it may be thrown out of the question. The prosecutor must in general be prepared to show that the offense was committed in the county where the venue is laid, and it will not lie upon the defendant to disprove that circumstance; but we have seen that the particular ville, time, number, quantity and value need never be accurately proved except where they enter into the color and essence of the offense."

censed to be done a particular act, it is enough to prove either.¹

There are some cases where it is unnecessary that the proof should entirely correspond with the allegations in the accusation. Thus, an indictment for murder by poisoning with one kind of poison, may be supported by proof of another kind of poison. So an indictment for killing with a sword will be supported by proof of killing with a staff or gun, but an indictment for killing with poison will not be supported by proof of killing by stabbing.²

If A, B and C be charged with the murder of D, and it is laid in the indictment that A gave the stroke, and that B and C were present aiding and abetting, yet if the evidence shows that B alone gave the stroke, and that A and C were present, this will maintain the indictment, for they are all principals.³ A mere superfluous allegation, however, need not be proved, although it be stated on the face of the proceedings.⁴

The rule is, that whatever need not have been stated need not be proved, as it is unnecessary that the evidence in that regard should exactly correspond with the indictment.⁵

Degree of Proof.—The common law did not, according to the better opinions, require any particular number of witnesses or weight of other proof to convict a person of a particular offense, but seems to have left it altogether dependent upon a variety of circumstances too diversified and subtle to be specifically defined.⁶

¹ 1 Chitty, Cr. Law, 558.

² 1 Chitty, Cr. Law, 558, 559; 2 Hale, P. C., 291.

³ 1 Chitty, Cr. Law, 559; 2 Hale, P. C., 559.

⁴ 1 Chitty, Cr. Law, 559; 2 Leach, 594.

⁵ 1 Chitty, Cr. Law, 559.

⁶ 1 Chitty, Cr. Law, 559, citing Carth., 144; Fost., 223; 2 Hawk., c. 25, § 129; Bac. Abr., Ev. C. Blackstone says: "In almost every other accusation (except treason) one positive witness is sufficient. Baron Montesquieu lays it down for a rule, that those laws which condemn a man to death in *any case*, on the deposition of a single witness, are fatal to liberty; and he adds this reason, that the witness who affirms and the accused who denies make an equal balance; there is necessity, therefore, to call in a third man to incline the scale. But this seems to be carrying matters too far; for there are some crimes in which the very privacy of their nature excludes the possibility of having more than one witness. 4 Com., 357-8.

There seems to have been no general, well defined rule as to the degree of proof required prior to the present century. And even now there are but few cases that determine, except in treason and perjury, the number of witnesses necessary to justify a conviction. There is a tendency in the courts, however, to hold that each necessary link in the chain of circumstances shall be proved by testimony at least equal to that of a single witness, and it is difficult to perceive how a jury can say that the guilt of the accused is established beyond a reasonable doubt upon less evidence than that. The argument that if this degree of proof is required some will escape unpunished, is not entitled to any weight, because there is no certainty, where less evidence than would equal that of a single witness is required to convict, that the guilty will be punished, but rather those who are strongly suspected, however innocent they may be, will frequently be punished. A jury must necessarily determine the guilt or innocence of the party on trial from the evidence, and that must reach such degree of certainty as to exclude reasonable doubt. No material link in the chain of circumstances therefore can be supplied by presumption or conjecture.

Corpus Delicti.—That the offense alleged has been committed by some one must be proved. As stated by that eminent jurist, Ch. J. Shaw, "The evidence must establish the *corpus delicti*, as it is termed, or the offense committed as charged."¹ And even in cases of confession the fact should be proved independently of the confession, the confession being used for the purpose of connecting the defendant with the offense.²

It Devolves on the State to Prove the Affirmative of the Issue, the guilt of the accused—and not on him to establish his innocence. All the presumptions of law independent of evidence are in favor of innocence; and every person may rely on the presumption of innocence until he is proved guilty.³

Knowledge.—In certain cases, however, where knowledge of

¹ *Com. v. Webster*, 5 Cush., 319.

² *Dodge v. People*, 4 Neb., 231; *Cooley, Const. Lim.*, 315; *Stringfellow v. State*, 26 Miss., 157; *People v. Hennessey*, 15 Wend., 147; 1 *Greenleaf, Ev.*, 217.

³ 1 *Chitty, Cr. L.*, 564; *Com. v. Webster*, 5 Cushing, 320.

the defendant of the nature of his conduct is the point in issue, as where he is charged with uttering a forged instrument, knowing it to be forged, evidence of his having committed a series of acts of the same description may be received as presumptive evidence of knowledge.¹

So on a charge for knowingly passing counterfeit money, it may be shown that the prisoner had other money of the same kind in his possession and had transferred it to other persons, as presumptive evidence that he knew the money was counterfeit.²

The best Evidence must be Given of which the Nature of the Case will Permit.—That is, that no proof can be admitted which, from its very nature, shows that the party offering it has it in his power to adduce better evidence if he thought proper to do so. The rule excludes evidence which is merely substitutionary in its character, when the original is in the possession of the party, or can be procured. Therefore, a copy of a deed or other writing will not be received when it is in the power of the party to produce the original. So parol evidence will not be received of the contents of any writing, which it is in the power of the party offering it to produce. If however it be proved that the original has been lost or destroyed, evidence of its contents may be received.³

The general effect of the rule requiring the best evidence is to prevent fraud and to induce parties to bring before the jury the kind of evidence which is least calculated to mislead them. In general, the rule goes no further than to prohibit evidence which is merely substitutionary, when direct and conclusive evidence may be had.⁴ Therefore, wherever written evidence exists of the facts sought to be proved by parol, it must be produced if within the power of the party.

If, however, the distinction of written and unwritten or circumstantial and direct evidence does not exist between that which is offered and that withheld, either will be admissi-

¹ 1 Chitty, Cr. L., 464; *Bainbridge v. State*, 30 O. S., 269.

² 1 Chitty, Cr. Law, 564.

³ 1 Chitty, Cr. L., 566, 567; 1 Greenleaf, Ev., § 82; 1 Phillips, Ev., 565, 572.

⁴ *Com. v. James*, 1 Pick., 375.

ble, though less satisfactory than some other which the party had in his power to introduce.¹ The evidence to be excluded is that which, from the nature of the case, supposes evidence of a superior quality or grade to be in the power of the party offering it.

Where there is no Substitution of evidence, but merely a selection of weaker for stronger proof, or a failure to supply all the evidence capable of being produced, the rule is not violated. Thus, if a deed or will is attested by several subscribing witnesses, all of them need not be called to prove its execution, one being sufficient. So to prove handwriting it is not necessary to call the supposed writer.²

Negative Averments—Proof of.—As a general rule, where the indictment contains a negative averment, some proof must be given to sustain it where the ground of action rests upon such negative allegation, or where the statute in describing the offense contains such negative matter, and where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise.³ An exception to the rule seems to prevail in some cases where a penalty is imposed for doing an act which the law does not permit except by those duly licensed, as for selling liquor, etc.⁴

In Kansas, under a statute requiring a permit to sell intoxicating liquor, it was held that no material averment in an information which is denied by the defendant is taken as true, but must be proved in some manner by the prosecution.⁵

Facts Legally Presumed are, until rebutted, as effectual as

¹ Daggett, J., in *Barnum v. Barnum*, 9 Conn., 242-249; *Ainsworth v. Greenlee*, 1 Hawks., 190; *Govenor v. Roberts*, 2 Hawks., 26, and note; 1 Phillips, Ev., 570.

² 1 Phillips, Ev., 571; *R. v. Hurley*, 2 Mo. & R., 478.

³ *Cheadle v. State*, 4 O. S., 478-9, citing 1 Greenleaf, Ev., §§ 78-80; 3 East, 192; 3 Bos. & Pul., 302; 19 J. R., 345; 2 Cowp., 654; 2 Pick., 139.

⁴ *Cheadle v. State*, 4 O. S., 479.

⁵ *State v. Schweiter*, 27 Kas., 518. In this case the probate judge, whose duty it was to issue the permit, testified orally that he had been judge for five or six years, that he knew the defendant, and that he had never issued a permit to him. The court held that this was sufficient *prima facie*. As to proof of advice of physicians in case of abortion, see *Moody v. State*, 17 O. S., 110.

facts proved. And where a party claims to control the legal effect of facts by the alleged existence of other facts, the burden is on him to show a preponderance of evidence in favor of the existence of the latter. Facts which are neither proved, nor to be presumed, are for judicial purposes regarded as not existing.¹

The legal presumption of innocence can be overcome only by full proof, such as will exclude all reasonable doubt of the guilt of the accused. And the reason of the rule makes it applicable to all criminal cases.²

Presumption of Puberty in Male.—While the law presumes the incapacity of a male person, under fourteen years of age, to commit the crime of rape, still if the evidence in the case repels this presumption, the jury, in a proper case, may be justified in finding that he had in fact arrived at the age of physical puberty.³

Presumption of Non-consent.—The law presumes that a female child under the age of ten years is incapable of consenting to criminal intercourse, or to an assault with intent to commit the act, but this may be overcome by proof to the contrary.⁴

Sex Presumed from Name.—Where a complaint for an assault with intent to commit a rape did not state in terms that the person named was a “female child or woman,” yet from the name of the person assaulted, stated in the complaint, and the

¹ *Silvus v. State*, 22 O. S., 101.

² *Fuller v. State*, 12 O. S., 433; *Horne v. State*, 1 Kas., 42.

³ *Williams v. State*, 14 Ohio, 222.

⁴ *O'Meara v. State*, 17 O. S., 516. In *Stephens v. State*, 34 Alb. L. J., 228, the supreme court of Indiana held, that under an indictment for an assault with intent to commit a rape upon a female child under twelve years of age, the prosecution must prove both the intention and an assault; if in pursuance of that intention, and after certain familiarities consented to by the girl, the attempt is abandoned on her refusal to allow the intercourse, there can be no conviction. It appears from the opinion in the case that there is no statute in Indiana making it no defense to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that she consented to the act of indecency. Preponderance of evidence is all that is required to rebut the presumption. *O'Meara v. State*, 17 O. S., 515.

use of the pronoun, "her," the sex was presumed and therefore the complaint was not void.¹

Presumption from Use of Weapon.—Where one person assails another violently, with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that he intended death or other bodily harm; and as there can be no presumption of any proper motive or legal excuse for such an act, the consequence follows that in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice. If, however, death, though willfully intended, was inflicted immediately after provocation given by the deceased, supposing that such provocation consisted of a blow or an assault, or other provocation on his part, which the law deems adequate to excite sudden and angry passion, and create heat of blood, this fact rebuts the presumption of malice; but still, the homicide being unlawful, because a man is bound to curb his passions, is criminal, and is manslaughter.²

Instructions.—It is ordinarily sufficient if the court, in its charge to the jury, state once fully and clearly the general propositions of law applicable to the case, such as those concerning reasonable doubt and the presumption of innocence; and it is seldom error if it fails to restate those propositions in connection with any separate and special phase of the case.³

The court can not be called upon to charge the jury upon abstract propositions, but only those arising upon the evidence. But to refuse to give such instructions as properly arise in the case is error.⁴

The court may properly refuse to give the jury a specific instruction, which, though correct under a different state of facts, requires essential modification to prevent it from misleading the jury and excluding from their consideration the particular and material facts and circumstances of the case.⁵

A judgment will not be reversed, however, for a misdirec-

¹ *Tillson v. State*, 29 Kas., 452.

² *Com. v. Webster*, 5 Cush., 305.

³ *State v. Kearley*, 26 Kas., 77; *Caw v. People*, 3 Neb., 369.

⁴ *Lewis v. State*, 4 Ohio, 397.

⁵ *Callahan v. State*, 21 O. S., 306.

tion of the court on an abstract proposition of law that could not arise from the testimony, or influence the decision of the jury.¹

It is not error for the court to refuse to give its opinion on the weight of testimony, nor to refuse to exclude from the jury evidence tending to prove the issue, but which is insufficient for that purpose.²

Where the defendant is shown to have made false statements, which, from their nature, might have been prompted either by his guilt of the crime charged, or by other sinister motives, it is not error for the court to refuse to instruct the jury to which motive they should rather attribute it, but leave the question of motive to them.³

It is not error for the court, in charging the jury, to recite what is claimed by the parties to be proved, where this is fairly done, for the purpose only of a proper explanation of the law applicable to the case.⁴ It is a dangerous practice, however, from the liability to affect the minds of the jurors.

It is not error for the court to refuse to give to the jury, in its charge, a true and pertinent proposition of law asked by counsel, provided it appears from the whole charge that the court fairly and fully stated the law applicable to the case, although in a different form and language.⁵

It is not error in the court, while charging the jury, to repeat to them the statement of a witness, and to inform them, where such is the fact, that the counsel on both sides *admit the truth* of the statement.⁶ Care must be taken, however, not to give the admitted proposition undue weight. It is unsafe as a general rule, and often calculated to mislead, to adopt a charge prepared for a particular case, and give it as a rule of law to guide juries in weighing evidence in other cases dissimilar in their circumstances.⁷

¹ *Stewart v. State*, 1 O. S., 66.

² *Hummel v. State*, 17 O. S., 628.

³ *Brown v. State*, 18 O. S., 497.

⁴ *Mimms v. State*, 16 O. S., 222.

⁵ *Bond v. State*, 23 O. S., 349.

⁶ *Id.*

⁷ *Harrington v. State*, 19 O. S., 268. The court below had instructed the jury in regard to proof of good character as follows: "But in higher crimes

Weight to be Given to Proof of Character.—The charge of Ch. J. Shaw, in *Com. v. Webster*, upon the weight to be given to the good character of the accused where the charge is for a crime of a high grade—in effect that as the enormity of the offense increases the weight to be given to evidence of good character diminishes, is not generally recognized as a correct statement of the law on that point, and in New York was expressly denied.¹ The true rule seems to be that in all cases proof of good character is to go to the jury, to be considered by them in connection with all the other facts and circumstances of the case; and if, notwithstanding the proof of his good character, they believe from the evidence that the accused is guilty, it is their duty so to find.² Good character is no excuse for crime, but it is a circumstance bearing indirectly on the question of the guilt of the accused, which the jury are to consider. In other words, it raises a presumption that the accused was not likely to have committed the crime with which he is charged. The force of the presumption, however, depends upon the strength of the opposing evidence to produce conviction of the truth of the charge. If the evidence establishing the charge is of such a nature as not, upon principles of reason and good sense, to be overcome by the fact of good character, the latter will be unavailing and immaterial.³

It is error to charge the jury that proof of the prisoner's good character is entitled to less weight where the question is one of great and atrocious criminality than upon accusations of a lower grade.⁴

Where, on a trial for larceny, the attorney for the accused asked instructions upon three distinct propositions, neither of

of great atrocity, where we look for some extraordinary motive to have induced the commission of the offense, good character would not be of the same avail as it would in the class of minor offenses I have before alluded to," etc. This was copied substantially from the charge of Ch. J. Shaw in *Com. v. Webster*, 5 Cush., 324. The court held the charge erroneous, proof of good character being of equal weight in both cases.

¹ *Cancemi v. People*, 16 N. Y., 501.

² *State v. Henry*, 5 Jones (N. C.), 66.

³ *Harrington v. State*, 19 O. S., 269.

⁴ *Harrington v. State*, 19 O. S., 264.

which instructions were correct either separately or when considered with reference to the others, it was held that the court properly refused to give them.¹

Instructions should have reference to the circumstances of the case, and be so given as to secure the fair consideration and judgment of the jury upon the points at issue.²

A charge which consists mainly of extracts from opinions in reported cases, having no special reference to the circumstances of the case on trial, is objectionable; and where from the consideration of the whole evidence it is reasonable to suppose the jury may have been misled, a new trial should be granted.³

Where the court, in charging the jury in a criminal case, reads a section from the statute without incorporating the same in its written charge, but merely referring thereto, such failure to incorporate the statute in the written charge will not authorize a reversal of the judgment.⁴

Where a juror makes an inquiry of the court in relation to the case, the court may answer the inquiry without reducing the answer to writing, provided in doing so it makes no independent statement of a rule of law.⁵

An instruction, though correct as an abstract proposition, which seems likely, without some qualification and explanation, to mislead the jury, may properly be refused.⁶

It is not error for the court to refuse to give an instruction, though correct law, if not applicable to the facts proved, and substitute one that does apply to such facts.⁷

When instructions, favorable to the accused upon a given question are asked by him and given as presented, he will not be heard to complain of such instructions.⁸

Unnecessary instructions, not calculated to assist the jury in rendering a verdict on the issues submitted to them, should

¹ *Eckels v. State*, 20 O. S., 515.

² *M. & C. Ry. Co. v. Picksley*, 24 O. S., 654.

³ *Id.*; *Raper v. Blair*, 24 Kas., 374.

⁴ *State v. Mortimer*, 20 Kas., 93.

⁵ *State v. Potter*, 15 Kas., 302.

⁶ *State v. Ingram*, 16 Kas., 15.

⁷ *Lewis v. State*, 4 Kas., 297.

⁸ *Stacy v. Reddick*, 7 Kas., 144.

not be given, although they contain a correct statement of the law upon the subject to which they relate.¹

Where a certain instruction is asked and refused, but other instructions are given which fully embrace the instruction refused, as far as proper, no error is committed in the refusal.²

It is not incumbent on the trial court to accept and adopt, in its charge to the jury, the instructions as framed and requested by the parties, even though they may be appropriate and state the law correctly. If the principles contained in the instructions refused are embraced and fairly stated by the court in its general charge, there is no just ground of complaint.³

Failure of Defendant to Testify.—An instruction that “in considering the testimony you should not draw any unfair inferences or unjust conclusions because of any failure or omission, on his part, to offer any particular kind of evidence, but he should be tried alone upon the facts proved. You are to presume the existence of no fact unless it has been testified to; you are to found your verdict on the testimony of the witnesses upon the witness stand, and are not to supplement it with any other fact that you may think exists, but which has not been proved,” is not erroneous.⁴

Misspelled Name—Idem Sonans.—Where the name of the person killed was “Bernhart,” and the name, as testified to by the different witnesses, was “Banhart,” “Benhart,” “Beanhart” and “Bernhart,” an instruction that the mere difference in spelling the name of the deceased as testified to by the witnesses, and that set forth in the information to have been his name, was immaterial if the name proved be *idem sonans* with that stated in the information. Held, not erroneous.⁵

As a general rule, the name of the person injured should be stated in the indictment or information with sufficient certainty, so that the accused may know with what offense he is

¹ State v. Medicott, 9 Kas., 257.

² State v. Groning, 33 Kas., 18.

³ State v. Tatlow, 34 Kas., 80.

⁴ State v. Skinner, 34 Kas., 257.

⁵ State v. Witt, 34 Kas., 488.

charged; but where the person injured is so well described and his name is so given that his identity can not be mistaken, the object of the rule has been accomplished.¹

Additional Instructions—Absence of Accused.—Where the jury, on the trial of a felony, has retired to consider of their verdict, it is error for the court, on the return of the jury into court, to again instruct them as to the law of the case in the absence of the accused, who is then in jail under the order of the court.² And such error is not cured by the presence of the prisoner's counsel at the giving of such additional instruction,³ and a reviewing court will not inquire into the correctness of such instructions. It will be presumed that the prisoner was prejudiced thereby.⁴ While the court, when so requested, is bound to give or refuse the charge, the court is not required to charge in the language of counsel, however sound in law or pertinent to the case the proposition may be, but the judge may select his own language. Where, however, a charge is not given substantially, it is to be regarded as refused.⁵

The Object of Instructions must be Kept in View, which is to enable the jury to apply the law to the facts proved in the case, and so render a correct verdict. The court, not the jury, has the sole power to determine what the issues are. It is the duty of the court, therefore, to state clearly and explicitly to the jury the questions for their determination.

The court, in all cases, should prepare and give such instructions as it may deem necessary to enable the jury to render a correct verdict. These should be as brief as possible, in distinct paragraphs, each containing a separate proposition, and clearly stating the law applicable to the testimony in the case.⁶

¹ *State v. Witt*, 34 Kas., 488.

² *Jones v. State*, 26 O. S., 208.

³ *Id.*

⁴ *Id.*

⁵ *McHugh v. State*, 42 O. S., 155.

⁶ In this and many other states, instructions must be in writing, and filed with the clerk before being given to the jury, and the court is not permitted to instruct orally except by consent. There is no hardship in this, as the writer knows from experience. And even in states where the statute does not require instructions to be reduced to writing, it will be found more sat-

All Questions of Fact must be Submitted to the Jury.—They are the judges of the facts, as the court is of the law. Their respective duties, therefore, are clear and distinct, and care should be taken by the court to avoid trenching on the province of the jury. A candid, fair-minded judge, who enters upon the trial of a case without feelings or bias, and who shows throughout the trial that he has but one desire, viz., to administer the law as it is, will, to a considerable extent, impress the jury for the time being with his own qualities. If, therefore, at the conclusion of such a trial, the judge, in a few plain, pointed, and direct instructions, embracing the law of the case, directs the jury as to their duty in applying the law, they will almost invariably render a correct verdict.¹

If the Attorney for Either Party Desires Instructions upon one or more points, it is his duty to prepare such as he may desire. Error will not lie for a failure to instruct upon a given point, unless an instruction is asked to be given thereon. In the preparation of such instructions let the attorney state the law fairly and correctly as applied to the testimony. Nothing is gained by asking an incorrect instruction, as ordinarily it will be refused. As a rule if an attorney can not succeed by correct instructions he may expect defeat.²

isfactory to the court, jury and counsel, and less liable to error, if the court will instruct in writing. Each word will then be carefully considered and weighed, and generally the points presented more concisely and clearly to the jury.

¹ Many judges are able in a few clear and concise instructions to cover all points in the case, and to give instructions which are entirely satisfactory to both parties. This can be done very readily by taking up each point upon which there is testimony, and stating the law applicable thereto. It will be found advantageous to take sufficient time to prepare instructions properly, as it may save the necessity of a new trial. In their preparation let the judge keep in view three points, viz., *brevity, clearness, sufficiency.*

² Occasionally an attorney, who apparently expects defeat, will ask a very large number of instructions, many of them on abstract propositions, apparently from the desire to get error into the record. Such cases, to the credit of the profession, are rare, yet a few have come under the observation of the writer. Where such instructions are asked the court should carefully examine them, and if they contain any matter proper to be considered, and which has not already been covered by those given by the court, such matter should either be given or a new instruction embodying it be prepared, and the judge should firmly refuse to give those not applicable to the testimony.

The jury should be made to feel that the whole responsibility of deciding the facts rests upon them, and the judge should carefully avoid, either by word or act, the giving of any intimation of his own opinion. All experience has shown that as a general rule the slightest suggestion from the judge will have great weight with the jury in the decision of the case. This arises from the fact that they have confidence in his integrity and know that he is accustomed to analyzing evidence and determining its weight, while on almost every jury there are more or less of its members wholly inexperienced in such business, and perhaps some of them, from want of knowledge, indecision of character, or other cause, incapable of weighing testimony. Laws prohibiting oral instructions, in this state at least, were passed because it was found that in almost every case some portion of the language of the judge was construed by the jury as an intimation of his own views, and while questions of fact were submitted to them under the former practice, the same as under the present, the supposed expression of the judge frequently had a controlling effect. The same, no doubt, is the case in other states.¹

Exceptions to Instructions.—A general exception to the whole charge will be unavailing as an exception to particular paragraphs. Therefore where one or more paragraphs are deemed objectionable, *each* must be excepted to. The court should allow the attorneys a reasonable time to examine the instructions and except to such as they may deem objectionable. It would be well for the court to adopt a rule not inconsistent with the statute in that regard, or else at the time of giving the instructions announce that a certain time would be given in which to take exceptions. This course would obviate the necessity of excepting to all paragraphs of which there is any doubt.²

¹ A monograph, entitled "Charging the Jury," by Judge Seymour D. Thompson, contains a synopsis of the decisions relating to the subject, with many valuable suggestions, and will be found very useful both to the bench and bar.

² The court should, as far as possible, protect the rights of the parties by preserving their exceptions, and should afford every facility to enable them to have the case reviewed, if so desired. The court has no interest in the

Exceptions to Instructions Should not be Taken in the Presence of the Jury unless absolutely essential to save the rights of the party. The rules of court should be so framed as to permit exceptions to instructions to be taken after the jury has retired. The fact that exceptions are taken to certain instructions is sometimes seized upon as one intimation that the judge is unfavorable to the party excepting. So, if instructions are asked and refused they should not be read, but simply marked "refused." Any controversy in the presence of the jury over the giving or refusing of instructions will almost invariably operate to the prejudice of the accused.

Juror to be Sworn as a Witness.—If a juror possesses any knowledge in regard to the case, he should be sworn as a witness, and an opportunity given to examine and cross-examine him. If he is not so sworn and examined he has no right to state facts to the jury within his own knowledge, nor to advance opinions in conflict with the testimony.¹

When a Case is Submitted to the Jury they must be kept together in some convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The officer having them in charge shall not suffer any communication to be made to them, or make any himself, except to ask them whether they have agreed upon a verdict, unless by order of the court, nor shall he communicate to any one before the verdict is rendered any matter in relation to the state of their deliberations. If the jury are permitted to separate during the trial they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person on the subject of the trial, or to listen to any conversation on the subject,

matter except to see that justice is administered. And whether its rulings are sustained or reversed, the court, having endeavored to do its duty, may safely leave the result to the appellate tribunal. To the credit of the bench be it said, that, so far as the writer has observed, there is a general disposition to afford every facility in that regard. A contrary course certainly would be in conflict with the spirit of fairness which is supposed to actuate the judge in his dealings with those who contend for their rights before his court.

¹ *Head v. Hargrave*, 105 U. S., 45; *Patterson v. Boston*, 20 Pick., 166.

and that it is their duty not to form or express an opinion thereon until the cause is finally submitted to them.¹

The Jury Should be Kept Together in all criminal cases of importance until they have agreed upon their verdict or are discharged. A jury gathered up without reference to the independence of character or qualifications of its members, should not be exposed to the gossip that to a certain extent attends every criminal trial of any prominence.² It is a matter resting in the discretion of the court however.³

FORM OF OATH TO OFFICER HAVING CHARGE OF JURY

You do solemnly swear that you will keep this jury in some private and convenient place; that you will not suffer any communication to be made to them or make any yourself, except to ask them whether they have agreed upon a verdict, unless by order of the court; nor shall you communicate to any one before the verdict is delivered any matter in relation to the state of their deliberations.⁴

¹ Cr. Code, §484.

² The court may, even in a capital case, permit the jury to separate during the progress of the trial and before the case is finally submitted to them (*Bergin v. State*, 31 O. S., 111), if the proper admonitions are given. In the opinion in the case cited the court say: "In some districts of this state juries in capital cases are not permitted to separate after being sworn. In many cases this is certainly proper, especially in cases in reference to which there exists strong partisan feeling, or an excited state of the public mind, by which the jury, if permitted to separate, might be unconsciously impressed and influenced. It is, however, a matter resting in the sound discretion of the court trying the case. See also *Davis v. State*, 15 Ohio, 72; *Bainbridge v. State*, 30 O. S., 265; *State v. Engles*, 13 Ohio, 490; *State v. Stackhouse*, 24 Kas., 445; *State v. McKinney*, 31 Kas., 570; *Madden v. State*, 1 Kas., 341. At common law the jury are not permitted to separate or leave the place appointed for their deliberations without the special permission of the court. 1 Chitty's Cr. L., 634.

³ See § 319, Thompson & M. on Juries.

⁴ Cr. Code, § 485. The statute merely prescribes the duty of the officer without providing that he shall swear to perform such duties. The better course, however, is to administer an oath in all cases.

The common law form as given by Chitty (1 Cr. L., 632) is as follows: "You shall swear that you will keep this jury without meat, drink, fire or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they be agreed, so help you God."

It has been held that if the jury is accompanied by an unsworn officer

Separation after Cause is Submitted.—After the jury have retired to consider of their verdict in a criminal case, they should be kept together until they agree upon a verdict or are discharged. It is error in the court to permit them to separate and go to their meals without supervision during their deliberations; even though counsel for the defendant consent to such separation.¹

Sealed Verdict.—The court may, in the exercise of a sound discretion, in a criminal case, direct the jury to seal up their verdict and separate, and bring it into open court at a time specified.² A privy verdict could not be returned at common law,³ and the right has been denied in Massachusetts.⁴ A privy verdict is of no force or effect, unless assented to by all the jurors in open court.⁵ If any juror dissents from the verdict as read, it can not be received. In civil cases it has been held that the court may order the jury to retire, and again consider

the verdict would be set aside, unless it affirmatively appear that the accused was not prejudiced thereby. *McIntyre v. People*, 38 Ill., 514; *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.

¹ In *Parker v. State*, 18 O. S., 88, the court, in speaking of the right to separate, in civil cases, after a cause is submitted, say: "But the discretionary power thus conferred is limited to trials in civil cases, and until authorized by statute was never permitted in this state, whilst the jury were deliberating on their verdict. On the contrary it was said by the court * in *Sargent v. State*," 11 Ohio, 472: "In no case can the jury, after they have retired to consider of their verdict, be permitted to separate and disperse until they have agreed; and a contrary practice in criminal cases has, we believe, never prevailed or been sanctioned in this state." See also *Weis v. State*, 22 O. S., 486; *State v. Hendricks*, 32 Kas., 559.

² *State v. Engles*, 13 Ohio, 490. In this case the jury retired to consider their verdict about 11 o'clock A. M. on Saturday. At 6 P. M. of the same day court adjourned till Monday, the judge directing the sheriff, if the jury agreed, to have them seal up their verdict, and bring it into court on Monday morning at 9 o'clock. The jury agreed at about 7 P. M. on Saturday and sealed up their verdict according to directions, and separated until Monday, when they came into court and delivered it. See also *Sanders v. State*, 2 Iowa, 230.

³ *Coke, Litt.*, 227 b.

⁴ *Com. v. Dorus*, 108 Mass., 488.

⁵ *Young v. Seymour*, 4 Neb., 86.

their verdict.¹ How far this rule will be applied in criminal cases is not definitely settled; but within the rule laid down in *Parker v. State*, the failure to agree before they separate would seem to require the court to discharge the jury.

Discharge of Jury for Cause.—In case a jury shall be discharged on account of the sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is no probability of their agreeing, the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal, and such discharge shall be without prejudice to the prosecution.²

There must be Sufficient Cause.—The discharge of the jury without the consent of the prisoner, after it has been duly impaneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative.³

The court has no authority arbitrarily, and without sufficient cause, to discharge a jury for disagreement. The county should not be subjected to the expense of a second trial where there is a reasonable probability that a verdict may be reached on the first, while the prisoner is entitled, as a matter of right, to a verdict in his favor, if after a full and careful examination of the testimony and comparison of views the jury should find that the charge was not established by the proof.⁴

¹ *Bunn v. Hoyt*, 3 Johns., 255; *Douglass v. Tousey*, 2 Wend., 352; *Thompson & M. on Juries*, §§ 336-340.

² Cr. Code, § 486. At common law, if the jury fail to "agree before the judges at the assizes depart, they may be carried from place to place, until they become unanimous. And it is laid down to be an uncontroverted rule, that a jury sworn and charged in a capital case can not be discharged until they have given a verdict. But it has been held, that if eleven of the jury be agreed and one of them dissents, who says he would rather die in prison, the opinion of the eleven can not be received; but a new venire must be awarded, as if one of them had died previous to the verdict." 1 Chitty, Cr. L., 634.

³ *Hines v. State*, 24 O. S., 134; *State v. Schuchardt*, 18 Neb., 454.

⁴ *State v. Schuchardt*, 18 Neb., 457. In this case the cause was submitted to the jury at seven o'clock P. M., and at six o'clock the next morning the jury reported to the court that they were unable to agree, and they were there-

The Record must show the Existence of the Necessity which required the discharge of the jury; otherwise the defendant will be exonerated from the liability of further answering to the indictment.¹

ORDER DISCHARGING JURY FOR SICKNESS OF JUROR, ETC.

Title of Cause.

Now, on this day, came the respective parties by their attorneys, and it appearing to the court that S T, one of the jurors, by reason of sickness is unable further to perform his duties as a juror in said case, [or that there is no probability of the jurors agreeing on a verdict], said jury is therefore discharged without day, without prejudice to the prosecution.

In Murder, Jury to Find Degree.—That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court to determine the degree of the crime, and shall pronounce sentence accordingly.²

It is within the lawful province of the jury to determine the grade of the crime; but the court can not imperatively require the jury to render a verdict for a particular degree of homicide, nor deny to them the power of rendering such verdict as their judgment and conscience may dictate, after being fully instructed by the court as to their duty.³

May be Restricted to One Count.—Where an indictment for

upon discharged without the consent of the prisoner. It was held that the discharge was unauthorized, and that the prisoner should be discharged. The authorities are collected and examined in the case cited.

¹ Hines v. State, 24 O. S. 134; State v. Schuchardt, 18 Neb., 454.

² Cr. Code, § 439. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto; and upon an indictment for any offense, the jury may find the defendant not guilty of the offense, but guilty of an attempt to commit the same, where such an attempt is an offense. Cr. Code, § 487.

³ Adams v. State, 29 O. S., 412.

murder in the first degree contains several counts, under either of which it is equally competent on the same proof to return a verdict of murder in the second degree, it is not to the prejudice of the accused for the court to restrict the jury in finding the defendant guilty of murder in the second degree to one of the counts only.¹

Upon the Trial of an Indictment for Murder in the First Degree the jury may return a verdict of murder in the second degree, without expressly acquitting the defendant of murder in the first degree. Such verdict is equivalent to "not guilty" of the higher crime charged.²

Distinct Offenses.—Where, however, distinct offenses are charged in separate counts of an indictment, the jury must either return a general verdict of not guilty, or respond to each charge in their finding.³

Manslaughter—Assault and Battery.—On an indictment for murder, the jury may return a verdict of manslaughter,⁴ or of assault and battery only.⁵

So, if a party is indicted for malicious shooting with intent to kill, the jury may find him guilty of assault and battery.⁶ And where the charge is for robbery and an assault with intent to rob, the verdict may be for assault and battery, or for assault alone.⁷

Value of Property.—Where the indictment charges an offense against the property of another by larceny, embezzlement, or obtaining under false pretenses, the jury on conviction shall ascertain and declare in their verdict the value of the property stolen, embezzled or falsely obtained.⁸ *Schoonover v. State*, was decided before this section was passed.⁹

¹ *Adams v. State*, 29 O. S., 412.

² *Morehead v. State*, 34 O. S., 212; *State v. O'Kane*, 23 Kas., 244; *Bobanan v. State*, 18 Neb., 57.

³ *Wilson v. State*, 20 Ohio, 26; *Williams v. State*, 6 Neb., 334; *Casey v. State*, 29 N. W. R., 265.

⁴ *Wroe v. State*, 20 O. S., 460.

⁵ *Marts v. State*, 26 O. S., 162.

⁶ *Heller v. State*, 23 O. S., 582.

⁷ *Howard v. State*, 25 O. S., 399; *Stewart v. State*, 5 Ohio, 241.

⁸ Cr. Code, § 488.

⁹ *Armstrong v. State*, 21 O. S., 360. The above section applies to horse-

On an indictment for larceny, laying the value of the property at four hundred and eighty dollars, a general verdict of guilty implies a finding that the value of the property stolen at least equals thirty-five dollars, and an express finding in the verdict of such value is not necessary.¹

ENTRY OF SUBMISSION OF CAUSE TO THE JURY, AND THE VERDICT, ETC.

Title of Cause.

Now, on this day, the jury having heard the testimony offered by the respective parties, the charge of the court, and the argument of counsel, retired in charge of E F, a bailiff appointed by the court for that purpose, to consider their verdict; and afterward, on the same day, after due consideration they returned into court the following verdict:

The State of —	}	
v. A D.		We, the jury, duly impaneled and sworn in the above entitled cause, find the defendant guilty as charged in the indictment [or information].
		G H, Foreman.

Thereupon, at the request of the defendant, the court directed the clerk to poll the jury. The name of each juror was thereupon called by the clerk, and he was asked if the foregoing was his verdict, to which inquiry each juror for himself answered, "It is." The jury was thereupon discharged, and the defendant ordered into the custody of the sheriff, to await the further orders of the court.

VERDICT OF NOT GUILTY AND DISCHARGE.

Title of Cause.

We, the jury, duly impaneled and sworn in the above entitled cause, find the defendant not guilty.

G H, Foreman.

stealing, and if the jury return a general verdict of guilty, without finding the value of the property, it will be reversed on error for insufficiency. *Armstrong v. State*, 21 O. S., 357. The obtaining the signature of a party by false pretenses, to a promissory note, however, is not within the provision of the statute. *Ellars v. State*, 25 O. S., 385.

¹ *Schoonover v. State*, 17 O. S., 294. The proper course, however, is to find the value of the property stolen, embezzled, or obtained by false pretenses. This decision is placed upon the ground that the larceny of property of the value of thirty-five dollars constitutes felony, and as the prisoner was charged with the larceny of property of much greater value, therefore the finding of the jury that he was guilty of felony was equivalent to a finding that the property stolen exceeded thirty-five dollars in value.

ORDER ON VERDICT OF NOT GUILTY.

And there being no other charges against the defendant he is discharged.

VERDICT OF GUILTY OF GRAND LARCENY:

Title of Cause.

We, the jury, duly impaneled and sworn, do find the defendant guilty as he is charged in the indictment [or information] and we find the value of said property to be the sum of — dollars.

GUILTY OF HORSE STEALING.¹*Title of Cause.*

We, the jury, duly impaneled and sworn, do find the defendant guilty as charged in the indictment, and find the value of said property at the time of said larceny to be the sum of — dollars.

GUILTY ON ONE COUNT.

Title of Cause.

We, the jury, duly impaneled and sworn, find the defendant guilty as he is charged in the [first] count of the indictment, and not guilty on the [second and third counts.]

GUILTY OF A LESS DEGREE THAN CHARGED.

Title of Cause.

We, the jury, duly impaneled and sworn, find the defendant not guilty of murder in the first degree as he is charged in the indictment, but do find him guilty of manslaughter.

GUILTY OF AN ATTEMPT.

Title of Cause.

We, the jury, duly impaneled and sworn, find the defendant not guilty of [rape] as he is charged in the indictment, but do find him guilty of an attempt to commit rape.

GUILTY OF ASSAULT.

Title of Cause.

We, the jury, duly impaneled and sworn, find the defendant not guilty of — as he is charged in the indictment, but do find him guilty of an assault.

¹ Evidence showing the larceny of a *gelding* will not authorize a verdict of stealing a *horse*. *State v. Buckles*, 26 Kas., 237.

Oral Verdict.—Where a verdict of guilty, as charged in the indictment, is returned by the jury through their foreman orally in open court in proper form, and each juror in response to the interrogatory of the clerk says the verdict is his, and it is entered on the record, the fact that the verdict is not in writing, signed by the foreman, is not such an irregularity as affects materially any substantial rights of the defendants, and is not ground for a new trial.¹

After the jury have returned their verdict and been discharged, they can not be ordered to re-assemble and alter or amend it.²

¹ *Hardy v. State*, 19 O. S., 579. At common law the verdict is delivered orally by the jury and recorded by the clerk, who, after recording it, reads the same to the jury and asks them if it is their verdict. 1 *Chitty, Cr. L.*, 635.

² *Sargent v. State*, 11 Ohio, 472; 1 *Chitty*, 645.

CHAPTER XLI.

NEW TRIAL.

A New Trial after a verdict of conviction may be granted on the application of the defendant, for any of the following reasons affecting materially his substantial rights: First, irregularity in the proceedings of the court, or the prosecuting attorney, or the witnesses for the state, or any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial. Second, misconduct of the jury, or of the prosecuting attorney, or of the witnesses for the state. Third, accident or surprise which ordinary prudence could not have guarded against. Fourth, that the verdict is not sustained by sufficient evidence, or is contrary to law. Fifth, newly discovered evidence, material for the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial. Sixth, error of law occurring at the trial.¹

¹ Cr. Code, § 490. At common law in a criminal case an inferior court can not grant a new trial on the merits, although it may do so for some irregularity in the proceedings. 2 Tidd's Pr., 905; Burns, J., *New Trial*; R. v. Peters, 1 Burr, 568. Where, however, after the jury had retired to consider their verdict one of them held a conversation with a stranger, a new trial was granted. R. v. Fowler, 4 B. & Ald., 273. The rule in the English courts under the common law appears to have been that if the jury, under the direction of the judge, returned a verdict of guilty, it was final. This rule of the common law, however, has never prevailed in the state courts of this country with a few exceptions. *People v. Comstock*, 8 Wend., 549; *Com. v. Green*, 17 Mass., 515. In *U. S. v. Gilbert*, 2 Sumn., 51, Judge Story assumed that granting a new trial to a defendant after a verdict of guilty was to put him twice in jeopardy, and hence was a violation of the constitution of the United States. This doctrine is not accepted as law by any court at the present time. The object of granting a new trial is to administer justice. If this is found to be necessary in civil cases, where

The Application for a new trial shall be by motion, upon writ-ten grounds filed at the term the verdict is rendered, and shall, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be within three days after the verdict was rendered, unless unavoidably prevented.¹

In Assigning the Grounds for such motion it shall be sufficient to assign the same in the language of the statute.²

Affidavits to be Filed. When.—The causes enumerated in subdivisions two, three and five of section four hundred and ninety, must be sustained by affidavits showing their truth and may be controverted by affidavits.³

The court is restricted to the causes assigned. It is important therefore, in preparing the motion, to assign as many grounds as are believed to exist.⁴

Attempt to Pack Jury.—Where, on a motion for a new trial, it is shown that the prevailing party, prior to the commencement of the trial, attempted to pack the jury, the verdict will be set aside for such misconduct unless it clearly appear that the adverse party was not prejudiced thereby.⁵

Irregularity, etc.⁶—The party claiming a new trial on the

there is but little or no excitement attending the trial, but where the jury not unfrequently mistake the law or the facts, it is certainly equally as essential in a criminal case where popular clamor may have made itself felt in the jury room, or prejudicial errors have occurred in the proceedings. In *Melvin v. Taylor*, 2 Hod., 126-7, Ch. J. Tindal said: "I think that without some power of this nature residing in the breast of the court, the trial by jury would in particular instances be productive of injustice."

¹ Cr. Code, § 491.

² Cr. Code, § 491.

³ Id., § 492.

⁴ A court is necessarily confined to the grounds assigned in the motion for a new trial; hence the importance of assigning as many grounds as seem to be justified. The motion is almost invariably hastily prepared and without time to review the testimony. The writer, when judge of the district court, suggested to young attorneys the propriety of assigning as many grounds as would cover all possible errors. On the argument, however, only such errors as are relied upon should be insisted upon.

⁵ *May v. Ham*, 10 Kas., 598.

⁶ In *People v. Knapp*, 42 Mich., 267, where the officer in charge of the jury remained in the room with them during their deliberations, a new trial

ground of irregularity in proceedings, must have been prejudiced thereby. If he was not prejudiced a new trial should not be granted.¹ Any irregularity, however, in the proceedings, or of the prosecuting officer, witnesses for the state, order of the court, or abuse of discretion, by which the defendant is prevented from having a fair trial, will be sufficient cause. If the irregularity complained of does not appear in the proceedings of the court so as to be included in the record proper, or bill of exceptions, it must be set forth by one or more affidavits. In such case the court no doubt may permit counter affidavits to be filed.²

was granted; Cooley, J., in delivering the opinion of the court said: "The attention of the court was called to the fact on the motion for a new trial, but on its being made to appear that the officer did not converse with the jury in their room, the motion was denied. * * 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. * * In their private deliberations the jury are likely to have occasion to comment with freedom on 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 unfriendly 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." The soundness of this reasoning is unquestioned. The jury must be permitted, freely and without interruption, to discuss the evidence, credence to be given to certain witnesses, their motives, etc., as shown by the evidence, and this without the danger of what is said or done being privately reported to friends of the officer.

¹ Carlin v. Donsagan, 15 Kas., 173; Karney v. Paisley, 13 Iowa, 89.

² As to irregularity in permitting separation of jury before verdict, see

Misconduct of Jury, etc.—Where the jury of their own motion and by their own means, without the knowledge of the court, and without the presence, knowledge or consent of the prisoner, obtain part of a newspaper purporting to contain a part of the charge of the court in the case they are considering, and use said information to guide their deliberations, although the charge thus published may happen to be accurate, the verdict ought to be set aside.¹

Irregularity of Court.—Thus, after the jury have retired, the judge should not confer with them except in the presence of the parties, as where the jury, after retiring to consider their verdict, returned into court for information as to the evidence on particular points, which information the court gave in the absence of the accused, it was held to be prejudicial error;² and where the jury reported that they were unable to agree, whereupon the judge stated to them that the case was peculiar, and there was reason to believe that they had been tampered with, the verdict was set aside.³ So where the judge sent to the jury a written charge to the grand jury, the verdict was set aside.⁴

Juror Asleep.—While it is the duty of jurors to give strict attention to the evidence in a case, and a conscientious juror will do so, still the fact that a juror falls asleep, or does not give close attention to the evidence, is not ordinarily ground

Cantwell v. State, 18 O. S., 477; *Parker v. State*, Id., 88. *Not misconduct of prosecuting attorney* to conceal from a witness, until after the trial, the fact that he was under indictment for harboring the accused, knowing that he had committed the crime. *Jackson v. State*, 39 O. S., 97. The witness should be apprised however, as to his rights in the premises.

¹ *Farrer v. State*, 2 O. S., 54. The holding of conversations by the jury, while in their room, with persons on the street, in regard to the subject of their deliberations, before their verdict is rendered, is in general good cause for setting aside the verdict.

² *Maurer v. People*, 43 N. Y., 1; *Wade v. State*, 12 Ga., 25.

³ *State v. Ladd*, 40 La. Ann., 271.

⁴ *Holton v. State*, 2 Fla., 476. In *Gandolfoe v. State*, 11 O. S., 114, where the judge, at the request of the jury, and in the absence of the prisoner, sent them a copy of the statutes of the state, calling their attention to three sections relating to homicide, it was held an exercise of discretion which did not prejudice the prisoner, and furnished no ground for a new trial.

for a new trial.¹ While it is the duty of counsel to call the attention of the court to the fact that a juror is asleep, to be available on error, still, in considering a motion for a new trial, if it is apparent to the court that the jury have not carefully weighed the evidence, from inattention or other cause, it should see that the rights of the accused are protected by a new trial or otherwise.

Jurors Casting Lots.—Where the jury resort to chance to determine their verdict, it will be set aside. This, however, appears to be limited to those cases where the jurors before the verdict, bind themselves to adhere to the result.² Where there is no prior agreement to abide the result and the verdict is based upon the individual estimates of the jurors, it will ordinarily be sustained.³

In a criminal case, after the jury have retired to consider of their verdict, it is misconduct for a bailiff to enter the jury room while the jury are in session; and it would be gross misconduct for the bailiff, or any one else, to enter the jury room while the jury were in actual consultation or deliberation in regard to their verdict. It is also misconduct for the jury to separate after retiring to consider of their verdict and before rendering their verdict. It is also misconduct for them to eat anything during such time, except with the express permission of the court. And where such misconduct is shown on the part of the bailiff or jury, it devolves on the prosecution to show that nothing transpired which could in the least have influenced any member of the jury adversely to the interests of the defendant.⁴

¹ *Baxter v. People*, 3 Gilm., 368. In this case one of the jurors had a chill, and by an order of the court was placed on a pallet, when he fell asleep, of which the prisoner and his counsel were aware, but failed to call the attention of the court to the fact.

² *Hale v. Cove*, 1 Stra., 642; *Thompson v. Com.*, 8 Gratt., 637; *State v. Barnstetter*, 65 Mo., 149.

³ *Thompson v. Com.*, 8 Gratt., 637; *Dooley v. State*, 28 Ind., 239.

⁴ *State v. Bailey*, 32 Kas., 84. In the case cited the court say (p. 99), that "while several irregularities occurred in the case, yet we do not think that anything took place to prevent the defendant from having a fair and impartial trial." But where a bailiff in charge of the jury entered the

Personating Juror.—Where a person not summoned as a juror personates one who was returned on the venire, sits at the trial, and joins in a verdict of guilty, the verdict will be set aside and a new trial granted, it appearing that neither the accused nor his counsel was guilty of laches.¹

Private Statement of Juror.—Where a juror in a criminal case makes no statement with respect to the matter on trial until the jury retires to consider their verdict, and then makes to his fellow jurors a statement of matters alleged to be within his own personal knowledge, contradicting, in an important particular, the testimony of one of the defendant's witnesses, and the defendant is convicted, ground is afforded by such misconduct for a new trial, where the fact is properly made to appear; but the affidavits of jurors will not be regarded for the purpose of setting aside the verdict until misconduct of the jury is shown *abundante*;² and there being no evidence except that of jurors, the court refused to set the verdict aside.

Bias of Juror.—Where a juror, when interrogated, stated that he had formed no opinion respecting the guilt or innocence of the accused, and after verdict of guilty it appeared that before the trial he had said, "If he (the prisoner) is not hung, there is no use of laws," a new trial was granted.³

Where a juror, at different times before the trial of a prisoner for murder, said he believed the prisoner would be hung; that he ought to be hung; that nothing could save him; that salt could not save him, and that there was no law to clear him; but afterward made oath that he had not formed an opinion, a new trial was granted.⁴ To obtain a new trial on this ground, it is essential that the motion should be supported by an affidavit showing the fact that such objection was

room while the jury were deliberating on their verdict, and read a portion of the instructions to them, the verdict was set aside. *State v. Brown*, 22 Kas., 222. So, where a bailiff, at the request of a juror, passed an atlas to the jury. *State v. Latz*, 23 Kas., 728. But see *State v. Dickson*, 6 Kas., 209; *State v. Taylor*, 20 Id., 643.

¹ *McGill v. State*, 34 O. S., 228.

² *Kent v. State*, 42 O. S., 426.

³ *Busick v. State*, 19 Ohio, 193.

⁴ *Sellers v. State*, 3 Scam., 412.

unknown, either to the accused or his counsel, when the jury was impaneled.¹

Third. Accident or Surprise.—The word “accident” is construed as meaning “such an unforeseen event, misfortune, loss, act or omission, as is not the result of any negligence or misconduct in the party.”²

Surprise denotes “the situation in which a party is placed without a default of his own which will be injurious to his interests.”³ A new trial may be granted where the accused is surprised by the testimony of his own witnesses, who, there was reason to believe, had been tampered with;⁴ where a material witness becomes confused and is unable to testify,⁵ or where a material witness for the defendant, who was regularly subpoenaed and in attendance shortly before the trial, absented himself without the knowledge or consent of the defendant or his attorney, and his absence was not discovered till after the jury was sworn.⁶

Where, however, the alleged surprise is with respect to the testimony of a certain witness, and it is not shown that such testimony is not true, or that it will be different on a new trial, the party is not entitled to a new trial on the ground of surprise.¹

Where a new trial is granted on the ground of surprise, and it appears to promote the ends of justice by giving an opportunity for the introduction of new testimony, which could not

¹ Parks v. State, 4 O. S., 234. See also Loeffner v. State, 10 O. S., 598; Blackburn v. State, 23 O. S., 146. As to misconduct of sheriff see Koons v. State, 36 O. S., 195-201. Probably it should appear that proper inquiries were made of the juror when examined on his *voir dire*.

² 1 Bouv. Law Dict. (14 Ed.), 52.

³ 2 Id., 573.

⁴ Todd v. State, 25 Ind., 212.

⁵ Ainsworth v. Sessions, 1 Root, 175.

⁶ Ruggles v. Hall, 14 John., 112. The court say: “The defendant can not be charged with such negligence as to preclude himself on that ground. Knowing that the witness had been attending for several days, the defendant had good reason to believe that he was still there, and his suddenly absenting himself was a matter of surprise.”

⁷ Osborne v. Young, 23 Kas., 769. See also Parker v. Bates, 29 Kas., 597; Beal v. Codding, 32 Kas., 107.

have been anticipated on the former trial, the supreme court will not vacate the order.¹

Impeaching Evidence.—As a general rule the introduction of unexpected evidence, impeaching the character of a witness of the accused, is not cause for a new trial.²

Fourth. That the Verdict is not Sustained by Sufficient Evidence.—Where a new trial is sought on the ground that the witnesses are not *credible*, the ruling of the trial court thereon can not be reviewed.³

A verdict will not be set aside unless it is clearly contrary to the evidence.⁴

In a criminal case, as well as in a civil action, it may be assigned for error that the court overruled a motion for a new trial predicated upon the ground that the verdict was against the weight of evidence.⁵

Where one of the grounds on which a new trial is sought is that the verdict is against the law or evidence, the court will look to the charge as well as the evidence with a view of determining whether or not a new trial should be granted, and this, too, whether the charge was excepted to or not.⁶

Fifth. Newly Discovered Evidence.—Where newly discovered evidence was simply to the matter of threats, and only tends to make more emphatic and clear what is already plain by the testimony, that the parties were enraged against each other, there is no error in refusing a new trial on that ground.⁷

Where a party in apparent good health is assailed, his body pierced with bullet wounds, and he thereupon falls to the ground and dies within thirty minutes, the fact that certain physicians would testify that such wounds were not necessarily fatal is no cause for a new trial.⁸

¹ Ragan v. James, 7 Kas., 354.

² Com. v. Drew, 4 Mass., 391; Com. v. Green, 17 Id., 515. See Stites v. McKibben, 2 O. S., 588.

³ Whitcomb v. State, 14 Ohio, 282.

⁴ Breese v. State, 12 O. S., 146.

⁵ O'Meara v. State, 17 O. S., 516, 517.

⁶ M. & C. Ry. Co. v. Strader, 29 O. S., 448.

⁷ State v. Kearley, 26 Kas., 77.

⁸ Id.

Due Diligence.—It must appear by affidavit that the newly discovered evidence could not have been discovered before the trial by the use of ordinary diligence. The affidavit must state the facts—what was done—to show diligence, and a mere allegation that diligence was used is not sufficient.¹ To obtain a review, all the evidence must be before the supreme court.²

Cumulative Evidence.—Newly discovered evidence which is merely cumulative is no cause for a new trial. The word “cumulative,” when applied to evidence, means tending to prove the same point to which other evidence has been offered.

Properly it is additional evidence of the same kind to the same point.³ There are some exceptions to the rule that a new trial will not be granted for newly discovered cumulative evidence, as where the new evidence will render clear what was before doubtful.⁴

Sixth. Error of Law Occurring at the Trial.—On the trial of an indictment for murder in the first degree, charging the accused with purposely killing another by administering poison, the evidence tending to show no other grade of offense, it is error to charge the jury to the effect that if they find the accused guilty their duty will be fulfilled by convicting of murder in the first or second degree, or manslaughter. And where the verdict is returned for a lower grade of homicide than murder in the first degree, a new trial should be granted where it appears from the evidence that a verdict of acquittal might have been rendered if the jury had been properly instructed.⁵

Under the assignment of errors of law, all the rulings of the court during the progress of the trial, to which exceptions were taken by the party complaining, may be again considered

¹ *Smith v. Williams*, 11 Kas., 104; *Axtell v. Warden*, 7 Neb., 190; *Boyd v. Sanford*, 14 Kas., 280.

² *Clark v. Hall*, 10 Kas., 81; *Thom v. Davis*, 16 Kas., 22.

³ *Parker v. Hardy*, 24 Pick., 246.

⁴ *Barker v. French*, 18 Vt., 460; *Waller v. Graves*, 20 Conn., 305; *Casey v. State*, 29 N. W. R., 264.

⁵ *Desbrack v. State*, 88 O. S., 365.

by the court. In some of the states specific assignments of error must be made, and where such rule prevails a general assignment will not be sufficient.

MOTION FOR NEW TRIAL.

Title of Cause.

The defendant moves the court for a new trial in this case for the following reasons affecting materially his substantial rights:

First. Irregularity in the proceedings of the court, etc. (*state specific ally the irregularity complained of.*)

Second. Misconduct of the jury, etc., in this (*state specifically the misconduct.*)

Third. Accident [or surprise] in this (*state the facts showing accident or surprise.*)

Fourth. That the verdict is not sustained by sufficient evidence.

Fifth. That the verdict is contrary to law.

Sixth. Newly discovered evidence material to the defendant, as shown by the affidavits of A B, C D and E F, submitted herewith, which evidence the defendant was unable with reasonable diligence to have discovered and produced at the trial, as shown by his own affidavit herewith submitted.

Seventh. Error of law occurring at the trial.¹

Eighth. The court erred in giving the second paragraph of the instructions.

M S, Attorney for Defendant.

AFFIDAVIT OF MISCONDUCT OF JURY, PROSECUTING ATTORNEY OR WITNESSES FOR STATE.²

Title of Cause and Venue.

G H, being first duly sworn, deposes and says that about 9 o'clock P. M. of the — day of —, 18—, and while the jury in said cause were considering their verdict, he, at the request of said jury, handed them for examination a newspaper, to wit: The Weekly Register of —, 18—, which paper contained the testimony and instruction of the court in the aforesaid case.

G H.

Subscribed, etc.,

AFFIDAVIT ON GROUND OF ACCIDENT OR SURPRISE.

Title of Cause and Venue.

A B, defendant in the above entitled cause, being first duly sworn, deposes and says, that on the trial of said cause, one L M was a material wit-

¹ In addition to this general assignment it may be well to make specific assignments, as that the court erred in giving the first [second, third, etc.] paragraphs of the instructions. The court erred in giving instructions, etc.

² Farrer v. State, 2 O. S., 54.

ness for the defendant, without whose testimony he could not safely proceed to trial (*state what the witness will swear to*); that affiant caused him to be duly subpoenaed, and he was present attending court when the jury in the case was impaneled and sworn, and so continued while the evidence on the part of the state was introduced, but when the state rested, and affiant called said L M as a witness, he could not be found, but without the knowledge or consent of affiant, had secreted himself; that neither affiant nor his attorney had any knowledge whatever of his whereabouts, nor that he intended to absent himself and not appear as a witness in the case, by reason of which affiant was taken by surprise, and was unable to make his defense in the case.¹

A B.

Subscribed, etc.,

AFFIDAVIT ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.²*Title of Cause and Venue.*

A B, defendant in said cause, being first duly sworn, deposes that since the trial in said cause he has discovered new evidence material for his defense; that one J S was present at the time the wounds were inflicted upon A E; that he, said J S, saw one J B and A E struggling together on the night of — 18—, at —, and that he distinctly saw said J B, in self-defense apparently, in order to free himself from said A E, repeatedly strike him, said A E, with a knife; that he saw the knife plainly, and heard said A E exclaim, you (meaning said J B) have killed me; that said J S was a resident of — in the state of — and left immediately after the said occurrence without mentioning the fact to any one here, so far as the affiant is aware, and affiant has only learned of the existence of such testimony since the trial of said cause, and he knows of no one else by whom he could prove the same facts.

A B.

Subscribed, etc.

CORROBORATING AFFIDAVIT OF J S.³*Title of Cause and Venue.*

J S being first duly sworn deposes and says that on the — day of — 18—, he was visiting relatives at — in the state of —; that about — o'clock, P. M., on said day, he saw a struggle between one A E and J B; that

¹ *Ruggles v. Hall*, 14 John., 112. Where a material witness, after being subpoenaed, hides to avoid being sworn, it does not seem to be necessary to set forth all that he would swear to. The party is entitled to submit his evidence to the jury.

² *Casey v. State*, 29 N. W. R., 273, 274.

³ *Id.*

said A E seized J B, and endeavored to choke him and otherwise maltreat him, when J B struck said A E on the side four or five times with the knife; that A E then relaxed his hold, and I distinctly heard said A E say, you (meaning J B) have killed me; that A B was not engaged in the struggle; that affiant saw said A E rise up after the struggle with J B, and he appeared to be severely injured, and, I have since learned, soon after died; that at the time of said occurrence, affiant was a resident of — in the state of —, and left on the following morning without mentioning this circumstance to any one; that afterward, learning that A B had been convicted of the murder of A E, and knowing such conviction to be unjust, I notified the attorney of said A B of the above facts.

J.S.

Subscribed, etc.

ORDER GRANTING NEW TRIAL.

Title of Cause.

This cause came on to be heard on the motion of the defendant to set aside the verdict in said cause and grant a new trial, and was submitted to the court, on consideration whereof the court doth sustain the same, and said verdict is hereby set aside and vacated, and a new trial granted.

ORDER OVERRULING MOTION FOR NEW TRIAL.

Title of Cause.

This cause came on to be heard on the motion of the defendant to set aside the verdict, and for a new trial, and was submitted to the court, on consideration whereof the court does overrule the same (*to which ruling of the court the defendant excepts*).

In Considering a Motion for a New Trial the judge should place himself in the situation of the jury for the purpose of weighing the evidence. Let him carefully review it and ask himself if the evidence fairly and fully considered justifies a verdict of guilty. If it does, and there are no material errors in the rulings of the court, the verdict should be permitted to stand. If, however, the evidence, when fully and fairly considered, fails to establish the prisoner's guilt, the judge has a plain duty to perform, to set the verdict aside. He is clothed with the power for the very purpose of protecting the rights of the accused, and let him perform his duty fairly and fearlessly. No greater injury can be done an innocent person than to convict him of an offense of which he is not

guilty, crush his hopes and aspirations, and place a stain upon his good name that can never be effaced. It is not a question of suspicion. Courts have nothing to do with that however strong it may be. They must be governed by the evidence in the case and by the presumptions of innocence, which, independently of proof of guilt, must prevail in every case. If, therefore, the proof fails to show that the accused is guilty, or if there are prejudicial errors in the record, the verdict should be promptly set aside and a new trial awarded.¹

There must be Actual Errors.—To authorize a court to set aside the verdict and grant a new trial there must be actual errors in the proceedings which have prevented the accused from having a fair and impartial trial, or the evidence must be insufficient to establish his guilt. Merely technical errors, which have not prevented a fair trial of the guilt or innocence of the accused, should never be made the basis of a new trial. It is the duty of the court to enforce the law and punish the guilty in order that life and property may be secure and the law respected, and even if the case appeals to the sympathy of the judge it is his duty to enforce the law. In other words, he is to see that an innocent person is not convicted of a crime, but at the same time he is not to grant new trials unless it is plainly his duty to do so under all the circumstances of the case.

Defect in Information or Indictment.—As a rule a new trial should not be granted for a mere defect in the form of charging the offense, where there is sufficient, if the language is liberally construed, to constitute a charge of the offense alleged.

The Effect of Granting a New Trial on the motion of the defendant is to open the case for a re-trial upon the counts upon which he was acquitted as well as those on which he was convicted.²

¹ The jury may misconceive the issue, misunderstand the instructions, fail to analyze all the facts, or in times of excitement be unconsciously influenced by popular clamor, and unless the court will correct the error a great wrong will be committed. *Fisk v. State*, 9 Neb., 66. Many years ago a capable judge, in setting aside a verdict because it was not authorized by the evidence, said: "If the evidence does not establish the fact that this man is a felon, my duty requires me to protect him from being branded as one."

² *Lesslie v. State*, 13 O. S., 390; *Jarvis v. State*, 19 Id., 585; *State v.*

A Motion in Arrest of Judgment may be granted by the court for either of the following causes: First. That the grand jury which found the indictment, had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court. Second. That the facts stated in the indictment do not constitute an offense.¹

No Judgment can be Arrested for a Defect in Form.—The effect of allowing a motion in arrest of judgment shall be to place the defendant in the same position with respect to the prosecution as before the indictment was found. If, from the evidence on the trial, there shall be sufficient evidence to believe him guilty of an offense, the court shall order him to enter into a recognizance with sufficient security conditioned for his appearance at the first day of the next term of the same court otherwise the defendant shall be discharged.²

MOTION IN ARREST OF JUDGMENT:

Title of Cause.

The defendant moves the court to arrest the judgment in this case for the following causes:

First. That the grand jury had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court.

Second. That the facts stated in the indictment do not constitute an offense.

S T, Attorney for Defendant.

Behimer, 20 O. S., 572. In Bohanan v. State, 18 Neb., 57, the question was very carefully considered, several weeks being spent in the examination of authorities, and the rule above stated was sustained. State v. McCord, 8 Kas., 243.

¹ Cr. Code, § 493.

² Cr. Code, § 494. At common law, "want of sufficient certainty in setting forth either the person, the time, place or the offense," is cause for arresting the judgment. 4 Bla. Com., 375. Where the averments in the indictment fail to show an offense the judgment of conviction will be arrested and reversed. Davis v. State, 19 O. S., 270. Formal defects must be taken advantage of by a motion to quash or plea in abatement. Carper v. State, 27 O. S., 572; Kerr v. State, 36 Id., 614. The sufficiency of an information is to be determined by the rule governing indictments. State v. Barnett, 3 Kas., 251. The objection that an information is not properly verified is waived by pleading to the merits, and entering upon the trial. State v. Ruth, 21 Kas., 583; State v. Otey, 7 Id., 69.

ORDER SUSTAINING MOTION.

Title of Cause.

This cause came on for hearing on the motion of the defendant in arrest of judgment, and was submitted to the court, on consideration whereof the court does allow the same. [And it appearing from the evidence that there is sufficient reason to believe the defendant guilty of an offense, he is therefore required to enter into a recognizance with sufficient security, in the sum of \$—, conditioned for his appearance at the first day of the next term of this court, in default of which it is ordered that he be committed to the jail of said county.] (If the defendant is discharged, say: It is therefore ordered that said defendant be discharged.)

ORDER OVERRULING MOTION IN ARREST.

Title of Cause.

This cause came on for hearing on the motion of the defendant in arrest of judgment, and was submitted to the court, on consideration whereof the court does overrule the same. [To which ruling the defendant excepts.]

CHAPTER XLII.

JUDGMENT AND SENTENCE.

Before the sentence is pronounced the defendant must be informed by the court of the verdict of the jury and asked whether he has anything to say why judgment should not be pronounced against him.¹

If the defendant have nothing to say, or if he show no good and sufficient cause why judgment should not be pronounced, the court shall proceed to pronounce judgment as provided by law.²

Court will Presume Question to Have Been Asked, When.—In the absence of a bill of exceptions showing the contrary, a reviewing court will presume that the court informed the prisoner of the verdict and asked him if he had anything to say why judgment should not be pronounced. *Carper v. State*, 27 O. S., 572; *Bartlett v. State*, 28 Id., 669; *Bond v. State*, 23 Id., 349.

Whenever a Fine shall be the whole or a part of the sentence; the court may in its discretion order that the person sentenced shall remain confined in the county jail till the amount of such fine and costs are paid.³

¹ Cr. Code, § 495.

² Id., § 496. At common law, if the sentence was erroneous, there was no authority to re-sentence the prisoner, it being held that the court had exhausted its power by imposing the sentence. A number of cases may be found in this country sustaining the common law rule. In *King v. Kenworthy*, 1 Barn. & Cress., 711, and *R. v. Holloway*, 5 Eng. L. & Eq., 312, the former practice was overruled, and these cases have generally been followed in this country. *Beale v. Com.*, 25 Penn. St., 22; *Benedict v. State*, 12 Wis., 313; *Williams v. State*, 18 O. S., 46; *Picket v. State*, 22 Id., 405; *Dodge v. People*, 4 Neb., 220.

³ Cr. Code, § 497.

What Sentence of Imprisonment Must Contain.—In all cases where any person shall be convicted of any offense by this code declared criminal and made punishable by imprisonment in the penitentiary, the court shall declare in their sentence for what period of time, within the respective period prescribed by law, such convict shall be imprisoned at hard labor in the penitentiary; and shall moreover determine and declare in their sentence whether any, and if any, for what period of time such convict shall be kept in solitary confinement in the cells of the penitentiary without labor.¹

Expiration of Time without Imprisonment is not an execution of the sentence of imprisonment. The essential portion of a sentence is the *punishment*, including the *kind* and *amount* thereof, without reference to the time when it shall be inflicted.²

Where the Offense Forms but One Transaction, and the indictment contains several counts on which the jury have returned a verdict of not guilty, it is error in the court to sentence on each count separately.³

The Terms of a Sentence of imprisonment ought to be so definite and certain as to advise the prisoner, and the officer charged with the execution of the sentence, of the time of its commencement and termination, without being required to inspect the records of any other court, or the record of any other case.⁴

One Term of Imprisonment may Commence when another Terminates in certain cases. But where the sentence was imprisonment "for a further term of ten years, to commence at the expiration of the sentence aforesaid," and there is nothing in the record to show to what the word "aforesaid," relates, the sentence will be void for uncertainty.⁵

Lost Indictment.—If after conviction the indictment be lost or stolen from the files, its place may be supplied by copy, like lost pleadings. The presence of the original indictment is not indispensable to the sentence of the prisoner.⁶

¹ Id., § 498.

² Hollon v. Hopkins, 21 Kas., 638.

³ Woodford v. State, 1 O. S., 428.

⁴ Picket v. State, 22 O. S., 405; Larney v. Cleveland, 34 Id., 599.

⁵ Williams v. State, 18 O. S., 46.

⁶ Mounts v. State, 14 Ohio, 295.

Revision of, during Term.—Where a court, in passing sentence for a misdemeanor, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion and in furtherance of justice, at the same term and before the original sentence has gone into operation, or any action has been had upon it, revise, and increase or diminish such sentence within the limits authorized by law.¹

The Sentence.—An examination of the statutes of the several states will show a great want of uniformity in the penalties inflicted for particular crimes. It is not the purpose of the writer, in a work of this kind, to discuss the propriety of additional legislation, but the duty of the court in passing sentence. The object of imposing punishment is three-fold: First, the reformation of the offender, second, to deter others from the commission of crime, and third, the protection of society.² In former times it was supposed that severe punishments were the only protection to society. Hence we find that at the time Blackstone wrote his commentaries there were one hundred and sixty offenses punishable with death.³ Every week in the year men were hanged, in London, in great numbers. The effect was unfavorable, not to say brutalizing upon public morals, and crimes were deliberately and constantly committed even in plain view of the gallows.

The laws of the Roman kings and emperors and the twelve tables of the *decemviri* were full of cruel punishments, and neither life, liberty nor property was adequately protected.

Certainty and not Severity.—Experience has shown that it is the certainty and not the severity of punishment which deters

¹ Lee v. State, 32 O. S., 113. A general verdict that the defendant "is guilty as he stands charged in the indictment," where it contains two counts charging distinct misdemeanors, will authorize a sentence on each count. Eldridge v. State, 37 O. S., 191.

² Blackstone (4 Com., 252), says: "All punishment inflicted under temporal laws may be classed under three heads: such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example, all of which conduce to one and the same end, of preventing future crime, whether that can be effected by amendment, disability or example."

³ 4 Com., 19.

from crime.¹ Great discretion is necessarily given to the judge before whom a prisoner is convicted as to the extent of the punishment to be imposed. It is supposed that he will graduate the punishment in severity according to the heinousness of the offense. It is probable that the ends of justice would be greatly promoted by a still greater discretion. There certainly is a great difference in the character of the offense between the hardened villain who waylays and robs his victim, or who burglariously enters your dwelling at night with the intent to steal, and murder if necessary; and the young man of previously good character who has been guilty of some act which barely makes him criminally liable. In the one case the full punishment allowed by law perhaps would not be too severe, particularly if the party had been previously convicted of a similar offense, while in the other, if the law will permit a punishment other than by imprisonment in the penitentiary and the consequent infamy, it might and probably would have the effect thereafter to make him a law abiding citizen. In no case should the sentence exceed the bounds of just punishment. But little reformation may be expected from a prisoner smarting under a disproportionate and unjust sentence. The fact that he has been convicted of a crime does not authorize the courts to deprive him of those rights which the law still recognizes, nor to treat him as one having no rights.²

¹ "We may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action (Beccar, c. 6), that crimes are more effectually prevented by the *certainty* than by the *severity* of punishment. For the excessive severity of the laws (says Montesquieu, Sp. L. C., 6, c. 13), hinders their execution." 4 Blacks. Com., 16, 17.

² In Vol. 20, p. 80, of the Central Law Journal, is the following: A man named Hammond had been convicted of being engaged in burglary, in connection with which he had assaulted the constable who arrested him. Ch. J. Coleridge, in passing sentence, said, "that the man had already had seventeen years penal servitude for stealing a coat and piece of elastic web, and that there ought to be some reasonable proportion between an offense and its punishment," and sentenced the prisoner to eight months hard labor. After-

SENTENCE ON VERDICT OF GUILTY.

Title of Cause.

And now on this day the defendant, A B, heretofore convicted of the crime of —, came into court in the custody of the sheriff, and was informed by the court of the verdict of the jury and asked if he had anything to say why judgment should not be pronounced against him; whereupon said defendant answered nothing [or showing no good and sufficient cause why judgment should not be pronounced].¹

It is therefore considered by the court that said A B, the defendant, be imprisoned in the penitentiary of the state of — (if there are more than one, designate the particular one) and kept at hard labor, Sundays excepted, for the period of — years, and that he pay the costs of prosecution taxed

ward a surgeon was charged with rape and found guilty of an attempt to commit. The Ch. J. in passing sentence said, "the fact that the prisoner, having the education of a gentleman, had forgotten the restraints of his position, was a reason why he should suffer more than people in an inferior rank of life. He must be imprisoned and kept to hard labor for two years."

In Vol. 20, p. 257, Am. Law. Rev., is a synopsis of the report of a speech delivered by Ch. J. Coleridge, as the presiding officer at a supper given by the St. Giles mission to discharged prisoners, as follows: "If in his judicial capacity he was made familiar with the extent and variety of crime, he was also made acquainted with the unbending pertinacity and infinite variety of the temptations which produce crime." * * * "In his judgment there should be much greater leniency in the scale of our punishments. He had thought a great deal about the question and had come to the conclusion that lengthened periods of imprisonment imposed by our law were productive of almost unmixed evil. The practice imposed on judges by more than one act of parliament of sentencing to long terms of imprisonment persons convicted of trivial but repeated offenses, deserved thorough condemnation. Petty offenses, even though often repeated, remained petty offenses still. He had often had men brought before him, a great part of whose lives had been passed year after year in terms of imprisonment for what were really only trifling matters—offenses which, in the scale of dignity, hardly reached the height of petty larceny. There should always be some degree of moral proportion between the crime punished and the punishment inflicted. Unless this were so the punishment was apt to strike the public and the sufferer with a strong sense of injustice, which was productive of much evil. The time had come for a general revision of our system in this respect."

¹ The above statement, in substance, is necessary to appear in each sentence in order that it may show that the statutory requirement has been complied with, and that the prisoner was present in court when sentence was pronounced. As substantially the same form is applicable in each case the above may be copied in connection with each sentence.

at ——. (*Solitary confinement in the cells of said penitentiary is no part of this sentence.*)

SENTENCE OF DEATH.¹

It is therefore considered by the court that said A B, the defendant, be confined in solitary confinement in the jail of — county until the — day of —, A. D. 18—, on which day, between the hours of — A. M. and — P. M., said defendant shall be taken by the sheriff to the place of execution in said county, and there be hanged by the neck until he is dead, and that he pay the costs of prosecution taxed at \$—.

SENTENCE OF IMPRISONMENT IN JAIL, ETC.

It is therefore considered by the court that said defendant, A B, be imprisoned at hard labor, Sundays excepted, in the jail of — county for the term of — and that he pay the costs of prosecution taxed at \$—.

SENTENCE IMPOSING A FINE.

It is therefore considered by the court that the defendant, A B, pay a fine of — dollars, and the costs of prosecution, taxed at \$—.

CUMULATIVE SENTENCES.²

It is therefore considered by the court that the defendant, A B, be confined at hard labor, Sundays excepted, in the —, until the — day of —, A. D. 18—, and that he be further imprisoned in said — for the term of —, commencing on said — day of —, A. D. 18—, and kept at hard labor, Sundays excepted, and that he pay the costs of prosecution taxed at \$—.

SENTENCES ON PLEA OF GUILTY.

Title of Cause.

And now on this — day came the prosecuting attorney of — county,

¹ The common law form, as given by Chitty, is as follows, after the verdict of guilty: "And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth anything to say wherefore the said justices here ought not, upon the premises and verdict aforesaid, to proceed to judgment and execution against him, who nothing further saith unless he before had seen. Whereupon all and singular the premises being seen and by the said justices here fully understood, it is considered by the court here that the said Peter Hunt be taken to the jail of * in the said county of W. from whence he came, and from there to the place of execution, on Monday, now next ensuing, being the ninth of this instant, August, and there be hanged by the neck until he is dead, and that afterward his body be dissected and anatomized." 4 Chitty, Cr. L., 392.

² Williams v. The State, 18 O. S. 46; Pickett v. The State, 22 Id. 405; Larned v. Cleveland, 34 Id. 599.

and also the defendant, A B, accompanied by his counsel, said defendant having heretofore, on the — day of —, A. D. 18—, entered a plea of guilty of the charge in the information [or indictment], and the court [having heard the evidence offered by the parties and the argument of counsel, and] being fully advised in the premises, and said defendant being asked if he had anything to say why judgment should not be pronounced against him, answered he had nothing, etc.

It is therefore considered by the court that said A B, the defendant, etc.

Suspension of Execution of Sentence.—When a person shall be convicted of an offense and shall give notice to the court of his intention to apply for a writ of error, the court may in its discretion, on application of the person so convicted, suspend the execution of the sentence or judgment against him until the next term of the court, or for such period, not beyond the session of the court nor beyond the next term of the supreme court, as will give the person so convicted a reasonable time to apply for such writ. Provided, where any such conviction is of an offense the punishment whereof is capital, at least one hundred days shall intervene between the date of such sentence and judgment, and the day appointed for execution.¹

Must Enter into Recognizance.—No court shall suspend the execution of the sentence or judgment against any person convicted and sentenced for a misdemeanor, unless such person shall enter into a recognizance, with such security as the court may require, conditioned that the person so convicted and sentenced shall appear at the next term of such court, and from term to term until the case shall be determined, and abide the judgment or sentence of the court.²

Whenever a person shall be convicted of a felony, and the judgment shall be suspended as aforesaid, it shall be the duty of the court to order the person so convicted into the custody of the sheriff, to be imprisoned until the case in error is disposed of. If any person so convicted shall escape, the jailer or other officer from whose custody the escape was made may return to the clerk of the proper court the writ by virtue of which the convict was held in custody, with information of the

¹ Cr. Code, § 503.

² Id., § 504.

escape indorsed thereon, whereupon said clerk shall issue a warrant stating such conviction, and commanding the sheriff of the county to pursue after such person into any county of the state; and said sheriff shall take such person and commit him to the jail of such county.¹

In States where a Writ of Error is a Writ of Right, which in capital cases operates as a supersedeas, it would seem that in bailable cases, where the evidence is not strong, or material error prejudicial to the accused is apparent in the record, that pending the proceedings in error the accused should be admitted to bail, satisfactory sureties being given.

There is neither justice nor propriety in keeping a person in jail pending the proceedings in error, when the probabilities are that he is not guilty, and his neighbors and friends have sufficient confidence in him to become his sureties. This power was constantly exercised by the judges at common law under the name of reprieve, even in cases of treason.²

If the Evidence is Insufficient, or there is Manifest Prejudicial Error in the Record, there should be a suspension of the sentence until the case can be reviewed. If the judgment is afterward reversed, and on a new trial the accused is acquitted, the fact that he has been in prison will cast a cloud upon his reputation from which he will never recover, however innocent he may have been of the crime with which he was charged.

Where the Guilt is Evident, and there is no material error in the record, the law should be permitted to take its course, and the party should not be admitted to bail. In other words, where the testimony shows that the prisoner is guilty and no material error is apparent in the record, the sentence should not be suspended.

ORDER SUSPENDING SENTENCE.

Title of Cause.

This cause came on for hearing on the motion of A B, the defendant, for

¹ Cr. Code, § 505.

² 4 Bla. Com., 394; 1 Hale's P. C., 368; 2 Dyer, 295; 1 Chitty, Cr. L., 758; Miller's Case, 9 Cow., 734.

a suspension of sentence pending the proceedings in error in the supreme court, and it appearing to the court [or judge] that said defendant intends to have said cause reviewed in the supreme court, and that a transcript is now being prepared for that purpose, it is ordered that the execution of the sentence and judgment against him be suspended until —*. It is further ordered that said A B be committed to the custody of the sheriff to be imprisoned in the jail of said county until the case in error is disposed of.

WHERE THE SENTENCE IS SUSPENDED AND BAIL FIXED.

Follow the preceding form to the *, then say: It is further ordered that the defendant be admitted to bail in the sum of \$ —, with good and sufficient sureties that he will appear at the next term of this court, and from term to term until the case shall be determined, and abide the judgment and sentence of the court.

ORDER CARRYING SUSPENDED SENTENCE INTO EXECUTION.

Title of Cause.

This cause came on for hearing upon the motion of the prosecuting attorney to enforce the sentence against the defendant, heretofore suspended by proceedings in error, and it appearing to the court that the judgment against said defendant has been affirmed by the supreme court and that the cause is remanded to carry the sentence into effect, it is therefore ordered that said sentence be now carried into effect and execution.

RECOGNIZANCE WHERE SENTENCE IS SUSPENDED.

The State of —, }
— County. }

Be it remembered that A B, C D and E F, personally appeared in open court [or before me], on the — day of —, 18—, and acknowledged themselves jointly and severally indebted to the state of —, in the sum of — dollars, to be levied of their goods and chattels, lands and tenements, if default is made in the conditions following:

Whereas, at the — term of the — court of — county, A B was convicted of the crime of —, and has given notice of his intention to have said case reviewed by the supreme court, and has ordered a transcript for that purpose and obtained a suspension of sentence.

Now, therefore, the conditions of this recognizance are such, that if the above bounden A B shall personally appear before the — court, at the next term thereof, and from term to term until the case shall be determined, and abide the judgment and sentence of the court, then this obligation to be null and void, otherwise to remain in full force and effect.

A B.
C D.
E F.

Taken and acknowledged in open court (*or state according to the facts*)

this — day of —, 18—. (*If taken before an officer, he should sign his name and official position.*)

Writs of Error.—In all criminal cases, writs of error shall be issued by the clerk of the supreme court upon the filing of a petition in error and transcript of the record of the proceedings of the district court, and payment of costs, as in civil cases. Provided, that if any person desiring to obtain such writ of error shall file an affidavit with the clerk of the court that he is unable, on account of his poverty, to pay said costs, the clerk shall enter the suit upon the docket, and upon the entry of final judgment indorse the amount of costs upon the mandate, and the same shall be paid by the county in which the indictment was found.¹

Judgment for Costs.—Where the trial of a party, indicted for a crime, is continued, on his motion, to the next term of the court, a judgment against him for cost of the continuance will not be reviewed until after the final determination of the case.²

A defendant in a criminal case can appeal only after judgment against him, that is, after final judgment, and intermediate orders can be reviewed only on such appeal. An order refusing to discharge a prisoner while a complaint charging him with a crime is pending against him, is not a final order.³

Errors must be Assigned.—A reviewing court will not ordi-

¹ Cr. Code, § 502. *There must be a final judgment in the court below before a writ of error will be granted.* *Kinsley v. State*, 3 O. S., 508; *Hockett v. Turner*, 19 Kas., 527; *Green v. State*, 10 Neb. 102. Before a cause will be reversed for error, it must appear affirmatively that the error affects the substantial right of the party complaining. *Hall v. Jenness*, 6 Kas., 356. Error must affirmatively appear, and will not be presumed. *State v. English*, 9 Pacific Rep., 761. The rules of the Kansas Supreme Court require the plaintiff to number the pages of the petition in error and the record, and he is also required to file a written or printed brief, which must refer specifically to the pages of the record which he desires to have examined. Where the only reference in the brief was to the record, "pages 1 to 160 inclusive," it was held to be insufficient. *State v. McCool*, 9 Pacific Rep., 618.

² *Cochrane v. State*, 30 O. S., 61.

³ *State v. Edwards*, 10 Pacific Rep., 544. In *Re Edwards*, Id., 536; *State v. Freeland*, 16 Kas., 9; *State v. Horneman*, Id., 452.

narily notice errors which are not specifically assigned, and where substantial justice does not require it to be done, will not review such errors.¹

Under the provisions of the constitution of Nebraska² no allowance of a writ of error by a judge is necessary. To obtain a review of the proceedings all that is required is to file in the supreme court a transcript of the proceedings of the district court and a petition in error, in which the errors alleged to exist in the record are specifically assigned. A writ of error will then be issued by the clerk.³

¹ *Booth v. Hubbard's Adm.*, 8 O.S., 244; *State v. Dennerson*, 14 Kas., 133; *Powers v. Kindt*, 13 Kas., 74. The assignment of errors constitutes the appellant's complaint in the supreme court. *State v. Fanrote*, 4 N. E. Rep., 19; *Hartlep v. Cole*, 94 Ind., 513. But in a proper case the reviewing court may permit an amendment of the assignments of errors or additional assignments, and should do so where justice requires it.

² In Ohio, where the allowance of a writ of error is necessary, the supreme court, in *Bartlett v. State*, 22 O. S., 205, say: "We refuse to allow the writ for the reason that the application can as well be made to the court of common pleas. Were we to establish the practice that all such applications were to be made to this court without first going to the common pleas, we should be utterly unable to dispose of the business of the court. Necessity therefore compels us to confine the hearing of such applications to exceptional cases, where the special circumstances render it necessary."

In criminal cases, at common law, no bill of exceptions can be allowed. The later cases in England, however, permit such bills in cases of misdemeanor. *R. v. Puget*, 1 Leon., 5; *R. v. Higgins*, 1 Vent., 366; *R. v. Nutt*, 1 Barnard., 307. But in case of treason or felony no bill of exceptions has ever been allowed at common law. *Bac. Abr.*, Bill of Exceptions; 2 *Hawk. P. C.*, c. 46. This illustrates the fierce spirit of the common law. The accused in England, until about the beginning of the present century, was denied the assistance of counsel on the trial of the main issue; and until Ch. J. Holt changed the rule the witnesses for the defense were not sworn. In most cases a charge of crime was equivalent to a conviction.

³ *Cr. Code*, § 508. The form of a petition in error is given on pages 788, 789, of *Maxwell's Pleading and Practice under the Code* (4th Ed.,) and of a summons in error on page 715 of the same work, and need not be repeated here. If the transcript is imperfect a form of suggestion of diminution and order for complete transcript will be found on page 716 of the same work. Also a form of abstract of the record including the bill of exceptions, p p. 779-786, procedure in the supreme court, 787-796.

In *Blackburn v. State*, 22 O. S., 581, it was held that the time for the

Affirmance of Judgment.—If a writ of error be allowed and on the hearing the judgment of the court in which the trial was had shall be affirmed, such court shall carry into execution the sentence pronounced against the defendant at the next term after the judgment of affirmance is rendered.¹

Reversal of Judgment.—When the defendant has been committed to the penitentiary of the state, and the judgment by virtue of which the commitment is made shall be reversed on a writ of error, by which reversal the defendant shall be entitled to his discharge or to a new trial, the clerk of the court reversing such judgment shall, under the seal of the court, forthwith certify the same to the warden of the penitentiary.²

REVERSAL OF JUDGMENT IN SUPREME COURT AND DISCHARGE OF THE DEFENDANT.

Title of Cause.

Now on this — day³ this cause came on for hearing upon the petition in error and the transcript of the record, and was argued by counsel and submitted to the court, on consideration whereof the court finds that there is error in said record prejudicial to the plaintiff in this: (*State the errors as shown by the opinion.*) It is therefore considered by the court that the judgment be reversed and set aside, and [as the proof fails to show that the crime charged was in fact committed by any one]⁴ the plaintiff discharged.

allowance of writs of error in criminal cases not punishable with death was not limited to three years from the date of the judgment. A different rule was adopted in *Kountz v. State*, 8 Neb., 294.

¹ Cr. Code, § 507.

² *Id.*, § 512. The warden, on the receipt of such certificate, in case a discharge of the defendant is ordered, shall immediately discharge such defendant from the penitentiary. Cr. Code, § 513.

In case a new trial be ordered the warden of the penitentiary shall forthwith cause said defendant to be taken and conducted to the county jail, and committed to the custody of the keeper thereof in the county in which said defendant was convicted. Cr. Code, § 514.

³ Where, as in the supreme court, causes are usually taken under advisement before being decided, the entry may be: "This cause having been submitted at a former day of this term and taken under advisement, on consideration whereof the court finds that there is error in said transcript in this," etc.

⁴ It is probably unnecessary to state the grounds on which a discharge is granted, yet it is better to do so in every case, so that it may appear that the court was justified in its action.

REVERSAL AS TO PART OF JUDGMENT.

Title of Cause.

Now, on this — day, this cause came on for hearing upon the petition in error and transcript of the record, and was argued by counsel and submitted to the court, on consideration whereof the court finds that there is error in said record prejudicial to the plaintiff in this: [that before pronouncing sentence on said plaintiff he was not informed by the court of the verdict of the jury, and asked whether he had anything to say why judgment should not be pronounced against him.]¹ The judgment is therefore reversed, the verdict to remain in full force, and the cause is remanded to the court below to render judgment as required by law.

A Judgment, though pronounced by a judge, is not his determination and sentence, but the sentence and determination of the law. Therefore the style of the judgment is not that it is ordered or resolved by the court, for then the judgment might appear to be his own, but "it is considered." "*Consideratum est per curiam,*"² etc.

¹ Dodge *v.* People, 4 Neb., 220; Williams *v.* State, 18 O. S., 46; Pickett *v.* State, 22 Id., 405; Beale *v.* Com., 25 Penn. St., 22; Benedict *v.* State, 12 Wis., 313. It was formerly held at common law that if the sentence was so defective as to be invalid the prisoner must be discharged; but this doctrine is now overruled. R. *v.* Kenworthy, 1 Barn. & C., 711; R. *v.* Holloway, 5 Eng. L. & Eq., 310, and cases cited above. The courts of New York seem to adhere to the former common law rule. A judgment must be regularly pronounced and formally entered to authorize the execution of the sentence, and a mere recital that "defendant had been sentenced by the court" is insufficient. State *v.* Huber, 8 Kas., 447. Where the record merely recites that "thereupon the court sentenced the defendant, William M. Prewit, to be hanged by the neck until dead, the sentence to be carried into effect on the 23d day of June, 1876, between the hours of 12 o'clock m. and 6 o'clock p. m." it is not a judgment, but a mere recital that one was rendered. Prewit *v.* People, 5 Neb., 382.

² 3 Bla. Com., 396. On page 378 he says: "For if judgments were to be the private opinions of the judge, men would then be the slaves of their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation with which an offender might flatter himself, if his punishment depended on the humor or discretion of the court." The discretionary power of the courts, as to the amount of fines and length of imprisonment, seems to be an exception to the rule above stated, but really is not so. The law fixes the maximum and minimum amount of punishment for a specified offense, and empowers the court to impose the sentence ac-

JUDGMENT AFFIRMED.

Title of Cause.

Now, on this day, this cause came on for hearing upon the petition in error and transcript of the proceedings, and was argued by counsel and submitted to the court; on consideration whereof the court finds that there is no error prejudicial to the plaintiff in the record. It is therefore considered by the court that the judgment in said cause be, and the same is hereby affirmed, and that the plaintiff pay the costs of this action, taxed at —.

JUDGMENT AFFIRMED BUT SENTENCE MODIFIED.¹*Title of Cause.*

Now, on this day, this cause came on for hearing upon the petition in error and transcript of the proceedings, and was argued by counsel and submitted to the court, on consideration whereof the court finds that there is no error in the proceedings prejudicial to the plaintiff, but that the punishment imposed is excessive. It is therefore considered by the court that the judgment be modified by reducing the term of imprisonment from [five] years to [one] year, from the date of said sentence, [or the amount of fine from \$ — to \$ —], and as thus modified the judgment is affirmed.

Plea not Affected.—When the judgment is reversed for error in the proceedings subsequent to the plea of guilty, such plea is not affected by the judgment of reversal.²

ording as the circumstances attending the commission of the crime may be aggravating or otherwise. A judgment in a criminal case can not be divided up, and parceled out, and pronounced from time to time by the court. But the court may, in the exercise of a reasonable discretion, suspend sentence for a time to enable the court to inform itself of such matters as will enable it to impose a proper sentence. *People v. Felker*, 27 N. W. R., 869. The information obtained by the court upon the subject should be obtained in open court, as otherwise it is liable to mislead.

¹ The power to modify a sentence by reducing the amount of the punishment no doubt exists in all reviewing courts, which possess the power to affirm, reverse, or modify judgments. This power has been exercised for many years by the supreme court of Iowa—*State v. Moody*, 50 Iowa, 443. *State v. Upson*, 20 N. W. Rep., 173—and is clearly in furtherance of justice.

² *Sutcliffe v. State*, 18 Ohio, 469. The court say [p. 480]: "The reversal in the case necessarily put an end to the judgment, and the verdict on which the judgment had been founded, but according to no principle could it be made to reach the prisoner's plea. It is true, the first verdict was in effect a return of not guilty upon the first two counts; but when the cause was remanded to the common pleas, it stood, as to the third count, precisely as when first at issue, and before any error had occurred. The reversal did not extend to the plea."

An Indictment Containing Several Counts, some of which are defective and some of which are good, is sufficient to sustain a general verdict of guilty, yet such general verdict will not authorize separate penalties upon separate counts.¹

The rule that a judgment on a general 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.²

A judgment on a general verdict of guilty, on an indictment containing some good and some bad counts, is not erroneous because not rendered with express reference to the good counts.³

Where the defendant is found guilty upon several distinct counts of an indictment, some of which are bad and some good, a judgment and sentence in general terms on such verdict is not erroneous, provided the sentence be proper and warranted by the laws applicable to the good counts.⁴

The tendency of the courts at the present time is to extend every reasonable facility to the accused to enable him to have a fair trial, and so to guard his rights that he shall not be convicted unless actually guilty, but when a fair trial has been had, to disregard merely technical errors, either in the statement of the offense, provided it is apparent what offense is intended, or in the proceedings.

The common law courts, having no power to grant new trials upon the merits, sought to accomplish the same result in many cases by sustaining defects of form in the indictment.

These decisions of the common law courts have been followed to some extent, without considering the increased power

¹ *Buck v. State*, 1 O. S., 61.

² *Robbins v. State*, 8 O. S., 131.

³ *Boose v. State*, 10 O. S., 575.

⁴ *Bailey v. State*, 4 O. S., 441.

of the courts under the statute to grant new trials upon the merits for prejudicial errors in the proceedings.

Where, therefore, a person is charged with a specific offense, and is tried and found guilty thereof, no objection being made to the form of the charge until after the verdict of guilty, the verdict, as a rule, should be permitted to stand if the offense is distinctly charged in the indictment or information, although not in the language of the statute, or in definite or precise terms.¹

¹ A statute authorizing the amendment of an indictment or information after verdict would be in furtherance of the due administration of justice.

CHAPTER XLIII.

BILLS OF EXCEPTIONS, TRANSCRIPTS, ETC.

The Prosecuting Attorney may Present to the Supreme Court any Bill of Exceptions taken under the provisions of section four hundred and eighty-three, and apply for permission to file it with the clerk thereof, for the decision of such court upon the points presented therein; but prior thereto he shall give reasonable notice to the judge who presided at the trial in which the bill was taken, of his purpose to make application; and if the supreme court shall allow such bill to be filed, such judge shall appoint some competent attorney to argue the case against the prosecuting attorney, which attorney shall receive for his services a fee not exceeding one hundred dollars, to be fixed by such court, and to be paid out of the treasury of the county in which the bill was taken.¹

If the supreme court shall be of the opinion that the question presented should be decided upon, they shall allow the bill of exceptions to be filed and render a decision thereon.²

The judgment of the court in the case in which the bill was taken shall not be reversed, nor in any manner affected; but the decision of the supreme court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may afterward arise in the state.³

The Right of the State to a Bill of Exceptions did not exist at common law, and exists alone by virtue of the statute. Nearly all the states have passed laws conferring this right, the object

¹ Cr. Code, § 515.

² Cr. Code, § 516

³ Cr. Code, § 517

being to settle the law correctly upon the questions involved, not to affect the judgment. The judgment against the state, however, to bar a further prosecution, must be based upon the verdict of a jury. Thus in *State v. Lawrence*,¹ the defendant was indicted for incest, there being two counts in the indictment. The court required the prosecution to elect upon which count it would proceed, and on the trial of the remaining count, after the evidence for the prosecution had closed, sustained a motion of defendant to dismiss for want of sufficient evidence, and the case was not submitted to the jury. This would not bar a future prosecution.

NOTICE TO JUDGE BY PROSECUTING ATTORNEY.

Title of Cause.

To O P, Judge of the District court of —County:

You are hereby notified that on the — day of —, 18—, or as soon thereafter as I can be heard, I will apply to the supreme court at — for permission to file a bill of exceptions in the above entitled cause with the clerk thereof, for the decision of such court upon the points presented therein.

Oct. 15, 18—.

Respectfully yours,

G H, Prosecuting Atty. — County.

ALLOWANCE OF BILL OF EXCEPTIONS OF PROSECUTING ATTORNEY.

The court being of the opinion that the questions presented should be decided upon, hereby allow, and order the filing of this bill of exceptions.²

Oct. 20, 18—.

M S, Chief Justice [or Judge] of Supreme Court.

APPOINTMENT OF ATTORNEY TO ARGUE THE CASE.

Title of Cause.

It satisfactorily appearing to me that the supreme court has allowed the filing of the bill of exceptions in said cause in said court, I therefore hereby

¹ 19 Neb., 307.

² This order to be indorsed upon the bill of exceptions.

appoint S T, a competent attorney, to argue the case against the prosecuting attorney, in said court.

Oct. 25, 18—.

O P, Judge of the District Court of — County.

A BILL OF EXCEPTIONS ON A HEARING UPON MOTION, ETC.¹

In the — Court of — County [Nebraska].
 State of — }
 v. } Bill of Exceptions.
 A B. }

Be it remembered that on the hearing of a motion filed by the defendant [for a change of venue] in said cause, before R S, judge of said court, at the —, 18—, term thereof, to wit, on the — day of —, 18—, the defendant, in support of said motion, filed and read the affidavits of A B, C D and E F, as follows: (*Copy affidavits.*) And the state, in opposition to said motion, filed and read the affidavits of G H and J K as follows: (*Copy.*)

The foregoing is all the evidence offered or given by either party on the hearing of the motion for change of venue in said cause, and on the application of the [defendant] this bill of exceptions is allowed by me, and ordered to be made a part of the record in this case.

Dated—, 18—.

B S, Judge.

BILL OF EXCEPTIONS.

In the — Court of — County [Nebraska].
 State of — }
 v. } Bill of Exceptions.
 A B. }

Be it remembered that on the trial of this cause in the — court of — county, before Hon. R S, judge of said court, at the —, 18—, term thereof, to wit, on the — day of —, 18—, the following proceedings were had, to wit: E F, called as a juror in said cause, and being examined on his *voir dire* testified: "I am a resident of — county, and an elector therein, and am — years of age. I am not related to the defendant. I have heard of the offense with which he stands charged, and have read in the newspapers what purported to be the evidence on the preliminary examination, and have formed an opinion as to his guilt or innocence." Whereupon the de-

¹ In many cases where a preliminary motion or other form of objection is supported by affidavits, or other evidence is heard before the term at which the trial is had, and it is claimed that the court erred in its ruling, in order to obtain a review of such ruling it is necessary to except to the same, and preserve the evidence used on the hearing thereof by a bill of exceptions.

All presumptions being in favor of the correctness of the ruling of the court, the error must appear on the face of the proceedings.

tendant challenged the juror for cause, which challenge was overruled by the court, to which the defendant excepted. G H, called as a juror in said cause, and being examined on his *voir dire*, testified as follows: "I am — years of age, and a resident and elector of — county. I have formed an opinion as to the guilt or innocence of the accused." Question. "Upon what is your opinion founded?" Ans. "Upon reading newspaper statements, rumor and hearsay." Ques. "Do you feel able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence?" Ans. "I think I could now, but I might possibly lean a little the other way." Whereupon the defendant challenged the juror for cause, which challenge the court overruled, to which the defendant excepted.¹

I J, called as a juror, being examined on his *voir dire*, testified as follows: (*proceed with the examination of each juror challenged, where the challenge was overruled, showing exception to the ruling of the court thereon.*)

(*If, after the challenges for cause have been exercised or waived, objection be made to the peremptory challenges, set out the cause of objection with an exception to the ruling of the court.*²)

Thereupon the jury, being duly impaneled and sworn, one S T was called as a witness on behalf of the state, who, being duly sworn, testified on his direct examination as follows: "I am — years of age, and a resident of —. I am acquainted with the defendant. I had a conversation with the defendant in reference to this matter on or about the — day of —, 18—, in which he made certain admissions to me in regard to the same. The admissions were made voluntarily on his part."

Cross-Examination:—Q. "Where did this conversation take place?" A. "In the cell in which the prisoner was confined in the jail."

Q. "How came you to be there?" A. "I was charged with the offense of —."

¹ In *Curry v. State*, 4 Neb., 547, one J. O. C., called as a juror, testified on his *voir dire* that he had both formed and expressed an opinion as to the prisoner's guilt. He said, "My opinion is based upon general rumor and newspaper report; *think* I could return a fair and impartial verdict. I think I could now, but *I might possibly lean a little the other way.*" The juror was thereupon challenged for cause and the challenge overruled, to which defendant excepted. In reversing the ruling of the trial court, the supreme court, by Lake, C. J., says, "We think it is clear that where the ground of challenge is the formation or expression of an opinion by the juror, before the court can exercise any discretion as to his retention upon the panel, it must be shown by an examination of the juror, on his oath, not only that his opinion was formed solely in the manner stated in this proviso, but in addition to this, the juror must swear unequivocally that he feels able, notwithstanding such opinion, to render an impartial verdict upon the evidence."

²A party waiving his right of peremptory challenge can not complain of the disqualification of a juror, known to exist at the time of the impaneling. *Palmer v. The People*, 4 Neb. 68.

Q. "Was it an actual charge, or merely a manufactured one to enable you to have access to the defendant?" A. "The charge was fictitious."

Q. "Did you state to the defendant that you had committed this crime in order to show him that you were in trouble like himself so as to gain his confidence?" A. "That was the object."

Q. "Did you boast of other acts of crime which you said you had committed?" A. "I may have done so."

Q. "Did you tell him that you had influential friends who would procure bail for you as soon as they received your letter; and that if the defendant would confess to you, so that you might understand the true nature of his offense, you would, on your release, procure bail for him?" A. "I did."

Q. "Were not these alleged admissions of the defendant made to you after such promise and as a result of the same?" A. "They were made afterward, but I can not say that they were made in consequence of any promises made by me."

The state now offered to prove the alleged confessions of the defendant to said witness, to which the defendant objected, because the same did not appear to have been made voluntarily, but under promises of favor; which objection was overruled by the court, to which ruling the defendant excepted.

The witness then testified as follows: (*copy with objections, exceptions, etc.*)

The state, to further maintain the issue on its part, called as a witness one K L, who, being duly sworn, on his direct examination testified as follows:

"I am a resident of —, and on or about the — day of —, 18—, I received a letter from the defendant in regard to the matter in controversy."

Q. "Have you that letter with you?" A. "I have not."

Q. "Do you remember the contents of the letter?" A. "I do."

Q. "You may state the contents of the letter."

The defendant objected to a statement of the contents of the letter for the reason that the loss of the original had not been proved; which objection was overruled by the court, to which the defendant excepted.

The witness then stated the contents of the letter as follows: (*Copy with objections and exceptions.*)

The state, further to maintain the issue on its part, called as a witness one M N, who, being duly sworn, testified on his direct examination as follows: (*Proceed with the examination of each witness on behalf of the state, with the objections and exceptions to the rulings of the court.*)

(*After all the evidence on behalf of the state has been presented say*)

THE STATE RESTED.

The defendant thereupon called as a witness one Q R, who, being duly sworn, on his direct examination testified as follows: (*Set out the testimony on the direct and cross-examinations, with the objections and exceptions to the rulings of the court.*)

The defendant, further to maintain the issue on his part, called as a witness one W Y, who, being duly sworn, on his direct examination testified as follows: (*Set out the testimony on direct and cross-examination of each witness called by the defendant, with the objections and exceptions to the rulings of the court.*)

(*When all the testimony on behalf of the defendant has been introduced say*)

THE DEFENDANT RESTED.

In rebuttal, the state called as a witness one N M, who, being first duly sworn, on his direct examination testified as follows: (*Set out the testimony on the direct and cross-examination, with the objections and exceptions.*)

THE STATE RESTED.

In arguing the cause to the jury, the prosecuting attorney used the following language: (*Set out the language claimed to be objectionable, and show that the attention of the court was called to it at the time, and an exception taken to the ruling of the court.*¹)

The arguments being concluded, the prosecuting attorney asked leave to introduce proof showing the county and state in which the offense is alleged to have been committed; which leave the court granted, to which ruling of the court the defendant excepted.²

The state then called as a witness S T, who testified that the offense was committed in — county in the state of —.

Cross-examined, etc.

— to the admission of which testimony the defendant excepted.

The defendant thereupon asked leave to introduce testimony tending to prove the following facts: (*Set out the matter sought to be proved with the ruling of the court, and exceptions.*)

The court thereupon instructed the jury as follows: (*Set out the instructions in separate paragraphs numbered consecutively.*)

To the giving of the third, fourth, fifth and sixth instructions the defendant severally excepted. The state then asked the following instructions, (*set out*) which were refused, to which refusal the prosecuting attorney excepted.

The defendant thereupon asked the following instructions, (*set out in consecutively numbered paragraphs the instructions asked*) the second, fourth and fifth of which were refused, to which refusal the defendant excepted.

¹ In many cases it will be necessary to set out the language complained of by affidavits, and to obtain a ruling of the trial court thereon if it is sought to incorporate the objectionable statements in the bill of exceptions.

² See *State v. Teismadre*, 30 Kas., 477.

The court modified the first instruction asked as follows: (*Set out the instruction as modified*) to which change the defendant excepted.¹

The foregoing is all the evidence offered or given by either party on the trial of the cause, together with the objections, rulings and exceptions thereto (*with the instructions of the court and those asked and refused*), and on application of the defendant this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

R S, Judge.²

Dated — 18—.

In states where the instructions to the jury are not by statute required to be filed and entered of record, they must be preserved in a bill of exceptions, to be available in a re-

¹ All matters which the statute *requires* to be entered of record should be omitted from the bill of exceptions. In this state the instructions to the jury are required to be filed with the clerk before being given to the jury, and they thus become a part of the record and should not be inserted in the bill of exceptions. *Morrow v. Sullender*, 4 Neb., 375; *Eaton v. Carruth*, 11 Id., 233. A motion for a new trial and verdict are also properly matters of record. *Eaton v. Carruth*, 11 Neb., 233. All motions, likewise, which are required to be filed with the clerk, where the ruling thereon is to be entered on the record, thereby become a part of the record, and need not be preserved in a bill of exceptions.

But a contrary rule prevails if a motion or the ruling thereon is *not required* to be entered of record. If matters are entered of record which the statute does not require to be recorded, they do not thereby become a part of the record and supersede the necessity of a bill of exceptions.

Thus, suppose affidavits are filed with the clerk; they do not thereby become a part of the record, because they are merely evidence, and may or may not have been used on the hearing, and unless brought into the record by a bill of exceptions are not available in a reviewing court. *Ray v. Mason*, 6 Neb., 101; *Garner v. White*, 23 O. S., 192. So all matters relating to the examination of jurors on their *voir dire* and the impaneling of the jury, and all matters relating to the conduct of the trial, together with the evidence, written or oral, introduced or offered and excluded, with the rulings of the court thereon, if sought to be reviewed, must be preserved in a bill of exceptions.

Where documents are inserted in a bill they should be in some manner identified, so that it may clearly appear that they were given or offered in evidence. This may be done by marking them as Exhibits A, B, C, etc., as he case may be. For forms of order extending time in which to prepare bill, receipt of proposed bill, proposed amendments to bill and notice of presentation of draft of bill and proposed amendments to judge, see *Maxwell's Pl. & Pr.* (4 Ed.), pp. 775, 776.

² In states requiring it, a seal should be attached.

viewing court; also all instructions asked and refused or modified.

In those states where the bill of exceptions is required to be signed during the term at which the trial is had, the court should aid the party in every way possible to enable him to perfect the bill. For this purpose an adjournment to a future day may frequently be necessary, as, ordinarily, it is impossible to prepare a bill during the trial, or while court is actually in session.

Bills of exception are frequently signed after the term as *of the term*.¹ The better course, however, is to have the bill signed during the term at which the trial is had, as otherwise some unforeseen occurrence may prevent the signing of the bill.

The statute providing for bills of exceptions is remedial in its nature, and is to be liberally construed in furtherance of justice.

TRANSCRIPT.

State of — }
— County. }

Pleas before the — court of — county [Nebraska], at a term begun and holden in the county of —, on the — day of —, 18—, before R S, judge of said court.

State of — }
v. }
A B. }

Be it remembered that heretofore, to wit, on the — day of —, 18—, being one of the days of the regular — term of said court,² * the grand

¹ *Irvine v. Brown*, 6 O. S., 12. In the opinion the court say: "Bills of exceptions are frequently made up and signed after a trial, and sometimes after the adjournment of the court; but in such cases the parties are concluded by the record, which shows that the bills were perfected on the trial and then formed part of the record. There is no objection to this practice."

² In case of proceedings by information, follow the form of transcript to the *, and then say: "Came G H, prosecuting attorney of — county, as informant, and filed an information, duly signed and verified, against A B, who had theretofore, on the — day of —, 18—, had a preliminary examination therefor, as provided by law, before E F, a justice of the peace, in and for said county (or had waived the same, or was a fugitive from justice, as the case may be). Which information is in the words and figures following, to wit:" (*Copy information, and proceed as in transcript.*)

jury heretofore chosen, selected and sworn in and for the county of —, came into open court in charge of a sworn officer, and being called in open court each answered to his name, and the grand jury being present, by their foreman, presented to the court an indictment on which was indorsed the words "A true bill," signed G H, Foreman, which indictment is in the words and figures following, to wit:

(Copy indictment in full.)

And on the same day a copy of said indictment was duly served on said defendant, A B.

Thereafter on the — day of —, 18—, the defendant [moved to quash the indictment for the following reasons (*state grounds of motion*): which motion on the same day was overruled, to which defendant excepted.]

That afterward, to wit: on the — day of —, 18—, the defendant filed a plea in abatement for defects extrinsic to the record, as follows: (*Copy plea.*)

To which plea the prosecuting attorney filed a demurrer as follows: (*Copy demurrer.*)

Which demurrer on the — day of —, 18—, was sustained by the court; to which the defendant excepted.

Afterward on the — day of —, 18—, the defendant demurred to the indictment as follows: (*Copy demurrer.*)

Which demurrer, on the — day of —, 18—, was overruled; to which ruling defendant excepted.

That afterward, to wit, on the — day of —, 18—, the defendant, on being arraigned in open court, offered a plea in bar as follows: (*Copy plea.*)

To which plea in bar the prosecuting attorney filed demurrer as follows: (*Copy demurrer.*)

Which demurrer, on the — day of —, 18—, was sustained by the court; to which the defendant excepted.¹

Thereafter, on the — day of —, 18—, the defendant, A B, accompanied by his counsel, U V, was brought to the bar of the court, and the indictment heretofore presented by the grand jury, and each and every count thereof was in open court read to the said A B, and the said A B, being asked by the court whether he is guilty or not guilty of the offense charged, answered, "Not guilty," which plea was entered on the indictment.

That afterward, to wit, on the — day of —, 18—, the defendant filed a motion for a change of venue, as follows: (*Copy motion.*)

Which motion on the same day was overruled by the court, to which the defendant excepted.

Thereupon the prosecuting attorney, under the direction of said court,

¹ The transcript in relation to a motion to quash, plea in abatement, demurrer to plea, demurrer to the indictment, plea in bar and demurrer to the plea are given merely as examples. If no error is claimed in the rulings of the court thereon, they may be omitted from the transcript.

designated the — day of —, 18—, being a day in said term, for the trial of said cause.

Thereafter, on the day last named, this cause coming on further to be heard, the defendant, A B, accompanied by his counsel, U V, being present in open court and ready for trial, came a jury in said cause, consisting of (*give names*) twelve good and lawful men having the qualifications of jurors, who were duly examined, chosen, impaneled and sworn as prescribed by law. And the jury, after hearing the evidence, as well on the part of the defendant, A B, as on the part of the state, and the arguments of counsel, as well for the defendant as for the prosecution, were instructed by the court as follows: (*Copy all the instructions given, in consecutively numbered paragraphs, noting exceptions on the margin, together with all instructions asked and refused or modified.*¹)

And said jury, after receiving said instructions, retired in charge of an officer duly sworn, to consider of their verdict.

And thereafter, on the — day of —, 18—, being a day of said term, came the jury heretofore sworn in this cause, in charge of the sworn officer, and the defendant, A B, being present in open court with his counsel, the jury, being called by the clerk of the court, and each juror for himself answering to his name, returned into open court the following verdict, to wit: (*Copy verdict.*)

Afterward, to wit, on the — day of — 18—, said defendant, A B, filed a motion for a new trial as follows: (*Copy motion.*)

That thereafter, on the — day of —, 18—, said motion, being submitted to the court, was overruled; to which the defendant excepted.

That thereafter, on the — day of —, 18—, defendant filed a motion in arrest of judgment for the following causes: (*state*) which motion on the same day was submitted to the court and overruled; to which the defendant excepted.

That thereafter, on the — day of —, 18—, being a day of said term and said court being open for the transaction of business, said defendant, A B, accompanied by his counsel, was brought to the bar thereof and informed by the court of the verdict of the jury, and asked whether he had anything to say why judgment should not be pronounced against him; and said defendant having nothing to say (*or showing no good and sufficient cause why judgment should not be pronounced*) and no further plea to interpose, the court pronounced the following sentence and judgment, to wit: (*Copy.*)

And on the same day a mittimus was duly issued, to carry into effect the sentence and judgment of the court, and the same was delivered to the sheriff of — county. (*Copy bill of exceptions.*)

¹ As heretofore stated, the instructions are a part of the record, and hence a part of the transcript only in states where the statute requires them to be filed before being given to the jury.

CERTIFICATE OF CLERK.

State of — }
 — County. }

I, L C, clerk of the — court of — county, do hereby certify that the foregoing is a true and perfect transcript of the record in the above entitled cause, as the same is on file and of record in my office.

[L. S.]

L C, Clerk of the — Court.

Dated —, 18—.

CERTIFICATE WHEN THE ORIGINAL BILL OF EXCEPTIONS IS USED.¹

State of — }
 — County. }

I, L C, clerk of the — court of — county, do hereby certify that the foregoing is the original bill of exceptions in said cause, and a true and perfect transcript of the record in the above entitled cause, as the same is on file and of record in my office.

[L. S.]

L C, Clerk of the — Court.

Dated —, 18—.

FORM OF COMPLETE RECORD.

State of — }
 v. }
 A B. }

Be it remembered, that heretofore, to wit, on the — day of —, 18—, being one of the days of the regular — term of — court of — county, the grand jury, heretofore chosen, selected and sworn in and for the county of —, came into open court in charge of a sworn officer, and being called in open court each answered to his name, and the grand jurors, all being present, by their foreman presented to the court an indictment on which was indorsed the words "a true bill," signed G H, foreman; which indictment is in the words and figures following, to wit: (*Copy all entries.*)

¹ The original bill of exceptions can be used only in states where the statutes authorize it.

In all cases the original bill must be filed in the clerk's office, and, if used, duly certified by him to the reviewing court.

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