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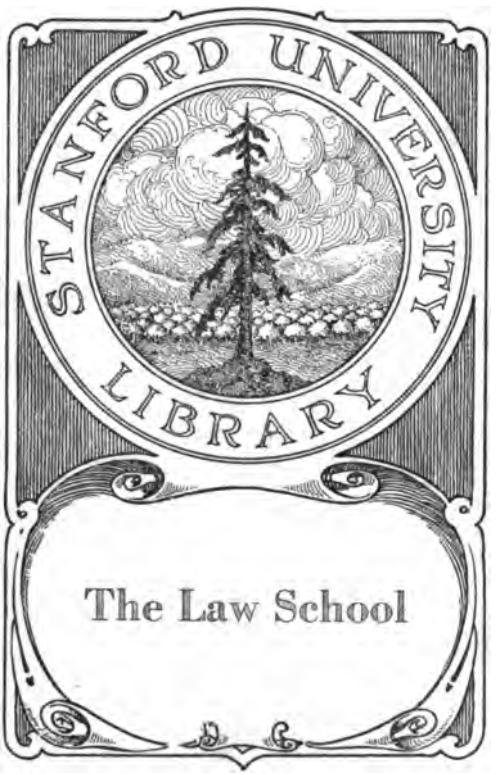

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HANDBOOK

OF

CRIMINAL PROCEDURE

BY WM. L. CLARK, JR.

AUTHOR OF CLARK'S HANDBOOK OF CRIMINAL LAW AND
CLARK'S HANDBOOK OF THE LAW OF CONTRACTS

SECOND EDITION

BY WILLIAM E. MIKELL, B. S., LL. M.

PROFESSOR OF LAW
IN THE UNIVERSITY OF PENNSYLVANIA

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PREFACE

IT IS twenty-two years since the first edition of Clark's Criminal Procedure was published. Since that time a great stream of decisions has gone under the legal bridge. The law governing criminal procedure has undergone considerable change in these two decades. This change has been brought about partly by statutory enactment, and partly by judicial legislation. The change wrought by both of these agencies has been in the same direction—toward a more rational system of procedural law. The super-technicalities once dominating criminal procedure are yearly being attacked by Legislatures, and daily meeting with less respect by courts. Naturally some jurisdictions have progressed much faster than others, but all are informed with the new spirit. The present editor has endeavored in this edition, as far as the limited space permitted, to represent the existing law, both by changes in the text and by the addition of new notes and citations of recent important cases.

W. E. MIKELL.

PHILADELPHIA, June, 1917.

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INTRODUCTION

Criminal procedure is the method fixed by law for the apprehension and prosecution of a person who is supposed to have committed a crime, and for his punishment if convicted. The term is really included in the broader term "criminal law," but the latter refers more particularly to that branch of the law which declares what acts are crimes, and prescribes the punishment for committing them. "In the nature of things," says Mr. Bishop, "there is a difference between a right and the means by which it is enforced; an obligation, and the legal steps by which the delinquent is made to atone for its violation; the law defining a crime, and the course of the court in punishing it. Out of this distinction grows the law of judicial procedure. It is that division of legal things under which are regulated the steps by which a legal right is vindicated or wrong punished." [1] The term "criminal procedure" includes pleading, evidence, and practice.

The term "pleading" is sometimes popularly used to signify the oral advocacy of a cause in court by counsel, but in its technical sense, and with respect to criminal procedure, it signifies the peculiar science or system of rules and principles according to which the written allegations in a criminal prosecution—that is, the accusation on the part of

[1] 1 Bish. Cr. Proc. § 1.

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the state, and the responsive allegations on the part of the accused—are framed, so as to produce a proper issue for trial, and the word "pleadings" signifies these allegations themselves.

The term "evidence" strictly signifies the matter presented at the trial of an issue, such as the testimony of witnesses, documents, etc., for the purpose of proving or disproving the fact alleged; or, as it is put by Greenleaf, it "includes all the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." [2] In its broader sense, however, it is used to signify, not only the probative matter, but the weight and effect of this matter or proof; and, further than this, to signify the rules of law governing the admissibility or competency of the matter offered, and the order in which it should be introduced.[3]

The term "practice" is usually employed as excluding both pleading and evidence, and to designate all the incidental acts and steps in the course of bringing matters pleaded to trial and proof, and procuring and enforcing judgment on them. As applied to criminal procedure, the term includes the rules which direct the course of the proceedings by which the accused is brought before the court, the conduct of the trial, and the proceedings after trial.

Prevention of Offenses

The state never punishes for an offense until it is committed, and it is only of proceedings to punish offenders that this work is to treat; but it is well to mention the fact that there are circumstances under which the law will interfere to prevent a threatened offense. This interference consists in obliging those persons whom there is probable ground to suspect of future misbehavior to stipulate with and to give full assurance to the public that such offense as is apprehended shall not happen, by finding pledges or securities for keeping the peace or for their good behavior.[4] The person of whose conduct the law is apprehensive is bound, with or without sureties, in a bond or recognizance to the state.

[2] 1 Greenl. Ev. c. 1, § 1. [3] Post, p. 590. [4] 4 Bl. Comm. 251.

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This is taken by some court or judicial officer. The bond or recognizance is of the following nature:[5] The person bound acknowledges himself to be indebted to the state in the sum specially ordered, with a condition that the recognizance or bond shall be void if he appear in court on a day named, and in the meantime keep the peace either generally, or particularly, also, with regard to the person who seeks the security; or, as is more usual, the obligation may be to keep the peace for a certain period, an appearance in court not being required. If it be for good behavior, then on condition that he demean and behave himself well, either generally or specially, for the time therein limited. If the condition is broken in the one case by any breach of the peace, in the other by any misbehavior, the recognizance or bond becomes forfeited or absolute, and the party and his sureties become absolutely debtors to the state in the amount of the penalty. The mode of procedure is very generally regulated by statute in the different states.

[5] Harris, Cr. Law, 301.

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CHAPTER I

JURISDICTION AND VENUE

1–8. In General.
8a. Jurisdiction as Determined by Locality of Crime, or Venue.

JURISDICTION IN GENERAL

1. Unless extended by statute, a state has jurisdiction only over those crimes committed within its territorial limits and crimes committed by its own citizens abroad.
2. There can be no valid prosecution for crime unless the court in which it is carried on is legally created and constituted, and has jurisdiction of the offense and of the person of the defendant.
3. Jurisdiction cannot be conferred by the consent of the defendant.

We have in another work considered the jurisdiction of a state to try and to punish crimes. Unless enlarged by statute, this jurisdiction extends only to crimes committed within the territorial boundary of the state and to crimes committed by its own citizens abroad.[1] It has been extended by statute in some states.[2] The jurisdiction of a particular court within a state to take cognizance of an act which is an offense against the state, and which the state has a right to punish, remains to be discussed.

[1] Clark, Cr. Law, 480–484. For the quantum of proof necessary to prove jurisdiction, see page 634, note 84. A statute of Arkansas made it a crime to allow cattle to run at large. The defendant, a resident of Missouri, turned his cattle loose in that state, intending that they should wander into Arkansas, and they did so. On indictment in Arkansas, under the statute, it was held that the defendant could not be convicted in Arkansas for an act done in Missouri. Beattie v. State, 73 Ark. 428, 84 S. W. 477.

[2] Clark, Cr. Law, 484.

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The state punishes for offenses through the instrumentality of courts which it has created and invested with authority for this purpose. No court can try and punish for any offense unless it is a legal court; that is, unless it is legally created and legally constituted. If the statute attempting to create a court is clearly unconstitutional, or otherwise clearly insufficient, there is no legal court, and, if a court purporting to have been so created assumes jurisdiction of an offense, its proceedings and judgment are an absolute nullity.[3] So if a statute creating a court provides that it shall be constituted in a certain way, or shall sit at a certain time only, or shall be presided over by a certain number of judges, a court illegally constituted, as where it sits at some time other than that prescribed, or is presided over by less than the prescribed number of judges, is in fact no court at all, and its proceedings and judgments are void.[4] It seems that the fact that a court sits at a place other than that prescribed by law does not necessarily render its judgment absolutely void.[5] The court must be presided over by an authorized judge; but he need not be a judge de jure to render its judgments valid. If he is a judge de facto, and no objection is taken before judgment, its

[3] It has been held that where a court has been established by an act of the Legislature which is apparently valid, and has gone into operation under such act, public policy demands that it shall be regarded as a de facto court, and that its judgments and proceedings shall not be open to collateral attack. State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409. There is much conflict on this question, and it would be beyond the scope of our work to go into it. The question is discussed at length, and the authorities are collected, in 1 Black, Judgm. (2d Ed.) §§ 173, 254–258.

[4] Jackson v. Com., 13 Grat. (Va.) 795; In re Terrill, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327; State v. Roberts, 8 Nev. 239; Grimmett v. Askew, 48 Ark. 151, 2 S. W. 707; 1 Black, Judgm. §§ 173–178. It has been held that the fact that more than the prescribed number of judges sit does not render the court illegal. McFarlan v. People, 13 Ill. 9. There is authority for the view that, if there was a reasonable mistake as to the time fixed by law for holding court, a judgment so rendered is valid. 1 Black, Judgm. § 177.

[5] 1 Black, Judgm. § 177.

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judgment will be valid.[6] And, generally, the judgments and proceedings of a de facto officer or court, where no objection was interposed to the jurisdiction, are valid.[7] If the court or judge is neither a de jure nor a de facto court or judge, the judgments are a nullity, and may be attacked at any time.[8]

Not only must the court be legally created and constituted, but it must have jurisdiction of the particular offense which it undertakes to punish. If it is not authorized to take cognizance of the offense at all, its judgment or action is a nullity for all purposes, and may be attacked at any time.[9]

[6] State v. Bloom, 17 Wis. 521; Spradling v. State, 17 Ala. 440; 1 Black, Judgm. §§ 175, 176.

[7] Id.; State v. Peyton, 32 Mo. App. 522; State v. Davis, 111 N. C. 729, 16 S. E. 540; 1 Black, Judgm. §§ 173–176. "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." Butler, C. J., in State v. Carroll, 38 Conn. 471, 472, 9 Am. Rep. 409.

[8] 1 Black, Judgm. §§ 175, 176.

[9] Com. v. Knowlton, 2 Mass. 530; Com. v. Johnson, 8 Mass. 87; Forsythe v. U. S., 9 How. 571, 13 L. Ed. 262; State v. Ridley, 114 N. C. 827, 19 S. E. 149; Cropper v. Com., 2 Rob. (Va.) 842; Rice v. State, 3 Kan. 141; State v. Grant, 34 S. C. 109, 12 S. E. 1070; State v. Cooper, 104 N. C. 890, 10 S. E. 510; Morris v. State, 84 Ga. 7, 10 S. E. 368; People v. International Nickel Co. (Co. Ct.) 155 N. Y. Supp. 156.

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If the court has no jurisdiction by law to take cognizance of an offense, jurisdiction cannot be conferred upon it by the defendant's consent. Consent of the parties cannot supply want of jurisdiction.[10]

The court must also have jurisdiction of the person of the defendant.

If the court is properly constituted, has jurisdiction of the offense, and custody of the person of the defendant, its jurisdiction is not affected by the fact that the defendant was illegally arrested or was illegally brought within the jurisdiction;[11] nor by mere errors in the proceedings, so long as it keeps within that jurisdiction. As said by the Supreme Court of the United States in a late case, the "court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law within its jurisdiction, and when, in taking custody of the accused, and in its modes of procedure, and in rendering judgment, it keeps within the limitations prescribed by the law, customary or statutory. When it goes outside these limits, its action, to the extent of the excess, is void. Proceeding within these limits, its action may be erroneous, but is not void."[12]

If a court has jurisdiction of the offense charged, its jurisdiction is not ousted by proof of a less offense, of which it could not have taken jurisdiction. On indictment for grand larceny, for instance, the defendant may be convicted of

[10] People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386; People v. Granice, 50 Cal. 447; Batchelder v. Currier, 45 N. H. 460; Mills v. Com., 13 Pa. 627; State of Indiana v. Tolleston Club of Chicago (C. C.) 53 Fed. 18; Hager v. Falk, 82 Wis. 644, 52 N. W. 432; Com. v. Maloney, 145 Mass. 205, 13 N. E. 482.

[11] Ex parte Scott, 9 B. & C. 446; Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283; In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; Com. v. Tay, 170 Mass. 192, 48 N. E. 1086. And see Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421. See, also, post, pp. 69, 71; State v. Fitzgerald, 51 Minn. 534, 53 N. W. 799. Though the court has jurisdiction, notwithstanding the arrest was illegal, if the prisoner seasonably moves to quash the proceedings, they will be quashed. See Ard v. State, 114 Ind. 542, 16 N. E. 504.

[12] In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149.

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petit larceny, though the court would have had no jurisdiction of a charge of petit larceny.[13]

State Courts

The courts in the various states are created, and their jurisdiction is conferred and defined, by statutes, which must be consulted.

Justices of the peace are, in general, given jurisdiction to examine persons accused of crime, and to admit them to bail, or commit them, to await trial in the higher court having jurisdiction to try and punish the offense. They are also given power to conserve the peace, and for that purpose to bind over to keep the peace, and for good behavior, those persons whose conduct renders such a step proper.[14] They are also generally given exclusive and final jurisdiction of petty offenses, like vagrancy, disorderly conduct, etc., and are given concurrent jurisdiction with the higher court of certain offenses. In some cases the accused is given the right to appeal from the justice's decision to the higher court, where he has a trial de novo. Other inferior courts, such as the police courts in the larger cities, have been created, and are given the same jurisdiction as justices of the peace.[15]

A coroner's court or inquest is held to inquire by a jury, generally of six men, into the cause of a death supposed to have been caused by violence.[16]

In all the states there is in each county a court of general original jurisdiction to try and punish for all offenses other than trifling offenses within the exclusive jurisdiction of justices of the peace. In some states it is called the "circuit court"; in others, the "district court"; in others, the "superior court"; in others, the "court of quarter sessions," etc.

[13] People v. Rose (Super. Buff.) 15 N. Y. Supp. 815; People v. Fahey, 64 Cal. 342, 30 Pac. 1030; Ex parte Bell, 4 Cal. Unrep. Cas. 309, 34 Pac. 641; State v. Fesperman, 108 N. C. 770, 13 S. E. 14; Winburn v. State, 28 Fla. 339, 9 South. 694.

[14] Ante, p. 2.

[15] See, as to justice's jurisdiction, Com. v. Harris, 8 Gray (Mass.) 470; Com. v. O'Connell, Id. 464.

[16] Post, p. 148.

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In some states there are other courts between this and justices of the peace, such as county and corporation courts.

In every state, and by recent enactment in England, there is a court having jurisdiction, on appeal or writ of error, to review the judgment of the trial court.

Federal Courts

The federal courts of criminal jurisdiction are the commissioners' court, the District Court, the Circuit Courts of Appeal, and the Supreme Court. The jurisdiction of the federal courts arises solely out of the Constitution and the acts of Congress. They have only such jurisdiction as is thus conferred.

United States commissioners are charged, generally, with such functions in the federal government as devolve upon justices of the peace in the state government.[17] They are appointed and removable by the District Courts.[18]

The District Courts of the United States have jurisdiction, exclusive of the state courts, of all offenses against the United States, committed within their respective districts or on the high seas.[19]

The Circuit Courts of Appeals have appellate jurisdiction of crimes on writ of error to the District Court.[20]

The Supreme Court of the United States has appellate jurisdiction in the following cases: (1) To review a decision of the Circuit Court of Appeals in a case certified to it by the latter, or caused by the Supreme Court to be certified;[21] (2) where the judges of a District Court certify the case to the Supreme Court;[22] (3) on writ of error to the

[17] See Foster, Federal Practice, § 483.

[18] Act May 28, 1896, c. 252, § 9, 29 Stat. 181 (U. S. Comp. St. 1916, § 1421).

[19] Act March 3, 1911, c. 231, § 24, 36 Stat. 1091 (U. S. Comp. St. 1916, § 991 [1–25]).

[20] Act March 3, 1911, c. 231, § 128, 36 Stat. 1133 (U. S. Comp. St. 1916, § 1120).

[21] Act March 3, 1911, c. 231, § 239, 36 Stat. 1157 (U. S. Comp. St. 1916, § 1216).

[22] Act March 3, 1911, c. 231, § 252, 36 Stat. 1160 (U. S. Comp. St. 1916, § 1229).

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state court of highest resort in certain cases;[23] (4) by writ of habeas corpus, aided by writs of certiorari, where a person is without authority detained in custody under color of the authority of the United States.[24]

JURISDICTION AS DETERMINED BY LOCALITY OF CRIME, OR VENUE

3a. As a rule, prosecutions must be instituted and carried on in the county in which the crime was committed, and it is generally deemed to have been committed in the county in which it was consummated. There are a few exceptions to the rule, even at common law, and many exceptions have been made by statute. The county in which the offense was committed is called the "venue."

It has always been the rule of the common law that an offense must be prosecuted in the county in which it was committed,[25] though there have been exceptions. The chief reason of the rule was that the accused was entitled to a jury from the county in which the offense was committed.

Formerly, where an offense was commenced in one county and consummated in another, the offender could not be tried at all.[26] Even in case of murder, if the mortal blow

[23] Act March 3, 1911, c. 231, § 237, 36 Stat. 1156 (U. S. Comp. St. 1916, § 1214).

[24] Rev. St. U. S. §§ 763, 764 (U. S. Comp. St. 1916, vol. 2, pp. 2144, 2145, and notes).

[25] 1 Chit. Cr. Law, 189; 4 Bl. Comm. 303; 2 Hawk. P. C. c. 25, §§ 35, 51; Rex v. Jones, 6 Car. & P. 137; Hughes v. State, 35 Ala. 351; State v. Jones, 8 N. J. Law, 307; Id., 9 N. J. Law, 357, 17 Am. Dec. 483. And see the cases hereafter referred to. For the early history of the jury in criminal trials, see 2 Pollock & Mait. Hist. Eng. L. c. 9.

[26] 1 Chit. Cr. Law, 177; 1 Hale, P. C. 651, 652; 2 Hawk. P. C. c. 25, §§ 36; 40, 3 Coke, Inst. 48; Cro. Car. 488. It is provided by statute in some states that crimes committed within a certain distance of county boundaries may be prosecuted in either county. See Ex parte Davis, 48 Tex. Cr. R. 644, 89 S. W. 978, 122 Am. St. Rep. 775. Under such a statute, if a person commits a crime in one county, and is

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was given in one county, and the party died of the blow in another, it was doubted whether he could be punished; for it was supposed that a jury of the first county could not take cognizance of the death, and a jury of the second county could not take cognizance of the blow.[27] Most of the courts, however, have held that there is jurisdiction in such cases, considering that the crime is committed where the blow or poison is given, and that the prosecution must be in that county.[28] A few courts have held that it is not committed until death occurs, that the death is the consummation of the crime, and that the prosecution must be in the county of the death.[29] These questions, in so far as homicide is concerned, were set at rest in England by St. 2 & 3 Edw. VI, c. 24, which is old enough to have become a part of our common law. This statute provided that in cases of striking and poisoning in one county, and death ensuing in another, the offender may be indicted, tried, and punished in the county where the death ensued. And similar statutes have been enacted in some of our states.[30] In other states he must be prosecuted in the county where the poison or blow

legally tried in the adjacent county, he cannot afterwards be put on trial in the first county. Ex parte Davis, supra.

[27] Coke says that in such a case "no sufficient indictment could thereof have been taken in either of the said counties, because, by the law of the realm the jurors of one county could not inquire of that which was done in another county." 3 Coke, Inst. 48. Hale says: "It was doubtful whether he were indictable or triable in either, but the more common opinion was that he might be indicted where the stroke was given." Starkie says this difficulty was sought to be avoided by the legal device of "carrying the dead body back into the county where the blow was struck, and the jury might there inquire both of the stroke and death." 1 Stark. Cr. Pl. (2d Ed.) 3, 4, note.

[28] 1 Hale, P. C. 426; 1 East, P. C. 361; Riley v. State, 9 Humph. (Tenn.) 646. And see, for same principle, Green v. State, 66 Ala. 40, 41 Am. Rep. 744; State v. Carter, 27 N. J. Law, 499; People v. Gill, 6 Cal. 637; State v. Gessert, 21 Minn. 369.

[29] See Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89, and authorities there cited.

[30] Com. v. Parker, 2 Pick. (Mass.) 550; Stoughton v. State, 13 Smedes & M. (Miss.) 255.

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was given.[31] In others it is provided that the prosecution may be in either county.[32]

These statutes, fixing the county in which offenses may be prosecuted, even though they allow prosecution in a county other than that in which the offense was committed, are constitutional.[33]

[31] Stout v. State, 76 Md. 317, 25 Atl. 299. Where the statute provides that the venue shall be in the county where the poison is "administered," and the poison is given into the hands of the deceased in S. county, carried by the deceased into M. county, and there swallowed, M. county is the proper venue of the resulting murder, for the poison is "administered" where it is swallowed. Robbins v. State, 8 Ohio St. 131.

[32] State v. Pauley, 12 Wis. 537; State ex rel. Brown v. Stewart, 60 Wis. 587, 19 N. W. 433, 50 Am. Rep. 388; Territory v. Hicks, 6 N. M. 596, 30 Pac. 872.

[33] Com. v. Parker, 2 Pick. (Mass.) 550. And see Archer v. State, 106 Ind. 426, 7 N. E. 228; Tippins v. State, 14 Ga. 422; Steerman v. State, 10 Mo. 503; State v. Pauley, 12 Wis. 537; Tyler v. People, 8 Mich. 320; Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89; State v. Johnson, 38 Ark. 568; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; Hanks v. State, 13 Tex. App. 289; Ham v. State, 4 Tex. App. 645; Adams v. People, 1 N. Y. 173. See St. 7 Geo. IV, c. 64, § 12; Code Cr. Proc. N. Y. § 134, which provides: "When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county." See People v. Mitchell, 49 App. Div. 531, 63 N. Y. Supp. 522. Where a county is divided, a criminal act done before the division is to be prosecuted in the particular new county in which is the place of the offense. Hernandez v. State, 19 Tex. App. 408. In Archer v. State, 106 Ind. 426, 7 N. E. 225, it was held that where defendant seized and bound deceased in M. county, and carried him, so bound, into O. county, and there killed him, that defendant could be indicted and tried in M. county, since the seizure and binding "was an overt act forming a material part of the crime" committed in O. county. In Jackson v. Com., 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336, defendant gave deceased poison in X. county and, erroneously thinking her dead, took her into C. county, and there cut off her head, for the purpose of concealing her identity. It was held that he could be convicted of murder in C. county, if the act of cutting off her head was part of a felonious attempt to kill deceased in X. county. Statutes in some states extend this principle to crimes committed partly in one state and partly in another. People v. Arnstein, 211 N. Y. 585, 105 N. E. 814.

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Larceny is committed where the property is taken and carried away. But at common law, if a person steals goods in one county, and carries them into another, he may be prosecuted in either; for it is considered that the possession of the stolen goods by the thief is a larceny in every county into which he carries them, because, the legal possession still remaining in the owner, every moment's continuance of the trespass and felony amounts to a new taking and asportation.[84] The rule is expressly so declared by statute in some states.

At common law the offense of obtaining property by false pretense is committed and can be prosecuted only in the county where the property was first obtained, not in the county where the false pretense was made;[85] nor in a coun-

[84] 4 Bl. Comm. 305; 2 Hale, P. C. 163; 1 Chit. Cr. Law, 178; 2 East, P. C. 771, 772; Com. v. Cousins, 2 Leigh (Va.) 708; Com. v. De Witt, 10 Mass. 154; People v. Gardner, 2 Johns. (N. Y.) 477; State v. Hunter, 50 Kan. 302, 32 Pac. 37; People v. Staples, 91 Cal. 23, 27 Pac. 523; Massie v. Com., 90 Ky. 485, 14 S. W. 419; Tippins v. State, 14 Ga. 422; Crow v. State, 18 Ala. 541; Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455; State v. Douglas, 17 Me. 193, 35 Am. Dec. 248. Some courts apply the doctrine where goods are stolen in one state and brought into another. Com. v. Andrews, 2 Mass. 14, 3 Am. Dec. 17; Rex v. Peas, 1 Root (Conn.) 69; State v. Bartlett, 11 Vt. 650; State v. Underwood, 49 Me. 181, 77 Am. Dec. 254. But see People v. Gardner, 2 Johns. (N. Y.) 477; People v. Schenck, 2 Johns. (N. Y.) 479; Simmons v. Com., 5 Bin. (Pa.) 617; State v. Brown, 2 N. C. 100, 1 Am. Dec. 548; People ex rel. Trombley v. Humphrey, 23 Mich. 480, 9 Am. Rep. 94, and cases there cited; Stanley v. State, 24 Ohio St. 172, 15 Am. Rep. 604; State v. Le Blanch, 31 N. J. Law, 82; Simpson v. State, 4 Humph. (Tenn.) 456; Beal v. State, 15 Ind. 378; State v. Reonnals, 14 La. Ann. 278. Defendant was indicted in H. county for stealing "four live tame turkeys." He stole the live turkeys in C. county, killed them there, and took them, dead, into H. county. It was held that he could not be convicted in H. county for stealing live turkeys, but might be convicted there for stealing dead turkeys. Rex v. Parker, 1 Russ. 174.

[85] Rex v. Burdett, 4 Barn. & Ald. 179; Stewart v. Jessup, 51 Ind. 413, 19 Am. Rep. 739; Com. v. Van Tuyl, 1 Metc. (Ky.) 1, 71 Am. Dec. 455; People v. Adams, 3 Denio (N. Y.) 190, 45 Am. Dec. 468; Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291; Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126; Sims v. State, 28 Tex. App. 447, 13 S. W. 653. And see State v. Shaeffer, 89 Mo. 271, 1 S. W. 293; Com. v. Wood, 142 Mass. 459, 8 N. E. 432. As to pro-

ty into which the goods were subsequently carried.[36] When the goods are obtained by means of a letter containing false representations sent from one county to a person in another county, who, relying on the false representations, ships the goods, the venue of the crime is the county in which the goods were delivered to the common carrier, for the latter is the agent of the defendant to receive the goods.[37]

The gist of the crime of embezzlement being the conversion of the money or property received, the crime is committed where the conversion takes place, and, in principle, the county in which such conversion takes place is the proper venue. While this is admitted, and the cases hold that the defendant can be there indicted,[38] many cases hold that the courts of this county have not exclusive jurisdiction, but that the accused may be indicted and tried in the county in which he fails to render an account of the money or property received by him—such county being the place where it is his duty to account therefor,[39] or in which he renders a false account thereof.[40] The mere fact that the defendant received the property in a certain county does not give that county jurisdiction of the offense.[41] In some states by ex-

curing goods by means of an innocent agent in another county, see post, p. 18.

[36] Reg. v. Stanbury, 9 Cox, Cr. Cas. 94.

[37] Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291; Com. v. Taylor, 105 Mass. 172.

[38] Campbell v. State, 35 Ohio St. 70; State v. Small, 26 Kan. 209; State v. Bailey, 50 Ohio St. 636, 36 N. E. 233; Taylor's Case, 2 Leach, Cr. Cas. 974; Reg. v. Rogers, 3 Q. B. Div. 28.

[39] State v. Hengen, 106 Iowa, 711, 77 N. W. 453.

[40] Reg. v. Rogers, 3 Q. B. Div. 28.

[41] People v. Murphy, 51 Cal. 376. The cases holding that where the transaction on which the embezzlement is predicated extended over more than one county—as where the conversion took place in one county and the false accounting took place in another—the defendant may be tried in either county, and therefore in the county in which he failed to account, or in which he rendered a false account, seem to be based on a misunderstanding of two earlier cases, Rex v. Taylor, 2 Leach, C. C. 974, and Reg. v. Murdock, 5 Cox, Cr. Cas. 360. In both of these cases the accused collected money for the prosecutor in one county and rendered a false account thereof in another county. He was indicted in the latter county. There was

press statutory provision the venue may be in a county other than that in which the property was converted.[42]

The proper venue in burglary is the county in which the burglary was committed; i. e., the county in which the breaking and entering took place.[43] Statutes in some states provide, however, that the accused may be prosecuted either where the burglary was committed, or in any county into which the goods burglariously taken are carried.[44] Such a statute has been held unconstitutional in Missouri [45] and Indiana.[46]

The venue of robbery is the county in which the property is taken. Where, for instance, a person is seized in one county, and carried into another, and there forced to surrender money, the venue of the robbery is in the latter county.[47] If a person robs another in one county, and carries the goods into another county, it would only be larceny in the latter, for the other essentials of robbery are not committed there.[48]

The place of prosecution for forgery is in the county where the instrument was forged, and the place of prosecution for the offense of uttering a forged instrument is in the county where the instrument was uttered.[49] An indict-

no evidence that he had ever converted the money until he made the false accounting. All that the court held was that there was evidence to go to the jury that the embezzlement took place in the latter county. These cases are no authority for the rule for which they are cited in many subsequent cases, viz. that the courts of the county in which the conversion took place have not exclusive jurisdiction (see State v. Bailey, 50 Ohio St. 636, 36 N. E. 233); or for the rule that the prosecuting power may, in various circumstances, elect to consider the embezzlement committed in any one of several counties (see Bish. New Cr. Proc. § 61, 2).

[42] Cohen v. State, 20 Tex. App. 224.

[43] Martin v. State, 176 Ind. 317, 95 N. E. 1001.

[44] Haskins v. People, 16 N. Y. 344.

[45] State v. McGraw, 87 Mo. 161.

[46] Martin v. State, supra.

[47] Sweat v. State, 90 Ga. 315, 17 S. E. 273.

[48] 1 Hale, P. C. 507, 508; 2 Hale, P. C. 163.

[49] 2 East, P. C. 992; State v. Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775; People v. Rathbun, 21 Wend. (N. Y.) 509; Com. v. Parmenter, 5 Pick. (Mass.) 279.

ment for forgery will not lie at common law in a county in which the offender is found with the instrument, or in which he utters it, if it was actually forged in another county.[50] But, according to some of the cases, possession of the instrument in one county may raise a presumption that it was forged there, if there is nothing to show the contrary.[51] In some states, by statute, the prosecution may be in any county where the instrument was forged or used or passed.[52] The uttering of a forged instrument in another county, by means of an innocent agent, like the post office, for instance, will be presently considered.[53]

It would seem that the offense of sending a threatening letter is committed in the county in which it is dispatched, not in the county in which it is received, if it is received in another county, since the sending of it completes the offense; and so it has been held.[54] But there are authorities to the effect that if a person, by an innocent agent, like the post office, sends a threatening letter into another county, where it is delivered, the venue may be laid in the latter county.[55]

At common law a prosecution for receiving stolen goods must be brought in the county in which the goods are received, not in the county in which they are stolen.[56] By

[50] 2 East, P. C. 992; Com. v. Parmenter, 5 Pick. (Mass.) 279; Spencer v. Com., 2 Leigh (Va.) 751.

[51] Spencer v. Com., supra; U. S. v. Britton, 2 Mason, 464, Fed. Cas. No. 14,650. Contra, Com. v. Parmenter, supra.

[52] Mason v. State, 32 Tex. Cr. R. 95, 22 S. W. 144, 408. It was held in State v. Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775, that the mailing of a forged instrument is not an act requisite to the offense of uttering a forged instrument, there being no uttering in such case until the receipt of the letter, and therefore, where a forged instrument was mailed in A. county to a person in B. county, the accused could not be prosecuted in A. county under a statute providing that where a crime has been committed partly in one county and partly in another, or the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either.

[53] Post, p. 19.

[54] Landa v. State, 26 Tex. App. 580, 10 S. W. 218.

[55] Post, p. 19.

[56] See State v. Habib, 18 R. I. 558, 30 Atl. 462; State v. Rider, 46 Kan. 332, 26 Pac. 745.

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statute in some states, however, this crime may also be prosecuted in the county in which the goods were stolen;[57] in others, it may be prosecuted in any county into which the stolen goods were carried by the receiver, or in which he had possession of them;[58] in others, in any county in which or through which the property was carried by the person stealing the same.[59]

Prosecutions for libel must be in the county of publication.[60] As we shall see, if a person authorizes the publication of a libel by either an innocent or a guilty agent, he is guilty of a publication in any county in which the libel is published;[61] and it has been held that if a person composes a libel in one county, with intent to publish it in another, and afterwards does so publish it, he may be indicted in either.[62]

At common law, prosecutions for bigamy must be in the county where the bigamous marriage was entered into; and such is the law in many of our states.[63] By statute in England, it was provided that persons guilty of bigamy may be tried in any county in which they are arrested.[64] In some states the statute punishing bigamy makes the of-

[57] State v. Ward, 49 Conn. 429; Thurman v. State, 37 Tex. Cr. R. 646, 40 S. W. 795.

[58] Wills v. People, 3 Parker, Cr. R. (N. Y.) 473.

[59] Thurman v. State, 37 Tex. Cr. R. 646, 40 S. W. 795.

[60] Rex v. Johnson, 7 East, 68; Rex v. Watson, 1 Camp. 215, 216; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214. In the case last cited the libel was published in a newspaper printed in Rhode Island, but a copy of the paper containing the libel was received in Massachusetts. Held this was a publishing in Massachusetts. Contra, U. S. v. Smith (D. C.) 173 Fed. 227.

[61] Rex v. Johnson, 7 East, 65. And see Rex v. Brisac, 4 East, 164; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214. Post, pp. 19, 21.

[62] Rex v. Burdett, 4 Barn. & Ald. 95.

[63] 1 Hale, P. C. 693; People v. Mosher, 2 Parker, Cr. R. (N. Y.) 195; Finney v. State, 3 Head (Tenn.) 544; Walls v. State, 32 Ark. 565; Beggs v. State, 55 Ala. 108; Brewer v. State, 59 Ala. 101; Brown v. State (Tex. Cr. App.) 27 S. W. 137.

[64] 2 Jac. I, c. 11. A similar statute has been held unconstitutional in Walls v. State, 32 Ark. 565, and State v. Smiley, 98 Mo. 605, 12 S. W. 247.

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fense continuous, so that the parties may be punished in any county in which they are found in a bigamous state.[65]

By the weight of authority, if a nuisance is erected in one county, and affects the public in another, the offender may be prosecuted in either county.[66]

The venue of abduction for the purpose of concubinage is in the county where the woman was induced or forced to go away;[67] and the same is true of the crime of inveigling a person with intent to cause him to be sent out of the state.[68]

Crimes Committed while Personally Absent—Innocent Agent—Principal and Accessory

It is not always necessary that a person shall be present in a county in order to commit a crime there. If a person while in one county commits a felony or other crime through an innocent agent in another, he himself commits the crime in the latter.[69] Thus, if a person in one county should by means of an innocent agent, and this innocent agent may be the post office, obtain goods in another county by false pretenses, he himself, as principal, commits the offense in the latter county, and may be there punished.[70] If a man stands in one county, and, by throwing or shoot-

[65] State v. Johnson, 12 Minn. 476 (Gil. 378), 93 Am. Dec. 241; State v. Palmer, 18 Vt. 570; Com. v. Bradley, 2 Cush. (Mass.) 553.

[66] 2 Hawk. P. C. c. 25, § 37; Scott v. Brest, 2 Term R. 241; Scurry v. Freeman, 2 Bos. & P. 381; Com. v. Lyons, 3 Pa. Law J. 167; State v. Lord, 16 N. H. 357; Rex v. Burdett, 4 Barn. & Ald. 175, 176. But see, contra, In re Eldred, 46 Wis. 530, 1 N. W. 175; People v. International Nickel Co. (Co. Ct.) 155 N. Y. Supp. 156.

[67] State v. Johnson, 115 Mo. 480, 22 S. W. 463. See State v. Round, 82 Mo. 679.

[68] In re Kelly (C. C.) 46 Fed. 653. For venue in conspiracy, see Hyde v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; Brown v. U. S. Marshal, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136.

[69] 1 Hale, P. C. 430, 431, 615, 617; Anon., J. Kel. 53; People v. Rathbun, 21 Wend. (N. Y.) 509; People v. Adams, 3 Denio (N. Y.) 207, 45 Am. Dec. 468; Reg. v. Michael, 9 Car. & P. 356.

[70] People v. Adams, supra; People v. Rathbun, supra; Johns v. State, 19 Ind. 421, 81 Am. Dec. 408; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452.

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ing across the line into another, assaults or kills a person standing in the latter county, he is guilty of the homicide or assault in the latter county.[71] So, if a person, while in one county, causes a libel to be published by an innocent agent in another, he may be prosecuted in the latter.[72] The offense of uttering a forged instrument is committed where it is transferred or received by the person to whom it is uttered, and, therefore, if a forged instrument is mailed in one county to a person in another, where it is received, or is otherwise transferred in another county through an innocent agent, it is uttered in the latter,[73] and it has been held that the offense is not committed partly in each county.[74] The same rule has been applied to the sending of threatening letters, by an innocent agent like the post office, into another county;[75] but it would seem that, since the sending completes the offense, the offense is committed where the letter is mailed, and so it has been held.[76]

Hale says: "If a man were accessory before or after in another county than where the principal felony was committed, at common law it was dispunishable."[77] Hawkins

[71] And see People v. Adams, 3 Denio (N. Y.) 207, 45 Am. Dec. 468. On this principle, it was held by the Georgia court that the offense of shooting at another took effect and was committed in Georgia where a person standing on the South Carolina shore of the Savannah river aimed and fired a pistol at another, who was at the time in Georgia, though the ball missed him, and struck the water near his boat. Simpson v. State, 92 Ga. 41, 17 S. E. 984, 22 L. R. A. 248, 44 Am. St. Rep. 75. But in People v. International Nickel Co. (Co. Ct.) 155 N. Y. Supp. 156, it was held that defendant could not be tried in New York for nuisance in allowing noxious gases to escape from his factory in New Jersey, though they were wafted over to New York and there rendered a number of persons unsafe in life and in property.

[72] Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214. The same is true where it is published by a guilty agent. Post, p. 21.

[73] People v. Rathbun, 21 Wend. (N. Y.) 509; State v. Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775; Strang v. State, 32 Tex. Cr. R. 219, 22 S. W. 680.

[74] State v. Hudson, supra; People v. Rathbun, supra.

[75] 1 Chit. Cr. Law, 191; Rex v. Girdwood, 1 Leach, Crown Cas. 142; 2 East, P. C. 1120.

[76] Landa v. State, 26 Tex. App. 580, 10 S. W. 218.

[77] 1 Hale, P. C. 623.

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gives as the reason: "Because the county in which it arose could not take conusance of the principal felony arising in another county, without which they could not find that of the accessory." [78]

The subject was covered in England by a statute (2 & 3 Edw. VI, c. 24), providing that where a felony is committed in one county, and any other person shall be accessory in another, the latter may be indicted where his particular criminality existed as if the felony had been committed there.[79] This statute is old enough to have become a part of our common law; and by the weight of authority, in the absence of statute, the county in which the accessorial acts are done is the proper venue.[80] It will be noticed, however, that it merely permits the prosecution in the county in which the accessory acts, and does not say that he may not be indicted in the other county. Some courts hold that the courts of a county in which a crime is committed have jurisdiction to try and punish an accessory, though all the acts constituting him an accessory were committed in another county.[81]

In some states the statutes provide that the accessory shall be tried in the county where his acts were done.[82] Where statutes exist making accessories principals, it has been held that the accessory could be prosecuted in the county where the principal act was done.[83]

It seems to be well settled that, in misdemeanors, persons who take such a part in the crime as would render them liable as accessories were the crime a felony, but who are liable as principals because it is a misdemeanor, may be prosecuted in the county where the crime was committed,

[78] 2 Hawk. P. C. 457.

[79] 1 East, P. C. 362.

[80] State v. Wyckoff, 31 N. J. Law, 65; State v. Moore, 26 N. H. 448, 59 Am. Dec. 354; Baron v. People, 1 Parker, Cr. R. (N. Y.) 246; Tully v. Com., 13 Bush (Ky.) 142.

[81] Carlisle v. State, 31 Tex. Cr. R. 537, 21 S. W. 358; State v. Ellison, 49 W. Va. 70, 38 S. E. 574.

[82] People v. Hodges, 27 Cal. 340.

[83] Scully v. State, 39 Ala. 240; People v. Wiley, 65 Hun, 624, 20 N. Y. Supp. 445.

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though they were acting in another county.[84] A person, therefore, who, while in one county, causes a libel to be published, by means of a guilty agent in another, may be punished in the latter.[85]

Offenses Committed Near the Boundary Line

Because of the necessity to charge the offense to have been committed in the county in which the prosecution is instituted, and to prove its commission as laid, it was found that, in prosecutions for crimes committed near the boundaries of two or more counties, the defendant often escaped punishment for defect of the proof in this respect. It has therefore been provided by statute in most jurisdictions that, in an indictment for a felony (in some states for other offenses) committed on the boundary or boundaries of two or more counties, or within a certain distance (500 yards, for instance) therefrom, it shall be sufficient to allege that the crime was committed in either or any of said counties, and the crime may be inquired of, tried, and determined in the county within which it shall be so alleged to have been committed.[86]

These statutes have been held constitutional in some states,[87] and unconstitutional in others.[88]

Offenses Partly in One County and Partly in Another

It is sometimes provided by statute that, where a crime is committed partly in one county and partly in another, the offender may be indicted, tried, and punished in either. Under such a statute, if a man promises in one county to marry a woman, and on the same day takes her into another

[84] Rex v. Brisac, 4 East, 164; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; 1 Bish. Cr. Proc. § 57.

[85] Rex v. Brisac, supra; Rex v. Johnson, 7 East, 65; Rex v. Burdett, 4 Barn. & Ald. 95.

[86] 1 Chit. Cr. Law, 184; People v. Davis, 56 N. Y. 95; State ex rel. Brown v. Stewart, 60 Wis. 587, 19 N. W. 433, 50 Am. Rep. 388; Buckrice v. People, 110 Ill. 29; Com. v. Gillon, 84 Mass. (2 Allen) 502.

[87] State ex rel. Brown v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; State v. Robinson, 14 Minn. 447 (Gil. 333).

[88] Buckrice v. People, 110 Ill. 29.

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county, and there seduces her under such promise, he may be prosecuted in either county.[89] And where a conspiracy to take the life of a person is formed in one county, and in pursuance thereof he is there seized and bound, and is carried into another county and there killed, the murder may be prosecuted in either county.[90] And the same is true where an assault is committed—that is, a blow or poison given—in one county and death results in another.[91]

These statutes do not change the rule that a person who, while absent, commits a crime through an innocent agent, must be prosecuted where the crime was committed. It does not apply, therefore, where a forged instrument is mailed in one county, and received in another, but in such a case the prosecution for uttering the instrument must be in the latter.[92]

By statute in some states crimes committed on public conveyances may be prosecuted in any county through which the conveyance passed on the trip during which the crime was committed.[93] These statutes have generally been held constitutional.[94]

Locality of Crime against United States [95]

There are various provisions in the Constitution of the United States and acts of Congress securing the right to be tried where the offense was committed. Thus it is declared that trials shall be held "in the state where the said crimes shall have been committed; but, when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed";[96] and

[89] People v. Crotty, 55 Hun, 611, 9 N. Y. Supp. 937.

[90] Archer v. State, 106 Ind. 426, 7 N. E. 225.

[91] Archer v. State, supra; Green v. State, 66 Ala. 40, 41 Am. Rep. 744.

[92] State v. Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775.

[93] Nash v. State, 2 G. Greene (Iowa) 286; People v. Dowling, 84 N. Y. 478; Watt v. People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403.

[94] Watt v. People, supra; Steerman v. State, 10 Mo. 503. Contra, Craig v. State, 3 Heisk. (Tenn.) 227.

[95] As to locality as determining right to prosecute at all, see Clark, Cr. Law (3d Ed.) 477.

[96] Const. U. S. art. 3, § 2.

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that persons accused of crime shall have the right to trial by a jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.[97] And there are various provisions by act of Congress.[98] Crimes committed on the high seas, or elsewhere out of the jurisdiction of any particular state or district, are to be tried in the district where the offender is first found, or into which he is first brought.[99]

Change of Venue

In most, if not in all, the states, there are statutes providing for a change of the place of trial to another county, where certain grounds are shown.[100] This is called a "change of venue."

[97] Const. U. S. Amend. art. 6.

[98] See Rev. St. U. S. §§ 661, 662, 729 (U. S. Comp. St. 1916, vol. 2, pp. 2063, 2064, and notes).

[99] Rev. St. U. S. § 730 (U. S. Comp. St. 1916, § 1023).

[100] Post, p. 485.

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CHAPTER II

APPREHENSION OF PERSONS AND PROPERTY

4. Arrest in General.
5. Arrest by Warrant.
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34. Taking Property from Person Arrested.

ARREST

4. An arrest is the taking of a person into custody. It may be made—

(a) By virtue of a warrant issued by a competent authority.

(b) Under some circumstances, without a warrant.

When a crime has been committed, the first step, ordinarily, in the prosecution of the guilty person, is to secure his body, so that he may be forthcoming for his trial or in other words, to arrest him.

The arrest may be made in two ways. It may be made by virtue of a warrant of arrest, issued by a competent authority, and directing the apprehension of the offender;

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or it may, under some circumstances, be made without a warrant. We shall deal first with arrests by warrant, excluding, however, those questions which relate to arrests generally. We shall then deal in the same way with arrests without a warrant, and, finally, with those questions which relate to arrests generally, whether by or without a warrant. At the outset it will be well to state shortly the rights and liabilities of parties with reference to arrests.

Rights and Liabilities of Parties—Lawful Arrest

If an arrest is authorized, and is attempted or made in a proper manner, the person making it, whether he be, as we shall presently explain, an officer or a private person, merely performs his duty, and he incurs no liability whatever.[1] On the contrary, the law throws its protection around him. The person sought to be arrested, if he resists, is criminally liable for the mere resistance,[2] and also both civilly and criminally liable for assault and battery, if he resists with force.[3] If he, or a person assisting him, in his resistance, kills the person making the arrest, the homicide is murder.[4] If a person unlawfully departs from custody after he has been lawfully arrested, he is guilty of a misdemeanor known as an "escape";[5] and if he breaks from his place of imprisonment, or forcibly escapes, he is guilty of a misdemeanor or a felony, according to circumstances, known as a "prison breach."[6] If third persons interfere in aid of the person sought to be arrested, the bare interference constitutes a misdemeanor.[7] If they use force, they are also

[1] State v. Hull, 34 Conn. 132; State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44; Clark, Cr. Law, 211.

[2] People v. Haley, 48 Mich. 495, 12 N. W. 671; Clark, Cr. Law (3d Ed.) 435.

[3] People v. Haley, supra.

[4] Rex v. Ford, Russ. & R. 329; Mockabee v. Com., 78 Ky. 380; People v. Pool, 27 Cal. 572; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Clark, Cr. Law (3d Ed.) 213.

[5] State v. Leach, 7 Conn. 452, 18 Am. Dec. 113; Clark, Cr. Law (3d Ed.) 438.

[6] State v. Murray, 15 Me. 100; Com. v. Filburn, 119 Mass. 297; Clark, Cr. Law (3d Ed.) 438.

[7] Clark, Cr. Law (3d Ed.) 439.

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guilty of an assault and battery, and, if the person making the arrest is killed, they are guilty of murder.[8] If they procure the escape of the prisoner after his arrest, they are guilty of a misdemeanor or felony known as a "rescue."[9]

Same—Unlawful Arrest

On the other hand, if an arrest or attempt to arrest is illegal, either because there is no authority to arrest at all, or because the arrest is made in an unlawful manner, as, for instance, by the use of unnecessary violence, the person arresting, whether he be an officer or a private person, and whether the arrest is attempted or made with or without a warrant, is guilty of an assault and battery or false imprisonment, and is both civilly and criminally liable therefor.[10] An unlawful attempt to arrest or a false imprisonment may be lawfully resisted by any necessary force short of taking life or inflicting grievous bodily harm.[11] Even when life is taken in resisting, the attempt to arrest or the imprisonment is deemed sufficient provocation to reduce the homicide to manslaughter.[12] Within certain limits, not very clearly defined, third persons, particularly relatives, may interfere to prevent an unlawful arrest or imprisonment.[13]

Habeas Corpus

If a person is illegally arrested or detained in custody, he may obtain his release by petition to the proper court or judge for a writ of habeas corpus. This remedy will be considered in a separate chapter.

[8] Clark, Cr. Law (3d Ed.) 213; note 4, supra.

[9] Clark, Cr. Law (3d Ed.) 439.

[10] State v. Parker, 75 N. C. 249, 22 Am. Rep. 669; Burns v. State, 80 Ga. 544, 7 S. E. 88; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Clark, Cr. Law (3d Ed.) 272, 279.

[11] Massie v. State, 27 Tex. App. 617, 11 S. W. 638; Drennan v. People, 10 Mich. 169; Clark, Cr. Law (3d Ed.) 272.

[12] Yates v. People, 32 N. Y. 509; Drennan v. People, 10 Mich. 169; Reg. v. Thompson, 1 Moody, Crown Cas. 80; Drew's Case, 4 Mass. 391; Rafferty v. People, 69 Ill. 111, 18 Am. Rep. 601; Id., 72 Ill. 37; Clark, Cr. Law (3d Ed.) 223.

[13] Clark, Cr. Law (3d Ed.) 272.

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ARREST BY WARRANT

5. A warrant is a writ or precept, issued by an authorized magistrate, addressed to a proper officer or person, requiring him to arrest the body of an offender, or suspected offender, therein named, and bring him before a proper magistrate, to be dealt with according to law.

In all of the states, either by statute or at common law, warrants of arrest may be issued by any justice of the peace, or other magistrate who is given similar powers, on a proper complaint being made before him, for the arrest of a person who has committed a crime within his jurisdiction, or is reasonably suspected of having committed it. Warrrants are generally issued by justices of the peace or police magistrates, but they may also, at common law as well as by statute in most states, be issued by a judge of any court of record.

If possible, a warrant should be obtained in all cases; but, as we shall presently see, there are cases in which an arrest may be made without a warrant, even when there is time and opportunity to obtain one. Generally, in cases of misdemeanor, a warrant is necessary. We shall best consider the necessity for a warrant in treating of arrests without a warrant.

SAME—ISSUANCE OF WARRANT—COMPLAINT

6. To authorize the issuance of a warrant before indictment, there must be made before the proper magistrate a proper complaint, on oath or affirmation, showing that a crime has been committed, and that there is probable cause to suspect the accused. After indictment, the usual practice is to issue a bench warrant.

An arrest under an insufficient warrant is in effect an arrest without any warrant at all, and if a warrant is neces-

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sary such arrest is illegal. All the consequences of an illegal arrest or attempt to arrest follow. The sufficiency of a warrant, therefore, is an important question. The requisites are generally prescribed by statute, but in many respects the statutes are merely declaratory of the common law. We shall deal with the question with reference to the common law, but will call attention to any important changes which have been made by statute.

Where an indictment has been found against a person, a justice of the peace or other competent authority can issue a warrant for the arrest of the accused, on the production to him of a properly authenticated copy thereof. The general practice, however, is for the judge or clerk of the court in which the indictment is pending to issue a bench warrant, directing the accused to be arrested and brought before some proper magistrate.

It was at one time thought that a warrant of arrest could not be issued until after indictment,[14] but it has long been settled to the contrary.[15] A warrant may issue to bring a person before a magistrate for examination, and determination of the question whether he should be held to await action by the grand jury. But, to enable a magistrate to issue a warrant in the first instance—that is, before indictment—it is necessary, not only under the constitution and by statute in most jurisdictions, but also at common law, that a proper complaint under oath or affirmation shall be laid before the magistrate, in order that he may determine that a crime has been committed, and that there is probable cause to suspect the accused. Without such a showing, a warrant should never be issued.[16] The Constitutions of the United States and of most of the states declare that the people shall be secure from unreasonable arrests, and that no warrant shall issue to arrest any person without describing him as nearly as may be, nor without probable cause sup-

[14] 4 Inst. 176; 2 Hawk. P. C. 132; 1 Chit. Cr. Law, 12.

[15] 2 Hale, P. C. 108; 4 Bl. Comm. 290; 1 Chit. Cr. Law, 13. And see cases hereafter cited.

[16] 4 Bl. Comm. 290; Caudle v. Seymour, 1 Q. B. 889; State v. Wimbush, 9 S. C. 309; Wells v. Jackson, 3 Munf. (Va.) 479; State v. Mann, 27 N. C. 48.

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ported by oath or affirmation. This is substantially a declaration of what has always been the common law.

Sufficiency of the Complaint

A form for a complaint made before a justice of the peace to procure the issuance of a warrant is given below.[17]

At common law, as well as by statute in most states, the complaint must be made under the oath or affirmation of the complainant, or of some other witness on his behalf. The oath or affirmation is essential.[18] By statute in many of the states it is also required to be reduced to writing. In some it is expressly required that the magistrate, after examining on oath the complainant and any witness produced by him, shall reduce the complaint to writing, and cause it to be subscribed by the complainant. It seems, however, that this provision is merely directory, in so far

[17] State (or Commonwealth) of ———, County of ———, to wit.

A. B., upon oath, complains that on the ——— day of ———, A. D. ———, C. D., in the county of ———, in said state (or commonwealth), (or in the county aforesaid), did feloniously steal, take, and carry away one overcoat, of the value of twenty-five dollars, of the goods and chattels of the said A. B. (or of any other person who may have been the owner). The said A. B., therefore, prays that the said C. D. may be apprehended, and held to answer the said complaint, and to be further dealt with according to law.

Dated this the ——— day of ———, A. D. ———.

[Signed] A. B.

State (or Commonwealth of ———, County of ———, to wit.

I, X. Y., a justice of the peace, of the county aforesaid, do certify that on this day, in said county, personally appeared before me the said A. B., whose name is signed to the foregoing complaint, dated on this ——— day of ———, A. D. ———, and, being duly sworn, deposes and says that the facts stated in said complaint are true.

Given under my hand this ——— day of ———, A. D. ———. X. Y., J. P.

The forms will differ in some respects, under the practice or statutes of the various states.

[18] State v. Wimbush, 9 S. C. 309; Caudle v. Seymour, 1 Q. B. 889; Daniels v. State, 2 Tex. App. 353. But see State v. Killet, 2 Bailey (S. C.) 289. It has been held that the oath cannot be administered by the magistrate's clerk, but must be administered by the magistrate himself. Lloyd v. State, 70 Ala. 32; Poteete v. State, 9 Baxt. (Tenn.) 261, 40 Am. Rep. 90. But see, contra, State ex rel. Bryant v. Lauver, 26 Neb. 757, 42 N. W. 762.

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as it provides for reduction to writing by the magistrate himself, and that the writing may be done by the complainant or any other person.[19] In other states it is merely provided that the magistrate shall examine the complainant and his witnesses on oath; the complaint is not required to be reduced to writing.[20] Writing is not necessary at common law.[21]

Ordinarily, any person is competent to make a complaint if he is capable of understanding the nature of an oath or affirmation, and so competent to testify, for it is the wrong against the public, and not against the individual, that is to be considered and punished.[22] It is no objection to a complaint, therefore, that it was made by a convict.[23] An insane person or a child of very tender years would no doubt be incompetent, as he could not understand the nature of an oath or affirmation.[24] By statute, in some jurisdictions, it is provided, on grounds of public policy, that a complaint for adultery can only be made by the injured husband or wife.[25]

[19] Gen. St. Mass. c. 170, § 10; Rev. St. Ill. 1874, p. 401, § 348. As to subscription and jurat, see Com. v. Wallace, 14 Gray (Mass.) 382; Webb v. State, 21 Ind. 236; Com. v. Quin, 5 Gray (Mass.) 478. A complainant who cannot write may subscribe by making his mark. Com. v. Sullivan, 14 Gray (Mass.) 97; Sale v. State, 68 Ala. 530.

[20] People v. Lynch, 29 Mich. 278; People v. Becktel, 80 Mich. 623, 45 N. W. 582.

[21] See cases above cited.

[22] People v. Stokes (Gen. Sess.) 24 N. Y. Supp. 727; State v. Killet, 2 Bailey (S. C.) 289.

[23] State v. Killet, supra; People v. Stokes, supra. But see Walker v. Kearney, 2 Strange, 1148, and Rex v. Moore, Cas. t. Hardwick, 176. In the case last cited, where a statute required the complaint to be made on oath, it was held that a warrant should not issue on a complaint made by an "informer" who would have benefited by the conviction, as such informer was not competent to take the oath required. Statutes in some jurisdictions require the information at least in certain cases to be sworn to by a person competent to take an oath. See State v. Downing, 22 Mo. App. 504; Taulman v. State, 37 Ind. 353. In the case last cited the court held that, as a wife was not competent to testify against her husband, she could not swear to an information against him for carrying concealed weapons.

[24] Whart. Cr. Ev. §§ 366–376.

[25] State v. Roth, 17 Iowa, 336; State v. Brecht, 41 Minn. 50, 42 N. W. 602.

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"Complaint" is a term which is applied, not only to the accusation made for the purpose of procuring a warrant, but also to the accusation upon which an offender is put upon his trial before a magistrate, or other inferior court, for offenses within the latter's jurisdiction to punish.[26] The latter complaint is more in the nature of an indictment or information, and is very different from a complaint for the purpose of procuring a warrant. What would suffice in the latter may not be sufficient in the former, so the distinction must be borne in mind.[27] Some of the text-books confuse the two.[28] The complaint for the purpose of an arrest and examination need not be as specific as an indictment, information, or complaint on which the accused is to be tried and punished.[29] It should, however, contain a full description of the offense charged with a reasonable degree of certainty.[30] It has been said that it need not allege positively that the accused has committed the crime; that it will be sufficient to state that there are reasonable grounds to suspect that he has committed it;[31] but by the weight of authority it is not enough to aver suspicion merely, or belief on information received from others. There must be an averment of personal knowledge and belief.[32]

[26] Post, p. 149.

[27] Com. v. Phillips, 16 Pick. (Mass.) 211.

[28] This caution is deemed necessary, for the reason that some of the books virtually ignore the distinction, and assume that there is no difference in their requisites. A complaint on which a person is to be put upon his trial before a magistrate, and possibly upon a trial de novo on appeal to the district or circuit court, requires the same certainty of allegation as an indictment, and we shall consider its sufficiency when we come to treat of the indictment. We are here concerned only with the complaint necessary for the purpose of arrest and commitment.

[29] Com. v. Phillips, 16 Pick. (Mass.) 211.

[30] State v. Burrell, 86 Ind. 313; Housh v. People, 75 Ill. 487; In re Way, 41 Mich. 299, 1 N. W. 1021.

[31] Com. v. Phillips, 16 Pick. (Mass.) 214; Housh v. People, 75 Ill. 487.

[32] Smith v. Boucher, Cas. t. Hardw. 69; Com. v. Lottery Tickets, 5 Cush. (Mass.) 369; People v. Recorder of Albany, 6 Hill (N. Y.) 429; In re Way, 41 Mich. 299, 1 N. W. 1021; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; People v. Heffron, 53 Mich. 527, 19 N. W.

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Evidence to Authorize Issuance

Under the constitutional provision which we have already mentioned, and which is merely declaratory of the common law, a warrant of arrest cannot be issued except on probable cause, supported by oath or affirmation. In other words, the complaint or evidence adduced before the magistrate must show that the crime charged has been committed, and that there is probable cause to suspect the accused. It is also very generally so provided by statute in the different states. If a warrant is regular on its face, however, and was issued by a magistrate having jurisdiction, it is not rendered illegal by the fact that the proof before the magistrate was not sufficient to justify its issuance.[88]

SAME—SUFFICIENCY OF WARRANT

7. The warrant, to authorize an arrest—
   - (a) Must have been issued by a magistrate having jurisdiction.
   - (b) It may, in the absence of statutory restriction, be issued on Sunday, and at any time of the day or night.
   - (c) It must in some, but not all, jurisdictions be under seal.
   - (d) It must state the offense, and an offense for which an arrest may be made.
   - (e) It must show authority to issue it, as that a complaint on oath or affirmation was made.
   - (f) It must correctly name the person to be arrested, or, if his name is unknown, so describe him that he may be identified.
   - (g) It must show the time of issuance.
   - (h) It must be directed to a proper officer, either by name or by description of his office.
   - (i) It must direct, and not merely authorize, the arrest.

170; State v. Hobbs, 39 Me. 212; Conner v. Com., 3 Bin. (Pa.) 38; Welch v. Scott, 27 N. C. 72; Comfort v. Fulton, 39 Barb. (N. Y.) 56.

[88] State v. James, 80 N. C. 370; post, p. 41.

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(j) It must command the officer to bring the accused before the issuing magistrate or some other magistrate having jurisdiction.

(k) Clerical errors and formal defects will not render it insufficient.

The form of a warrant of arrest is given below.[34]

Jurisdiction

The magistrate or judge issuing the warrant must have jurisdiction of the subject-matter. A warrant issued without any jurisdiction at all, or in excess of jurisdiction, or a warrant issued by a person not a magistrate, as where a blank warrant is filled up by a private person, is illegal and void.[35]

Time of Issuance

A warrant may be issued on Sunday as well as on any other day, in the absence of statutory provision to the contrary;[36] and it may be issued at any time of the day or

[34] State (or Commonwealth) of ———, County of ———, to wit. To the Sheriff or Any Constable of Said County:

Whereas, A. B. has this day made complaint and information on oath before me, X. Y., a justice of the peace of the county aforesaid, that C. D., on the ——— day of ———, A. D. ———, in said county, did feloniously steal, take, and carry away one overcoat, of the value of twenty-five dollars, of the goods and chattels of the said A. B.:

These are therefore to command you (or now, therefore, you are commanded) forthwith to apprehend and bring before me, or some other justice of said county, the body of the said C. D., to answer said complaint, and to be further dealt with according to law.

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

X. Y., J. P. [Seal.]

[35] Wells v. Jackson, 3 Munf. (Va.) 479; Rafferty v. People, 69 Ill. 111, 18 Am. Rep. 601; Id., 72 Ill. 37; State v. Bryant, 65 N. C. 327; State v. Shelton, 79 N. C. 605. The warrant need not state the offense with the particularity of an indictment, however. Thus a warrant to arrest for larceny is not invalid for not containing the word "feloniously," or because it does not allege the ownership of the property. State v. Jones, 88 N. C. 671.

[36] Pearce v. Atwood, 13 Mass. 347; post, p. 57. A warrant may be issued on Sunday, whenever an arrest may be made on Sunday,

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night. As we have already seen, it may be issued before the accused has been indicted.[37]

Form and Contents of Warrant

Not only must the warrant be issued by a magistrate or judge having jurisdiction to issue it, and on a sufficient complaint, but it must be sufficient in form.

By the weight of authority, it must be not only under the hand of the magistrate or judge, but also under his seal.[38] In some jurisdictions, however, a seal is not deemed necessary, even at common law,[39] and in others it has been declared unnecessary by statute.

The warrant must state shortly the offense for which the arrest is to be made, or recite the substance of the accusation, and, of course, it must state an offense for which an arrest may lawfully be made.[40] It should state the time

"for, if the arrest is authorized by law, the order to make such arrest must likewise be lawful." Pearce v. Atwood, supra.

[37] Ante, p. 28.

[38] 4 Bl. Comm. 290; Tackett v. State, 3 Yerg. (Tenn.) 393, 24 Am. Dec. 582; Welch v. Scott, 27 N. C. 72; State v. Worley, 33 N. C. 242; State v. Drake, 36 Me. 366, 58 Am. Dec. 757; State v. Coyle, 33 Me. 427; People v. Holcomb, 3 Parker, Cr. R. (N. Y.) 656; Beekman v. Traver, 20 Wend. (N. Y.) 67; State v. Goyette, 11 R. I. 592; Lough v. Millard, 2 R. I. 436; State v. Weed, 21 N. H. 268, 53 Am. Dec. 188; State v. Curtis, 2 N. C. 471; Somervell v. Hunt, 3 Har. & McH. (Md.) 113; State v. Caswell, T. U. P. Charlt. (Ga.) 280. A wafer or scroll sufficient, if intended as a seal. State v. McNally, 34 Me. 210, 56 Am. Dec. 650; State ex rel. West v. Thompson, 49 Mo. 188.

[39] Padfield v. Cabell, Willes, 411; Burley v. Griffith, 8 Leigh (Va.) 447; Davis v. Clements, 2 N. H. 390; Thompson v. Fellows, 21 N. H. 430. In some of these cases, the warrant was not for arrest, but for commitment. See State v. Drake, 36 Me. 366, 58 Am. Dec. 757.

[40] Money v. Leach, 1 W. Bl. 555; Caudle v. Seymour, 1 Q. B. 889; People v. Phillips, 1 Parker, Cr. R. (N. Y.) 104; People v. Mead, 92 N. Y. 415; Duckworth v. Johnston, 7 Ala. 578; Brazleton v. State, 66 Ala. 96; Johnson v. State, 73 Ala. 21; In re Booth, 3 Wis. 1; State v. Hobbs, 39 Me. 212; Brady v. Davis, 9 Ga. 73; State v. Rowe, 8 Rich. (S. C.) 17; State v. Leach, 7 Conn. 452, 18 Am. Dec. 113; State v. Whitaker, 85 N. C. 566; State v. Jones, 88 N. C. 671; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; State v. Everett, Dud. (S. C.) 295; Moore v. Watts, 1 Breese (Ill.) 42. The place where the crime was committed must be stated with a reasonable degree of certainty.

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of commission of the offense. It has been held, however, that a statement that the offense was committed on a day later than the date of the warrant, as where a warrant issued in March, 1878, stated the offense to have been committed on May 20, 1878, instead of May 20, 1877, does not render the warrant invalid, where the complaint gives the correct date previous to its issuance, as the mistake is merely clerical, and not misleading.[41]

It must contain recitals showing authority to issue it, as, for instance, that a complaint under oath or affirmation has been made.[42] This is probably not necessary under the statutes in some jurisdictions.

It must be specific, and correctly name the person to be arrested, giving his surname and his Christian name, or at least the initial letter of it; or, if his name is unknown, it must so state, and must describe him so that he may be identified.[43] This is not only required by the common law,

Price v. Graham, 48 N. C. 545. A warrant for larceny must state the value of the stolen property, so that it may appear whether the lower or the higher court has jurisdiction. People v. Belcher, 58 Mich. 325, 25 N. W. 306.

[41] Heckman v. Swartz, 64 Wis. 48, 24 N. W. 473.

[42] Caudle v. Seymour, 1 Q. B. 889; Smith v. Bouchier, 2 Strange, 993; Brady v. Davis, 9 Ga. 73; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; State v. Wimbush, 9 S. C. 309; Bissell v. Gold, 1 Wend. (N. Y.) 213, 19 Am. Dec. 480; Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102; Com. v. Ward, 4 Mass. 497; Conner v. Com., 3 Bin. (Pa.) 38; Halsted v. Brice, 13 Mo. 171.

[43] Com. v. Crotty, 10 Allen (Mass.) 403, 87 Am. Dec. 669; West v. Cabell, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643 (collecting authorities); Rex v. Hood, 1 Moody, Crown Cas. 281; Mead v. Haws, 7 Cow. (N. Y.) 332; Money v. Leach, 1 W. Bl. 555; Alford v. State, 8 Tex. App. 545; Miller v. Foley, 28 Barb. (N. Y.) 630; Brady v. Davis, 9 Ga. 73; Nichols v. Thomas, 4 Mass. 232; Wells v. Jackson, 3 Munf. (Va.) 458; Hoye v. Bush, 1 Man. & G. 775; Griswold v. Sedgwick, 6 Cow. (N. Y.) 456; Gurnsey v. Lovell, 9 Wend. (N. Y.) 319; Melvin v. Fisher, 8 N. H. 407; Scott v. Ely, 4 Wend. (N. Y.) 555; Clark v. Bragdon, 37 N. H. 562; Johnston v. Riley, 13 Ga. 97, 137; Scheer v. Keown, 29 Wis. 586; Wilks v. Lorck, 2 Taunt. 400; Haskins v. Young, 19 N. C. 527, 31 Am. Dec. 426. The arrest of a person by a wrong name cannot be justified, though he was the person intended, unless it be shown that he was known by one name as well as the other. Shadgett v. Clipson, 8 East, 328; Griswold v. Sedg-

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but is also rendered necessary by the constitutional provision to which we have referred, and a statute dispensing with the requirement would be void. A general warrant to apprehend all persons suspected of a crime, as, for instance, to apprehend the authors, printers, and publishers of a libel, without naming them, is void.[44] In England, under statutes which are old enough to have become a part of our common law, general warrants to take up loose, idle, and disorderly persons, such as prostitutes, vagrants, drunkards, and the like, are an exception to this rule.[45] With us, under our constitutional provisions, such a warrant would no doubt be void, but there are in most jurisdictions statutes and ordinances allowing such arrests without any warrant at all. This, it is held, does not violate the constitution.[46]

The warrant, it has been held, must state, or at least show, the time of issuance;[47] must be directed to a proper officer by name, or a proper class of officers by the description of their office;[48] must direct, and not merely authorize, the arrest;[49] and must command the officer to bring

wick, 6 Cow. (N. Y.) 456; Wilks v. Lorck, 2 Taunt. 400. The use of a fictitious name—such as "John Doe"—without other description is not allowable. See Mead v. Haws, 7 Cow. (N. Y.) 332. The fact that a proper name is misspelled does not render the warrant insufficient, if the true name and the name as given are idem sonans. People v. Gosch, 82 Mich. 22, 46 N. W. 101. It has been held, however, that, under statutes allowing amendments in criminal proceedings and process, where a person has been arrested under a complaint and warrant giving a wrong name, they may be amended so as to give his name correctly. It was so held where Mary E. Keehn had been arrested under a complaint and warrant against Jenny M. Keehn, and action was brought for false imprisonment. Keehn v. Stein, 72 Wis. 196, 39 N. W. 372.

[44] Money v. Leach, 1 W. Bl. 555; 4 Bl. Comm. 291; Com. v. Crotty, supra.

[45] Money v. Leach, 3 Burrows, 1766.

[46] Post, p. 46.

[47] Donahoe v. Shed, 8 Metc. (Mass.) 326.

[48] Wells v. Jackson, 3 Munf. (Va.) 458; Abbott v. Booth, 51 Barb. (N. Y.) 546; State v. Wenzel, 77 Ind. 428. But see Com. v. Moran, 107 Mass. 239.

[49] Abbott v. Booth, 51 Barb. (N. Y.) 546.

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the accused before the proper magistrate, to be dealt with according to law.[50]

Clerical errors and merely formal defects will not render the warrant insufficient.[51] Variances between the warrant and complaint may be cured by amending the warrant, provided that such amendment does not change the nature of the offense charged in the complaint. Thus a warrant for larceny may be amended so as to allege the correct name of the owner of the property.[52]

Before Whom Warrant Returnable

The warrant must order the officer to bring the accused either before the issuing magistrate or judge, or some other magistrate or judge having jurisdiction of the subject-matter.[53] Though there was at one time some doubt on the subject, the propriety of making the warrant returnable before a magistrate or judge, other than the one who issued it, is well settled,[54] and is very generally expressly authorized by statute. It must, however, be returnable before some magistrate or court having jurisdiction of the subject-matter.[55]

[50] Reg. v. Downey, 7 Q. B. 281. Use in the mandate of a warrant of the phrase, "to be dealt with according to law," instead of, "to answer such complaint," as provided by statute, is a mere informality, which does not affect the validity of the warrant. Bookhout v. State, 66 Wis. 415, 28 N. W. 179.

[51] Com. v. Murray, 2 Va. Cas. 504; Heckman v. Swartz, 64 Wis. 48, 24 N. W. 473; Com. v. Martin, 98 Mass. 4; Donahoe v. Shed, 8 Metc. (Mass.) 326; State v. Jones, 88 N. C. 671; Johnson v. State, 73 Ala. 21. But see State v. Lowder, 85 N. C. 564; State v. Whitaker, 85 N. C. 566. A warrant dated on the "twenty-third" day of a certain month is not invalid by reason of the word "third" being written above the word "second," which has been obliterated by drawing a line of ink through it. Com. v. Martin, 98 Mass. 4.

[52] People v. Hilderbrand, 71 Mich. 313, 38 N. W. 919.

[53] Reg. v. Downey, 7 Q. B. 281.

[54] Foster's Case, 5 Coke, 59; 2 Hale, P. C. 112; Com. v. Wilcox, 1 Cush. (Mass.) 503. And the statutes, where they have not provided otherwise, are held not to have changed the common law in this respect. Com. v. Wilcox, supra.

[55] Stetson v. Packer, 7 Cush. (Mass.) 562.

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Life of Warrant—Alteration

Warrants are usually made returnable "forthwith," but the warrant remains in force until it is returned. Until then, even though the accused has been arrested, it is still in force, so that, should he escape, it would justify his rearrest.[56] After it has been returned it is functus officio, and no longer of any validity.[57]

No alteration can be made in a warrant by any person other than the magistrate who issued it. Any material alteration by another magistrate, before whom it is returnable, or by any other person, renders it invalid.[58]

SAME—EXECUTION OF THE WARRANT

8. As regards the execution of the warrant by making the arrest—

(a) It can only be executed by the officer to whom it is directed either by name or by description of office.

(b) It cannot confer authority to execute it on one officer, where a statute provides for its execution by another.

(c) Unless a statute so allows, it cannot be executed outside the jurisdiction of the issuing magistrate or court.

(d) Perhaps it may be directed to and executed by a private person. As to this there is a conflict in the authorities.

(e) Where the warrant is necessary, it must be in the possession of the officer at the time of the arrest.

(f) It must be returned after the arrest.

The person executing a warrant must be authorized to execute it, or the arrest will be illegal.[59] When a warrant

[56] Cooper v. Adams, 2 Blackf. (Ind.) 294; Com. ex rel. Schwamble v. Sheriff, 1 Grant, Cas. (Pa.) 187.

[57] Com. v. Roark, 8 Cush. (Mass.) 210; Tubbs v. Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744.

[58] Haskins v. Young, 19 N. C. 527, 31 Am. Dec. 426.

[59] Reynolds v. Orvis, 7 Cow. (N. Y.) 269; Wood v. Ross, 11 Mass. 271.

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is directed to an officer by the description of his office, he can execute it only within his own precinct; but, when it is directed to an officer by name, he may execute it anywhere within the jurisdiction of the magistrate or judge who issued it.[60] A warrant at common law cannot confer authority to execute it outside of the jurisdiction of the issuing magistrate or judge.[61] A warrant, therefore, issued by a justice of the peace or judge of one county, must be backed or indorsed by a justice of the peace or judge of another county before it can be executed in the latter.[62] In some states, however, the statutes provide that a warrant, issued either by a judge of a court of record or by a justice of the peace of a county in which an offense is committed, shall extend all over the state, and may be executed in any county without having it indorsed, the officer to whom it is directed being given the same authority in any other county as he has in his own.[63]

Where a statute provides that certain arrests shall be made by a certain officer or class of officers, a warrant for such an arrest cannot confer authority to execute it upon any other officer or class of officers.[64]

A warrant is ordinarily directed to a sheriff, constable, or other peace officer, but, according to the weight of authority, it may at common law be directed to a private person by name, in which case, of course, he would in respect to its execution stand in the same position as an officer.[65]

[60] Blatcher v. Kemp, 1 H. Bl. 15, note; Rex v. Chandler, 1 Ld. Raym. 545; Rex v. Weir, 1 Barn. & C. 288.

[61] Krug v. Ward, 77 Ill. 603; Smotherman v. State, 140 Ala. 168, 37 South. 376.

[62] 4 Bl. Comm. 291. It is so provided by statute in some states. Peter v. State, 23 Tex. App. 684, 5 S. W. 228; Ledbetter v. State, 23 Tex. App. 247, 5 S. W. 226; State v. Dooley, 121 Mo. 591, 26 S. W. 558.

[63] See Sturm v. Potter, 41 Ind. 181; State v. Dooley, 121 Mo. 591, 26 S. W. 558.

[64] Reynolds v. Orvis, 7 Cow. (N. Y.) 269; Wood v. Ross, 11 Mass. 271.

[65] 4 Bl. Comm. 291; 1 Hale, P. C. 581; 2 Hale, P. C. 110; 2 Hawk. P. C. c. 13, § 28; Meek v. Pierce, 19 Wis. 300; Rex v. Kendall, 1 Ld. Raym. 66; Kelsey v. Parmelee, 15 Conn. 265; Blatcher v. Kemp, 1

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There are some cases which hold that it cannot be directed to a private person, at least if its execution by an officer is possible.[66]

The officer or person executing a warrant must have it in his possession at the time of the arrest,[67] and after he has made the arrest the warrant must be returned.[68]

When the function of a warrant has been performed—i. e., when the person has been arrested under it and been recognized to appear—or has appeared and been discharged from arrest, the warrant is spent, and the prisoner cannot be again arrested without new process.[69]

An officer may call upon others to assist him in the execution of a warrant, and they are bound to obey the command. The officer's authority in this respect is not different from his authority in making a lawful arrest without a warrant, so we will postpone consideration of the ques-

H. Bl. 15; Case of Village of Chorley, 1 Salk. 176; Com. ex rel. Simpson v. Keeper of the Prison, I Ashm. (Pa.) 183; McConnell v. Kennedy, 29 S. C. 180, 7 S. E. 76. But a private person is not bound to execute it. 1 Hale, P. C. 581; 2 Hale, P. C. 110; 2 Hawk, P. C. c. 13, § 28.

[66] Com. v. Foster, 1 Mass. 488; Noles v. State, 24 Ala. 672.

[67] Codd v. Cabe, 1 Exch. Div. 352; Webb v. State, 51 N. J. Law, 189, 17 Atl. 113; Cabell v. Arnold (Tex. Civ. App.) 22 S. W. 62. In the latter case an officer, to whom a warrant had been delivered, was held civilly liable because his deputy made the arrest without having the warrant in his possession. As to the officer's liability, however, the case has been reversed. Id., 86 Tex. 102, 23 S. W. 645, 22 L. R. A. 87. It was affirmed in so far as it held possession of the warrant by the officer making the arrest necessary. See, also, Smith v. Clark, 53 N. J. Law, 197, 21 Atl. 491.

[68] Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Dehm v. Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374. Failure of the officer in this respect will not render those lawfully assisting in the arrest liable. Dehm v. Hinman, supra.

[69] Doyle v. Russell, 30 Barb. (N. Y.) 300; State v. Queen, 66 N. C. 615; State v. Brittain, 25 N. C. 17. "If a constable, after he hath arrested the party * * * suffer him to go at large, upon his promise to come again at such a time and find sureties, he cannot afterwards arrest him by force of the same warrant. However, if the party return and put himself again under the custody of the constable, the constable may lawfully detain him." 2 Hawk. P. C. c. 13, § 9.

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tion. Other questions relating to arrests generally, whether with or without a warrant, such as notice of purpose and authority, use of force, and the like, will also be hereafter considered.

SAME—WARRANT AS PROTECTION TO OFFICER

9. An officer is not liable for executing a warrant which is regular and valid on its face, and issued from a court or magistrate having jurisdiction of the subject-matter, though the warrant may in fact have been voidable, or even void; but he is not protected by a warrant void on its face.

It is obvious that the administration of justice would be greatly retarded if an officer receiving a warrant which is regular and valid on its face should be compelled, at his peril, to examine into the circumstances under which it was procured, and determine the validity of the proceedings prior to its issuance. It is therefore universally held that an officer, to whom a warrant is directed and delivered is bound to execute it, so far as the jurisdiction of the magistrate or court and himself extends, if it was issued by a magistrate or court having jurisdiction, and is regular and valid on its face.[70] Being charged with this duty, he cannot be held liable to the party arrested for executing the warrant, though it may have been irregularly or wrongfully issued.[71] "It will not do to require of executive officers, be-

[70] Stoddard v. Tarbell, 20 Vt. 321, and cases hereafter cited.

[71] Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Nichols v. Thomas, 4 Mass. 232; Kennedy v. Duncklee, 1 Gray (Mass.) 65; Pearce v. Atwood, 13 Mass. 324; Wilmarth v. Burt, 7 Metc. (Mass.) 257; Parsons v. Lloyd, 3 Wils. 345; Boyd v. State, 17 Ga. 194; Allison v. Rheam, 3 Serg. & R. (Pa.) 139, 8 Am. Dec. 644; Warner v. Shed, 10 Johns. (N. Y.) 138; Parker v. Walrod, 16 Wend. (N. Y.) 514, 30 Am. Dec. 124; Savacool v. Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Cooper v. Adams, 2 Blackf. (Ind.) 294; Brother v. Cannon, 1 Scam. (Ill.) 200; Robinson v. Harlan, 1 Scam. (Ill.) 237; State v. Kirby, 24 N. C. 201; Cody v. Quinn, 28 N. C. 191, 44 Am. Dec. 75; State v. Jones, 88 N. C. 671; Cooley, Torts, 459, and cases there cited.

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fore they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of legal process; as officers so situated would be necessarily obliged to judge for themselves, and would often judge wrong, as to the lawfulness of the authority under which they are required to act. It is a general and known principle that executive officers, obliged by law to serve legal writs and processes, are protected in the rightful discharge of their duty, if those precepts are sufficient in point of form, and issue from a court or magistrate having jurisdiction of the subject-matter. If such a magistrate shall proceed unlawfully in issuing the process, he, and not the executive officer, will be liable for the injury consequent upon such act." [72]

It has been said that "it is the general rule that when the authority under which an officer acts is voidable only, he is justified by it, but not when the authority is void"; [73] but the protection of the warrant extends further than this. An officer may even be justified by a void warrant, if the defect does not appear. "No doctrine is more firmly established than this, namely, that an officer may justify acts done by him under a process that is void, unless it appears on its face to be void, as well as acts done under a process that is voidable, and has been avoided." [74]

If the warrant is illegal and void on its face, the officer not only is not bound to execute it, but if he does so, or forcibly attempts to do so, he will be both civilly and criminally liable for the assault and battery or false imprisonment, and all the other consequences of an illegal arrest or attempt to arrest will follow. [75] Amendable defects do not

[72] Sandford v. Nichols, supra.

[73] Nichols v. Thomas, supra.

[74] Kennedy v. Duncklee, supra. And see Parsons v. Lloyd, supra; Allison v. Rheam, supra; People v. Warren, 5 Hill (N. Y.) 440.

[75] Rafferty v. People, 69 Ill. 111, 18 Am. Rep. 601; Parker v. Walrod, 16 Wend. (N. Y.) 514, 30 Am. Dec. 124; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Griswold v. Sedgwick, 6 Cow. (N. Y.) 456; Rex v. Hood, 1 Moody, 281; Noles v. State, 24 Ala. 672; Gurney v. Tufts, 37 Me. 130, 58 Am. Dec. 777; State v. McDonald, 14 N. C.

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avoid the warrant, and therefore do not render the officer liable; but he is liable if the magistrate or judge had no jurisdiction of the subject-matter,[76] provided the want of jurisdiction is not latent;[77] or where the warrant does not state a specific offense for which an arrest may lawfully be made;[78] or where a seal is omitted when required by law;[79] or where the warrant does not name the accused when his name is known, or so describe him when his name is unknown that he may be identified;[80] or, possibly, where no complaint under oath was made for the issuance of the warrant, and the warrant does not state that it was made.[81]

By the weight of authority, the mere fact that the officer knows that the warrant was obtained for an unlawful purpose, or was illegally issued, does not give him the right to

468; Moore v. Watts, Breese (Ill.) 42; State, to Use of Brown v. Crow, 11 Ark. 642.

[76] State v. McDonald, 14 N. C. 471; Allen v. Gray, 11 Conn. 95; Sprague v. Birchard, 1 Wis. 457, 60 Am. Dec. 393; Camp v. Moseley, 2 Fla. 171; Barnes v. Barber, 1 Gilman (Ill.) 401; McDonald v. Wilkie, 13 Ill. 22, 54 Am. Dec. 423; Tefft v. Ashbaugh, 13 Ill. 602; State v. Shelton, 79 N. C. 605; Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102; Miller v. Grice, 1 Rich. (S. C.) 147; Stephens v. Wilkins, 6 Pa. 260.

[77] Pearce v. Atwood, 13 Mass. 324; Savacool v. Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Churchill v. Churchill, 12 Vt. 661; Miller v. Grice, 1 Rich. (S. C.) 147; Rodman v. Harcourt, 4 B. Mon. (Ky.) 230; Barnes v. Barber, 1 Gilman (Ill.) 401. A constable is justified in executing process regular on its face, though the officer issuing it was but an officer de facto. Wilcox v. Smith, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; Com. v. Kirby, 2 Cush. (Mass.) 577. Knowledge by the officer of facts rendering the warrant void for want of jurisdiction does not render him liable, if the want of jurisdiction does not appear on the face of the warrant. People v. Warren, 5 Hill (N. Y.) 440; post, p. 44.

[78] Ante, p. 34.

[79] Ante, p. 34.

[80] Ante, p. 35.

[81] Ante, p. 35. If there was a complaint under oath, the fact that it was false is immaterial. State v. James, 80 N. C. 370. Insufficiency of the complaint not appearing upon the warrant does not render the officer liable. Donahoe v. Shed, 8 Metc. (Mass.) 326; State v. Mann, 27 N. C. 45; Welch v. Scott, 27 N. C. 72; Humes v. Taber, 1 R. I. 464.

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refuse to execute it, and therefore does not render the warrant any the less a protection to him, provided it is valid on its face. He must be governed by the warrant alone.[82] If he acts without his jurisdiction, or the jurisdiction conferred by the warrant,[83] or if the warrant is not directed to him, or, though it is directed to him, he is not authorized by law to execute it,[84] it will afford him no protection. The fact that the accused is exempt from arrest does not render the officer liable, if the fact does not appear on the face of the warrant.[85] It seems that under no circumstances is the warrant any protection to the officer if it is not returned.[86]

It is sufficient in all cases, to render the officer liable, that the warrant shows on its face facts or a form which renders it insufficient in law, whether the officer knows of the insufficiency or not, for he is conclusively presumed to know the law.[87]

[82] Tarlton v. Fisher, 2 Doug. 671; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Webber v. Gay, 24 Wend. (N. Y.) 485; People v. Warren, 5 Hill (N. Y.) 440; Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 324; Gott v. Mitchell, 7 Blackf. (Ind.) 270; Wilmarth v. Burt, 7 Metc. (Mass.) 257; Whitworth v. Clifton, 1 Moody & R. 531.

[83] Ante, p. 38; People v. Burt, 51 Mich. 199, 16 N. W. 378.

[84] Ante, p. 39; Freegard v. Barnes, 7 Exch. 827; Russell v. Hubbard, 6 Barb. (N. Y.) 654; Reynolds v. Orvis, 7 Cow. (N. Y.) 269; Wood v. Ross, 11 Mass. 271.

[85] Tarlton v. Fisher, 2 Doug. 671; Carle v. Delesdernier, 13 Me. 363, 29 Am. Dec. 508; Chase v. Fish, 16 Me. 132.

[86] Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390; Tubbs v. Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744; Dehm v. Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374. But see Com. v. Tobin, 108 Mass. 426, 11 Am. Rep. 375. Persons lawfully assisting the officer, however, will not be liable. Dehm v. Hinman, supra.

[87] Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151.

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SAME—ARREST WITHOUT A WARRANT

10. BY OFFICER—Any peace officer may arrest without a warrant under the following circumstances:
   (a) By verbal direction of a judge or justice of the peace—
      (1) For a felony or breach of the peace committed in the presence of the judge or justice.
      (2) For any offense committed in the presence of the judge or justice in court.
   (b) Without any direction, but of his own accord—
      (1) For a felony committed or being attempted in his own presence or view.
      (2) For a breach of the peace committed in his own presence or view, provided the arrest is made during its commission, or, perhaps, immediately afterwards.
      (3) On a reasonable charge by another that a felony has been committed by the person arrested.
      (4) On his own reasonable suspicion that a felony has been committed, and that the person arrested is guilty, though in fact no felony has been committed at all.
      (5) He may recapture a prisoner who has escaped from lawful custody, whether before or after conviction.

11. BY PRIVATE PERSON—A private person has the same authority as an officer to arrest without a warrant, except that, where he arrests on suspicion for a felony, he must show that a felony had in fact been committed by some one.[88]

[88] This statement is in accordance with the great weight of authority, but, as we shall see, there is some conflict in the authorities. A few courts have held, for instance, that where an arrest is made on suspicion for a felony actual guilt of the person arrested must be shown; and there is some authority against his right to arrest for a breach of the peace.

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12. STATUTES—The authority both of officers and of private persons to arrest without a warrant is very much extended by statute in many jurisdictions.

It has been contended that the constitutional provision to which we have referred, declaring that the people shall be secure from unreasonable arrests, and that no warrant to arrest a person shall issue without describing him as nearly as may be, nor without probable cause supported by oath or affirmation, renders all arrests unlawful except upon a warrant so issued; but it is well settled that the provision does not apply to reasonable arrests without a warrant, authorized either by the common law or by statute.[89] In many cases it would defeat the ends of justice if no arrest could be made without a warrant, for while a warrant is being procured the offender may escape. Under certain circumstances, therefore, such arrests have been allowed from the earliest times. As we shall see, when an arrest is made without a warrant, the prisoner must be taken before a proper magistrate, and a complaint made. It is not necessary, however, that the magistrate shall issue his warrant. This would be unnecessary.[90]

Arrest by Officer without a Warrant

In the first place, a judge or justice of the peace may himself apprehend, or cause to be apprehended, without the issuance of a warrant, any person committing a felony or breach of the peace in his presence.[91] So, also, a judge or

[89] Wakely v. Hart, 6 Bin. (Pa.) 318; North v. People, 139 Ill. 81, 28 N. E. 966.

[90] Hoggatt v. Bigley, 6 Humph. (Tenn.) 236.

[91] 4 Bl. Comm. 292; Com. v. McGahey, 11 Gray (Mass.) 194; State v. Shaw, 25 N. C. 20; Holcomb v. Cornish, 8 Conn. 375; Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102; Lancaster v. Lane, 19 Ill. 242; O'Brian v. State, 12 Ind. 369. In some jurisdictions, the power of a magistrate in this respect is extended by statute to all offenses committed in his presence. A magistrate has the same authority to command assistance in pursuing and retaking an offender whom he has so caused to be arrested for an offense committed in his presence, and who has escaped, which he had to command the original arrest. Com. v. McGahey, supra.

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justice of the peace, in whose presence in court an offense is committed, may direct the arrest of the offender without issuing a warrant, though the offense may be such as would require a warrant under other circumstances.[92]

Dr. Wharton seems to lay down the proposition that "for all offenses committed or attempted in the presence of an officer," whether a felony or merely a misdemeanor, he may arrest without a warrant,[93] but this is not true at common law. The cases cited in support of the proposition are most of them cases in which there was a felony or breach of the peace, or else cases in which the arrest was expressly authorized by statute. It is well settled that a sheriff, constable, or other peace officer invested by statute with like powers, may arrest without a warrant for a felony,[94] or for a misdemeanor, provided it amounts to breach of the peace,[95] committed in his presence, and within his jurisdic-

[92] Lancaster v. Lane, 19 Ill. 242.

[93] Whart. Cr. Pl. & Prac. § 8; citing Reg. v. Mabel, 9 Car. & P. 474; Derecourt v. Corbishley, 5 El. & Bl. 188; Galliard v. Laxton, 2 Best & S. 363; Com. v. Deacon, 8 Serg. & R. (Pa.) 47; State v. Brown, 5 Har. (Del.) 505; Wolf v. State, 19 Ohio St. 248 (authorized by statute); People v. Wilson, 55 Mich. 506, 21 N. W. 905 (this was a case of felony, and the opinion assumes that, had it not been so, the arrest would have been unauthorized); State v. Bowen, 17 S. C. 58; Staples v. State, 14 Tex. App. 136. There are statutory provisions to this effect in many states.

[94] Doering v. State, 49 Ind. 56, 19 Am. Rep. 669; Carr v. State, 43 Ark. 99; Cahill v. People, 106 Ill. 621. This includes statutory felonies. Firestone v. Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266.

[95] Taylor v. Strong, 3 Wend. (N. Y.) 384; Douglass v. Barber, 18 R. I. 459, 28 Atl. 805; City Council v. Payne, 2 Nott & McC. (S. C.) 475; Quinn v. Heisel, 40 Mich. 576; People v. Bartz, 53 Mich. 493, 19 N. W. 161; Crosland v. Shaw (Pa.) 12 Atl. 849; State v. Lewis, 50 Ohio St. 179, 33 N. E. 405, 19 L. R. A. 449; Com. v. Tobin, 108 Mass. 426, 11 Am. Rep. 375; Com. v. Kennedy, 136 Mass. 152; State v. Brown, 5 Har. (Del.) 505; Knot v. Gay, 1 Root (Conn.) 66; Shanley v. Wells, 71 Ill. 78; Com. v. Deacon, 8 Serg. & R. (Pa.) 47; McCullough v. Com., 67 Pa. 30; State v. Bowen, 17 S. C. 58; Pow v. Beckner, 3 Ind. 475; Vandeveer v. Mattocks, 3 Ind. 479; Ross v. State, 10 Tex. App. 455, 38 Am. Rep. 643; Staples v. State, 14 Tex. App. 136. It must be remembered that fighting, rioting, etc., is not necessary to constitute a breach of the peace. A breach of the peace is "a

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tion; and, if committed within his view or hearing, it is committed in his presence.[96] He may also arrest without a warrant on a reasonable charge of a felony having been committed,[97] or upon his own reasonable suspicion that it has been committed;[98] and the fact that it afterwards turns out that his suspicion was unfounded, or even that no offense had been committed at all, will not make the arrest unlawful.[99] In this respect an officer stands on a different footing from a private person; for the latter, as we shall

violation of public order,—the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace." Galvin v. State, 6 Cold. (Tenn.) 294. "The term 'breach of the peace' is generic, and includes riotous and unlawful assemblies, riots, affray, forcible entry and detainer, the wanton discharge of firearms so near the chamber of a sick person as to cause injury, the sending of challenges and provoking to fight, going armed in public without lawful occasion in such manner as to alarm the public, and many other acts of a similar character." People v. Bartz, supra. In this case it was held that the wanton discharge of firearms in the streets of a city, being well calculated to alarm the public, was a breach of the peace.

[96] People v. Bartz, supra; State v. McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607. But it has been held that shouting in the streets of a village was not in the presence of an officer who was 150 feet away, on another street, and did not see the offender, and had no direct knowledge who committed the offense. People v. Johnson, 86 Mich. 175, 48 N. W. 870, 13 L. R. A. 163, 24 Am. St. Rep. 116. An officer may arrest without a warrant for wife beating, if he arrives at the scene during the progress of the beating, or immediately thereafter, being attracted by the noise of the disturbance or the outcry of the woman. Ramsey v. State, 92 Ga. 53, 17 S. E. 613.

[97] Samuel v. Payne, 1 Doug. 359; Hobbs v. Branscomb, 3 Camp. 420; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702. It is not only the officer's right, but it is his duty, to arrest under such circumstances, and, if he refuses to do so, he is guilty of a misdemeanor. Cowles v. Dunbar, 2 Car. & P. 565.

[98] Ledwith v. Catchpole, Cald. 291; Doering v. State, 49 Ind. 56, 19 Am. Rep. 669; Wade v. Chaffee, 8 R. I. 224, 5 Am. Rep. 572; Beckwith v. Philby, 6 Barn. & C. 635; Rohan v. Sawin, 5 Cush. (Mass.) 281; Eanes v. State, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289; Davis v. Russell, 5 Bing. 354; Lawrence v. Hedger, 3 Taunt. 14; Hobbs v. Branscomb, 3 Camp. 420; Lewis v. State, 3 Head (Tenn.) 127; Rex v. Woolmer, 1 Moody, 334; Nicholson v. Hardwick, 5 Car. & P. 495.

[99] Rohan v. Sawin, 5 Cush. (Mass.) 281; Davis v. Russell, 5 Bing. 354; Com. v. Cheney, 141 Mass. 102, 6 N. E. 724, 55 Am. Rep. 448; Com. v. Presby, 14 Gray (Mass.) 65.

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see, must show that an offense had actually been committed by some one. There must in all cases be a reasonable suspicion to authorize the arrest; that is, a bona fide suspicion, and probable cause therefor.[1] Some courts have held that it must appear that the accused may escape if time is taken to procure a warrant,[2] but the great weight of authority is to the contrary.[3] The right of an officer to arrest on another's accusation, or on his own suspicion only, is limited to cases of felony.[4]

As a rule, at common law, an officer can under no circumstances arrest without a warrant for a misdemeanor not

[1] Davis v. Russell, 5 Bing. 364; Wade v. Chaffee, 8 R. I. 224, 5 Am. Rep. 572; Somerville v. Richards, 37 Mich. 299; Mure v. Kaye, 4 Taunt. 34; State v. Underwood, 75 Mo. 230; State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; Boynton v. Tidwell, 19 Tex. 118; People v. Burt, 51 Mich. 199, 16 N. W. 378; Hogg v. Ward, 3 Hurl. & N. 417; Hobbs v. Branscomb, 3 Camp. 420; Firestone v. Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266; Hall v. Hawkins, 5 Humph. (Tenn.) 357; Lawrence v. Hedger, 3 Taunt. 14; Findlay v. Pruitt, 9 Port. (Ala.) 195; Sugg v. Pool, 2 Stew. & P. (Ala.) 196; Winebiddle v. Porterfield, 9 Pa. 137. An indictment for a felony is sufficient cause. 1 East, P. C. 301; Ex parte Krans, 1 Barn. & C. 261. So, also, is a proclamation by the Governor. Eanes v. State, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289. The suspicion must have been bona fide. If it was otherwise, the fact that there were reasonable grounds for suspicion is not enough. Roberts v. Orchard, 2 Hurl. & C. 769. Whether or not there was probable cause is to be determined by the facts as they were known to exist at the time of the arrest. Thomas v. Russell, 9 Exch. 764; Swaim v. Stafford, 25 N. C. 289. In Wills v. Jordan, 20 R. I. 630, 41 Atl. 233, it was held that an officer was not justified in arresting, without a warrant, a person on the mere statement of confessed principals in the felony that such person had been a principal in the felony, where there was no corroboration by trustworthy information by others, or by circumstances affording reasonable ground of suspicion against the person arrested. See, also, Isaacs v. Brand, 2 Starkie, 167.

[2] See O'Connor v. State, 64 Ga. 125, 37 Am. Rep. 58; Ross v. State, 10 Tex. App. 455, 38 Am. Rep. 643; Staples v. State, 14 Tex. App. 136.

[3] Davis v. Russell, 5 Bing. 354; Wade v. Chaffee, 8 R. I. 224, 5 Am. Rep. 572; Burns v. Erben, 40 N. Y. 463; Rohan v. Sawin, 5 Cush. (Mass.) 281.

[4] Com. v. McLaughlin, 12 Cush. (Mass.) 615; Rex v. Curvan, 1 Moody, 132; Com. v. Carey, 12 Cush. (Mass.) 246; Griffin v. Coleman, 4 Hurl. & N. 263; Rex v. Ford, Russ. & R. 329; Bowditch v. Balchin, 5 Exch. 378.

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amounting to a breach of the peace;[5] nor, according to the overwhelming weight of authority, can he arrest for a breach of the peace after it is over, unless it was committed in his presence or view, and even then the arrest must be made within a reasonable time after the commission of the offense.[6] It is otherwise by statute in many states.[7] In most, if not all, the states there are statutes and city ordinances, which are clearly valid, authorizing officers to arrest for certain misdemeanors without a warrant, when committed in their presence.[8] An officer may and should, without a war-

[5] Com. v. Carey, 12 Cush. (Mass.) 246; Bright v. Patton, 5 Mackey (D. C.) 534; Com. v. McLaughlin, 12 Cush. (Mass.) 615; People v. McLean, 68 Mich. 480, 36 N. W. 231; Drennan v. People, 10 Mich. 169; Quinn v. Heisel, 40 Mich. 576; In re Way, 41 Mich. 299, 1 N. W. 1021; Scott v. Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; Danovan v. Jones, 36 N. H. 246; Com. v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475; Hopkins v. Crowe, 7 Car. & P. 373; Rex v. Bright, 4 Car. & P. 387; Butolph v. Blust, 5 Lans. (N. Y.) 84; State v. Grant, 76 Mo. 236; Coupey v. Henley, 2 Esp. 540; Reg. v. Walker, 1 Dears. Crown Cas. 358; Stocken v. Carter, 4 Car. & P. 477; Shanley v. Wells, 71 Ill. 78; Cahill v. People, 106 Ill. 621. But see Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; State v. Roberts, 15 Mo. 28; State v. Brown, 5 Har. (Del.) 505; Hatton v. Treeby, [1897] 2 Q. B. 452.

[6] See the cases heretofore cited, and see, more particularly, Taylor v. Strong, 3 Wend. (N. Y.) 384; State v. Lewis, 50 Ohio St. 179, 33 N. E. 405, 19 L. R. A. 449; Quinn v. Heisel, 40 Mich. 576; People v. Haley, 48 Mich. 495, 12 N. W. 671; Webb v. State, 51 N. J. Law, 189, 17 Atl. 113; Reg. v. Walker, 6 Cox, Cr. Cas. 371; Reg. v. Marsden, 11 Cox, Cr. Cas. 90; Cook v. Nethercote, 6 Car. & P. 741; Sternack v. Brooks, 7 Daly (N. Y.) 142. But see the dicta in Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68; Reg. v. Light, Dears. & B. 332; State v. Sims, 16 S. C. 486.

[7] The statutes of many of the states allow an officer to arrest without a warrant for any public offense committed in his presence, and this includes misdemeanors. Dilger v. Com., 88 Ky. 550, 11 S. W. 651. And in some states there are statutes allowing arrests without a warrant for certain misdemeanors, on information received from others. Jacobs v. State, 28 Tex. App. 79, 12 S. W. 408; Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812 (carrying weapons).

[8] Thomas v. Incorporated Village of Ashland, 12 Ohio St. 127; White v. Kent, 11 Ohio St. 550; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Mitchell v. Lemon, 34 Md. 176; Roddy v. Finnegan, 43 Md. 490; Danovan v. Jones, 36 N. H. 246; Bryan v. Bates, 15 Ill. 87; Main v. McCarty, 15 Ill. 441; Smith v. Donelly, 66 Ill. 464.

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rant, interpose to prevent a breach of the peace, and to accomplish this object he may arrest the person menacing, and detain him in custody until the chance of the threat being executed is over.[9] It is true that an officer must always interfere to prevent an attempted felony, and, if necessary to prevent the felony, he may arrest the offender and take him before a magistrate, though an attempt to commit a felony is only a misdemeanor. It will no doubt be found, however, that in every such case the attempt will amount to a breach of the peace. It is also true that if a person obstructs an officer in his lawful attempt to arrest with or without a warrant, either by using force himself, or by encouraging the person sought to be arrested to resist, the officer may arrest him without a warrant.[10] It will be noticed, however, that, though the resistance is a misdemeanor only, it is a breach of the peace. The rule does not apply where the attempt to arrest is unlawful, for resistance is then justifiable.

Where a prisoner, either before or after he has been convicted, escapes from lawful custody, even with the consent of the officer having him in charge, he may be pursued and rearrested without a warrant.[11]

Arrest by Private Person without a Warrant

The right of a private person to arrest without a warrant is almost, but not quite, the same as that of an officer.

A judge or justice of the peace may cause to be apprehended, without issuing a warrant, any person committing a felony or breach of the peace in his presence. He may cause the arrest to be made by a private person as well as by an officer.[12]

It is also well settled at common law that any private person who is present when a felony is committed, not only

[9] Crosland v. Shaw (Pa.) 12 Atl. 849; State v. Carpenter, 54 Vt. 551; Hayes v. Mitchell, 80 Ala. 183.

[10] Coyles v. Hurtin, 10 Johns. (N. Y.) 85; Levy v. Edwards, 1 Car. & P. 40; White v. Edmunds, Peake, 89.

[11] 1 Chit. Cr. Law, 61; Com. v. McGahey, 11 Gray (Mass.) 194; Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812; Simpson v. State, 56 Ark. 8, 19 S. W. 99.

[12] 2 Hawk. P. C. c. 13, § 14.

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may, but must, arrest the offender, though he has no warrant.[13] By the great weight of authority, also, where a felony has in fact been committed, a private person may arrest on reasonable suspicion that it was committed by the person arrested, though his suspicion may be unfounded in fact.[14] In such a case his position is different from that of an officer, in that he will be liable for assault and battery or false imprisonment, and the other consequences of an illegal arrest or attempt to arrest will also follow, unless it is shown, not only that there was probable cause for his suspicion, but also that a felony had actually been committed by some one. Proof of probable cause to believe, and belief in good faith, that a felony had been committed, will not excuse him as it would an officer.[15] Some of the courts have said that an arrest by a private person without a warrant cannot be justified by proving the actual commission of the crime by some one, and suspicion on probable cause of the person arrested; that actual guilt of the person arrested

[13] 4 Bl. Comm. 293; Long v. State, 12 Ga. 293; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Phillips v. Trull, 11 Johns. (N. Y.) 486; Ruloff v. People, 45 N. Y. 213; Rex v. Hunt, 1 Moody, 93; Keenan v. State, 8 Wis. 132; Weimer v. Bunbury, 30 Mich. 211; Davis v. Russell, 5 Bing. 364; Kindred v. Stitt, 51 Ill. 407.

[14] 2 Hale, P. C. 78; Ashley's Case, 12 Coke, 90; Wakely v. Hart, 6 Bin. (Pa.) 316; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Kennedy v. State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; U. S. v. Boyd (C. C.) 45 Fed. 851; Long v. State, 12 Ga. 293; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Com. v. Deacon, 8 Serg. & R. (Pa.) 47; Cary v. State, 76 Ala. 78; Brockway v. Crawford, 48 N. C. 433, 67 Am. Dec. 250; State v. Roane, 13 N. C. 58; Smith v. Donelly, 66 Ill. 464; Wrexford v. Smith, 2 Root (Conn.) 171; Carr v. State, 43 Ark. 99; Reuck v. McGregor, 32 N. J. Law, 70; Wilson v. State, 11 Lea (Tenn.) 310.

[15] Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Burns v. Erben, 40 N. Y. 463; Wakely v. Hart, 6 Bin. (Pa.) 316; Com. v. Carey, 12 Cush. (Mass.) 246; Beckwith v. Philby, 6 Barn. & C. 638; People v. Adler, 3 Parker, Cr. R. (N. Y.) 249; Com. v. Deacon, 8 Serg. & R. (Pa.) 49; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Teagarden v. Graham, 31 Ind. 422; Brockway v. Crawford, 48 N. C. 433, 67 Am. Dec. 250; Carr v. State, 43 Ark. 99; Reuck v. McGregor, 32 N. J. Law, 70; Doughty v. State, 33 Tex. 1; Findlay v. Pruitt, 9 Port. (Ala.) 195; Salisbury v. Com., 79 Ky. 425; Allen v. Wright, 8 Car. & P. 522.

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must be shown;[16] and in Texas it has been held that the offense must have been committed in the presence of the person making the arrest;[17] but these cases are contrary to the overwhelming weight of authority. In no case is mere conjecture, or suspicion without probable cause, sufficient to justify the arrest.[18]

As a rule, a private person cannot arrest without a warrant for a misdemeanor, even when it is committed in his presence,[19] though it is otherwise by statute in some jurisdictions,[20] and, as in the case of arrests by an officer, there are some exceptions at common law. He cannot arrest for a breach of the peace after it is over,[21] but by the weight of authority he may not only interpose to stop a breach of the peace, but may, during its continuance, or where there is reasonable ground for apprehending its renewal, arrest the offender and take him before a magistrate, or turn him over

[16] Rohan v. Sawin, 5 Cush. (Mass.) 285; Com. v. Carey, 12 Cush. (Mass.) 251; Kindred v. Stitt, 51 Ill. 407; Morley v. Chase, 143 Mass. 396, 9 N. E. 767. No authorities, however, are cited in these cases in support of the proposition.

[17] Alford v. State, 8 Tex. App. 545 (citing no authority, however).

[18] Davis v. Russell, 5 Bing. 364. We have already collected the cases on this point in treating of arrests by an officer without a warrant. Many of the cases there cited are cases of arrest by a private person. The liability of an officer and a private person is the same in this respect; so it is only necessary to refer to what we have already said on the subject. Ante, p. 49. In People v. Lillard, 18 Cal. App. 343, 123 Pac. 221, it was held that when accused, a private person, saw deceased running at night, and heard persons crying out, "Stop him!" "Catch him!" "He did it!" "He is the robber!" and, deceased being ordered by defendant four times to stop, he refused to do so, defendant had reasonable cause to believe the deceased had committed a felony, and if, in fact, he had, defendant was justified in killing him, if necessary to effect his arrest.

[19] Fox v. Gaunt, 3 Barn. & Adol. 798; Price v. Seeley, 10 Clark & F. 28; Phillips v. Trull, 11 Johns. (N. Y.) 487; Handcock v. Baker, 2 Bos. & P. 262; Butler v. Turley, 2 Car. & P. 585; Coward v. Baddeley, 4 Hurl. & N. 478; Wooding v. Oxley, 9 Car. & P. 1.

[20] In some states it is provided that a private person may arrest for any crime committed in his presence. People v. Morehouse, 53 Hun, 638, 6 N. Y. Supp. 763.

[21] Price v. Seeley, 10 Clark & F. 28; Phillips v. Trull, 11 Johns. (N. Y.) 487.

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to an officer.[22] A private person not only may, but must, interpose to prevent the attempted commission of a felony, or infliction of a deadly injury, and, if necessary to prevent it, may arrest the offender, though the attempt is only a misdemeanor.[23] As already stated, however, such an attempt must necessarily, in most, if not in all, cases, amount to a breach of the peace, so that the arrest may be justified on that ground.[24]

A private person may also recapture a prisoner charged with a felony, who has broken jail, or otherwise escaped from lawful custody, before or after conviction, though the prison breach or escape is only a misdemeanor.[25]

There are circumstances, as we shall now see, under which a private person may be called upon by an officer to assist him in making an arrest.

SAME—ASSISTING OFFICER

13. An officer authorized to make arrests may call upon private persons to assist him, and they are bound to do so, provided they act in his actual or constructive presence.

If there is just cause, any justice of the peace or sheriff may take of the county any number of persons he thinks proper to pursue, arrest, and imprison felons or breakers of the peace. This is called "raising the posse comitatus." Persons who refuse to aid are guilty of a misdemeanor. This applies not only where the sheriff is acting under a warrant, but also where he is acting without a warrant as a conservator of the peace.[26] Not only may the sheriff or a

[22] Price v. Seeley, 10 Clark & F. 28; Timothy v. Simpson, 1 Cromp., M. & R. 757; Derecourt v. Corbishley, 5 El. & Bl. 188.

[23] Handcock v. Baker, 2 Bos. & P. 260; Rex v. Hunt, 1 Moody, 93; Reuck v. McGregor, 32 N. J. Law, 70; Dill v. State, 25 Ala. 15; Ruloff v. People, 45 N. Y. 213; Long v. State, 12 Ga. 293; Com. v. Deacon, 8 Serg. & R. (Pa.) 47; Keenan v. State, 8 Wis. 132.

[24] Ante, p. 51.

[25] State v. Holmes, 48 N. H. 377.

[26] Dalton, c. 171; 4 Bl. Comm. 293.

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justice of the peace thus raise the posse comitatus, but any other peace officer, authorized to make arrests or to suppress breaches of the peace, may call upon private persons to assist him in the execution of his duty, whether he is acting under a warrant, or, in a proper case, without a warrant, and any person who without good excuse refuses to aid is guilty of a misdemeanor.[27] If the command is made by a proper officer, and the case is one in which he apparently has authority, the persons assisting him will be protected against any liability for their assistance, though in fact the officer may not have authority, or, though having authority, he may so fail to comply with the law as to become liable himself.[28] To justify private persons, however, in acting at the command of an officer in cases in which they would have no right to act of their own accord, they must act in the actual or constructive presence of the officer.[29] As we

[27] 2 Hawk. P. C. c. 13, § 7; Com. v. Field, 13 Mass. 321; Coyles v. Hurtin, 10 Johns. (N. Y.) 85; Blatch v. Archer, Cowp. 63; McMahan v. Green, 34 Vt. 69, 80 Am. Dec. 665; Mitchell v. State, 12 Ark. 50, 54 Am. Dec. 253; State v. James, 80 N. C. 370; State v. Shaw, 25 N. C. 20.

[28] Dehm v. Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374; Reed v. Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122; Watson v. State, 83 Ala. 60, 3 South. 441; Firestone v. Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266. "When the defendant was called upon by the sheriff in this case to assist him in arresting the plaintiff, he was not at liberty to refuse. Nor could he demand of the sheriff an inspection of the warrant under which he was acting, in order to see by what authority he was proceeding, and whether in his judgment it would be safe to assist him. * * * The nature of the case requires that there should be no delay in rendering the requisite assistance. No nice inquiries into the written authority of the sheriff to do what he is doing. It is sufficient that the officer asks for aid in a matter in which he has by law a right to ask for aid, and that he is a known public officer. The person who is thus called on is protected by the call from being sued for rendering the requisite assistance. If the officer has no warrant, or authority that will justify him, he may be liable as a trespasser; but the person who is called upon for aid, having no means of knowing what the warrant is by which the officer acts, and who relies upon the official character and call of the sheriff as his security for doing what is required, is clearly entitled to protection against suits by the person arrested." Aldis, J., in McMahan v. Green, supra.

[29] Coyles v. Hurtin, supra; Mitchell v. State, supra; State v. Shaw,

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have seen, the verbal command of a judge or justice of the peace to arrest for a felony or breach of the peace committed in his presence must be obeyed.

A private person cannot refuse to assist an officer when called on on the ground that such assistance involves personal danger; nor can he constitute himself the judge of the necessity for obedience.[80] But a private person, it has been held, is not liable to indictment for refusing to aid an officer when summoned to do so, if such aid would be futile as well as dangerous.[81]

SAME—ARREST UPON HUE AND CRY

14. Arrest upon hue and cry is an old common-law process of pursuing with horn and with voice all felons and such as have dangerously wounded others.

The hue and cry could be raised by officers or by private persons or by both. The officer and his assistants have the

supra; People v. Moore, 2 Doug. (Mich.) 1; Com. v. Field, 13 Mass. 321; Rex v. Patience, 7 Car. & P. 775. The officer need not be actually present. He may, for instance, leave persons whom he has called upon to assist, and go after help, and they must act in his aid during his temporary absence. "The sheriff," it was said in such a case, "is quodam modo present by his authority, if he be actually engaged in efforts to arrest, dum fervet opus, and has commanded and is continuing to command and procure assistance. When he is calling on the power of the county, or a requisite portion of it, to enable him to overcome resistance, it would be impossible that he should be actually present in every place where power might be wanting. The law is not so unreasonable as to require the officer to be an eye or ear witness of what passes, and to render all his authority null and void except when he is so present. * * * The question in these cases does not turn upon the fact of distance, so long as the sheriff is within his county, and is bona fide and strictly engaged in the business of the arrest." Coyles v. Hurtin, supra. It has lately been held in Michigan, however, that a sheriff, having a warrant in a case in which a warrant is necessary, cannot send his deputy to one place to make the arrest without the warrant, while he goes to another place for the same purpose with the warrant. People v. McLean, 68 Mich. 480, 36 N. W. 231.

[80] Dougherty v. State, 106 Ala. 63, 17 South. 393.

[81] Dougherty v. State, supra.

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same powers, protection, and indemnity as if acting under a warrant. If a warrant has been obtained, and the felon has fled into another county, he may be followed by hue and cry without having the warrant backed or signed by a justice of the latter county. Private persons who join in the hue and cry are justified, even though it may turn out that no felony has in fact been committed. If, however, a private person wantonly and maliciously, and without cause, raises the hue and cry, he commits a breach of the peace, and is guilty of a misdemeanor.[32]

SAME—TIME OF ARREST

15. In the absence of statutory provision to the contrary, an arrest may be made at any time.

An arrest at common law may be made on Sunday.[33] By statute, in some jurisdictions, the right to execute a warrant on Sunday is limited in terms to cases of treason, felony, and breach of peace, but the term "breach of peace" is held to include all indictable offenses.[34] In other jurisdictions, it is provided by statute that an arrest cannot be made on Sunday for a misdemeanor, unless upon direction of the magistrate indorsed upon the warrant.

An arrest at common law may be made at any time of the day or night,[35] but by statute, in some jurisdictions, the right to arrest at night is very much restricted.

[32] 4 Bl. Comm. 293; 2 Hale, P. C. 98; Jackson's Case, 1 East, P. C. 298; Galvin v. State, 6 Cold. (Tenn.) 283; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645.

[33] State v. Smith, 1 N. H. 346; Pearce v. Atwood, 13 Mass. 324, 347; Main v. McCarty, 15 Ill. 441; Rawlins v. Ellis, 16 Mees. & W. 172.

[34] Rawlins v. Ellis, supra; Watts v. Com., 5 Bush (Ky.) 309; Keith v. Tuttle, 28 Me. 326.

[35] State v. Smith, supra; Wright v. Keith, 24 Me. 158; State v. Brennan's Liquors, 25 Conn. 278.

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SAME—NOTICE OF PURPOSE AND AUTHORITY

16. An officer, commonly known as such, and acting within his own precinct, need not show his warrant, but he must, if requested, tell its substance. A private person or an officer not commonly known, or who is acting outside his precinct, must show his warrant if requested. An officer or private person arresting without a warrant must give notice of his authority and purpose, unless they are known or are obvious.

EXCEPTION—If the arrest is resisted, it may be effected before notice of authority.

An arrest, to be legal, must not only be authorized, but must be made in a proper manner. If made in an improper manner, the person making it is just as liable for the injury as if he had proceeded without any authority at all. When a warrant is necessary for a legal arrest, the person making the arrest must have the warrant with him when making the arrest.[36] An officer, if he is commonly known to be an officer, and is acting within his own precinct, need not show his warrant, though requested to do so; but he must, if requested, tell the substance of it.[37] But all private persons to whom a warrant is directed, and officers who are not commonly known, or who are acting out of their own precincts, must show their warrant if requested.[38] So, also, an officer acting without a warrant should, unless the party

[36] People v. McLean, 68 Mich. 480, 36 N. W. 231; Smith v. Clark, 53 N. J. Law, 197, 21 Atl. 491.

[37] 2 Hawk. P. C. c. 13, § 28; Com. v. Cooley, 6 Gray (Mass.) 350; Arnold v. Steeves, 10 Wend. (N. Y.) 514; Bellows v. Shannon, 2 Hill (N. Y.) 92; Codd v. Cabe, 1 Exch. Div. 352; Hall v. Roche, 8 Term R. 188; Shovlin v. Com., 106 Pa. 369; State v. Curtis, 2 N. C. 471; State v. Caldwell, 2 Tyler (Vt.) 214; State v. Phinney, 42 Me. 384. Code Cr. Proc. N. Y. § 173, provides that an officer must show his warrant, if required.

[38] 2 Hawk. P. C. c. 13, § 28; State v. Curtis, 2 N. C. 471; Frost v. Thomas, 24 Wend. (N. Y.) 418; Arnold v. Steeves, 10 Wend. (N. Y.) 514; People v. Nash, 1 Idaho, 206; State v. Kirby, 24 N. C. 201.

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is previously acquainted with the fact, or can plainly see it, notify him that he is an officer, or that he arrests in the name of the state, and for what offense,[39] but he need not do so if his character and the reason of the arrest are known to the accused, or are obvious.[40] It is established by the weight of authority, however, that an officer, whether acting with or without a warrant, need not state his character or authority before making the arrest, where the arrest is resisted, as this might defeat the arrest. It is enough if he does so on request, after the arrest has been made.[41] A private person, in making an arrest without a warrant, must make known his purpose,[42] but, as is the case with an officer, he need not do so in express words, where the circumstances render his purpose obvious.[43]

The person acting under a warrant is not required to allow a person he is about to arrest to have physical possession of the warrant; and if he should do so, and the return of the warrant is refused, force may be used to recover possession of it.[44]

[39] Yates v. People, 32 N. Y. 509; Wolf v. State, 19 Ohio St. 248.

[40] Wolf v. State, supra; Com. v. Tobin, 108 Mass. 426, 11 Am. Rep. 375; Roberts v. State, 14 Mo. 144, 55 Am. Dec. 97; Lewis v. State, 3 Head (Tenn.) 127; People v. Pool, 27 Cal. 573.

[41] Com. v. Cooley, 6 Gray (Mass.) 350; State v. Townsend, 5 Har. (Del.) 487; Rex v. Woolmer, 1 Moody, 334; Com. v. Field, 13 Mass. 321; Drennan v. People, 10 Mich. 169; Kernan v. State, 11 Ind. 471; Boyd v. State, 17 Ga. 194; Shovlin v. Com., 106 Pa. 369. But see State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359.

[42] Fost. Crown Law, 311; Rex v. Howarth, 1 Moody, 207; Long v. State, 12 Ga. 293; State v. Bryant, 65 N. C. 327; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645.

[43] State v. Mowry, 37 Kan. 369, 15 Pac. 282; Rex v. Howarth, 1 Moody, 207. And see Wolf v. State, 19 Ohio St. 248. The omission of the person making the arrest to declare his authority when such declaration is required by law has the effect of withdrawing from such person the protection the law throws around its officers when in the legal discharge of their duty. It does not justify the person arrested in killing him, though it may reduce such killing to manslaughter. State v. Phinney, 42 Me. 384.

[44] Rex v. Milton, Moody & M. 107.

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SAME—USE OF FORCE

17. All necessary force, even to the taking of life, may be used to effect an arrest or prevent an escape in cases of felony, and all necessary force, short of taking life, may be used, in cases of misdemeanor. In no case can unnecessary force be used.

Neither an officer nor a private person, in making an arrest, can use unnecessary violence; if he does so, he will be liable both civilly and criminally for assault and battery, or criminally for murder or manslaughter if homicide results.[45] He may in any case use all necessary force, short of taking life, both to effect the arrest and to retain the custody of his prisoner.[46] It has been held, for instance, that an officer may strike a man who is fighting, if the blow is necessary to stop the fight, and if he acts in good faith.[47] So, also, if necessary, an officer may tie or handcuff an unruly prisoner, but he cannot use handcuffs unnecessarily.[48] If a legal attempt to arrest is forcibly resisted, the officer may oppose force to force, to overcome the resistance, even though the death of the person resisting may be the consequence, provided there is reasonable necessity for the kill-

[45] State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44; State v. Sigman, 106 N. C. 728, 11 S. E. 520; Wright v. Keith, 24 Me. 158; Murdock v. Ripley, 35 Me. 472; Burns v. State, 80 Ga. 544, 7 S. E. 88; Skidmore v. State, 43 Tex. 93; State v. Mahon, 3 Har. (Del.) 568; Findlay v. Pruitt, 9 Port. (Ala.) 195; Clark, Cr. Law, 211.

[46] State v. Pugh, supra; State v. McNinch, 90 N. C. 695; State v. Fuller, 96 Mo. 165, 9 S. W. 583; State v. Mahon, 3 Har. (Del.) 568; Ramsey v. State, 92 Ga. 53, 17 S. E. 613; Beaverts v. State, 4 Tex. App. 175; Clark, Cr. Law, 211.

[47] State v. Pugh, supra.

[48] Wright v. Court, 4 Barn. & C. 596; State v. Sigman, supra; State v. Stalcup, 24 N. C. 50; Dehm v. Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374; Leigh v. Cole, 6 Cox, Cr. Cas. 331. And, if handcuffs are used in the bona fide belief that they are necessary, the officer will not be liable, though it afterwards appears that they were unnecessary. Firestone v. Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266.

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ing.[49] It has been held that this applies to misdemeanors as well as felonies, and to civil as well as criminal cases.[50] After an arrest has once been made, and the offender is in custody, the officer having him in charge may kill him to prevent his escape, if such extreme measures are necessary, and he may, under like circumstances, kill others who are

[49] State v. Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; Clements v. State, 50 Ala. 117; People v. Lillard, 18 Cal. App. 343, 123 Pac. 221; Clark, Cr. Law, 134.

[50] State v. Dierberger, supra; State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359. But there are cases which seem to be contrary. Dilger v. Com., 88 Ky. 550, 11 S. W. 651. In the recent case of Robertson v. Arizona, 188 Fed. 783, 110 C. C. A. 489, an officer was indicted for murder in killing deceased, whom he was attempting to arrest for a misdemeanor. The following instruction was held correct: "It was entirely within his rights (that is to say, within the rights of the plaintiff in error as an officer) to use force to overcome resistance. You must observe the difference between resisting arrest and running away. Be the offense ever so trivial, if he actually resists arrest and fights back against arrest, the officer may use all force necessary and summon all the assistance that the surrounding circumstances offer him, to enable him to overcome that resistance even to the infliction of bodily harm, or, if necessary in extremity, the infliction of death. This duty of the officer to avoid infliction of injury or death only occurs when the man seeks to avoid arrest, but it does not devolve upon him to avoid the infliction of injury or death if it be necessary to overcome resistance, but he may inflict it only if it is necessary, and he may go only so far as it is necessary to effect arrest or overcome resistance. If the officer's life becomes in jeopardy during the course of the attempt to overcome resistance in making the arrest, he has the right as anybody else to protect himself from bodily harm or death." Though in theory the distinction between killing to effect the arrest and killing only in self-defense may be important, the result in an actual case is the same. The typical case is where the officer tries to arrest an offender and the offender resists. All the cases agree that the officer need not abandon the effort to complete the arrest because of such resistance; indeed, they all agree that it is his duty to continue this effort to make the arrest. The offender then continues his resistance; the officer may use force sufficient to overcome this resistance; this is met with greater force by the offender. Now the officer, all agree, cannot kill unless it is either apparently necessary to effect the arrest or in self-defense. But it will never be apparently necessary to kill to effect the arrest until the officer's life is in apparent danger, for until that time it does not appear but that a little more force than is being used will be sufficient to effect the arrest without killing.

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seeking to rescue the prisoner;[51] but, in those jurisdictions where it is held that an officer cannot kill to effect an arrest for a misdemeanor, it is also held that he cannot kill to prevent the escape of one in custody for a misdemeanor, as this is virtually a rearrest.[52] In misdemeanor cases, where a person sought to be arrested does not assault the officer and forcibly resist the attempt to arrest, but flees, the officer cannot kill him in pursuit, but must rather suffer him to escape.[53] It is otherwise in the case of felonies. A fleeing felon may be killed if he cannot otherwise be taken.[54] In all cases the killing must be apparently necessary.[55] If an officer's life is threatened, or grievous bodily harm is imminent, he may kill to save himself. What we have said also applies to lawful arrests by a private person.

Life may also be taken by an officer or a private person, if necessary, in order to prevent a felony[56] or suppress a riot,[57] but not to suppress an affray,[58] for in the latter case it cannot be necessary.

[51] 4 Bl. Comm. 179; Fost. Crown Law, 321; 1 Hale, P. C. 496; 2 East, P. C. 821; Jackson v. State, 76 Ga. 473; State v. Bland, 97 N. C. 438, 2 S. E. 460; Clark, Cr. Law, 135.

[52] Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; Head v. Martin, 85 Ky. 480, 3 S. W. 622; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68; Brown v. Weaver, 76 Miss. 7, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512. It is otherwise where the attempted escape is a statutory felony. State v. Turlington, 102 Mo. 642, 15 S. W. 141.

[53] Fost. Crown Law, 291; State v. Moore, 39 Conn. 244; Dilger v. Com., 88 Ky. 550, 11 S. W. 651; Clark, Cr. Law, 136.

[54] 1 East, P. C. 302; Rex v. Finnerty, 1 Craw. & D. 167; Jackson v. State, 66 Miss. 89, 5 South. 690, 14 Am. St. Rep. 542; State v. Roane, 13 N. C. 58.

[55] Clark, Cr. Law (3d Ed.) 177.

[56] 1 East, P. C. 271; State v. Harris, 46 N. C. 190; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Clark Cr. Law (3d Ed.) 178, and cases there cited.

[57] 1 Hale, P. C. 495; 4 Bl. Comm. 179; Pond v. People, 8 Mich. 150; Clark, Cr. Law (3d Ed.) 177.

[58] People v. Cole, 4 Parker, Cr. R. (N. Y.) 35; Conner v. State, 4 Yerg. (Tenn.) 137, 26 Am. Dec. 217; Clark, Cr. Law (3d Ed.) 177.

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SAME—BREAKING DOORS, ETC.

18. An officer, if, after notice of his purpose and authority, he is refused admittance, may break an outer or inner door or window of a house, for the purpose of executing a warrant, or of making a lawful arrest without a warrant, or to liberate himself or another who, having entered to make an arrest, is detained therein. A private person may so break into a house, to prevent a felony, or to arrest a person for a felony actually committed by him, but not to arrest a suspected felon. Either an officer or a private person may so break into a house to arrest a person who has escaped from lawful custody.

In order to execute a warrant for a crime, the officer may break open doors, if upon demand of admittance it cannot be otherwise obtained.[59] The right to break doors to execute a warrant exists in the case of a misdemeanor, as well as in the case of a felony. It could not be otherwise, without allowing a man to defy the law.[60]

Where the house is occupied by the accused, the authorities are agreed that the officer is not liable as a trespasser for forcing an entrance, though it may turn out that the accused is not there, provided there was probable ground to believe he was there.[61] And by the better opinion the same is true where the house is occupied by a third person.[62]

[59] Fost. Crown Law, 320; 1 Hale, P. C. 583; 2 Hale, P. C. 103, 117; 1 East, P. C. 323; 1 Chit. Cr. Law, 51; State v. Smith, 1 N. H. 346; Com. v. Irwin, 1 Allen (Mass.) 587; Barnard v. Bartlett, 10 Cush. (Mass.) 501, 57 Am. Dec. 123; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; Hawkins v. Com., 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; Shanley v. Wells, 71 Ill. 78; Kelsy v. Wright, 1 Root (Conn.) 83; State v. Shaw, 1 Root (Conn.) 134.

[60] See the authorities above cited.

[61] Barnard v. Bartlett, 10 Cush. (Mass.) 501, 57 Am. Dec. 123; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Hawkins v. Com., 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; State v. Smith, 1 N. H. 346.

[62] Com. v. Irwin, 1 Allen (Mass.) 587; Com. v. Reynolds, supra.

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It has been said that the right of an officer to break doors to effect an arrest without a warrant is generally the same as if he proceeded upon a warrant, but this is not true. It seems to be well settled that, where a felony has been committed, he may break doors and arrest without a warrant, and that he need not have seen the felony committed, but may act on the information of some one else who saw it.[63] He may also, according to the weight of authority, break into a house when there is an affray or breach of the peace therein, even when the doors are fastened.[64] Some of the cases, however, hold that he can only do so where the doors are unfastened.[65] In other cases of misdemeanor, as, for instance, where unlawful gaming is going on in the house, or intoxicating liquors are being sold in violation of law, he cannot break in without a warrant,[66] for he could not even arrest without a warrant.

If a private person sees a felony committed, he may break into a house to arrest the offender, if the latter is within the house and refuses to surrender, but he cannot break into a house to arrest a suspected felon.[67] He may also break into a house to prevent a felony.[68] It has been said that he may break into a house where he is certain a felony has been committed, though he was not an eyewitness to its commission.[69]

In all cases, without as well as with a warrant, after a person has been once actually arrested, and has escaped from custody, any door may be broken open to retake him, after proper demand of admittance.[70]

Contra, 1 Chit. Cr. Law, 57; 2 Hale, P. C. 117; Johnson v. Leigh, 1 Marsh. 565, 6 Taunt. 246; Hawkins v. Com., 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

[63] 1 Hale, P. C. 583, 589; 1 Chit. Cr. Law, 53.

[64] 1 Hale, P. C. 583, 589; Handcock v. Baker, 2 Bos. & P. 260.

[65] Com. v. Tobin, 108 Mass. 426, 11 Am. Rep. 375.

[66] McLennon v. Richardson, 15 Gray (Mass.) 74, 77 Am. Dec. 353. And see Bailey v. Ragatz, 50 Wis. 554, 7 N. W. 564, 36 Am. Rep. 862.

[67] 2 Hale, P. C. 78, 82; 1 Chit. Cr. Law, 53; Brooks v. Com., 61 Pa. 358, 100 Am. Dec. 645.

[68] Handcock v. Baker, 2 Bos. & P. 260.

[69] 1 Chit. Cr. Law, 52.

[70] 1 Chit. Cr. Law, 58; Fost. Crown Law, 320; Genner v. Sparks, 6

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Where an officer who has entered a house is locked in, or otherwise prevented from retiring, he may break out, or other officers may break in to rescue him.[71] Where an officer has entered a house he may always break an inner door, if admittance is demanded and refused.[72] In all cases, except perhaps of felony, demand of admittance must be made before the door is broken.[73]

In cases where the officer is not allowed by law to break the door, procuring the opening of the door by a false pretense, and forcibly rushing in, has been held to be a breaking.[74]

SAME—WHAT CONSTITUTES AN ARREST

19. To constitute an arrest, there must be actual restraint of the person arrested, or else he must submit to the custody of the officer or person arresting.

Legal consequences attach to an escape from lawful arrest, and in many respects the position and the rights and liabilities of the parties arresting and arrested are different before and after the arrest has been made. It often becomes

Mod. 173, 1 Salk. 79; Com. v. McGahey, 11 Gray (Mass.) 194; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; Cahill v. People, 106 Ill. 621. And where the prisoner has taken shelter in his own house, and the pursuit is fresh, the door may be broken without demand of admittance. Allen v. Martin, supra.

[71] 1 Chit. Cr. Law, 58; 1 Hale, P. C. 459; Fost. Crown Law, 319; Genner v. Sparks, 6 Mod. 173, 1 Salk. 79.

[72] 1 Chit. Cr. Law, 58; 1 Hale, P. C. 458, 459; Lee v. Gansel, Cowp. 1; Ratcliffe v. Burton, 3 Bos. & P. 223; Hubbard v. Mace, 17 Johns. (N. Y.) 127; Williams v. Spencer, 5 Johns. (N. Y.) 352; Hutchison v. Birch, 4 Taunt. 618.

[73] 1 Chit. Cr. Law, 53; Launock v. Brown, 2 Barn. & Ald. 592; Burdett v. Colman, 14 East, 163; Ratcliffe v. Burton, 3 Bos. & P. 229; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510; State v. Oliver, 2 Houst. (Del.) 585. As stated in a previous note, where a prisoner escapes from custody and takes shelter in his own house, the officer, in fresh pursuit, may break in without demand of admittance, as the prisoner is aware of the object of the officer. Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564.

[74] Park v. Evans, Hob. 62. But see Rex v. Backhouse, Lofft, 61.

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important, therefore, to determine when an arrest has been made and the accused is in the custody of the officer. To constitute an arrest, mere words are not sufficient.[75] There must be some actual restraint of the person of the accused, or he must submit. Merely to say to him that he is under arrest is not enough, if he does not submit; but it is sufficient if the officer touches him, however lightly;[76] and it is enough if the officer, being in a room with the accused, tells him that he is under arrest, and locks the door.[77] Even though the officer uses no force at all, if he tells the accused that he is under arrest, and the accused submits, there is an arrest, and if the accused afterwards runs off he is guilty of an escape.[78] As we have seen, an officer or private person in making an arrest should make known his purpose and authority, unless the purpose or authority is already known or is obvious. If he fails to do so, and the purpose to arrest is not known nor obvious, physical restraint will not constitute an arrest.[79] If the authority and purpose to arrest

[75] Grainger v. Hill, 4 Bing. N. C. 212; Brushaber v. Stegemann, 22 Mich. 266; Mowry v. Chase, 100 Mass. 85.

[76] Genner v. Sparks, 1 Salk. 79, 6 Mod. 173; Whithead v. Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672.

[77] Williams v. Jones, Cas. t. Hardw. 301; Grainger v. Hill, 4 Bing. N. C. 212.

[78] Emery v. Chesley, 18 N. H. 198; Mowry v. Chase, 100 Mass. 79; Pike v. Hanson, 9 N. H. 491; Russen v. Lucas, 1 Car. & P. 153; George v. Radford, Moody & M. 244; Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Shannon v. Jones, 76 Tex. 141, 13 S. W. 477. But see U. S. v. Benner, Baldw. 239, Fed. Cas. No. 14,568; Huntington v. Shultz, Harp. (S. C.) 452, 18 Am. Dec. 660; Lawson v. Buzines, 3 Har. (Del.) 416; State v. Mahon, 3 Har. (Del.) 568. Submission to authority asserted under a pretended warrant has been held an arrest. Haskins v. Young, 19 N. C. 527, 31 Am. Dec. 426. In Shannon v. Jones, 76 Tex. 141, 13 S. W. 477, the officer read the warrant to the appellee while she was sick and confined to her bed, and told her she must give bond or go to jail. She gave bond. It was held that this constituted an arrest. The giving bond was submission.

[79] 1 Bish. Cr. Proc. § 158; Whart. Cr. Pl. & Prac. § 3; citing Yates v. People, 32 N. Y. 509; Rex v. Howarth, 1 Ryan & M. 207; State v. Belk, 76 N. C. 10. In Grosse v. State, 11 Tex. App. 364, the officer who had taken the prisoner in charge testified that he took charge of the prisoner in his capacity of marshal, but that he did not consider the prisoner as under arrest. The court said: "The question is not so

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are obvious, as where the officer shows his badge, or does some other act from which it can be seen that he is an officer and acts as such, express notice is not necessary.[80]

SAME—DUTY AFTER ARREST

20. An officer or private person, after making an arrest, must, without unnecessary delay, take his prisoner before a magistrate for examination; but a private person may, if he chooses, deliver his prisoner to an officer.

When an arrest has been made, the officer should, as soon as the circumstances will permit, bring his prisoner before a proper magistrate. If he is guilty of unnecessary delay, he will be liable for false imprisonment. This applies, not only to arrests under a warrant,[81] but also to arrests without a warrant either by an officer [82] or by a private person,[83] except that where the arrest is by a private person he may, if he prefers, deliver his prisoner over to an officer to be taken before the magistrate. In such a case he ceases to be further responsible for the safe custody of the prisoner. Nec-

much the intentions and opinions of the marshal in regard to the matter, but the actual situation of the defendant; and he was not only in actual, but intentional, arrest."

[80] Ante, p. 58; People v. Pool, 27 Cal. 573.

[81] 1 Chit. Cr. Law, 59; 2 Hale, P. C. 119; Tubbs v. Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744; Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390; Butler v. Washburn, 25 N. H. 251; Rex v. Bootle, 2 Burrows, 864; Harris v. City of Atlanta, 62 Ga. 290; Boaz v. Tate, 43 Ind. 67; Papineau v. Bacon, 110 Mass. 319; Phillips v. Fadden, 125 Mass. 198; Johnson v. Mayor, etc., of Americus, 46 Ga. 80; Butolph v. Blust, 5 Lans. (N. Y.) 84; Burke v. Bell, 36 Me. 321; post, p. 87.

[82] See the authorities above cited; and see Simmons v. Vandyke, 138 Ind. 380, 37 N. E. 973, 26 L. R. A. 33, 46 Am. St. Rep. 411; Wright v. Court, 4 Barn. & C. 596; Com. v. Deacon, 8 Serg. & R. (Pa.) 47; Scircle v. Neeves, 47 Ind. 289; Burke v. Bell, 36 Me. 317; Papineau v. Bacon, 110 Mass. 319; post, p. 87.

[83] See the authorities above cited; and see, particularly, Com. v. Deacon, 8 Serg. & R. (Pa.) 47; Com. v. Tobin, 108 Mass. 429, 11 Am. Rep. 375; post, p. 87.

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essary delay will not render either an officer or a private person liable.[84]

In some states, if the warrant so directs, the officer may take his prisoner either before the magistrate who issued it, or before some other magistrate having concurrent jurisdiction of the subject-matter. In other states he can only take him before the magistrate who issued the warrant. The law in this respect must be followed.[85]

SAME—AUTHORIZED ARREST IN UNAUTHORIZED MANNER

21. The fact that an authorized arrest is made in an unauthorized manner will render the officer or person arresting liable, but will not affect the state's right to detain the accused.

The authority to arrest, either with or without a warrant, should not be confused with the requirements of the law in regard to the manner of making the arrest. "The manner and circumstances of execution relate not to the authority, unless expressly or by necessary intendment made to; and, if the law prescribes the modes of execution, this is either to secure the execution of the process, or to guard the person whose arrest is commanded from unnecessary annoyance or oppression, and a departure in this respect ought not to affect the question of authority." [86] If an officer, making an authorized arrest, uses unnecessary force, he becomes civilly liable, as would any other wrongdoer; and, if

[84] Arnold v. Steeves, 10 Wend. (N. Y.) 514. If a prisoner cannot be brought before a justice on the night of his arrest, the officer may place him in jail for the night. Wiggins v. Norton, 83 Ga. 148, 9 S. E. 607. A party may waive his right to be immediately taken before a magistrate. Nowak v. Waller, 56 Hun, 647, 10 N. Y. Supp. 199. The time during which a prisoner may be detained before being taken before a magistrate is in many states expressly limited by statute. Arnold v. Steeves, supra.

[85] Post, p. 90.

[86] Cabell v. Arnold, 86 Tex. 102, 23 S. W. 645, 22 L. R. A. 87; post, p. 70, note, 91.

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he refuses to disclose his authority when he should do so, he may forfeit the right he would otherwise have to compensation for injury inflicted by the person sought to be arrested in resisting, and such person would not be liable criminally for the resistance, unless he should intentionally kill the officer, and even then only for manslaughter; but the arrest and detention would be none the less under the authority of law, and therefore legal. The prisoner would not be entitled to a discharge from custody.[87]

FUGITIVES FROM JUSTICE

22. A person who commits a crime in one country or state, and flees into another, cannot be followed and arrested in the latter without its consent.

SAME—INTERNATIONAL EXTRADITION

23. By treaties, however, between the United States and most foreign countries, and by acts of Congress in pursuance thereof, provision is made for the extradition of fugitives from justice in specified cases. This is a matter in which the states cannot act.

24. A person extradited for one crime cannot be tried for another.

25. By the weight of authority, a person can be tried and punished for a crime committed in this country, though he has been forcibly abducted from a foreign country.

By the law of nations, a person who commits a crime in one country, and flees into another, cannot be followed and

[87] People v. Park, 92 Misc. Rep. 369, 156 N. Y. Supp. 816; Cabell v. Arnold, supra. "If the officer expressly declare that he arrests under an illegal precept, and on that only, yet he is not guilty of false imprisonment, if he had at the time a legal one; for the lawfulness of the arrest does not depend on what he says, but what he has." State v. Kirby, 24 N. C. 201; State v. Elrod, 28 N. C. 250.

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arrested in the latter without its consent, and, further than this, there is no obligation, under the law of nations, upon the latter to surrender the fugitive;[88] but this difficulty, in so far as the United States and foreign nations are concerned, is regulated by treaties between them, mutually allowing the extradition of fugitives, and by acts of Congress giving effect to the treaty provisions. This is a matter in which, as far as we are concerned, the United States government alone can act. The states, while they are in a sense independent sovereignties, have no national powers as respects foreign nations. They cannot provide for the surrender of fugitives from foreign countries, nor can they demand of a foreign government the surrender of a fugitive.[89]

A person extradited from a foreign country under a treaty cannot be tried for a crime not within the treaty between that country and the United States;[90] nor, unless the treaty so allows, can he be tried for a different offense than that for which he was extradited;[91] at least not without first releasing him from arrest and giving him an opportunity to leave the country.[92]

It is almost needless to add that in all cases the provisions of the treaty, and of any act of Congress in pursuance of it, must be complied with.[93]

[88] Ex parte McCabe (D. C.) 46 Fed. 363, 12 L. R. A. 589. As to international extradition, see, generally, In re Ezeta (D. C.) 62 Fed. 972.

[89] Holmes v. Jennison, 14 Pet. 540, 614, 10 L. Ed. 579; Ex parte Holmes, 12 Vt. 631; People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483.

[90] U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425; State v. Vanderpool, 39 Ohio St. 273, 48 Am. Rep. 431; Ex parte Hibbs (D. C.) 26 Fed. 421.

[91] U. S. v. Rauscher, supra; State v. Vanderpool, supra; Ex parte Coy (D. C.) 32 Fed. 911; In re Reinitz (C. C.) 39 Fed. 204, 4 L. R. A. 236; In re Baruch (C. C.) 41 Fed. 472; Ex parte Hibbs (D. C.) 26 Fed. 421.

[92] U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425. One who has been extradited for the purpose of being tried for one crime cannot be imprisoned for another crime of which he had previously been convicted, but should be placed on trial for the crime for which extradition was granted. Johnson v. Browne, 205 U. S. 309, 27 Sup. Ct. 539, 51 L. Ed. 816, 10 Ann. Cas. 636.

[93] In re Herris (D. C.) 32 Fed. 583. While a person is not to be sent from this country on mere demand or surmise, this government

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There has been a direct conflict of opinion on the question whether a person who has been illegally extradited, or who has been kidnapped without any proceedings at all, and brought from one country into another, can be tried for a crime. The treaties do not guarantee a fugitive from the justice of one country an asylum in the other. They only make provision that for certain crimes he shall be deprived of that asylum, and surrendered to justice, and prescribe the mode in which this shall be done.[94] Where a fugitive is extradited under a treaty, good faith, as between the countries, requires that the treaty provisions shall be observed, and, as we have seen, he cannot be tried for an offense other than the one for which he was extradited. It has been said, on the other hand, that a person who has not been extradited under a treaty, but has been forcibly abducted from one country, and brought into another in which he is charged with a crime, has no rights under the treaty, and there is the highest authority for holding that his abduction does not prevent his trial and punishment.[95] There are cases that hold the other way.[96] In reason, it would seem that the person arrested should not be allowed to raise any objection, though an objection coming from the authorities

should respond to a request for extradition, if there is reasonable ground to suppose the accused to be guilty of an extraditable offense, even if presented in untechnical form. Glucksman v. Henkel, 221 U. S. 508, 31 Sup. Ct. 704, 55 L. Ed. 830.

[94] Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421; Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549. But see State v. Vanderpool, 39 Ohio St. 273, 48 Am. Rep. 431.

[95] Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283; Ker v. Illinois, 119 U. S. 437, 7 Sup. Ct. 225, 30 L. Ed. 421; Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549; Ex parte Scott, 9 Barn. & C. 446; Lopez & Sattler's Case, 1 Dears. & B. Crown Cas. 525; State v. Smith, 1 Bailey (S. C.) 283, 19 Am. Dec. 679; State v. Brewster, 7 Vt. 118; In re Miles, 52 Vt. 609; Dows' Case, 18 Pa. 37; State v. Ross, 21 Iowa, 467; The Richmond v. U. S., 9 Cranch, 102, 3 L. Ed. 670; People v. Rowe, 4 Parker, Cr. R. (N. Y.) 253; State v. Wenzel, 77 Ind. 428; Ex parte Wilson, 63 Tex. Cr. R. 281, 140 S. W. 98, 36 L. R. A. (N. S.) 243; note 29, infra.

[96] In re Robinson, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. Rep. 378; State v. Simmons, 39 Kan. 262, 18 Pac. 177; In re Cannon, 47 Mich. 481, 11 N. W. 280.

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of the country from which he was abducted should be regarded.

Where one has not been arrested and extradited under a treaty, but has been voluntarily surrendered for a crime not embraced in the provisions of a treaty, it has been held that he might be tried for another crime without being first given the opportunity of leaving the country.[97]

SAME—INTERSTATE EXTRADITION

26. Provision is made by the Constitution of the United States, by acts of Congress in pursuance thereof, and by auxiliary statutes in the different states, for the extradition of a person "charged" in one state with "treason, felony, or other crime," who shall "flee from justice and be found in another state."

27. In order that a person may be extradited—

(a) He must be judicially "charged" with a crime in the demanding state, as by indictment, affidavit, or complaint.

(b) He must not be charged with a crime against the state on which demand is made.

(c) He must have been in the demanding state, or he cannot have "fled from justice." It is sufficient, however, if, having been in the demanding state, and having committed a crime therein, he departed from it, though for other reasons than to escape.

(d) A person may be extradited for any crime against the laws of the demanding state.

28. By the weight of authority, a person may be tried for a crime other than that for which he was extradited.

29. By the weight of authority, also, the forcible abduction of a person from another state does not prevent his trial and punishment.

The Constitution of the United States provides that "a person charged in any state with treason, felony, or other

[97] Ex parte Foss, 102 Cal. 347, 36 Pac. 669, 25 L. R. A. 593, 41 Am. St. Rep. 182.

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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." [98] To carry this provision into effect, Congress has passed an act providing substantially that whenever the executive of any state shall demand any person, as a fugitive from justice, of the executive authority of another state to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of the demanding state, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the demanding state,[99] it shall be the duty of the executive authority of the state on which the demand is made to cause him or her to be arrested and secured, and to give notice of the arrest to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged.[1] There are further provisions which it is not necessary to mention. Our purpose is to treat the subject only in a general way.

Auxiliary to this act, some of the states have enacted statutes providing, among other things, for the arrest of fugitives from justice before demand by the state from which they have fled; while in other states, on grounds of comity, such an arrest and detention is allowed independently of statutory provision.[2] The executive on whom demand is

[98] Const. U. S. art. 4, § 2.

[99] A statement of the commission of a crime, without a copy of an affidavit, complaint, or indictment, is insufficient. In re Doo Woon (D. C.) 18 Fed. 898; Ex parte Pfitzer, 28 Ind. 451.

[1] Rev. St. U. S. § 5278 (U. S. Comp. St. 1916, § 10126).

[2] Com. v. Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285; Com. v. Tracy, 5 Metc. (Mass.) 536; People v. Schenck, 2 Johns. (N. Y.) 479; In re Fetter, 23 N. J. Law, 311, 57 Am. Dec. 382; In re Cubreth, 49 Cal. 435; People v. Wright, 2 Caines (N. Y.) 213; State ex rel. Adams v. Buzine, 4 Har. (Del.) 572; Com. ex rel. Short v. Deacon, 10 Serg. & R. (Pa.)

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made, if he complies with it, usually issues his warrant to the agent sent by the demanding executive, authorizing him to arrest and transport the fugitive, or he may issue his warrant to an officer of his own state, directing him to arrest the fugitive and turn him over to the agent of the demanding state.[3]

A fugitive cannot lawfully be surrendered, or even arrested, until proceedings have been commenced against him in the demanding state, making at least a prima facie showing of guilt, or, as expressed in the Constitution, until he is "charged" with a crime.[4] Thus he cannot be surrendered on the verdict of a coroner's jury charging him with the commission of a crime.[5]

An indictment or a complaint under oath is sufficient; but

125. But see Tullis v. Fleming, 69 Ind. 15. Some courts have held such an arrest legal when made without a warrant, and by a private person. Lavina v. State, 63 Ga. 513; Morrell v. Quarles, 35 Ala. 544.

[3] There has been some conflict as to the requisites of the warrant. Some of the cases seem to require that it shall set out the evidence necessary to authorize the state executive to issue it. Church, Hab. Corp. § 474; Doo Woon's Case (D. C.) 18 Fed. 898. But the weight of authority is to the contrary. "When the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issuance have been complied with, and it is sufficient if it recites what the law requires." Donohue's Case, 84 N. Y. 438. It is sufficient if it recites the affidavit or indictment on which it is based. It need not set it out in full nor be accompanied by it. Ex parte Stanley, 25 Tex. App. 372, 8 S. W. 645, 8 Am. St. Rep. 440, and cases there cited. It need not show that the crime charged and recited in the demand is a crime in the demanding state. Ex parte Stanley, supra; In re Renshaw, 18 S. D. 32, 99 N. W. 83, 112 Am. St. Rep. 778. The Governor of whom the prisoner is demanded is justified in returning him if it appears by the documents submitted that the accused was charged by indictment with a specified crime against the laws of the demanding state, and that he had become a fugitive from justice. There need not be any evidence of either fact before the Governor beyond the requisition papers, though the Governor may require such evidence if he see fit. The accused has no right to a hearing before the Governor. Marbles v. Creecy, 215 U. S. 63, 30 Sup. Ct. 32, 54 L. Ed. 92.

[4] Ex parte White, 49 Cal. 433.

[5] State v. Hufford, 28 Iowa, 391.

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whether a charge by information is enough is a point on which the authorities are not agreed. Some jurisdictions hold that, when prosecution by information is a legal method of prosecution in the demanding state, one against whom an information has been filed is "charged" with a crime within the meaning of the Constitution.[6] Others hold that a charge by information is not sufficient,[7] unless the information amount to the affidavit prescribed by the act of Congress,[8] or there has been a conviction on the information.[9]

The word "charged," in the Constitution, covers the case of a person who has been actually convicted of a crime and has escaped from arrest or imprisonment, as well as that of a person who is merely sought for the purpose of trial.[10]

There must be evidence that the act charged against the fugitive is a crime under the law of the demanding state.[11] Some courts, however, will take judicial notice of the penal statutes of another state, and by an examination of such statutes alone determine whether the act charged constitutes a crime.[12] Other states will take judicial notice only of the common law of the demanding state, and if the act charged is not a common-law crime, and is not shown to be a statutory crime in the requisition papers, will refuse to surrender the prisoner.[13]

[6] In re Hooper, 52 Wis. 699, 58 N. W. 741; State v. Hufford, 28 Iowa, 391; People v. Stockwell, 135 Mich. 341, 97 N. W. 765.

[7] Ex parte Bergman, 60 Tex. Cr. R. 8, 130 S. W. 174; Ex parte Hart (C. C.) 59 Fed. 894.

[8] Ex parte Hart (C. C.) 59 Fed. 894.

[9] Ex parte Bergman, 60 Tex. Cr. R. 8, 130 S. W. 174.

[10] In re Hope (Ex. Ch.) 10 N. Y. Supp. 28; Ex parte Bergman, 60 Tex. Cr. R. 8, 130 S. W. 174.

[11] Ex parte Sheldon, 34 Ohio St. 319. In Drew v. Thaw, 235 U. S. 432, 35 Sup. Ct. 137, 59 L. Ed. 302, Holmes, J., said: "It was suggested, among other things, that it was not a crime for a man confined in an insane asylum to walk out if he could, and that therefore a conspiracy to do it could not stand in any worse case. But that depends on the statute" [of New York, from which state Thaw had fled].

[12] Ex parte Sheldon, supra.

[13] State v. Swope, 72 Mo. 399.

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Whether one is a fugitive from justice is not to be tested or controlled by a statute of the demanding state.[14]

If the fugitive is already actually charged with a crime in the state upon which demand is made, he need not be surrendered,[15] though it is otherwise if he is merely amenable to a charge, no charge having yet been made.[16]

It would seem clear, from the constitutional provision and act of Congress above mentioned, that the executive

[14] Ex parte Bergman, 60 Tex. Cr. R. 8, 130 S. W. 174. But the statute of limitation of the demanding state will be considered in granting the requisition. In re Bruce (C. C.) 132 Fed. 390. The presence of the prisoner in the state need not be voluntary. It is sufficient if he "is found" there. Ex parte Innes (Tex. Cr. App.) 173 S. W. 291, L. R. A. 1916C, 1251. In this case the prisoner had committed a crime in Georgia. She went from Georgia to Oregon, and was delivered by the Governor of Oregon to the authorities in Texas on a requisition from the Governor of Texas. While awaiting trial in Texas the Governor of Texas granted a requisition for her from the Governor of Georgia. When tried for the alleged crime committed in Texas, she was acquitted, whereupon instead of releasing her from custody she was immediately arrested on the requisition from Georgia. On habeas corpus, it was held that she could be legally surrendered to the Georgia authorities, without first being allowed an opportunity to return to Oregon. But see In re Hope (Ex. Ch.) 10 N. Y. Supp. 28. One convicted of an offense against a state, who before the expiration of his sentence was delivered to the federal authorities to serve out a prior sentence, is at the termination of that sentence a "fugitive from justice," and may be arrested by the state authorities. People ex rel. American Surety Co. v. Benham, 71 Misc. Rep. 345, 128 N. Y. Supp. 610.

[15] In re Troutman, 24 N. J. Law, 634; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Taintor v. Taylor, 36 Conn. 242, 4 Am. Rep. 58; Ex parte Hobbs, 32 Tex. Cr. R. 312, 22 S. W. 1035, 40 Am. St. Rep. 782; Ex parte Sheldon, 34 Ohio St. 319; Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345; State v. Allen, 2 Humph. (Tenn.) 258; In re Opinion of the Justices, 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N. S.) 799. But if the Governor see fit to surrender him he may lawfully do so, and the accused cannot object. People ex rel. Gallagher v. Hagan, 34 Misc. Rep. 85, 69 N. Y. Supp. 475. Contra, In re Opinion of Justices, supra. In the case last cited the court holds that the act of the Governor of the state of refuge in returning a prisoner who is under sentence of a court of the state of refuge would be an unlawful interference with the execution of the sentence of a co-ordinate branch of the government.

[16] See the cases above cited.

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upon whom demand is made should have no discretion in the matter; that he cannot look beyond the requisition and the properly certified copy of the charge against the person demanded, and proof as to the identity of the person demanded, and the fact that he is a fugitive.[17] He should not receive evidence and determine the question of guilt or innocence of the crime charged,[18] nor should he determine the technical sufficiency of the charge,[19] or look into the motive or purpose of the demanding executive, and so it has been held;[20] but there are cases to the contrary.[21] However this may be, the executive of the state upon which the demand is made can determine the question for himself; that is, he has the power, as distinguished from the right to do so. If he thinks proper to exercise a discretion in the

[17] In re White, 55 Fed. 54, 5 C. C. A. 29.

[18] In re White, supra; Drew v. Thaw, 235 U. S. 432, 35 Sup. Ct. 137, 59 L. Ed. 302.

[19] State v. O'Connor, 38 Minn. 243, 36 N. W. 462; Ex parte Sheldon, 34 Ohio St. 319; In re Voorhees, 32 N. J. Law, 141; Davis' Case, 122 Mass. 324; Ex parte Pearce, 32 Tex. Cr. R. 301, 23 S. W. 15; In re Renshaw, 18 S. D. 32, 99 N. W. 83, 112 Am. St. Rep. 778. The information, complaint, or affidavit, however, must charge a definite offense in the demanding state. State v. O'Connor, supra; Smith v. State, 21 Neb. 552, 32 N. W. 594. An affidavit that affiant "has reason to believe, and does believe," that the alleged fugitive committed a certain crime, is not sufficient. Ex parte Spears, 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341.

[20] Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345; In re Manchester, 5 Cal. 237; Kingsbury's Case, 106 Mass. 223; In re Clark, 9 Wend. (N. Y.) 212; Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; Ex parte Swearingen, 13 S. C. 74. The motive for the prosecution cannot be inquired into; e. g., that the prosecution was inaugurated for the purpose of collecting a debt. Com. v. Superintendent of Philadelphia Co. Prison, 220 Pa. 401, 69 Atl. 916, 21 L. R. A. (N. S.) 939. Drew v. Thaw, 235 U. S. 432, 35 Sup. Ct. 137, 59 L. Ed. 302. There are statutes in some of the states making the surrender obligatory. See, also, Pearce v. Texas, 155 U. S. 116, 15 Sup. Ct. 116, 39 L. Ed. 164; In re Sultan, 115 N. C. 57, 20 S. E. 375, 28 L. R. A. 294, 44 Am. St. Rep. 433; In re Van Sciever, 42 Neb. 772, 60 N. W. 1037, 47 Am. St. Rep. 730.

[21] Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717; Hartman v. Aveline, 63 Ind. 344, 30 Am. Rep. 217; Kimpton's Case, 13 Am. Law Rev. 157.

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matter, and to deny the requisition, contrary to the act of Congress, there is no way in which his action can be controlled, for the federal government cannot control it.[22] The executive on whom the demand is made may revoke his warrant at any time before its execution, if he is satisfied that it ought not to have been issued.[23]

The words "other crimes," in the constitutional provision above referred to, include all crimes under the common law or statutes of the demanding state, though mere misdemeanors, and though not crimes in the state upon which the demand is made.[24] The person demanded must have been within the demanding state, and departed out of it, or there can have been no "fleeing," within the meaning of the constitution. A person, therefore, who commits an act without, taking effect and constituting a crime within, a state,[25] but who has never been within the state, cannot be demanded of the other state.[26] There need not, on the other

[22] Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717; In re Manchester, 5 Cal. 237.

[23] Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345.

[24] Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717; Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Brown's Case, 112 Mass. 409, 17 Am. Rep. 114; In re Clark, 9 Wend. (N. Y.) 212; People v. Brady, 56 N. Y. 182; State ex rel. Brown v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; In re Voorhees, 32 N. J. Law, 141; In re Fetter, 23 N. J. Law, 311, 57 Am. Dec. 382; Johnston v. Riley, 13 Ga. 97; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; Com. v. Green, 17 Mass. 515; Davis' Case, 122 Mass. 324; Com. v. Johnston, 12 Pa. Co. Ct. R. 263; Morton v. Skinner, 48 Ind. 123; Wilcox v. Nolze, 34 Ohio St. 520.

[25] Clark, Cr. Law (3d Ed.) 485.

[26] Jones v. Leonard, 50 Iowa, 106, 32 Am. Rep. 116; Hartman v. Aveline, 63 Ind. 344, 30 Am. Rep. 217; Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; In re Greenough, 31 Vt. 279; Jackson's Case, 12 Am. Law Rev. 602, Fed. Cas. No. 7,125; Wilcox v. Nolze, 34 Ohio St. 520; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63. A man standing in North Carolina, by shooting across the boundary into Tennessee, killed a man in the latter state. It was held that he could not be tried and punished in North Carolina, as the murder was committed in Tennessee. State v. Hall, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822. The authorities of Tennessee then sought to extradite the offender, but the North Carolina court held that he

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hand, have been an actual "fleeing from justice," as the term is popularly understood. A man who while in one state commits a crime there, and afterwards goes into another state, though for other reasons than to escape, may be extradited.[27]

As we have seen, a fugitive extradited from a foreign country, by virtue of provisions of a treaty between that country and the United States, cannot be tried for an offense other than that for which he was extradited. A few courts have held that the same rule applies in the case of interstate extradition;[28] but the great weight of authority is to the effect that "a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was rendered up, but may, after being restored to the demanding state, be lawfully tried and punished for any and all crimes

could not be surrendered, since, never having been in Tennessee, he could not be a fugitive from the justice of that state. State v. Hall, 115 N. C. 811, 20 S. E. 729, 28 L. R. A. 289, 44 Am. St. Rep. 501. In this case the authorities are collected, and the question is considered at length. The legislature could provide for a surrender in such cases. Id.

[27] In re Voorhees, 32 N. J. Law, 141; Kingsbury's Case, 106 Mass. 223; In re White, 55 Fed. 54, 5 C. C. A. 29; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63; Ex parte Brown (D. C.) 28 Fed. 653; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; State v. Richter, 37 Minn. 436, 35 N. W. 9; Drew v. Thaw, 235 U. S. 432, 35 Sup. Ct. 137, 59 L. Ed. 302; In re Bruce (C. C.) 132 Fed. 390. It has even been held that where a person organizes a bank in which he is an officer, and the business of which is under his control, and afterwards goes to another state, and allows the bank, while to his knowledge in an insolvent condition, to receive a deposit, in violation of the law of the state, he is guilty of the offense, though not in the state at the time of the deposit or afterwards, and is a fugitive from the justice of that state. In re Cook (C. C.) 49 Fed. 833. See, also, In re Sultan, 115 N. C. 57, 20 S. E. 375, 28 L. R. A. 294, 44 Am. St. Rep. 433. One is no less a "fugitive from justice" because he left the state when the crime was committed with the knowledge of and without objection by the authorities of the state. Bassing v. Cady, 208 U. S. 386, 28 Sup. Ct. 392, 52 L. Ed. 540, 13 Ann. Cas. 905.

[28] Ex parte McKnight, 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 128; In re Fitton (C. C.) 45 Fed. 471.

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committed within its territorial jurisdiction, either before or after extradition." [29]

What we have said as to the right of one country to try and punish a person forcibly abducted from another, applies also where a person is forcibly abducted from one state and brought into another.[30]

SEARCHES AND SEIZURES OF PROPERTY

30. At common law, as well as by statute in most states, a magistrate, to recover stolen property or procure evidence of a crime, may issue a warrant directing a search for, and seizure of, property.

31. To authorize the issuance of such a warrant, the same preliminary proceedings are generally necessary as are necessary to procure a warrant of arrest.

[29] Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549; Id., 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; State ex rel. Brown v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; People ex rel. Post v. Cross, 64 Hun, 348, 19 N. Y. Supp. 271; Id., 135 N. Y. 536, 32 N. E. 246, 31 Am. St. Rep. 850; Com. v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475; State v. Patterson, 116 Mo. 505, 22 S. W. 696; Harland v. Territory, 3 Wash. T. 131, 13 Pac. 453; Williams v. Weber, 1 Colo. App. 191, 28 Pac. 21; Ham v. State, 4 Tex. App. 645; State v. Glover, 112 N. C. 896, 17 S. E. 525; People v. Sennott, 20 Alb. Law J. 230; Hackney v. Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101. But see Waterman v. State, 116 Ind. 51, 18 N. E. 63, in which the contrary seems to be assumed; Musgrave v. State, 133 Ind. 297, 32 N. E. 885; State v. Kealy, 89 Iowa, 94, 56 N. W. 283; Reid v. Ham, 54 Minn. 305, 56 N. W. 35, 21 L. R. A. 232, 40 Am. St. Rep. 333; note 95, p. 71. In re Flack, 88 Kan. 616, 129 Pac. 541, 47 L. R. A. (N. S.) 807, Ann. Cas. 1914B, 789, overruling State v. Hall, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200; In re Little, 129 Mich. 454, 89 N. W. 38, 57 L. R. A. 295; Rutledge v. Krauss, 73 N. J. Law, 397, 63 Atl. 988. The same conflict exists as to the right to arrest in a civil action after extradition for a crime. See Weale v. Clinton Circuit Judge, 158 Mich. 563, 123 N. W. 31; In re Walker, 61 Neb. 803, 86 N. W. 510. Where fraud or imposition is practiced upon the executive of the state from which the fugitive is extradited, the courts of the demanding state will discharge the prisoner. Harland v. Territory, supra. See, also, Carr v. State, 104 Ala. 4, 16 South. 150.

[30] Notes 94–96, p. 71, supra.

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32. The requisites of a search warrant are generally the same as the requisites of a warrant of arrest, except as the difference in the purpose of the warrant renders them different. A search warrant—
   (a) Must accurately describe the person whose place is to be searched, the place, and the property to be seized.
   (b) It must command the property to be brought before the magistrate.
   (c) It must generally, both at common law and by statute, direct the search to be made in the daytime. In special cases it may direct a search in the nighttime.

33. A search warrant will protect the officer or person executing it under the same circumstances as a warrant of arrest will protect him.

The Constitution of the United States declares that the people shall be secure in their persons, houses, papers, and possessions, from unreasonable arrests, and that no warrant to search any place, or seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation. This provision does not apply to searches and seizures under authority of the states,[31] but the state constitutions contain the same or a similar restriction. The provision is substantially a declaration of the common law. It does not prohibit such searches and seizures as were authorized by the common law, nor does it prohibit statutes authorizing reasonable searches and seizures in cases not within the common law.[32] It does, however, prohibit unreasonable searches and seizures, even under legislative authority, for a statute in violation of the Constitution is void.

At common law, in order to recover stolen property, or,

[31] Reed v. Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122; Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

[32] Com. v. Dana, 2 Metc. (Mass.) 336; Allen v. Staples, 6 Gray (Mass.) 491; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487.

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it seems, to procure evidence of a crime, a magistrate, on a proper complaint, may issue a warrant directing the officer, or, as held by some courts, a private person,[33] to whom it is addressed, to make a search for and seize the property described in the warrant.[34] Such warrants are expressly authorized by statute in most of the states, and in addition to this there are statutes authorizing search warrants in cases not covered by the common law, such as warrants to search for and seize intoxicating liquors, lottery tickets, gambling apparatus, etc., kept in violation of law.

Not only under the statutes and the constitutional provision mentioned above, but also at common law, to authorize the issuance of a search warrant, there must be a complaint on oath or affirmation. This is essential. The usual form of a complaint for the purpose of obtaining a warrant to search for stolen property is for the complainant to aver in direct terms the fact that the property has been stolen, and then to aver that he hath cause to suspect, and doth suspect, that it is secreted in the house or place proposed to be searched.[35] The form of the complaint[36] in statu-

[33] Meek v. Pierce, 19 Wis. 300; ante, p. 39.

[34] 1 Chit. Cr. Law, 63; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; State v. Miller, 48 Me. 576; Allen v. Colby, 47 N. H. 544.

[35] Com. v. Phillips, 16 Pick. (Mass.) 214.

[36] The following is a form of complaint to procure a warrant to search for and seize stolen property, and to arrest the person in whose possession it is found:

State (or Commonwealth) of ———, County of ———, to wit:

A. B., upon oath, complains that on the ——— day of ———, A. D. ———, in the county aforesaid, one overcoat of the value of twenty-five dollars, of the goods and chattels of the said A. B., was feloniously stolen, taken, and carried away from him by C. D., and that he has just cause to suspect, and does suspect, that the said property is concealed in the dwelling house of the said C. D., at ———, in said county.

The said A. B. therefore prays that the said dwelling house may be searched, and the said stolen property seized and disposed of according to law, and that the said C. D. may be apprehended and dealt with according to law.

Dated this ——— day of ———, A. D. ———. [Signed] A. B.

(Here follows the jurat of the justice as in the form on page 29, ante.)

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tory cases is generally regulated by the statute. The facts inducing suspicion should be stated so that the magistrate may determine whether there is probable cause, for, in the absence of this, a warrant cannot be issued.[37] The warrant[38] should show that the necessary complaint under oath or affirmation was made.[39] Some courts hold that it must be under seal, but, as we have seen, there is a conflict on this point.[40]

General search warrants, like general warrants of arrest, are void. Not more than one place can be named in one warrant.[41] To be valid, the warrant must accurately describe the person whose place is to be searched, the place, and the things to be seized.[42] No other place than that

[37] 1 Chit. Cr. Law, 64; Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151; Com. v. Lottery Tickets, 5 Cush. (Mass.) 369.

[38] The following is a form of a search warrant. But the form may differ in the various states:

State (or Commonwealth) of ———, County of ———, to wit:
To the Sheriff or any Constable of said County:

Whereas, A. B., of the county aforesaid, has this day made complaint on oath, before me, X. Y., a justice of the peace of said county, that on the ——— day of ———, A. D. ———, in said county, one overcoat, of the value of twenty-five dollars, of the goods and chattels of the said A. B., was feloniously stolen, taken, and carried away by C. D., and that he has just cause to suspect, and does suspect, that the said property is concealed in the dwelling house of the said C. D., at ———, in said county.

Now, therefore, you are commanded to search the said dwelling house, and seize said stolen property, and bring the same, and the said C. D., the person in whose possession it is found, before me at my office in said county, to be disposed of and dealt with according to law.

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

[Signed] X. Y., J. P. [Seal.]

[39] State v. Staples, 37 Me. 228; State v. Spirituous Liquors, 39 Me. 262; Jones v. Fletcher, 41 Me. 254.

[40] People v. Holcomb, 3 Parker, Cr. R. (N. Y.) 656; ante, p. 34.

[41] State v. Duane, 100 Me. 447, 62 Atl. 80.

[42] Reed v. Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122; Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Humes v. Taber, 1 R. I. 464; People v. Holcomb, 3 Parker, Cr. R. (N. Y.) 656; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Meek v. Pierce, 19 Wis. 300; Stone v. Dana, 5 Metc. (Mass.) 98;

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described can be searched,[43] and it has been held that no other property than that described can be seized.[44] It has been held sufficient, where the warrant and the complaint on which it is issued are on the same paper, for the warrant to refer to the complaint for a description of the property to be seized.[45]

The warrant must command that the property to be seized shall be brought before the magistrate, to be disposed of according to law. It is void if it leaves the disposition of the property to the ministerial officer.[46]

The rules in regard to breaking doors in executing a search warrant are substantially the same as those stated in treating of arrest under a warrant. As a rule, locks should not be broken until the keys are demanded and refused, provided there is any person at hand upon whom demand may be made.[47]

The statutes authorizing search warrants must in all cases be strictly complied with. Some of the statutes, for instance, require the complaint to be fully set forth in the warrant, and a warrant failing to comply with the statute, as where it fails to name the complainants, is void.[48]

It is possible that a search warrant may direct a search to

Ashley v. Peterson, 25 Wis. 621; Dwinnels v. Boynton, 3 Allen (Mass.) 310; Com. v. Certain Intoxicating Liquors, 109 Mass. 371; Com. v. Certain Intoxicating Liquors, 115 Mass. 145; Jones v. Fletcher, 41 Me. 254; Flaherty v. Longley, 62 Me. 420; Tuell v. Wrink, 6 Blackf. (Ind.) 249; State v. Whiskey, 54 N. H. 164; U. S. v. Mills (C. C.) 185 Fed. 318. For descriptions of property held sufficient, see State v. Fitzpatrick, 16 R. I. 54, 11 Atl. 767. For description of premises held sufficient, see Com. v. Intoxicating Liquors, 146 Mass. 509, 16 N. E. 298.

[43] See the cases above cited; and see State v. Spencer, 38 Me. 30; Jones v. Fletcher, 41 Me. 254; McGlinchy v. Barrows, 41 Me. 74; State v. Thompson, 44 Iowa, 399. But see Dwinnels v. Boynton, supra.

[44] Crozier v. Cundey, 6 Barn. & C. 232, 9 Dowl. & R. 224; Stone v. Dana, 5 Metc. (Mass.) 98.

[45] Com v. Dana, 2 Metc. (Mass.) 329.

[46] Cooley, Const. Lim. 369.

[47] Androscoggin R. Co. v. Richards, 41 Me. 233.

[48] Guenther v. Day, 6 Gray (Mass.) 490. And see Hussey v. Davis, 58 N. H. 317.

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be made in the nighttime, but it is doubtful, except in cases of special necessity.[49] However this may be, the statutes very generally require that searches shall be made in the daytime only, except in special cases.[50] Where they allow a search in the nighttime, it may, of course, be made.[51]

A search warrant will protect the officer executing it under the same circumstances as a warrant of arrest will protect him. Indeed, the rules stated in treating of warrants of arrest are generally applicable to search warrants, except in so far as the difference in the object of the warrant may make them inapplicable.

TAKING PROPERTY FROM PERSON ARRESTED

34. Property found in the possession of a person arrested cannot be taken from him and turned over to the magistrate, unless it was apparently used in committing the crime, or is the fruit of the crime, or furnishes the prisoner the means of committing violence or escaping, or may be used as evidence.

If personal property, found in the possession of a person when he is arrested, was apparently used by him in the commission of the crime, or if it was obtained by the crime, or if by its means the prisoner may commit violence, or effect an escape, or if it may be used as evidence against him, it is lawful for the person making the arrest to take it from him;[52] but a prisoner cannot be deprived of his money or other property if it is in no way connected with the

[49] 2 Hale, P. C. 150.

[50] Cooley, Const. Lim. 369.

[51] Com. v. Hinds, 145 Mass. 182, 13 N. E. 397.

[52] 1 Bish. Cr. Proc. §§ 210-212; Reifsnyder v. Lee, 44 Iowa, 101, 24 Am. Rep. 733; Commercial Exch. Bank v. McLeod, 65 Iowa, 665, 19 N. W. 329, and 22 N. W. 919, 54 Am. Rep. 36; Houghton v. Bachman, 47 Barb. (N. Y.) 388; Rex v. Burgiss, 7 Car. & P. 488. Such property cannot be seized, even though it affords evidence against the prisoner of the commission of a similar crime to that for which the arrest is made. U. S. v. Mills (C. C.) 185 Fed. 318.

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charge or proof against him, or may not be used by him in violence or in escaping. "To take away the party's money in such cases is to deprive him of the lawful means of defense." [53] The fact, however, that property has been illegally obtained from a person, renders it none the less competent evidence against him.[54]

[53] Reg. v. McKay, 3 Crawf. & D. 205; Rex v. Kinsey, 7 Car. & P. 447; Rex v. O'Donnell, Id. 138; Rex v. Jones, 6 Car. & P. 343; Commercial Exch. Bank v. McLeod, supra; Welch v. Gleason, 28 S. C. 247, 5 S. E. 599.

[54] Post, p. 633; State v. Flynn, 36 N. H. 64; Williams v. State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; State v. Pomeroy, 130 Mo. 489, 32 S. W. 1002; State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227. The introduction in evidence of papers unlawfully taken from defendant is not a violation of the constitutional provision against compelling a person to testify against himself. State v. Pomeroy, supra; People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575. But see State v. Sheridan, 121 Iowa, 164, 96 N. W. 730; State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L. R. A. 437, 94 Am. St. Rep. 323; State v. Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711; State v. Krinski, 78 Vt. 162, 62 Atl. 37. See 4 Wigmore, Ev. § 2264.

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CHAPTER III

PRELIMINARY EXAMINATION, BAIL, AND COMMITMENT

35. Preliminary Examination.
36. Bail—In General.
37–38. Right to Release on Bail.
39. Sufficiency of Bail.
40. Remedy of Accused on Denial of Bail.
41. The Bond or Recognizance.
42. Release of Sureties.
43. Breach of Bond or Recognizance, or Forfeiture of Bail.
44. Commitment.
45. Habeas Corpus.

PRELIMINARY EXAMINATION

35. Both at common law, and very generally by statutes in the different states, a person arrested on a charge of crime is entitled to a preliminary examination before a proper magistrate, without unnecessary delay, to determine whether a crime has in fact been committed, and, if so, whether there is probable cause to suspect that he is guilty of its commission. Without such an examination as soon as the circumstances will permit, the detention of the accused will be unlawful.

EXCEPTIONS—(a) The right to an examination may be waived by the accused.

(b) An examination is not necessary where the accused is a fugitive from justice.

(c) A coroner's inquest and commitment in homicide cases is equivalent to an examination before a magistrate, in the absence of a statutory provision to the contrary.

(d) If an indictment against the accused has been found by the grand jury, an examination before a magistrate is not necessary.

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When an offender or suspected offender has been arrested in any of the modes mentioned in the preceding chapter, he must, as soon as the circumstances will permit, be taken before a proper magistrate, and given a preliminary hearing or examination, for the purpose of determining whether there is sufficient ground for detaining him for trial. In most of the states, if not in all of them, it is so provided by statute, but, independently of any statutory provision on the subject, a preliminary examination is necessary at common law. If it is denied the accused, or if it is illegally conducted, his detention will be unauthorized.[1]

There are some exceptions to this rule. In the first place, the right to an examination is a right which the accused may waive.[2] The waiver, however, to be effective against him, must have been made freely. A waiver under fear of personal violence cannot estop him from claiming this right.[3] Generally, it is provided that informations may be filed without a preliminary examination, where the accused is a fugitive from justice.[4]

In the absence of statutory provision to the contrary, the accusation returned by a coroner's jury upon an inquisition, and the commitment by the coroner, have the force and effect of an examination and commitment by a magistrate, though the inquisition was held in the absence of the accused. At common law, the accused can be tried on such

[1] Simmons v. Vandyke, 138 Ind. 380, 37 N. E. 973, 26 L. R. A. 33, 46 Am. St. Rep. 411; Devine v. State, 4 Iowa, 443; Papineau v. Bacon, 110 Mass. 319; State v. Miller, 31 Tex. 564; Jackson v. Com., 23 Grat. (Va.) 919; State v. Pay, 45 Utah, 411, 146 Pac. 300.

[2] State v. Cobb, 71 Me. 198; Stuart v. People, 42 Mich. 255, 3 N. W. 863; In re Malison, 36 Kan. 729, 14 Pac. 144; Butler v. Com., 81 Va. 159; Cowell v. Patterson, 49 Iowa, 514; State v. Mays, 24 S. C. 190; Benjamin v. State, 25 Fla. 675, 6 South. 433; McCoy v. State, 46 Ark. 141; Washburn v. People, 10 Mich. 372; People v. Jones, 24 Mich. 215; People v. Wright, 89 Mich. 70, 50 N. W. 792. But see Ex parte Ah Bau, 10 Nev. 264. See, for waiver by neglect to object before plea, People v. Ronsse, 26 Cal. App. 100, 146 Pac. 65.

[3] In re Malison, supra.

[4] People v. Kuhn, 67 Mich. 463, 35 N. W. 88; State v. Woods, 49 Kan. 237, 30 Pac. 520.

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an accusation. It is equivalent to an indictment.[5] This, of course, can apply only in cases of homicide.

The examination before a magistrate has nothing to do with the finding of an indictment against the accused by the grand jury, unless by reason of statutory provisions, as, for instance, where an indictment is allowed to be based upon the minutes of the preliminary examination. The two proceedings are entirely distinct. The fact, therefore, that the grand jury are investigating the charge against the accused does not deprive him of his right to an examination before a magistrate to determine whether he should be held to await the decision of the grand jury.[6] A discharge by the magistrate would not prevent an indictment by the grand jury; and an indictment would itself authorize or require detention of the accused, so that after an indictment an examination would be an idle ceremony, and therefore unnecessary.

It is required, both by the statutes and at common law, that the examination shall be had without any further delay than the circumstances render unavoidable.[7] Unnecessary delay will render the detention of the accused a false imprisonment.[8] At common law the hearing may be adjourned from time to time for good cause, or with consent of the

[5] Ex parte Anderson, 55 Ark. 527, 18 S. W. 856; Com. v. Lafferty, 11 Pa. Co. Ct. R. 513; post, p. 148.

[6] State ex rel. Matranga v. Recorder, 42 La. Ann. 1091, 8 South. 279, 10 L. R. A. 137.

[7] Scavage v. Tateham, Cro. Eliz. 829; In re Peoples, 47 Mich. 626, 14 N. W. 112; Davis v. Capper, 10 Barn. & C. 28; Wright v. Court, 4 Barn. & C. 596; State v. Freeman, 86 N. C. 683; and see cases hereafter cited. If a prisoner cannot be brought before a magistrate on the night of his arrest, the officer may place him in jail for the night. Wiggins v. Norton, 83 Ga. 148, 9 S. E. 607. See further, as to necessary delay, Arnold v. Steeves, 10 Wend. (N. Y.) 515; Wheeler v. Nesbitt, 24 How. 544, 16 L. Ed. 765. A party may waive his right to be immediately taken before a magistrate. Nowak v. Waller, 56 Hun, 647, 10 N. Y. Supp. 199.

[8] Tubbs v. Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744; Davis v. Capper, supra; State v. Kruise, 32 N. J. Law, 313. Statutes in some jurisdictions provide that on the return of the warrant, with the accused, the justice shall proceed to hear, try, and determine the case within one day, unless continued for cause. See Hepler v. State, 43 Wis. 479.

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defendant.[9] The length of time is now very generally limited by statute; but, even at common law, an adjournment for an unnecessary length of time is unlawful.[10] In no case, unless a statute should expressly so permit, can the hearing be adjourned to await the mere convenience of the magistrate or the prosecuting officers.[11]

Before Whom

At common law, and by the statutes in most of the states, the officer may, unless the warrant directs otherwise, take his prisoner either before the magistrate who issued the warrant, or before any other magistrate having jurisdiction of the offense.[12] In other states he can only take him before the magistrate who issued the warrant, unless he is absent, in which case he may take him before some other magistrate.[13]

In some states the statutes provide for a change of venue to some other justice on the ground of prejudice, or for other reasons;[14] but in others, where the statutes providing for a change of venue from one justice to another do not expressly mention preliminary examinations, it has been held, on a construction of them, that they do not apply to such examinations, but only to actions or proceedings which the justice has power to try and determine.[15]

[9] Chitty, Cr. Law, 73. If the order of adjournment is apparently for the benefit of the accused, is made in his presence, and without objection by him, it will be presumed that he consented to it. Com. v. Vincent, 160 Mass. 280, 35 N. E. 852.

[10] Davis v. Capper, supra; Hamilton v. People, 29 Mich. 173; Pardee v. Smith, 27 Mich. 43. An adjournment for an unreasonable time, or for a greater length of time than is fixed by statute, may render the magistrate and the officer having the custody of the accused guilty of false imprisonment. Davis v. Capper, supra.

[11] In re Peoples, supra. Absence of the county attorney from the county, when a warrant is returned to a justice, is ground for a reasonable continuance. State v. Nerbovig, 33 Minn. 480, 24 N. W. 321.

[12] Foster's Case, 5 Coke, 59; Com. v. Wilcox, 1 Cush. (Mass.) 503; Wiggins v. Norton, 83 Ga. 148, 9 S. E. 607; ante, p. 68.

[13] Batchelder v. Currier, 45 N. H. 460; People v. Fuller, 17 Wend. (N. Y.) 211.

[14] State v. Sorenson, 84 Wis. 27, 53 N. W. 1124.

[15] Duffies v. State, 7 Wis. 672; State v. Bergman, 37 Minn. 407, 34 N. W. 737.

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Mode of Conducting Examination

The mode in which a preliminary examination must be conducted is almost entirely regulated by statute, and these statutes must be strictly followed, or the proceedings will be void.[16]

Same—Complaint

It is generally required that a complaint shall be made against the accused. Where the accused has been arrested by warrant, the complaint made for the purpose of procuring the issuance of the warrant serves in most states as the complaint for the purpose of the examination. A complaint is just as necessary where the arrest has been made without a warrant.[17]

In some states it is held, however, that, as the complaint or affidavit made for the purpose of procuring an arrest is merely for the purpose of satisfying the magistrate that a crime has been committed and that there is probable cause to suspect the accused, if it is defective it will not invalidate the subsequent examination and commitment of the accused; that the accused can only avail himself of defects therein before his examination and commitment.[18] And it is also held that if, upon the examination, it is found that the accused is probably guilty of an offense other than that charged in the complaint, he should not for that reason be discharged. It is the duty of the magistrate to commit him for trial for the offense disclosed by the evidence.[19]

Even when a complaint is essential, yet where it is insufficient, because it fails to charge an offense, or because it does not charge the particular offense of which the evidence shows the accused is probably guilty, or for any other reason, the magistrate is not bound to discharge him, but may hold him until a new complaint is made.[20]

[16] Devine v. State, 4 Iowa, 443; Papineau v. Bacon, 110 Mass. 319; Jackson v. Com., 23 Grat. (Va.) 919.

[17] Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102. No warrant need be issued, however, as that would be unnecessary. Ante, p. 46.

[18] People v. Smith, 1 Cal. 9.

[19] People v. Smith, supra; People v. Wheeler, 73 Cal. 252, 14 Pac. 796; Ex parte Burke, 58 Miss. 50.

[20] See State v. Shaw, 4 Ind. 428.

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In some states the complaint made for the arrest and examination of the accused is of no force after the warrant of arrest is issued. The examination is had upon the warrant, and not upon the complaint.

Same—Attorneys for the State and for the Accused

The state is generally, but not necessarily, represented at the hearing by the prosecuting attorney. The prosecutor, unless it is prohibited by law, may also employ private counsel to assist.[21] At common law it was held that the accused had no right to be represented by counsel, since the proceeding is a preliminary investigation only, and not conclusive upon him;[22] but by constitutional provisions and by statute in most of the states he is given this right.[23]

Same—Presence of Accused

Probably at common law the accused could not insist on being present at the hearing, but it is very generally provided by statute that the examination shall be conducted in his presence.[24]

Same—Intimidation and Restraint of Accused

The accused, when brought before a magistrate for his examination, should not be subjected to intimidation or unnecessary personal restraint. He should not be handcuffed or otherwise bound, unless he is unruly.[25] The mere fact, however, that he was handcuffed when he waived his examination will not affect the validity of a subsequent indictment.[26]

Same—Examination of Witnesses

At common law witnesses for the accused are not necessarily examined at the preliminary hearing, and the accused

[21] People ex rel. Howes v. Grady, 66 Hun, 465, 21 N. Y. Supp. 381.

[22] Cox v. Coleridge, 1 Barn. & C. 37.

[23] People v. Napthaly, 105 Cal. 641, 39 Pac. 29; People v. Fuller (Sup.) 68 N. Y. Supp. 742. If counsel is not present, statutes provide that a reasonable time must be allowed defendant to procure counsel. People v. Napthaly, supra. This right to counsel may be waived, however. People v. Elliott, 80 Cal. 296, 22 Pac. 207.

[24] People v. Napthaly, 105 Cal. 641, 39 Pac. 29.

[25] 2 Hawk. P. C. c. 28, § 1; Britt. c. 5, fol. 14; State v. Kring, 64 Mo. 591; People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296.

[26] State v. Lewis, 19 Kan. 260.

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probably cannot insist upon their being examined;[27] but the better practice is to examine them if the accused asks it, and if their testimony may aid in determining whether there is probable cause.[28] In some states the statute expressly provides that the witnesses produced by the accused shall be examined. The accused is also allowed by statute, though not at common law, to cross-examine the witnesses against him.

It is generally provided by statute that the magistrate, while examining any witness, may in his discretion exclude from the place of examination all the other witnesses; and that he may also, if requested, or if he sees cause, direct the witnesses for or against the accused to be kept separate, so that they cannot converse with each other until they are examined. This discretionary power has always existed at common law. In the absence of statute, the evidence need not be reduced to writing.[29] It is provided in some states that the testimony of the witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses.[30] A failure in this respect will be fatal to all subsequent proceedings, where the subsequent prosecution is by information.[31]

Same—Examination of Accused

It is provided by the Constitutions of the United States, and of most if not all the states, that no person shall be compelled to be a witness against himself in a criminal case, and the accused, therefore, cannot be examined as a wit-

[27] See U. S. v. White, 2 Wash. C. C. 29, Fed. Cas. No. 16,685.

[28] Whart. Cr. Pl. & Prac. § 72; Anon., 2 Car. & K. 845.

[29] Redmond v. State, 12 Kan. 172.

[30] State v. Flowers, 58 Kan. 702, 50 Pac. 938; People v. Brock, 64 Mich. 691, 31 N. W. 585. Some statutes provide that the evidence must be reduced to writing when demanded by the accused, only. People v. Hines, 57 App. Div. 419, 68 N. Y. Supp. 276.

[31] People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857. Failure in this respect cannot be cured by amendment, after the justice has made his return to the circuit court. People v. Chapman, supra. Where the testimony was reduced to writing and signed, failure to read it to the witnesses is waived by not objecting to the filing of the information. People v. Gleason, 63 Mich. 626, 30 N. W. 210.

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ness unless he chooses to submit to examination.[32] At common law he was not allowed to be a witness in his own defense, but his incompetency in this respect has been very generally removed by statute, and he can now testify, if he desires to do so, in his own behalf on his preliminary examination.[33] When he does so, he becomes, like any other witness, subject to cross-examination by the attorney for the state, and, as we shall see, his testimony may be used against him at his trial.[34]

Same—Statement of Accused

Not only by statute in some states, but also at common law, or by early English statutes which are old enough to be a part of our common law,[35] the accused is entitled, but cannot be compelled, to make a statement not under oath.[36] In a few states he may be cross-examined. This statement may be used against him at the trial,[37] and the magistrate must so inform him. Failure to caution him in this respect may render the statement inadmissible against him.[38]

Same—Sufficiency of Evidence

Neither at common law nor by statute is the same degree of proof required in order that the magistrate may commit or bind over the accused to await action by the grand jury, or to await trial, as is necessary to convict him on his trial. The rule at common law is stated by Blackstone to be that if "it manifestly appears either that no such crime was com-

[32] Kelly v. State, 72 Ala. 244.

[33] State v. Kinder, 96 Mo. 548, 10 S. W. 77.

[34] Post, p. 642.

[35] Rex v. Fagg, 4 Car. & P. 566; Rex v. Green, 5 Car. & P. 312. His statement ought not to be taken until after the evidence against him is all received, and then he should be asked if he has anything to say in answer to the charge. Rex v. Fagg, supra.

[36] If the statement is under oath, it cannot be used against him. Rex v. Smith, 1 Starkie, 242; Rex v. Rivers, 7 Car. & P. 177; Reg. v. Pikesley, 9 Car. & P. 124.

[37] Post, p. 622. Where two prisoners are taken before a magistrate, and both make a statement, the statement of one cannot be used against the other on the trial. Reg. v. Swinnerton, 1 Car. & M. 593.

[38] Rex v. Green, 5 Car. & P. 312; post, p. 625.

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mitted, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful to discharge him. Otherwise he must be either committed to prison or give bail." [39] With us, however, more evidence is required. The general rule is that the magistrate must find that there is probable cause to believe the accused committed the crime charged; [40] and, even in the absence of such a provision, the evidence should show this much.[41] It need not, either at common law or under the statutes, show more.[42]

Statutes providing that the magistrate shall examine the complainant and his witnesses on oath are held directory as to the quantity of testimony to be taken. He need not examine all the witnesses present, either for the state or accused.[43]

Same—Binding Over the Witnesses

At common law, in cases of felony, the magistrate may require the material witnesses for the prosecution to enter into recognizances to appear at the trial of the accused, and if they cannot find security they may be committed to jail.[44] In some of our states, by statute, the power of the magistrate in this respect extends to misdemeanors.[45] In some

[39] 4 Bl. Comm. 296; Bostick v. Rutherford, 11 N. C. 90; Ex parte Bell, 14 Rich. (S. C.) 13.

[40] Where the statute provides that the magistrate must find that an offense has been committed, and that there is probable cause to believe the accused guilty, the record of the magistrate should show the existence of these conditions. State v. Tennison, 39 Kan. 726, 18 Pac. 948.

[41] State v. Hartwell, 35 Me. 129; Burr's Trial, 11, 15; Whart. Cr. Pl. & Prac. § 73; Yaner v. People, 34 Mich. 286; Reg. v. Johnson, 2 Car. & K. 394; Anon., Id. 845.

[42] People v. Sherman, 3 Cal. Unrep. Cas. 851, 32 Pac. 879, and cases cited above.

[43] Emery v. State, 92 Wis. 146, 65 N. W. 848. Where the statute provides that the magistrate shall examine the complainant and the witnesses in support of the prosecution, he need not examine all the witnesses for the prosecution who are present. It is sufficient if he receive such testimony from the complainant and his witnesses as may be offered. People v. Curtis, 95 Mich. 212, 54 N. W. 767.

[44] 2 Hawk. P. C. c. 16, § 2.

[45] Markwell v. Warren Co., 53 Iowa, 422, 5 N. W. 570.

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states the hardship resulting from this rule, where witnesses are unable to find sureties, has induced the legislature to pass statutes requiring them to be allowed to go at large on their own recognizance.

Same—Decision of Magistrate and Return

If the magistrate deems the evidence insufficient to show probable cause for holding the accused, he must discharge him. This discharge, however, will not prevent another complaint and examination for the same offense.[46] If, on the other hand, the magistrate determines that he should hold the accused for trial, he must make an order to that effect, and must fix the amount of bail, if the offense is bailable. The question of bail and the commitment will be presently explained.

The statutes generally require that the magistrate shall certify the examination and proceedings, and return the same to the clerk of the court before which the accused is bound to appear, and a proper return is generally essential to the validity of an information filed in the higher court, and to the jurisdiction of the higher court thereon.[47]

Effect of Want of Examination or Irregularities Therein

It is not every irregularity in the preliminary examination that will affect the subsequent proceedings against the accused. Failure to grant the accused a preliminary hearing, as we have already seen, or irregularities at the hearing, cannot affect the validity of an indictment against him; for the right of the grand jury to investigate a charge and present an indictment in no way depends upon a preliminary examination.[48] In some states an indictment is al-

[46] Templeton v. People, 27 Mich. 501; State v. Ritty, 23 Ohio St. 562; Cowell v. Patterson, 49 Iowa, 514; Ex parte Walsh, 39 Cal. 705; State v. Jones, 16 Kan. 608. The same is true where the prosecution has been dismissed, on appeal, because of the invalidity of the preliminary examination. People v. Brock, 64 Mich. 691, 31 N. W. 585.

[47] As to the sufficiency of the return, see People v. Dowdigan, 67 Mich. 95, 38 N. W. 920.

[48] Osborn v. Com. (Ky.) 20 S. W. 223; State v. Schieler, 4 Idaho, 120, 37 Pac. 272. Contra, Com. v. Hughes, 11 Pa. Co. Ct. R. 470.

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lowed to be founded on the minutes of a preliminary examination, and the rule there would be different.[49]

In those states, however, where the prosecuting attorney is allowed to file an information against the accused in lieu of an indictment, the preliminary examination is intended to take the place of a presentment by the grand jury, and furnish the same protection against prosecutions without cause. Here a proper preliminary examination, unless it is waived,[50] is not only a right of the accused, but is essential to the validity of an information upon which he is to be tried.[51] In such jurisdictions, where the statute requires the examining justice to hold the accused to answer, when he is satisfied that an offense has been committed, and that there is probable cause to believe the accused guilty, it has been held that the decision of the justice on these points is a judicial determination necessary to the jurisdiction of the higher court, and that an information filed in the higher court before any return has been made, showing such a decision by the justice, should be quashed, and this, notwithstanding a proper return is made pending the motion to quash.[52]

Presumption of Regularity of Proceedings

The proceedings before the magistrate are presumed to have been regular.[53] Where a statute, for instance, allows a magistrate to try a complaint where the punishment may be within or beyond his jurisdiction to try, and to bind over the accused for trial in the higher court if in his opinion the offense is so aggravated as to require a greater punishment than he can impose, his record need not show that the offense was so aggravated as to require binding over,

[49] See State v. Wise, 83 Iowa, 596, 50 N. W. 59; State v. Helvin, 65 Iowa, 289, 21 N. W. 645.

[50] Stuart v. People, 42 Mich. 255, 3 N. W. 863; ante, p. 88.

[51] O'Hara v. People, 41 Mich. 623, 3 N. W. 161; People v. Evans, 72 Mich. 367, 40 N. W. 473.

[52] People v. Evans, supra. It has been held, however, that, where the justice's return fails to show a waiver of examination, the court may order a further return, and when it is made the information will be upheld. People v. Wright, 89 Mich. 70, 50 N. W. 792.

[53] Boynton v. State, 77 Ala. 30.

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for the presumption in favor of his judgment binding him over will supply the omission.[54] So, also, where the testimony at the preliminary examination is not required to be, and is not, reduced to writing, it will be presumed, in the absence of any showing to the contrary, that it was sufficient to authorize the decision of the magistrate, whatever that decision may be.[55]

Waiver of Objections

As we have seen, the accused may waive his right to a preliminary examination. He may also, though he has not waived an examination, waive the objection that he was not given one, and he may waive any irregularities in the examination. As a rule, he will be deemed to have waived them if he has failed to make objections at the proper time. If, for instance, he enters into a recognizance, or gives a bail bond, for his appearance at court to stand his trial, without making any objection to the sufficiency of the warrant on which he was arrested, or the sufficiency of the complaint or information on which he is held, he waives any defects in this respect.[56] Giving bail is also a waiver of any irregularity in the order of commitment.[57]

Failure to plead in abatement in the trial court is a waiver of the objection that there has been no preliminary examination.[58] And, generally, objections to matters of form in the commitment proceedings are waived, if not raised before plea and trial.[59]

Power to Convict and Punish

In all the states magistrates have exclusive jurisdiction to try and punish for certain petty offenses. In some states they have concurrent jurisdiction with the higher court over

[54] State v. Watson, 56 Conn. 188, 14 Atl. 797. But see People v. Evans, 72 Mich. 367, 40 N. W. 473.

[55] Redmond v. State, 12 Kan. 172.

[56] State v. Longton, 35 Kan. 375, 11 Pac. 163; Cunningham v. State, 116 Ind. 433, 17 N. E. 904; State v. Perry, 28 Minn. 455, 10 N. W. 778.

[57] Cunningham v. State, supra.

[58] State v. Woods, 49 Kan. 237, 30 Pac. 520.

[59] March v. Com. (Pa.) 14 Atl. 375; People v. Hanifan, 98 Mich. 32, 56 N. W. 1048.

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certain offenses. They act in a twofold capacity—the one, that of an examining magistrate preparatory to binding the party to answer to the higher court upon presentment to be made by the grand jury, or, in some states, information to be filed by the prosecuting attorney; the other, that of a court competent to exercise final jurisdiction, or, in other words, a concurrent jurisdiction with the higher court to try the case, subject to an appeal, in which case a trial de novo is had in the higher court on the original complaint.[60] It has been held that a magistrate clothed with this double power may, in cases where the higher court has a concurrent original jurisdiction, bind over the party if the circumstances of the case seem to demand a higher punishment than he can inflict, although he has jurisdiction to determine the case and punish the offender by a penalty more limited than might be imposed by the higher court.[61] In some states the statute expressly so provides.

BAIL

36. Bail is security given by a person charged with a crime for his appearance for further examination, or for trial, whereupon he is suffered to go at large.[62]

Admission to bail has been said to consist in the delivery, or bailment, of the accused to his sureties on their giving security, he also entering into his own recognizance, for his appearance, at the time and place of trial, there to surrender and take his trial. In the meantime he is allowed to be at large, being supposed to remain in their friendly custody.[63] This definition is still good as far as it goes, but it

[60] Com. v. Harris, 8 Gray (Mass.) 470.

[61] Com. v. Harris, supra; Com. v. Sullivan, 156 Mass. 487, 31 N. E. 647.

[62] We are here dealing with bail before trial and conviction. In some cases bail may be allowed after a conviction, pending an appeal or writ of error.

[63] Harris, Cr. Law, 343; 4 Bl. Comm. 297; Nicolls v. Ingersoll, 7 Johns. (N. Y.) 145.

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does not cover all cases. A person accused of crime may, on adjournment of his preliminary examination, be admitted to bail to secure his appearance for further examination, and not for trial.[64] And in some cases he may be released on his own recognizance, without sureties.

Another form of security for the appearance of a person charged with crime was mainprise, but it is now obsolete. "The chief, if not only, difference between bail and mainprise seems to be this, that a man's mainpernors are barely his sureties, and cannot justify the detaining or imprisoning of him themselves, in order to secure his appearance; but that a man's bail are looked upon as his jailers of his own choosing, and the person bailed is, in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed as if he were in the actual custody of the proper jailer." [65]

The form of security is either a bond or a recognizance. These will be presently explained at length. It is sufficient to say here that a bail bond is a contract under seal, just like any ordinary bond, conditioned that the accused shall appear as therein provided. A recognizance is similar in so far as the obligation to pay money and the condition is concerned, but, instead of being a contract under seal, it is a contract of record, being acknowledged by the parties, and then entered or filed in the records of the court. At common law a deposit of money by the accused in lieu of furnishing sureties was not allowed, but it is now allowed by statute in some cases.

At common law any magistrate, judge, or court having jurisdiction to try and punish for a crime, has, as incident to such jurisdiction, the power to admit to bail in cases where the offense is bailable.[66] Jurisdiction to admit to bail is now very generally regulated by statute. It may be exercised by the magistrate before or at the preliminary examination, and provision is also made for application to the higher courts or judges, including the judges of the supreme court.

[64] Goodwin v. Dodge, 14 Conn. 206.
[65] 2 Hawk. P. C. c. 15, §§ 2, 3.
[66] People v. Huggins, 10 Wend. (N. Y.) 465.

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The question must be determined in each state by reference to the statute.

The power to admit to bail is a judicial power.[67] It can only be exercised by those having judicial powers. In the absence of statute, it cannot be exercised by a clerk, or other ministerial officer,[68] nor can it be delegated.[69] It has been held that a statute allowing the clerk of the court to determine whether an offense is bailable, or to fix the amount of bail, is unconstitutional, as conferring judicial powers on a ministerial officer.[70] A ministerial officer, however, may be, and is in many jurisdictions, allowed to approve and accept bail, after it has been allowed and fixed by the magistrate or judge, as that is a ministerial act.[71]

A magistrate may become criminally liable either for wrongfully denying bail, or for wrongfully allowing it. To refuse or delay to bail any person entitled to bail, or to willfully require excessive bail, is a misdemeanor, not only by statute, but also at common law.[72] On the other hand, a

[67] Gregory v. State ex rel. Gudgel, 94 Ind. 384, 48 Am. Rep. 162; Linford v. Fitzroy, 13 Q. B. 240; State v. Mills, 13 N. C. 555; Reg. v. Badger, 4 Q. B. 468; and see cases hereafter cited.

[68] Gregory v. State ex rel. Gudgel, supra; State v. Mills, supra; State v. Winninger, 81 Ind. 51; State v. Hill, 25 N. C. 398; Wallenweber v. Com., 3 Bush (Ky.) 68; State v. Jones, 3 La. Ann. 9; Solomon v. People, 15 Ill. 291; Com. v. Roberts, 1 Duv. (Ky.) 199; Dugan v. Com., 6 Bush (Ky.) 305; Com. v. Lee, 3 J. J. Marsh. (Ky.) 698; Governor v. Jackson, 15 Ala. 703. It cannot be exercised by the Governor of the state. Governor of Louisiana v. Fay, 8 La. Ann. 490. In England a sheriff had judicial powers to a certain extent, and it seems that he was allowed to admit to bail. See 1 Chit. Cr. Law, 98; Bengough v. Rossiter, 2 H. Bl. 418; Posteene v. Hanson, 2 Saund. 59. He has also been allowed the power in this country, in some jurisdictions. Dickinson v. Kingsbury, 2 Day (Conn.) 1; McCole v. State ex rel. Chipman, 10 Ind. 50; Schneider v. Com., 3 Metc. (Ky.) 411. But see cases above cited.

[69] Butler v. Foster, 14 Ala. 323; Jacquemine v. State, 48 Miss. 280; State v. Clark, 15 Ohio, 596; Morrow v. State, 5 Kan. 563; Antonez v. State, 26 Ala. 81.

[70] Gregory v. State ex rel. Gudgel, supra.

[71] State v. Winninger, 81 Ind. 51; Wallenweber v. Com., 3 Bush (Ky.) 68; State v. Jones, 3 La. Ann. 9; State v. Gilbert, 10 La. Ann. 524; State v. Benzion, 79 Iowa, 467, 44 N. W. 709.

[72] 4 Bl. Comm. 297; Evans v. Foster, 1 N. H. 374.

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magistrate who releases a prisoner on bail, where the offense is not bailable, is guilty of a negligent escape.[78]

SAME—RIGHT TO RELEASE ON BAIL

37. At common law it was within the discretion of the magistrate, judge, or court having jurisdiction and power to allow or deny bail in all cases. It could be allowed whenever it was deemed sufficient to insure the appearance of the accused, but not otherwise, and was therefore always allowed in cases of misdemeanor, less frequently in cases of felony, and almost always denied in cases of felony punishable by death.

38. It is now generally declared by the constitutions of the different states, or provided by statute, that the accused shall have an absolute right to give bail in all cases except where the punishment may be death, and even in those cases except where the proof is evident or the presumption great.

The ground upon which a magistrate commits a prisoner to jail, pending or after a preliminary examination and before trial, is to insure his appearance for examination or trial, and not to punish him. He is committed solely because there is a probability that he will not otherwise appear. For this reason, bail should be taken whenever it will insure his appearance, but not otherwise. It was therefore the general rule at common law that the accused should be released on bail in all cases except cases of felony, for in all such cases, the punishment being generally a mere fine or a short term of imprisonment in the county jail, it was thought that bail would insure the appearance of the accused. There was, however, no absolute right to be released on bail, even in cases of misdemeanor, though it was generally, if not always, allowed. If there were any reason to

[78] 4 Bl. Comm. 297; 2 Hawk. P. C. c. 15, § 7; Rex v. Clarke, 2 Strange, 1216; State v. Arthur, 1 McMul. (S. C.) 456.

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believe the accused would fail to appear, bail could be denied in any case.

Where the offense was a felony punishable by death, bail was scarcely ever allowed, for it was not thought that any pecuniary consideration could weigh against the desire to live.[74] Even when the felony was not punishable by death, bail was generally denied, unless the guilt of the accused was very doubtful. "Where guilt is clear," it was said, "and a rigorous and disgraceful imprisonment may follow for a great length of time, the presumption is strong that the accused will not appear and surrender himself to the demands of justice to avoid a mere forfeiture of property. The safest course, therefore, in cases of felony, where the guilt of the criminal is clear, is to deny bail." [75]

In cases of felony, however, the magistrate or court might always admit to bail in his discretion.[76] Even in capital cases, bail was sometimes allowed, for instance where there was a well-founded doubt of guilt; [77] or where the accused was ill, and his confinement endangered his life; [78] or where several continuances had been granted at the instance of the state.[79]

[74] See Cole's Case, 6 Parker, Cr. R. (N. Y.) 695; State v. Holmes, 3 Strob. (S. C.) 272.

[75] Per Sutherland, J., in Ex parte Tayloe, infra; People v. Dixon, 4 Parker, Cr. R. (N. Y.) 651.

[76] Ex parte Tayloe, 5 Cow. (N. Y.) 39; Ex parte Baronnet, 1 El. & Bl. 1; People v. Van Horne, 8 Barb. (N. Y.) 158; Com. v. Trask, 15 Mass. 277; People v. Dixon, 4 Parker, Cr. R. (N. Y.) 651; State v. Summons, 19 Ohio, 139; State v. McNab, 20 N. H. 160.

[77] Barronet's Case, 1 El. & Bl. 1; Ex parte Bridewell, 57 Miss. 39; U. S. v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 15,495; U. S. v. Hamilton, 3 Dall. 17, 1 L. Ed. 490; State v. Hill, 1 Tread. Const. (S. C.) 242; People v. Perry, 8 N. Y. Abb. Prac. (N. S.) 27; State v. Rockafellow, 6 N. J. Law, 332; Com. v. Semmes, 11 Leigh (Va.) 665; Archer's Case, 6 Grat. (Va.) 705; State v. Summons, 19 Ohio, 139.

[78] Aylesbury's Case, 1 Salk. 103; Rex v. Wyndham, 1 Strange, 2, 4; Harvey's Case, 10 Mod. 334; U. S. v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 15,495; Archer's Case, 6 Grat. (Va.) 705. Sickness is no ground for release of a person on bail, unless confinement aggravates his illness, and endangers his life. Rex v. Wyndham, supra; Ex parte Pattison, 56 Miss. 161; Lester v. State, 33 Ga. 192; Thomas v. State, 40 Tex. 6.

[79] Fitzpatrick's Case, 1 Salk. 103; Crosby's Case, 12 Mod. 66; U. S.

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In most of our states there are constitutional or statutory provisions giving persons arrested for crime an absolute right to release on bail, except where the offense is punishable by death, and the proof is evident or the presumption great. It will be noticed that the common law is changed by these provisions. The magistrate, judge, or court no longer has a discretion in all cases as to whether he will allow bail. He must allow it in all cases except where the offense is punishable by death, and even then he must allow it unless the proof is evident or the presumption great. These provisions are for the benefit of the accused, and it does not seem that they should be held to deprive the courts of the common-law power to admit to bail under special circumstances in capital cases, even though the proof is evident and the presumption great; but it has been held in Pennsylvania that no power at all to admit to bail exists in such cases.[80]

In construing the words, "when the proof is evident," the Texas court at first held that bail should be denied if the evidence adduced on the examination would sustain a verdict of murder in the first degree, but otherwise bail should be allowed.[81] But in a later case that decision was overruled, and it was held, following an Alabama case, that "if the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he will probably be punished capitally if the law be administered, bail is not a matter of right." [82]

v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 15,495; People v. Perry, 8 N. Y. Abb. Prac. (N. S.) 27; Rex v. Wyndham, 1 Strange, 2, 4. It is so by statute in many states. See Ex parte Chaney, 8 Ala. 424; Ex parte Stiff, 18 Ala. 464. An omission to prosecute at the first term after the arrest is not ground for bail, unless the omission has operated oppressively. State v. Abbot, R. M. Charlt. (Ga.) 244.

[80] Com. v. Keeper of Prison, 2 Ashm. (Pa.) 227.

[81] Ex parte Foster, 5 Tex. App. 625, 32 Am. Rep. 577.

[82] Ex parte Smith, 23 Tex. App. 100, 5 S. W. 99; Ex parte McAnally, 53 Ala. 495, 25 Am. Rep. 646. And see, as to this point, Com. v. Keeper of Prison, supra; Ex parte Wray, 30 Miss. 673; Ullery v. Com., 8 B. Mon. (Ky.) 3; State v. Summons, 19 Ohio, 139; Shore v. State, 6 Mo. 640; Ex parte Goans, 99 Mo. 193, 12 S. W. 635, 17 Am. St. Rep.

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SAME—SUFFICIENCY OF BAIL

39. The bail required should be such, and such only, as will be sufficient to insure the appearance of the accused.

It is declared by the Constitution of the United States, and those of the different states, that excessive bail shall not be required, and there are statutes in most jurisdictions limiting the amount of bail that may be required to such a sum as will, in the opinion of the judge or magistrate, secure the presence of the accused. This is merely a declaration of the common law. The object of requiring bail is to insure the presence of the accused to stand his trial, and the amount of bail required should be such only as to accomplish this object. "It has been sometimes argued that bail should be arbitrarily graded to meet the heinousness of the offense. But this is a dangerous principle, as it tends to show that on the rich who can find bail, and afford to forfeit it, there is no necessary corporal punishment imposed. Far wiser is it to adopt the principle that, in determining and adjusting bail, the test to be adopted by the court is the probability of the accused appearing to take his trial." [88]

571. It has been held that, except under extraordinary circumstances, an indictment creates such a presumption of guilt as to absolutely prevent admission to bail. Evidence to rebut the presumption was excluded. People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77; Hight v. U. S., Morris (Iowa) 407, 43 Am. Dec. 111. But see Lynch v. People, 38 Ill. 494; Lumm v. State, 3 Ind. 293; State v. Hill, 3 Brev. (S. C.) 89; Com. v. Rutherford, 5 Rand. (Va.) 646; Summerfield v. Com., 2 Rob. (Va.) 767; Tayloe's Case, 5 Cow. (N. Y.) 39. In many states it is held that indictment raises a rebuttable presumption that the proof is evident or the presumption great of the guilt of accused. Ex parte Towndrow, 20 N. M. 631, 151 Pac. 761. Doubt as to prisoner's sanity when the crime was committed may be ground for bail. Zembrod v. State, 25 Tex. 519. As to drunkenness as not raising doubt, see Ex parte Evers, 29 Tex. App. 539; 16 S. W. 343 (Hurt, J., dissenting). Where the jury are unable to agree on two trials for murder, bail should be allowed. People v. Perry, 8 N. Y. Abb. Prac. (N. S.) 27.

[88] Whart. Cr. Pl. & Prac. § 76. And see People v. Cunningham, 3 Parker, Cr. R. (N. Y.) 520; Reg. v. Scaife, 9 Dowl. 553, 5 Jur. 700; Com. v. Rutherford, 5 Rand. (Va.) 646; Com. v. Semmes, 11 Leigh (Va.) 665; Lumm v. State, 3 Ind. 293; State v. Hill, 3 Brev. (S. C.) 89.

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In applying this test, the circumstances and character of the accused, his means, the probability of his guilt, the nature of the crime charged, and the possible punishment, are all to be considered.[84] Where the punishment is a fine only, there is nothing to prevent the magistrate from requiring bail in an amount greater than the maximum fine. Indeed, it should be so required.[85] It has been held that a magistrate who has taken insufficient bail cannot direct the rearrest of the accused for the purpose of increasing it;[86] but it is otherwise by statute in some jurisdictions.

Sufficiency of Sureties—Justification

The magistrate or judge will act according to his discretion as to the sufficiency of the sureties, and, to determine their responsibility, he may orally examine them upon oath as to their means, or require them to justify by affidavit.[87] Such justification by the sureties is generally required by statute. Failure to justify, or justification in a less sum than fixed by law, cannot be urged by the sureties to escape liability.[88]

Same—Who may Become Bail

At common law, neither a married woman, nor an infant, nor an insane person, nor a person convicted of an infamous crime, could become bail.[89] But the disability of married women in this respect has been very generally removed by statute. Unless the statutes provide otherwise, there is no reason why any person who is capable of contracting may not become bail. An infant may enter into a bail bond or recognizance as principal.[90]

[84] Whart. Cr. Pl. & Prac. § 76; People v. Cunningham, supra; In re Barronet, 1 El. & Bl. 1; State v. Hopson, 10 La. Ann. 550.

[85] State v. Martinez, 11 La. Ann. 23.

[86] Ingram v. State, 27 Ala. 17.

[87] 1 Chit. Cr. Law, 99; 2 Hale, P. C. 125; People v. Vermilyea, 7 Cow. (N. Y.) 108.

[88] People v. Carpenter, 7 Cal. 402; People v. Shirley, 18 Cal. 121.

[89] 1 Chit. Cr. Law, 100; Rex v. Edwards, 4 Term R. 440; Bennet v. Watson, 3 Maule & S. 1.

[90] "If it [the recognizance] were executed for the purpose of preventing some third person from being imprisoned * * * we suppose it would not be classed as a necessary and might therefore be

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SAME—REMEDY OF ACCUSED ON DENIAL OF BAIL

40. A prisoner, if he is denied bail, or if excessive bail is required, has a remedy by application for a writ of habeas corpus.

If a person under arrest on a charge of crime is denied release on bail, or if excessive bail is required, he may apply to the proper judge or court for a writ of habeas corpus. After a hearing, the court will admit him to bail if his offense is bailable, and will fix the amount of bail.[91] Where, however, the magistrate or judge by whom bail was denied, is required to determine whether under the evidence and circumstances of the particular case bail should be allowed, so that the matter rest in his discretion, and is not bound to admit to bail as a matter of course, the higher court or judge will not interfere, except where that discretion has been exercised in an arbitrary, unjust, and oppressive manner. This applies not only to cases in which bail has been denied entirely,[92] but also to cases in which it is claimed that excessive bail has been required.[93] The subject of habeas corpus is for treatment in a subsequent chapter.

disaffirmed. But if it were executed for the purpose of preventing the minor himself from being imprisoned then we suppose it would be classed as a necessary of the highest order and could not be disaffirmed." State v. Weatherwax, 12 Kan. 464. See, also, McCall v. Parker, 13 Metc. (Mass.) 372, 46 Am. Dec. 735.

[91] Evans v. Foster, 1 N. H. 374.

[92] Lester v. State, 33 Ga. 192; Ex parte Jones, 20 Ark. 9; Ex parte Osborn, 24 Ark. 185; People v. McLeod, 25 Wend. (N. Y.) 483, 1 Hill (N. Y.) 377, 37 Am. Dec. 328.

[93] People v. Perry, 8 N. Y. Abb. Prac. (N. S.) 27; Lynch v. People, 38 Ill. 494; Lumm v. State, 3 Ind. 293; Lester v. State, 33 Ga. 192.

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SAME—THE BOND OR RECOGNIZANCE

41. A bond or recognizance cannot be taken unless authorized by law, and, when authorized, it must be taken in the manner and form prescribed by law. If unauthorized or illegally taken, or if it is not in proper form, it is void, and of no effect.

As we have heretofore stated, bail may be either in the form of a bond or of a recognizance. A bail bond is like any other bond, except in its condition.[94] It is a contract under seal between the accused and his sureties on the one side, and the state on the other, whereby the former bind themselves to pay the latter a certain sum of money if the accused fails to appear as therein provided. In some states this form of security is no longer used.

A recognizance is an obligation similar to the obligation created by a bail bond, acknowledged by the accused and his sureties before the magistrate, judge, or court, the acknowledgment being entered or filed in the records of the court. The practice now in giving a recognizance is generally to draw up and sign an instrument similar in form to

[94] The following is a form of bail bond:

Know all men by these presents:

That we, C. D. and E. F., are held and firmly bound unto the state (or commonwealth) of ——— in the penal sum of ——— dollars, for true payment whereof, well and truly to be made, we bind ourselves and our heirs, jointly and severally.

The condition of the above obligation is such that if the above-bound C. D. shall personally appear before the judge of the ——— court of the county of ———, state (or commonwealth) of ———, on the first day of the next term thereof, then and there to answer the state (or commonwealth, or people of the state) of ———, for and concerning a certain felony (or misdemeanor) by him committed, in this: that (describing the offense),—wherewith he, the said C. D., stands charged, and shall not depart thence without the leave of the said court, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this the ——— day of ———, A. D. ———.

C. D. [Seal.]
E. F. [Seal.]

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a bond, and, instead of sealing it, to acknowledge it before the magistrate or judge. The instrument is certified as having been acknowledged, and is filed. Unless required by statute, however, this formality is not necessary. "The manner of taking a recognizance is that the magistrate repeats to the recognizors the obligation into which they are to enter, and the condition of it, at large, and asks them if they are content. He makes a short memorandum, which it is not necessary that they should sign. * * * From this short minute the magistrate may afterwards draw up the recognizance in full form, and certify it to the court. This is the most regular and proper way of proceeding." [95] When the acknowledgment of obligation is entered in the records of the proper court, or filed therein, it becomes a matter of record. It is a contract, not under seal, but a contract of record, with all the characteristics of such a contract.[96]

Since, therefore, a bail bond or recognizance is a contract between the parties who execute it and the state, in determining its validity and effect we must not only look to see whether special statutory or common-law requirements are complied with, but also to see whether it accords with the rules relating to contracts generally. Parties cannot be held liable on an attempted bail bond or recognizance if for any reason they have failed to make a valid contract. We can notice shortly those requirements only which spring from the nature of this particular kind of obligation, or are prescribed by statute. Other questions that may arise will be answered by the law of contracts generally.

In the first place, to be valid, a bail bond or recognizance must be authorized, and must be taken in the mode prescribed by law. If a magistrate, judge, or court assumes without jurisdiction to admit a prisoner to bail, or if, though authorized to admit to bail, he exceeds his powers, or fails to comply with the requirements of the law, the bond or

[95] Com. v. Emery, 2 Bin. (Pa.) 434.

[96] 1 Chit. Cr. Law, 90; People v. Kane, 4 Denio (N. Y.) 535; Bridge v. Ford, 4 Mass. 641; State v. Crippen, 1 Ohio St. 401.

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recognizance is void, and neither the accused nor the sureties are liable thereon. It has no effect whatever.[97]

Whether or not a bond or a recognizance should be taken must generally depend on the statutes of the particular state. If a statute expressly requires a bond, a recognizance might not do;[98] and if it expressly requires a recognizance, a bond might be insufficient, unless in the latter case the bond, being filed of record, may be treated as a recognizance. At common law, and under a statute which is silent as to the form of bail, either a bond or a recognizance may be taken.[99]

A bail bond, like any other contract under seal, must be signed, sealed, and delivered, or it cannot take effect as a contract.[1] A recognizance, however, being a contract of record, need not be under seal.[2] Nor, unless it is so required by statute, need it be signed by the parties; for it is the acknowledgment and record thereof that gives it validity. If signed, the signatures may be rejected as surplusage.[3] At common law, and under the statutes in most states, the accused need not necessarily execute the bond or enter into the recognizance. The sureties may do so alone.[4]

[97] Com. v. Loveridge, 11 Mass. 337; Com. v. Fisher, 2 Duv. (Ky.) 376; State v. Kruise, 32 N. J. Law, 313; State v. Harper, 3 La. Ann. 598; Com. v. Otis, 16 Mass. 198; Governor of Louisiana v. Fay, 8 La. Ann. 490; Branham v. Com., 2 Bush (Ky.) 3; State v. Nelson, 28 Mo. 13; Cooper v. State, 23 Ark. 278; State v. Berry, 8 Greenl. (Me.) 179; Com. v. Canada, 13 Pick. (Mass.) 86; Powell v. State, 15 Ohio, 579; Solomon v. People, 15 Ill. 291; Darling v. Hubbell, 9 Conn. 350; State v. Randolph, 26 Mo. 213; Williams v. Shelby, 2 Or. 144; State v. Wenzel, 77 Ind. 428.

[98] See Johnson v. Randall, 7 Mass. 340.

[99] Pugh v. State, 2 Head (Tenn.) 227.

[1] Clark, Cont. 73. Signing is probably necessary, though there seems to have been some doubt on the question. Id.

[2] Slaten v. People, 21 Ill. 28; Campbell v. State, 18 Ind. 375, 81 Am. Dec. 363; Hall v. State, 9 Ala. 827; State v. Foot, 2 Mill, Const. (S. C.) 123.

[3] 1 Chit. Cr. Law, 90; Irwin v. State, 10 Neb. 325, 6 N. W. 370; King v. State, 18 Neb. 375, 25 N. W. 519; Madison v. Com., 2 A. K. Marsh. (Ky.) 131; Com. v. Mason, 3 A. K. Marsh. (Ky.) 456; Com. v. Emery, 2 Bin. (Pa.) 434. Contra, Cunningham v. State, 14 Mo. 402; State v. Foot, 2 Mill, Const. (S. C.) 123.

[4] State v. Patterson, 23 Iowa, 575; People v. Dennis, 4 Mich. 609,

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The bond or recognizance, to be valid, "must contain, and express in the body of it, the material parts of the obligation and condition." [5] By the weight of authority at common law, and generally under the statutes, a bond or recognizance must state the offense for which the accused is held. It need not state the circumstances under which the offense was committed, nor need it state all the facts necessary to constitute the offense; [6] but it must describe the offense itself accurately and with reasonable certainty.[7] If it states a charge for which an indictment will not lie, it is void.[8] It has also been held that a material variance in the description of the offense between the warrant, complaint, or indictment on which the accused is held, and the bond or recognizance is fatal.[9]

To avoid this result it is usual to insert a provision in the recognizance or bond binding the accused, not only to ap-

69 Am. Dec. 338; Com. v. Mason, 3 A. K. Marsh. (Ky.) 456; Com. v. Radford, 2 Duv. (Ky.) 9; Minor v. State, 1 Blackf. (Ind.) 236. But see State v. Doax, 19 La. Ann. 77; State v. Taylor, 19 La. Ann. 145.

[5] State v. Crippen, 1 Ohio St. 399.

[6] State v. Marshall, 21 Iowa, 143; Patterson v. State ex rel. Neff, 12 Ind. 86; State v. Hamer, 2 Ind. 371; Young v. People, 18 Ill. 566; People v. Baughman, 18 Ill. 152; Hall v. State, 15 Ala. 431; Browder v. State, 9 Ala. 58; People v. Dennis, 4 Mich. 609, 69 Am. Dec. 338; Com. v. Downey, 9 Mass. 520; Com. v. Daggett, 16 Mass. 447; Hampton v. Brown, 32 Ga. 251; Daniels v. People, 6 Mich. 381; State v. Williams, 17 Ark. 371; Besimer v. People, 15 Ill. 439; People v. Blankman, 17 Wend. (N. Y.) 252. But see Allison v. State, 33 Tex. Cr. R. 501, 26 S. W. 1080; U. S. v. Sauer (D. C.) 73 Fed. 671. In general, it need not state the venue of the offense. Cundiff v. State, 38 Tex. 641. Some statutes, however, make a statement of the venue necessary. La Rose v. State, 29 Tex. App. 215, 15 S. W. 33.

[7] Nicholson v. State, 2 Ga. 363; Simpson v. Com., 1 Dana (Ky.) 523; Goodwin v. Governor, 1 Stew. & P. (Ala.) 465. But see State v. Loeb, 21 La. Ann. 599; People v. Gillman, 125 N. Y. 372, 26 N. E. 469. The recognizance may be invalid on account of duplicity in statement, Hutchison v. State, 4 Tex. App. 435; or for describing the crime in the disjunctive, Walker v. State, 32 Tex. Cr. R. 517, 24 S. W. 909.

[8] Dailey v. State, 4 Tex. 417; Cotton v. State, 7 Tex. 547; Tousey v. State, 8 Tex. 173; McDonough v. State, 19 Tex. 293.

[9] Dillingham v. U. S., 2 Wash. C. C. 422, Fed. Cas. No. 3,913; Welch v. State, 36 Ala. 277; People v. Hunter, 10 Cal. 502; State v. Woodley, 25 Ga. 235; Draughan v. State, 35 Tex. Cr. R. 51, 35 S. W. 667; State v. Forno, 14 La. Ann. 450.

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pear at court and answer the specific charge for which he is held, but also binding him "not to depart therefrom without leave of the court" or "to answer such matters as shall be objected against him on behalf of the state." [10]

Since all the terms of the contract must be contained in the bond or recognizance, it must correctly and with certainty state the time and place at which the accused is to appear, including a description of the court at which he must appear.[11] In a California case it was held unnecessary to state the court, on the ground that it was fixed by law.[12]

Mere clerical errors will not invalidate the bond or recognizance.[13] Nor will it be avoided by recitals of unnecessary and irrelevant matter, since such matter may be rejected as surplusage.[14] Nor does the fact that the words used are improperly arranged affect the validity of the contract, where all the necessary words are inserted so that they can be understood.[15]

A bail bond, to be valid, need not be filed, for the execution and delivery is what renders it binding. A recognizance, however, derives its validity and effect from the fact that it is a judicial record, and it must therefore be certified by the magistrate to the proper court of record, and be there filed or recorded. It then becomes an obligation of record.[16] When the recognizance has thus become a matter of record, it will be presumed that a charge was properly preferred

[10] Pack v. State, 23 Ark. 235; State v. Bryant, 55 Iowa, 451, 8 N. W. 303; State v. Forno, 14 La. Ann. 450. See, further, post, 117.

[11] People v. Mack, 1 Parker, Cr. R. (N. Y.) 567; State v. Allen, 33 Ala. 422. In the latter case a recognizance taken by a justice of the peace, conditioned for the prisoner's appearance, on a certain day, before him, or some other justice, was held void for uncertainty, because the place of appearance was not specified. And a recognizance to appear to answer a charge on a day when the court does not sit is void. State v. Sullivant, 3 Yerg. (Tenn.) 281.

[12] People v. Carpenter, 7 Cal. 402.

[13] State v. Patterson, 23 Iowa, 575.

[14] State v. Adams, 3 Head (Tenn.) 259; Howie v. State, 1 Ala. 113; McCarty v. State, 1 Blackf. (Ind.) 338; State v. Wellman, 3 Ohio, 14.

[15] State v. Adams, supra.

[16] People v. Huggins, 10 Wend. (N. Y.) 464; People v. Kane, 4 Denio (N. Y.) 535; Bridge v. Ford, 4 Mass. 641; Com. v. Emery, 2 Bin. (Pa.) 431; King v. State, 18 Neb. 375, 25 N. W. 519.

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and examined into, and a proper decision made before it was entered into and acknowledged.[17]

By the weight of authority, a bond or recognizance taken before or approved by a person unauthorized by law, or in a case where the taking of it is unauthorized by law, so that it is invalid under the statutes, is invalid for all purposes. It cannot be upheld as a common-law obligation.[18]

SAME—RELEASE OF SURETIES

42. The sureties will be discharged from liability—

(a) By any change in the terms of the bond or recognizance made by the state without their consent.

(b) By any action on the part of the state prejudicing their rights.

(c) By surrendering the accused; and for this purpose they may arrest him, either themselves or by deputy, and at any time or place.

The liability of sureties on a recognizance or bail bond is limited to the precise terms of their contract, and they will be discharged if any change is made therein without their consent; as, for instance, where the state agrees with the accused to postpone the trial until a later day or term than that named in the bond or recognizance.[19] The sureties are also discharged by any other action by the state, without their knowledge or consent, prejudicing their rights, as where the accused is held imprisoned by the state at the date fixed in the bond for his appearance;[20] or where

[17] Shattuck v. People, 4 Scam. (Ill.) 477.

[18] Powell v. State, 15 Ohio, 579; Williams v. Shelby, 2 Or. 144; Dickenson v. State, 20 Neb. 72, 29 N. W. 184. Contra, State v. Cannon, 34 Iowa, 325; Dennard v. State, 2 Ga. 137.

[19] Reese v. U. S., 9 Wall. 13, 19 L. Ed. 541. And see Vincent v. People, 25 Ill. 500.

[20] People v. Bartlett, 3 Hill (N. Y.) 570. But see State v. Crosby, 114 Ala. 11, 22 South. 110. If, however, the accused has escaped or been discharged from such imprisonment, the bail are responsible

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it consents to the departure of the accused beyond their reach or control.[21]

Facts rendering the sureties unable to surrender the accused, other than his death, where they are not attributable to action by the state, will not release them.[22] For instance, they are not discharged or excused from their obligation by the fact that the accused has, since his release on bail, been arrested and imprisoned in another state, so that they are unable to surrender him,[23] nor by the fact that he is ill,[24] or even insane.[25]

As is the case with any other kind of contract, the sureties will, of course, be discharged from their obligation, if the terms thereof are complied with. What amounts to such a compliance will be presently shown.[26]

Arrest and Surrender of Accused

The sureties are not compelled to act as bail for a longer time than they wish. As we have already said, the accused is, in the eye of the law, in the custody of his sureties, who are considered his keepers. If they fear his escape, or for any other reason wish to be released, they may rearrest him, and surrender him before the magistrate or court by which he was bailed. They will then be discharged.[27] The ac-

for his appearance. State v. Crosby, 114 Ala. 11, 22 South. 110; Bishop v. State, 16 Ohio St. 419.

[21] Reese v. U. S., supra.

[22] Yarbrough v. Com., 89 Ky. 151, 12 S. W. 143, 25 Am. St. Rep. 524.

[23] State v. Scott, 20 Iowa, 63; Harrington v. Dennie, 13 Mass. 93; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Yarbrough v. Com., supra; King v. State, 18 Neb. 375, 25 N. W. 519; Devine v. State, 5 Sneed (Tenn.) 623.

[24] State v. Edwards, 4 Humph. (Tenn.) 226; Piercy v. People, 10 Ill. App. 219. Contra, People v. Tubbs, 37 N. Y. 586.

[25] Adler v. State, 35 Ark. 517, 37 Am. Rep. 48. Contra, where, having been declared insane, he is in custody of the officers of the state. Wood v. Com., 33 S. W. 729, 17 Ky. Law Rep. 1076.

[26] Post, p. 115.

[27] 1 Chit. Cr. Law, 104; Harp v. Osgood, 2 Hill (N. Y.) 216; Parker v. Bidwell, 3 Conn. 85; State v. Le Cerf, 1 Bailey (S. C.) 410; State v. Mahon, 3 Har. (Del.) 568; Com. v. Bronson, 14 B. Mon. (Ky.) 361. The court or magistrate cannot compel a continuance of responsibility against the express dissent of the bail. People v. Clary, 17 Wend.

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cused, however, will be allowed to find new sureties. The sureties may depute another to take and surrender the accused,[28] and either they or their agent may seize him at any time, and in any place, even in another state.[29]

SAME—BREACH OF BOND OR RECOGNIZANCE, OR FORFEITURE OF BAIL

43. As soon as the condition of the bond or recognizance is broken, the bail is said to be forfeited, and the sureties become absolutely liable on their obligation for the amount of the penalty.

If, at the time fixed for the appearance of the accused, he is called and fails to appear, unless his appearance is excused under the rules just mentioned, his bail is forfeited, and the sureties are absolutely liable for the amount of the penalty.[30] This liability is not necessarily affected by the

(N. Y.) 374. A bail in arresting his principal occupies substantially the same position as a person making any other authorized arrest. He becomes liable if he uses unnecessary force in the arrest or in the detention. Pease v. Burt, 3 Day (Conn.) 485. He may break open doors, as already explained. Nicolls v. Ingersoll, 7 Johns. (N. Y.) 145; Com. v. Brickett, 8 Pick. (Mass.) 138; Bean v. Parker, 17 Mass. 604; U. S. v. Bishop, 3 Yeates (Pa.) 37; Broome v. Hurst, 4 Yeates (Pa.) 123; Read v. Case, 4 Conn. 166, 10 Am. Dec. 110. The accused, in order that the sureties may be discharged, must be surrendered to the proper magistrate or court, or to some officer who has authority to commit him to jail. State v. Le Cerf, 1 Bailey (S. C.) 410; Com. v. Bronson, 14 B. Mon. (Ky.) 361. Merely to deliver him to the deputy sheriff is not sufficient. State v. Le Cerf, supra; Stegars v. State, 2 Blackf. (Ind.) 104. If the accused is indicted and arrested upon a warrant before default of appearance, this is equivalent to a surrender, and the bail are discharged. People v. Stager, 10 Wend. (N. Y.) 431.

[28] Nicolls v. Ingersoll, 7 Johns. (N. Y.) 145; Harp v. Osgood, 2 Hill (N. Y.) 216.

[29] Nicolls v. Ingersoll, supra; Com. v. Brickett, 8 Pick. (Mass.) 138; Read v. Case, 4 Conn. 166, 10 Am. Dec. 110; Anon, 6 Mod. 231; State v. Beebe, 13 Kan. 589, 19 Am. Rep. 93.

[30] Com. v. Johnson, 3 Cush. (Mass.) 454.

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fact that he is afterwards surrendered or arrested, or voluntarily appears, and is tried.[31] Generally, however, the court has the power to remit the forfeiture, if good excuse is shown;[32] and generally, by constitutional or statutory provisions, the Governor is given power to remit fines and forfeitures, so that he can remit the forfeiture of a bail bond or recognizance, even after the liability has passed into judgment.[33]

In felonies, a personal appearance by the accused is necessary, for he cannot be tried in his absence.[34] Where, however, under indictment for misdemeanor, the accused may, as is generally the case, appear and plead by attorney, and be tried in his absence, the court has no power to declare his bond or recognizance forfeited for failure to appear, if his attorney appears and offers to plead for him.[35] The mere appearance of the accused at the time and place required by the recognizance does not discharge the sureties from their obligation, where the court does not by its officer take him in custody;[36] but where the accused not only so appears, but is taken into custody, the sureties are discharged, and are not liable if he is subsequently released, or if he escapes.[37]

If the obligation merely requires the accused to appear and answer to a certain indictment, or for a particular crime, it would seem that he cannot be required to appear and an-

[31] Com. v. Johnson, supra; Shore v. State, 6 Mo. 640; Lee v. State, 25 Tex. App. 331, 8 S. W. 277.

[32] U. S. v. Feely, 1 Brock. 255, Fed. Cas. No. 15,082; Com. v. Dana, 14 Mass. 65.

[33] Harbin v. State, 78 Iowa, 263, 43 N. W. 210.

[34] State v. Rowe, 8 Rich. (S. C.) 17; post, p. 492.

[35] People v. Ebner, 23 Cal. 158; State v. Conneham, 57 Iowa, 351, 10 N. W. 677; post, p. 496. In an action on a recognizance as forfeited, however, a demurrer will not lie on this ground, unless it appears that the accused did appear by attorney. It is not enough that he could have so appeared. People v. Smith, 18 Cal. 498.

[36] Com. v. Ray, cited in Com. v. Coleman, 2 Metc. (Ky.) 386. And see Starr v. Com., 7 Dana (Ky.) 243.

[37] Com. v. Coleman, 2 Metc. (Ky.) 382. And see Lyons v. State, 1 Blackf. (Ind.) 309; State v. Murphy, 10 Gill & J. (Md.) 365; Smith v. State, 12 Neb. 309, 11 N. W. 317.

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swer for any other crime, or to any other indictment, for the sureties are entitled to stand strictly on the terms of their contract; and it has been so held.[38] But if the condition of the contract is not only that the accused shall appear, but also that he "shall not depart without the leave of the court," or "until discharged by due course of law," etc., then the condition is broken if he does so depart, without regard to whether the crime for which he is indicted is the same as the crime for which he was held.[39] A recognizance to appear in court from day to day to answer to a certain indictment, and not to depart without the leave of the court, is not discharged by the quashing of the indictment, but remains in force until the defendant has leave from the court to depart; and, if a new indictment is found, he and his sureties are bound for his appearance to answer it.[40]

It is essential to the breach of a bail bond or recognizance that the prisoner shall have been formally called before entry of his default, and in an action on the recognizance it must be proved that he was so called and failed to appear.[41]

It has been held that where an indictment is fatally defective there can be no breach of a recognizance to appear and answer.[42] There are many cases, however, to the effect that the sureties on a bail bond cannot question the validity of the indictment,[43] unless it was insufficient to confer jurisdiction, as where it was found by an illegally constituted

[38] Gray v. State, 43 Ala. 41; People v. Hunter, 10 Cal. 502.

[39] U. S. v. White, 5 Cranch, C. C. 368, Fed. Cas. No. 16,678; Pack v. State, 23 Ark. 235; Gentry v. State, 22 Ark. 544; State v. Bryant, 55 Iowa, 451, 8 N. W. 303.

[40] U. S. v. White, supra.

[41] Dillingham v. U. S., 2 Wash. C. C. 422, Fed. Cas. No. 3,913; Mishler v. Com., 62 Pa. 55, 1 Am. Rep. 377; Park v. State, 4 Ga. 329; State v. Grigsby, 3 Yerg. (Tenn.) 280; White v. State, 5 Yerg. (Tenn.) 183; Brown v. People, 24 Ill. App. 72. By statute in some states this is no longer necessary. State v. Murphy, 23 Nev. 390, 48 Pac. 628; State v. Holtdorf, 61 Mo. App. 515. The sureties need not be called. Mishler v. Com., 62 Pa. 55, 1 Am. Rep. 377.

[42] State v. Lockhart, 24 Ga. 420.

[43] Lee v. State, 25 Tex. App. 331, 8 S. W. 277; State v. Loeb, 21 La. Ann. 599.

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grand jury.[44] This question, it would seem, must depend on the terms of the contract as above explained.[45]

The accused cannot be required to appear at any time other than that stipulated in the bond or recognizance, even though the legislature should change the time of holding the court.[46]

As we have already seen, the sureties are not excused from liability for breach of their contract by the fact that the accused has been arrested and imprisoned in another state, or by any other fact rendering it impossible for them to surrender him, other than his death, or action by the state.[47]

Forfeiture of bail cannot affect the right of the state afterwards to capture and punish the accused.[48]

A forfeited bond or recognizance is enforced by entry of the forfeiture, and judgment, and by scire facias thereon, or by an action by the state on the obligation. The practice in this respect is generally regulated by statute.

COMMITMENT

44. If the offense is not bailable, or if bail is refused, or is not given, the accused is committed to jail to await his trial.

If the offense is not bailable, or if the magistrate, in a proper exercise of his discretion, determines not to allow bail, or the accused fails to furnish sufficient bail, and the evidence is sufficient to require him to be held for trial, the magistrate must commit him to jail to await his trial.

To authorize the detention of the accused after he is committed, a mittimus or warrant to the jailer is necessary,

[44] Wells v. State, 21 Tex. App. 594, 2 S. W. 806.
[45] Ante, p. 109.
[46] State v. Stephens, 2 Swan (Tenn.) 308; State v. Melton, 44 N. C. 426.
[47] Ante, p. 115.
[48] State v. Meyers, 61 Mo. 414; State v. Rollins, 52 Ind. 168.

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and, of course, it must be valid.[49] A form is given below.[50] It must be in writing, under the hand, and, by the weight of authority at common law, under the seal,[51] of the magistrate, and it must show the authority of the magistrate,[52] and the time and place of making it.[53] It must run in the name of the state, or that of the magistrate, judge, or court

[49] Sthreshley v. Fisher, Hardin, (Ky.) 249. A magistrate may by parol order a person to be detained a reasonable time, until he can draw up a formal commitment. 1 Chit. Cr. Law, 109; 7 East, 537; 2 Hale, P. C. 122. It has been held that the order or sentence of a court of record, without any mittimus, is sufficient to authorize the detention of the accused (In re Wilson [D. C.] 18 Fed. 37; People v. Nevins, 1 Hill [N. Y.] 154; State v. Heathman, Wright [Ohio] 691); but this cannot apply to justices of the peace, for a justice's court is not a court of record.

[50] State (or Commonwealth) of ———, County of ———, to wit. To the Sheriff or Any Constable of Said County, and the Jailer of Said County:

These are to command you, in the name of the state (or commonwealth) of ———, forthwith to convey and deliver into the custody of the said jailer, together with this warrant, the body of C. D., charged before me, X. Y., a justice of the peace of said county, on the oath of A. B., with a felony (or misdemeanor) by him committed, in this: that he, the said C. D., did, on the ——— day of ———, A. D. ———, in said county (here describe the offense); and you, the said jailer, are hereby required to receive the said C. D. into your jail and custody, that he may be tried for said offense by the ——— court of said county, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal this the ——— day of ——— A. D. ———.

[Seal.] X. Y., J. P.

[51] 1 Chit. Cr. Law, 109; 2 Hawk. P. C. c. 16, § 13; 2 Hale, P. C. 122; 4 Bl. Comm. 300; Somervell v. Hunt, 3 Har. & McH. (Md.) 113; State v. Caswell, T. U. P. Charlt. (Ga.) 280. In some jurisdictions, a seal is not deemed necessary. State v. Vaughn, Harp. (S. C.) 313; Thompson v. Fellows, 21 N. H. 425; Davis v. Clements, 2 N. H. 390. And in many it is rendered unnecessary by statute.

[52] 1 Chit. Cr. Law, 109. It must, for instance, show where the offense was committed, for it may have been committed beyond the magistrate's jurisdiction. It should also show the character of the magistrate. The initials "J. P.," after his signature, are sufficient to show that he is a justice of the peace. State v. Manley, 1 Tenn. (1 Overt.) 428; Rex v. York, 5 Burrows, 2684.

[53] 1 Chit. Cr. Law, 109; 2 Hale, P. C. 122.

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by whom it is issued.[54] It must be directed to the proper jailer, and not be generally to carry the accused to prison.[55] The accused must be described by his name, including his Christian name, if known, and, if not known, the fact should be stated, and he should be described so that he may be identified.[56] It seems to be unnecessary to state that the accused has been charged upon oath,[57] and it is certainly unnecessary to set out any of the evidence adduced before the magistrate;[58] but the mittimus must state the offense with which the party is charged, and must state it with reasonable certainty.[59] It is sufficient to state the nature of the crime. A detailed statement of the circumstances attending its commission is not necessary.[60] It must point out the place of imprisonment, and not merely direct that the accused shall be taken to prison;[61] and it should state the time of imprisonment, namely, "until he shall be discharged by due course of law."[62]

Errors in the commitment do not generally affect the validity of the examination and subsequent proceedings. The fact, for instance, that a magistrate erroneously com-

[54] 1 Chit. Cr. Law, 109.

[55] Rex v. Smith, 2 Strange, 934; Rex v. Fell, 1 Ld. Raym. 424.

[56] 1 Chit. Cr. Law, 110; 1 Hale, P. C. 577.

[57] 1 Chit. Cr. Law, 110; Rex v. Wyndham, 1 Strange, 3, 4; Rex v. Wilkes, 2 Wils. 158; Rex v. Platt, 1 Leach, 167.

[58] Rex v. Wilkes, 2 Wils. 158.

[59] 1 Chit. Cr. Law, 110; 2 Hale, P. C. 122; 4 Bl. Comm. 300; Rex v. Wilkes, 2 Wils. 158; Rex v. Judd, 2 Term R. 255; Rex v. Wyndham, 1 Strange, 2; Rex v. Marks, 3 East, 157; Rex v. Kendal, 1 Ld. Raym. 65; Collins v. Brackett, 34 Minn. 339, 25 N. W. 708; State v. Bandy, Ga. Dec. 40, pt. 2; Day v. Day, 4 Md. 262; Com. v. Ward, 4 Mass. 497; In re Ricker, 32 Me. 37. Thus a commitment containing no description of the crime charged, beyond the statement that the prisoner was accused of violating section 351 of the Penal Code, was held void. People ex rel. Allen v. Hagan, 170 N. Y. 46, 62 N. E. 1086. See, also, State ex rel. Lewis v. Arnauld, 50 La. Ann. 1, 22 South. 886. Where the offense is statutory, the mittimus should so show. Rex v. Remnant, 5 Term R. 169.

[60] People v. Johnson, 110 N. Y. 134, 17 N. E. 684; Collins v. Brackett, supra; In re Kelly (C. C.) 46 Fed. 653.

[61] Rex v. Smith, 2 Strange, 934; Rex v. Fell, 1 Ld. Raym. 424.

[62] 1 Chit. Cr. Law, 111.

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mits the accused to trial, in a county other than that in which the offense was committed, does not invalidate the examination and commitment, if it was otherwise proper, so as to prevent the filing of an information thereon in the proper county.[63]

HABEAS CORPUS

45. When a person who has been committed to jail, as just explained, is advised that his commitment is illegal, or that he is entitled to be discharged or bailed by a superior judge or court, he may obtain relief by writ of habeas corpus.

The right to apply for this writ is not limited to persons illegally committed by an examining magistrate, but extends to every person who is illegally imprisoned. We shall therefore consider the subject in a separate chapter.[64] We shall then see that irregularities in the preliminary examination, wrongful refusal to admit to bail, or irregularity and defects in the commitment, do not necessarily entitle the accused to a discharge.

[63] In re Schurman, 40 Kan. 533, 20 Pac. 277.
[64] Post, p. 651.

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CHAPTER IV

MODE OF ACCUSATION—TIME OF PROSECUTION—NOLLE PROSEQUI OR WITHDRAWAL

46. In General of Mode of Accusation.
47–48. Indictment and Presentment—The Grand Jury.
49. Information.
50. Coroner's Inquisition.
51. Complaint.
52–53. Time of Prosecution.
54. Nolle Prosequi, or Withdrawal of Accusation.

MODES OF ACCUSATION—IN GENERAL

46. The prosecution of a person charged with crime may be either:

(a) Upon an indictment or presentment upon oath by a grand jury.

(b) Upon a coroner's inquisition in cases of homicide.

(c) Upon an information preferred by the proper prosecuting officer without the intervention of a grand jury.

(d) Upon a complaint or information made under oath by a private person.

A formal accusation is essential to every trial for crime. Without it the court acquires no jurisdiction to proceed. Not even the consent of the accused can give it jurisdiction.[1] And, where the law requires a particular form of accusation, that form of accusation is essential. In a New

[1] 1 Bish. Cr. Proc. §§ 79, 95, et seq.; People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386; ante, p. 7. A conviction is bad where the charge does not in terms show a legal offense, though the meaning of the charge was understood by the defendant, and was in a form used time out of mind in the court in which it was made, Ex parte Hopkins, 61 Law J. Q. B. (N. S.) 240, 66 Law T. (N. S.) 53, 17 Cox, Cr. Cas. 444; and though he pleaded guilty, Klawanski v. People, 218 Ill. 481, 75 N. E. 1028.

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York case in which the law required prosecution by indictment, a fatal defect in the indictment was sought to be remedied by stipulation of counsel that the case should be tried as if the omitted allegation had been inserted. This the court held was not sufficient to give jurisdiction. "The charge as made, being a felony, the Constitution of this state requires the presentment or indictment of a grand jury as a prerequisite to trial; and, if the pleading they file with the court could be remodeled by stipulations between the counsel, the defendant would not be tried upon the presentment of the grand jury, but rather upon the consent of counsel. This court cannot acquire jurisdiction to try an offense by consent, nor can its jurisdiction over an offense be changed by consent, so as to embrace any other than that presented by the grand jury, where the action of that body is requisite." [2]

INDICTMENT AND PRESENTMENT—GRAND JURY

47. An indictment is a written accusation of a crime, presented on oath by a grand jury.

48. A presentment is the notice taken by a grand jury of an offense from their own knowledge or information, or of their own motion from information derived from others, on which an indictment is afterwards framed.

A distinction has been made between an indictment and a presentment. By presentment is meant the notice taken by a grand jury of an offense from their own knowledge or observation, or of their own motion on information from others, without any bill of indictment having been laid before them. Upon such a presentment the proper officer of the court afterwards frames an indictment or formal accu-

[2] People v. Campbell, supra. And see Com. v. Adams, 92 Ky. 134, 17 S. W. 276; Com. v. Mahar, 16 Pick. (Mass.) 120.

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sation.[3] By indictment is meant a written accusation of crime, drawn up, with us by the prosecuting attorney, and submitted to the grand jury, and by them found and presented as true.[4] When submitted to the grand jury, it is only a "bill" of indictment, and becomes an indictment when found and presented by them. This distinction, it has been said, though still recognized, is of no practical importance, for every indictment is in fact a finding and presentment; the grand jury find and "present" that the accused has committed a certain crime.[5] This observation, however, does not apply in all states, and the distinction must be borne in mind.

When Indictment Lies

An indictment lies for all treasons, felonies, or misdemeanors at common law. It has been from very early times

[3] 4 Bl. Comm. 301; State v. Cox, 8 Ark. 442; Id., 28 N. C. 444; Lewis v. Board of Com'rs of Wake County, 74 N. C. 197; State v. Morris, 104 N. C. 837, 10 S. E. 454; McKinney v. U. S., 199 Fed. 25, 117 C. C. A. 403. "A presentment made in the ordinary way by a grand jury is regarded, in the practice at common law, as nothing more than instructions given by the grand jury to the proper officer of the court for framing an indictment for an offense which they find to have been committed. When the indictment has been prepared by him, it is submitted to them; and, upon their finding it a true bill, the prosecution commences upon that indictment. The presentment merged in the indictment ceases and becomes extinct. If, however, the officer of the court, who is the representative of the crown, and whose concurrence and co-operation in the prosecution are always required, declines framing an indictment upon these instructions, the presentment ceases to exist for any purpose." Com. v. Christian, 7 Grat. (Va.) 631. It has been, and may still be, the practice in some states to allow the presentment an efficacy not known at common law. It has been allowed for some purposes to stand as an indictment, or to stand as the foundation for further proceedings, as by information, against the party presented. Com. v. Christian, supra.

[4] 4 Bl. Comm. 302; Ganaway v. State, 22 Ala. 777; Mose v. State, 35 Ala. 425; Goddard v. State, 12 Conn. 452; Lougee v. State, 11 Ohio, 71; Wolf v. State, 19 Ohio St. 255; State v. Cox, 8 Ark. 442; Board of Com'rs of Arapahoe County v. Graham, 4 Colo. 202; Vanderkarr v. State, 51 Ind. 93; State v. Tomlinson, 25 N. C. 33; State v. Walker, 32 N. C. 236; State v. Collins, 1 McCord (S. C.) 357; State v. Morris, 104 N. C. 837, 10 S. E. 454.

[5] Com. v. Keefe, 9 Gray (Mass.) 290.

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the usual mode of prosecution.[6] It lies for statutory as well as for common-law crimes. If a statute prohibits a matter of public grievance, or commands a matter of public convenience, such as the repairing of highways, all acts or omissions contrary to the command or prohibition of the statute, being misdemeanors at common law, are punishable by indictment if the statute specifies no other mode of proceeding.[7] If the statute specifies a mode of proceeding different from that by indictment, then, if the matter was already an indictable offense at common law, and the statute introduces merely a different mode of prosecution and punishment, and does not expressly or by necessary implication do away with indictment, the remedy is cumulative, and the prosecution may be either by indictment at common law, or by the mode pointed out by the statute.[8]

When Indictment is Necessary

At common law all offenses above the grade of misdemeanor must be prosecuted by indictment, for it is the policy of the common law that no man shall be put upon his trial for felony until the necessity therefor has been determined by a grand jury on oath.[9] The Constitution of the United States declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."[10] This provision does not apply to prosecutions by the states;[11] but in many of the state Constitutions there is a similar provision. In some states, instead of requiring an indictment in prosecutions "for a capital or otherwise infamous crime," it is required in all cases where the punishment is death or

[6] 2 Hawk. P. C. c. 25, § 4.

[7] Harris, Cr. Law, 349; Reg. v. Hall, L. R. 1 Q. B. 632.

[8] Harris, Cr. Law, 349; Rex v. Robinson, 2 Burrows, 799.

[9] 1 Chit. Cr. Law, 844; 2 Hale, P. C. 151; 4 Bl. Comm. 310; 2 Hawk. P. C. c. 26, § 3; Com. v. Barrett, 9 Leigh (Va.) 665.

[10] Const. U. S. Amend. art. 5. "Cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger," are excepted.

[11] Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; Turner v. People, 33 Mich. 363; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; Jones v. Robbins, 8 Gray (Mass.) 345; Parris v. People, 76 Ill. 274.

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confinement at hard labor. In others, an indictment is necessary in every case where an indictment will lie. In others, it is required only where the punishment is death or imprisonment for life.

There has been some conflict of opinion as to what constitutes an "infamous" crime, within the meaning of the Constitution. By the weight of opinion the question is determined by the punishment with which the offense may be visited, rather than by the nature of the act itself, and all crimes are held to be infamous that may be punished by death or by imprisonment in the penitentiary.[12] If they may be so punished, the fact that they may receive a less punishment is immaterial, for it is the possible punishment that makes the crime infamous.[13] The term "infamous crime" is not synonymous with "felony," except in those states where every offense that may be punished by death or imprisonment in the penitentiary is declared or held to be a felony.[14]

Where an indictment or presentment is required by the Constitution, such an accusation is essential to the court's jurisdiction to try the offender.[15] The defendant cannot even waive the benefit of the provision by consenting to be tried in another mode, for, as we have seen, jurisdiction cannot be conferred upon the court by consent.[16] Where the Constitution does not require an indictment, there is nothing to prevent the Legislature from providing for the prosecution of all offenses, even capital, by information, and in some states such statutes have been enacted.

[12] Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; Jones v. Robbins, 8 Gray (Mass.) 347; U. S. v. Wong Dep Ken (D. C.) 57 Fed. 206. And see Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751, 4 Ann. Cas. 501. Other offenses may be prosecuted by information. State v. Ebert, 40 Mo. 186; King v. State, 17 Fla. 183.

[13] See Clark, Cr. Law, (3 Ed.) 43.

[14] See Jones v. Robbins, supra.

[15] Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; Hewitt v. State, 25 Tex. 722; People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386.

[16] People v. Campbell, supra; ante, p. 7.

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There is another constitutional provision which has been claimed to render prosecutions for felony otherwise than by indictment illegal, because the common law required an indictment in such cases. This provision is that no person shall be deprived of life, liberty, or property without due process of law. It has been held, however, that this constitutional provision is not violated by an abolition of the grand jury system and indictments, provided some other formal and sufficient mode of accusation, as by information, is substituted.[17]

Powers of Grand Jury

The authorities are not agreed as to the powers and functions of the grand jury. Dr. Wharton[18] points out three different views that have been advanced on the subject.

The view taken by the English judges, and in which they are followed by some of the judges in this country, is that the grand jury has the power, on its own motion, to institute any prosecution it may see fit, and for this purpose to summon witnesses to appear before them; and that they cannot be controlled in their action by the court or the prosecuting officer.[19]

Another view in this country is that they can inquire into and present all offenses which are of public notoriety and within their knowledge, and such offenses as are given them in charge by the court or the prosecuting officer, but that they cannot summon witnesses, and inquire into and present other offenses, unless the accused has been examined before a magistrate.[20]

[17] Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; Rowan v. State, 30 Wis. 145, 11 Am. Rep. 559; State v. Boswell, 104 Ind. 541, 4 N. E. 675; State v. Ledford, 3 Mo. 102; Com. v. Francies, 250 Pa. 496, 95 Atl. 527; In re McKee, 19 Utah, 231, 57 Pac. 23.

[18] Whart. Cr. Pl. & Prac. §§ 332–340.

[19] Whart. Cr. Pl. & Prac. § 334; Ward v. State, 2 Mo. 120, 22 Am. Dec. 449; U. S. v. Thompkins, 2 Cranch, C. C. 46, Fed. Cas. No. 16,483; Blaney v. State, 74 Md. 153, 21 Atl. 547; State v. Wilcox, 104 N. C. 847, 10 S. E. 453; U. S. v. Kimball (C. C.) 117 Fed. 156; Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

[20] Whart. Cr. Pl. & Prac. § 338; McCullough v. Com., 67 Pa. 33;

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A third view is that they cannot inquire into and present certain offenses unless there has been a preliminary examination of the accused before a magistrate.[21]

A grand jury cannot indict or present for an offense that is not within the jurisdiction of the court in which they are acting.[22] It cannot present for offenses committed in another county.[23]

Selecting and Summoning the Grand Jury

The sheriff of every county was required by the common law to return to every term of the court having jurisdiction of offenses 24 men having the requisite qualifications; and from these men a grand jury were selected. The mode of selecting and summoning grand jurors is now generally regulated by statutes, and it is unnecessary to do more than refer to that fact, and leave the student to consult the statutes of his state.

Same—Qualification of Jurors

The common law requires grand jurors to be probi et legales homini (true and lawful men) and inhabitants of the county in which the crimes they are to inquire into were committed. Blackstone says they should also be freeholders.[24] They should be able to understand the language in

Brown v. Com., 76 Pa. 319; Com. v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; People v. Horton, 4 Parker, Cr. R. (N. Y.) 222; State v. Love, 4 Humph. (Tenn.) 255; State v. Lewis, 87 Tenn. 119, 9 S. W. 427; Lewis v. Board of Com'rs of Wake County, 74 N. C. 194. In Com. v. Green, supra, it was held that the grand jury could not make a presentment of a crime on the testimony of a witness given before them in the investigation of another matter.

[21] Whart. Cr. Pl. & Prac. § 339; Butler v. Com., 81 Va. 159.

[22] U. S. v. Hill, 1 Brock. 156, Fed. Cas. No. 15,364; Shepherd v. State, 64 Ind. 43; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134.

[23] Ante, p. 10; post, pp. 167, 449. Contra, by statute, State v. Lewis, 140 N. C. 626, 55 S. E. 600, 7 L. R. A. (N. S.) 669, 9 Ann. Cas. 604.

[24] 4 Bl. Comm. 302. Women, in the absence of a statute to the contrary, are not qualified to act as grand jurors. Rumsey v. Washington Terr., 3 Wash. T. 332, 21 Pac. 152. By "true and lawful men" is intended "that they must be liege subjects of the king, and neither aliens, nor persons outlawed even in a civil action, attainted of any treason, or convicted of any species of crimen falsi, as conspiracy or perjury which may render them infamous." 1 Chitty, Cr. Law, 307.

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which the proceedings are conducted;[25] they must be compos mentis.[26] Their qualifications are now generally prescribed by statute. Some statutes still require that they shall be freeholders.[27] Some require the qualification of an elector.[28]

At common law it was not a disqualification that a person was interested, other than in a direct pecuniary way, in the prosecution,[29] or that he was related to the accused, the prosecutor, or the victim of the crime;[30] or that he had formed or expressed an opinion of the guilt of the accused before the finding of the indictment.[31] In many states nothing but what is specified in the statute will disqualify a grand juror.[32]

The statutes generally exempt from jury duty persons who are over a certain age, or who occupy certain positions. This, however, is merely an exemption, which they may claim or not as they choose. It does not disqualify them.[33]

[25] U. S. v. Benson (C. C.) 31 Fed. 896.

[26] U. S. v. Benson, supra.

[27] See authorities collected in 20 Cyc. 1298.

[28] State v. Harris, 122 Iowa, 78, 97 N. W. 1093.

[29] In re Tucker, 8 Mass. 286; Com. v. Brown, 147 Mass. 585, 18 N. E. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736.

[30] State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818; State v. Russell, 90 Iowa, 569, 58 N. W. 915, 28 L. R. A. 195.

[31] Tucker's Case, 8 Mass. 286; State v. Chairs, 9 Baxt. (Tenn.) 196; State v. Hughes, 1 Ala. 655; Musick v. People, 40 Ill. 268. Contra, Com. v. Clark, 2 Browne (Pa.) 323; People v. Jewett, 3 Wend. (N. Y.) 314. Other grounds which, while not absolutely disqualifying a grand juror, so as to vitiate an indictment, have been said to be sufficient to sustain a challenge, are that the juror is related to the prosecutor, or person killed in cases of homicide, or otherwise has a personal interest in the prosecution. See Whart. Cr. Pl. & Prac. § 348; U. S. v. Williams, 1 Dill. 485, Fed. Cas. No. 16,716. But the fact that he is a member of an association for the detection of crime is no ground for challenge. Musick v. People, 40 Ill. 268. A grand juror may be challenged if he has conscientious scruples which will prevent his finding an indictment for a capital offense, if such an offense is to be inquired into. State v. Rockafellow, 6 N. J. Law, 332; State v. Duncan, 7 Yerg. (Tenn.) 271; Gross v. State, 2 Cart. (2 Ind.) 329.

[32] See Territory v. Hart, 7 Mont. 42, 14 Pac. 768.

[33] State v. Wright, 53 Me. 328; State v. Quimby, 51 Me. 395; Green v. State, 59 Md. 123, 43 Am. Rep. 542; State v. Forshner, 43 N. H. 89,

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Same—Constitution of Grand Jury—Impaneling

After the court has been opened in the usual way, the names of those summoned on the grand jury are called, and they are sworn. They must, at common law, number 12 at least, and not more than 23, so that 12 may be a majority, the concurrence of a majority and of that number being required to find an indictment. At common law a finding by less than 12 or by more than 23 is void.[84]

The oath administered to the jury is substantially the

80 Am. Dec. 132; Owens v. State, 25 Tex. App. 552, 8 S. W. 658; State v. Adams, 20 Iowa, 486; State v. Stunkle, 41 Kan. 456, 21 Pac. 675; Jackson v. State, 76 Ga. 551; post, p. 524. The court has power to excuse an individual grand juror on its own motion for sufficient cause, and may refuse to state the reason for excusing him. State v. Codington, 80 N. J. Law, 496, 78 Atl. 743.

[84] 2 Hale, P. C. 121; 2 Hawk. P. C. c. 25, § 16; King v. Marsh, 6 Adol. & El. 236; Clyncard's Case, Cro. Eliz. 654; State v. Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; People v. King, 2 Caines (N. Y.) 98; Pybos v. State, 3 Humph. (Tenn.) 49; State v. Symonds, 36 Me. 128; People v. Thurston, 5 Cal. 69; Hudson v. State, 1 Blackf. (Ind.) 317; Leathers v. State, 26 Miss. 73; English v. State, 31 Fla. 356, 12 South. 689; Com. v. Wood, 2 Cush. (Mass.) 149. In many of the states the maximum number that shall be necessary is prescribed by statute, and in some states more than 12 are required; but in very few states does the statute change the common-law requirement that there shall not be less than 12 nor more than 23, and that 12 must concur. Statutory provisions that there shall be a certain number (the maximum) have been held merely directory, and not a change of the common law, so as to prevent a finding by a jury less than that number, but of at least 12. Com. v. Wood, 2 Cush. (Mass.) 149; Com. v. Sayers, 8 Leigh (Va.) 722; State v. Miller, 3 Ala. 343; State v. Clayton, 11 Rich. (S. C.) 581; Hudson v. State, 1 Blackf. (Ind.) 317; State v. Davis, 24 N. C. 153; Pybos v. State, 3 Humph. (Tenn.) 49; People v. Butler, 8 Cal. 435. Contra, Doyle v. State, 17 Ohio, 222. Where the Constitution requires an indictment, it would seem that it requires such an indictment as was necessary at common law, and therefore an indictment found by the concurrence of at least 12 grand jurors; so that a statute allowing an indictment to be found on the concurrence of a less number than 12 would be unconstitutional; and so it has been held. State v. Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; English v. State, 31 Fla. 356, 12 South. 689. In some states the common-law requirement is not guaranteed by the Constitution, or is expressly changed, and there are statutes allowing a grand jury to consist of less than 12. See State v. Belvel, 89 Iowa, 405, 56 N. W. 545, 27 L. R. A. 846.

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same in most of the states, and substantially the same as that administered at common law. It is generally that they will diligently inquire and true presentment make of such articles, matters, and things as shall be given them in charge, or otherwise come to their knowledge, touching the present service; the commonwealth's or state's counsel, their fellows' and their own, they shall keep secret; that they shall present no one from envy, hatred, or malice, nor leave any one unpresented from fear, favor, affection, hope of reward, or gain, but shall present all things truly, as they come to their knowledge, according to the best of their understanding. The oaths administered in the different states vary somewhat, so that the statutes must be consulted. The foreman, when appointed by the court, is first sworn, and the rest of the jurors, several at a time, after him. They merely take the same oath without its being repeated to them.[35]

A foreman is appointed by the court before the jury is sworn, or else he is selected by the jurors after they retire, according to the practice in the particular jurisdiction.[36]

Same—Charge of the Court

After the grand jury has been sworn, the judge charges or instructs them; the object of the charge being to show them their duties, and to assist them by stating the law applicable to the various cases that may come before them, and by pointing out matters which require special attention. The judge should not express an opinion that a particular act to which he has directed their attention is in fact a crime[37] or that a particular person is guilty of a crime,[38] for these are the things the jury is to determine. The charge should not be inflammatory. It will not be a contempt of court to object to a charge on that ground, and, if the objection is properly taken, it may be ground for setting the indictment aside. It should be taken by plea.[39]

[35] The record must show that all the jurors were sworn. Roe v. State (Ala.) 2 South. 459; post, p. 169.
[36] See Blackmore v. State (Ark.) 8 S. W. 940.
[37] Clair v. State, 40 Neb. 534, 59 N. W. 118, 28 L. R. A. 367.
[38] State v. Turlington, 102 Mo. 642, 15 S. W. 141.
[39] Clair v. State, 40 Neb. 534, 59 N. W. 118, 28 L. R. A. 367.

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Same—Findings of Indictments

After they have heard the charge, the grand jury withdraw from the court to their own room, where they are to conduct their examinations, and hold their deliberations. Bills of indictment, which, as we have seen, are formal written accusations prepared in advance by the prosecuting officer of the county, and which do not become indictments until they are found true by the grand jury, are taken with them by the jury when they withdraw, or are sent or taken to them there by the prosecuting officer. The names of witnesses to be examined are sometimes indorsed on the bills by the prosecuting officer, but the latter, unless required by statute, need not so indorse them. He may summon and call or send such witnesses as he sees fit into the jury room, and in some states the jury may summon witnesses themselves.[40] The witnesses whose names are indorsed on the bill, or who are called or sent in, are sworn in open court before going into the jury room,[41] and are examined by the grand jurors. Only the witnesses for the prosecution need be examined, since the function of the grand jury is merely to inquire whether there is sufficient ground to put the accused upon his trial; but, as we have said, the jury may in some states call others, and they should do so if such witnesses may show that there is no ground for indictment. A person against whom a charge is pending has no right to be present himself nor by counsel, nor has he the right to send witnesses to be examined in his behalf.[42]

The grand jury should not hear any but legal evidence. If it is shown that an indictment was found entirely upon incompetent evidence, it will be quashed on plea in abatement.[43] But, by the better opinion, where there was the

[40] Ward v. State, 2 Mo. 120, 22 Am. Dec. 449; ante, p. 127.

[41] The general practice has been to swear the witnesses in court before they go into the grand jury room (State v. Kilcrease, 6 S. C. 444); but in some states they may be sworn in the grand jury room by the foreman (Bird v. State, 50 Ga. 585; Allen v. State, 77 Ill. 484); or, in Connecticut, by a magistrate (State v. Fasset, 16 Conn. 457).

[42] State v. Wolcott, 21 Conn. 272; People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[43] State v. Logan, 1 Nev. 509; People v. Lauder, 82 Mich. 109, 46 N. W. 956; Sparrenberger v. State, 53 Ala. 486, 25 Am. Rep. 643; Com. v.

slightest legal evidence, the court cannot inquire into its sufficiency, or set the indictment aside because some illegal evidence was received with it.[44]

A person who is accused of crime cannot be compelled to testify against himself, and the grand jury have no power to require him to testify. If they do so against his will, it is held by some courts that the indictment will be quashed.[45]

Knapp, 9 Pick. (Mass.) 498, 20 Am. Dec. 491; Com. v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; Com. v. McComb, 157 Pa. 611, 27 Atl. 794; Boone v. People, 148 Ill. 440, 36 N. E. 99. Contra, State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; Royce v. Terr., 5 Okl. 61, 47 Pac. 1083.

[44] People v. Lauder, 82 Mich. 109, 46 N. W. 956; People v. Hulbut, 4 Denio (N. Y.) 136, 47 Am. Dec. 244; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460; State v. Logan, 1 Nev. 509; Washington v. State, 63 Ala. 189; Bloomer v. State, 3 Sneed (Tenn.) 69; State v. Fasset, 16 Conn. 472; State v. Wolcott, 21 Conn. 272; Stewart v. State, 24 Ind. 142; Creek v. State, 24 Ind. 151; State v. Tucker, 20 Iowa, 508; State v. Fowler, 52 Iowa, 103, 2 N. W. 983; M'Kinney v. U. S., 199 Fed. 25, 117 C. C. A. 403; Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138; State v. Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376. It has been held in New Jersey that the indictment will not be set aside, even though there was no legal evidence before the grand jury. State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270.

[45] People v. Haines (Gen. Sess.) 1 N. Y. Supp. 55; State v. Froiseth, 16 Minn. 297 (Gil. 260); dissenting opinion in People v. Lauder, infra. And see People v. Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; Boone v. People, 148 Ill. 440, 36 N. E. 99; State v. Hawks, 56 Minn. 129, 57 N. W. 455. Merely being subpœnaed and compelled to take the usual oath administered to a witness is not an infringement of the right. U. S. v. Collins (D. C.) 145 Fed. 709. If the defendant voluntarily testifies, he cannot object. People v. Lauder, 82 Mich. 109, 46 N. W. 956; People v. King, 28 Cal. 265; U. S. v. Kimball (C. C.) 117 Fed. 156. A corporation cannot resist, on the ground of self-incrimination, the compulsory production of its books and papers before the grand jury. Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; State ex inf., Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902. Neither can an officer of a corporation refuse to produce the corporation's books on the ground that the contents thereof may tend to incriminate him. Wilson v. U. S., supra. Nor can one refuse to produce public records on the same ground. State ex rel. McClary v. Donovan, 10 N. D. 203, 86 N. W. 709. The same rule has been applied to quasi public records, such as written prescriptions of a druggist, which he is by law required to keep. State v. Davis, 68 W. Va. 142, 69 S. E. 639, 32 L. R. A. (N. S.) 501, Ann. Cas. 1912A, 996. The rule against incrimination does not apply

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Other courts hold that, though this is a violation of the defendant's constitutional rights, still it is no ground for setting aside the indictment, if there was other, and legal, evidence before the grand jury.[46]

By the weight of authority, the prosecuting attorney may and should attend before the grand jury while they are receiving evidence, and may assist in the examination of witnesses;[47] and he may be accompanied by his assistants, including his stenographer.[48] No one else can be present during the examination of witnesses, and no one, not even the prosecuting attorney, can be present during the deliberations of the jury.[49]

where there is a statute granting immunity from prosecution as to matters testified to. Hale v. Henkel, 210 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. As to effect of offer of a pardon, see Burdick v. U. S., 236 U. S. 79, 35 Sup. Ct. 267, 59 L. Ed. 476. The same rules as to immunity from testifying apply, whether the testimony is oral or consists of books and papers. Hale v. Henkel, supra.

[46] People v. Lauder, 82 Mich. 109, 46 N. W. 956; U. S. v. Brown, 1 Sawy. 531, Fed. Cas. No. 14,671. But see the dissenting opinion in People v. Lauder, supra.

[47] McCullough v. Com., 67 Pa. 30; State v. Adam, 40 La. Ann. 745, 5 South. 30; Shoop v. People, 45 Ill. App. 110. In Lewis v. Board of Com'rs of Wake County, 74 N. C. 194, it is held that the prosecuting attorney should not be present in the grand jury room.

[48] U. S. v. Simmons (C. C.) 46 Fed. 65. And see Courtney v. State, 5 Ind. App. 356, 32 N. E. 335. At least the presence of such stenographer is not ground for quashing the indictment, in the absence of evidence that the accused was prejudiced thereby. State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105; State v. Bates, 148 Ind. 610, 48 N. E. 2. Contra, State v. Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266. In some states the prosecuting attorney is expressly allowed by statute to take his stenographer into the grand jury room. Thayer v. State, 138 Ala. 39, 35 South. 406. In others he is forbidden to do so. Com. v. Berry (Ky.) 92 S. W. 936. A special assistant to the Attorney General is not within the rule allowing district attorneys to take a stenographer into the jury room. U. S. v. Rosenthal (C. C.) 121 Fed. 862; U. S. v. Va.-Car. Chemical Co. (C. C.) 163 Fed. 66. Contra, U. S. v. Cobban (C. C.) 127 Fed. 713.

[49] Wilson v. State, 70 Miss. 595, 13 South. 225, 35 Am. St. Rep. 664. In this case a conviction on indictment for forgery was reversed because it appeared that the attorney for the person defrauded by the forgery had been before the grand jury urging the bringing of the indictment. In U. S. v. Edgerton (D. C.) 80 Fed. 374, the indictment was quashed because an expert witness remained in the jury room

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If a majority of the jurors (which must, as we have seen, be at least 12 of them)[50] think that the evidence adduced makes out a sufficient case, the words "A true bill" are indorsed on the back of the bill, and signed by the foreman. In some states omission of this indorsement is fatal to the indictment.[51] If they are of the opposite opinion, the words "Not a true bill" are so indorsed. In the former case, the bill is said to be found; in the latter, it is said to be ignored or thrown out. The jury may find a true bill as to one count or charge in a bill, and ignore that in another; or as to one defendant, and not as to another; but they cannot return a special or conditional finding, or select part of a count as true and reject the other part.

There must be sufficient evidence before the grand jury to show, prima facie, that the accused is guilty, in order to warrant them in finding an indictment.[52] The evidence need not show guilt beyond a reasonable doubt.[53] As a general rule, however, the question of sufficiency of the evidence is

while another witness was being examined, and put questions to him. A statute prohibiting the presence of any person except the district attorney and a witness under examination does not prohibit the presence of an interpreter necessary to make intelligible to the jury the evidence of a witness. Lyon v. Com. (Ky.) 96 S. W. 857. In State v. Bacon, 77 Miss. 366, 27 South. 563, it was held that the presence of an interloper and statements there made by him urging the indictment of a person is not ground for quashing the indictment, in the absence of a showing that such acts influenced the presentment. See, also, Bennett v. State, 62 Ark. 516, 36 S. W. 947.

[50] Clyncard's Case, Cro. Eliz. 654; ante, p. 130.

[51] Low's Case, 4 Greenl. (Me.) 453, 16 Am. Dec. 271; Webster's Case, 5 Greenl. (Me.) 432; Gardner v. People, 3 Scam. (Ill.) 83; Nomaque v. People, Breese (Ill.) 145, 12 Am. Dec. 157; Dutell v. State, 4 G. Greene (Iowa) 125; State v. Elkins, Meigs (Tenn.) 109; Com. v. Walters, 6 Dana (Ky.) 290; Strange v. State, 110 Ind. 354, 11 N. E. 357. In other states the contrary is held. Com. v. Smyth, 11 Cush. (Mass.) 473; State v. Freeman, 13 N. H. 488; State v. Davidson, 12 Vt. 300; Sparks v. Com., 9 Pa. 354; State v. Cox, 28 N. C. 440. In some states this matter is regulated by statute. See Strange v. State, 110 Ind. 354, 11 N. E. 357; McKee v. State, 82 Ala. 32, 2 South. 451; Patterson v. Com., 86 Ky. 313, 5 S. W. 387.

[52] People v. Hyler, 2 Parker, Cr. R. (N. Y.) 570; 1 Bish. Cr. Proc. §§ 866, 867; State v. Cowan, 1 Head (Tenn.) 280.

[53] In re Commissioners of Franklin County, 5 Ohio Dec. 691.

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for the grand jury, and an indictment will not be set aside on the ground of the insufficiency of the evidence;[54] at least unless it appear that there was no legally competent evidence before them.[55] Many courts hold that the court cannot look into the evidence before the grand jury to determine its sufficiency. If the grand jury find a true bill on insufficient evidence, they simply violate their oath. According to these decisions, the indictment cannot be set aside.[56]

Any number of indictments may be preferred against the same person at the same time for distinct offenses; and even the fact that an indictment is pending for the same offense does not render a second indictment invalid.[57] It has been held that where an indictment is quashed for informality, and the case is resubmitted to the same grand jury, they may find and present a second indictment without reexamining the witnesses,[58] and there seems no good reason against this rule; but the contrary has been held.[59] The fact that one grand jury has ignored a bill is no reason why a fresh bill may not be submitted to, and found by, a subsequent grand jury.[60]

The power to find an indictment in a case under consideration does not cease until the jury have made their report, even if it ceases then. The fact, therefore, that the jury have voted not to find an indictment, will not prevent them from reconsidering the matter, and voting to find one, and they may do so without hearing any new evidence.[61]

At common law it is not necessary for the prosecuting offi-

[54] Stewart v. State, 24 Ind. 142; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134.

[55] Washington v. State, 63 Ala. 189; State v. Logan, 1 Nev. 509.

[56] Spratt v. State, 8 Mo. 247; Stewart v. State, supra; U. S. v. Reed, supra.

[57] Rosenberger v. Com., 118 Pa. 77, 11 Atl. 782; State v. Keena, 64 Conn. 212, 29 Atl. 470.

[58] McIntire v. Com. (Ky.) 4 S. W. 1.

[59] State v. Ivey, 100 N. C. 539, 5 S. E. 407.

[60] 4 Bl. Comm. 305; Potter v. Casterline, 41 N. J. Law, 27; State v. Cox, 28 N. C. 444; State v. Brown, 81 N. C. 570; State v. Harris, 91 N. C. 658; State v. Collis, 73 Iowa, 542, 35 N. W. 625.

[61] U. S. v. Simmons (C. C.) 46 Fed. 65.

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cer to countersign an indictment, but it is made so by statute in some states.[62]

When bills have been found, the grand jurors come into court, and hand the bills to the clerk, who states to the court the name of the accused, the charge, and the indorsement of the grand jury. The bills do not become valid indictments until they are thus presented to the court.[63]

The grand jury, as already intimated, are not restricted to the consideration of bills which have been prepared and submitted to them by the prosecuting attorney, but may inquire into such matters as are called to their attention by the court; and, as we have seen, they may in some states even inquire into matters of which they may learn through their investigations, or which may have otherwise come to their knowledge or the knowledge of individual jurors.[64] If they think any matter so coming under their investigation should be prosecuted, they so state, and the prosecuting attorney draws an indictment. This statement by the grand jury is what we have already described as a presentment.

Same—Indorsing Names of Witnesses and of Prosecutor

In order to give the accused some knowledge of the evidence which he may have to meet at the trial, and for other purposes, it is provided in many states that the names of the witnesses examined by the grand jury shall be indorsed on the indictment, or returned with it into court; but this

[62] Vanderkarr v. State, 51 Ind. 93; Com. v. Beaman, 8 Gray (Mass.) 499; Harrall v. State, 26 Ala. 53; Territory v. Harding, 6 Mont. 323, 12 Pac. 750; State v. Myers, 85 Tenn. 203, 5 S. W. 377; State v. Coleman, 8 S. C. 237; Taylor v. State, 113 Ind. 471, 16 N. E. 183; State v. Reed, 67 Me. 127. But see Teas v. State, 7 Humph. (Tenn.) 174.

[63] And it is essential that the record shall show such presentation in open court. Mose v. State, 35 Ala. 425; Thornell v. People, 11 Colo. 305, 17 Pac. 904; State v. Pitts, 39 La. Ann. 914, 3 South. 118; State v. Squire, 10 N. H. 559; Waterman v. State, 116 Ind. 51, 18 N. E. 63; Collins v. State, 18 Fla. 658; Johnson v. State, 24 Fla. 162, 4 South. 535; Brown v. State, 5 Yerg. (Tenn.) 367; State v. Cox, 28 N. C. 440; Nomaque v. People, Breese (Ill.) 146, 12 Am. Dec. 157; State v. Vincent, 91 Mo. 662, 4 S. W. 430; Gardner v. People, 20 Ill. 430. As to entry of the fact on the record nunc pro tunc, see Waterman v. State, supra; Johnson v. State, supra.

[64] McCullough v. Com., 67 Pa. 30.

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provision is generally regarded as being directory, and not mandatory, so that an omission to comply with it does not vitiate the indictment.[65] In a few states, minutes of the testimony are required to be taken, and returned into court. None of these provisions, unless they expressly show that such was the intention of the legislature, prevent the prosecuting attorney from calling and examining other witnesses at the trial than those who were examined before the grand jury, and whose names are so indorsed on the indictment.

It is also provided by statute in some states that the name of a private prosecutor shall be indorsed on the indictment, so that, if the prosecution is without cause, he may be taxed with the costs.

Same—Dissolution of Grand Jury

The grand jury is dissolved either by being discharged by the court, or by final adjournment of the court, and expiration of the term of its service. It cannot dissolve itself.[66]

Objections to Organization, Constitution, and Qualifications of Grand Jury or Jurors

Objections to the manner in which the grand jury were selected, summoned, or impaneled—as, for instance, because the venire to summon them was not sealed as required by law, or because they were not drawn as required by law, etc.—may be taken by challenge to the array, before indictment, by any person whose case is to come before them.[67]

[65] State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; State v. Hollingsworth, 100 N. C. 535, 6 S. E. 417; Hathaway v. State, 32 Fla. 56, 13 South. 592; Shelton v. Com., 89 Va. 450, 16 S. E. 355.

[66] Clem v. State, 33 Ind. 418; In re Gannon, 69 Cal. 541, 11 Pac. 240. In some states it is provided by statute that a grand jury, after being dismissed, may be summoned again. People v. McCauley, 256 Ill. 504, 100 N. E. 182.

[67] People v. Jewett, 3 Wend. (N. Y.) 314; State v. Duncan, 7 Yerg. (Tenn.) 271; Logan v. State, 50 Miss. 269. The practice of challenging the array has not prevailed in some states. State v. Griffice, 74 N. C. 316. In State v. Toth, 86 N. J. Law, 247, 90 Atl. 1125, it was held that the legality of the grand jury does not depend upon the validity or invalidity of the title of the officer by whom such body is selected or drawn; if the title of such officer is colorable, indictments found by a jury drawn by him are valid.

If the objection is not discovered before indictment, or if there is no opportunity to challenge, and in some states, even where there is such opportunity, the objection may be raised against the indictment, by plea in abatement, or, where the defect appears on the face of the record, by motion to quash.[68] It must be raised in one or the other of these ways, or it will be waived. It cannot be raised after pleading to the indictment on the merits.[69] In some jurisdictions it is held that objections to the manner of selecting and summoning the grand jury cannot be raised against an indictment by plea in abatement or otherwise, where the jurors were qualified and competent.[70] In some states the grounds for a challenge to the array have been restricted by statute.[71]

Objections to individual jurors on the ground that they are not qualified may be taken by challenge to the polls, before the jury is sworn, by any one against whom a charge of crime is pending or may be made, or by some person as amicus curiæ.[72] In most jurisdictions, as we shall see, the

[68] State v. Ward, 60 Vt. 142, 14 Atl. 187; Reich v. State, 53 Ga. 73, 21 Am. Rep. 265; State v. Flemming, 66 Me. 142, 22 Am. Rep. 552; Avirett v. State, 76 Md. 510, 25 Atl. 676, 987; Peters v. State, 98 Ala. 38, 13 South. 334.

[69] Wallace v. State, 2 Lea (Tenn.) 29; Ellis v. State, 92 Tenn. 85, 20 S. W. 500; State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758; Taylor v. Com., 90 Va. 109, 17 S. E. 812; Barron v. People, 73 Ill. 256; Conkey v. People, 5 Parker, Cr. R. (N. Y.) 31; State v. Martin, 24 N. C. 101; State v. Carver, 49 Me. 588, 77 Am. Dec. 275; State v. Whitton, 68 Mo. 91; State v. Clarissa, 11 Ala. 57; State v. Greenman, 23 Minn. 209; McQuillen v. State, 8 Smedes & M. (Miss.) 587; State v. Borroum, 25 Miss. 203; Byrne v. State, 12 Wis. 519; Brown v. Com., 73 Pa. 321, 13 Am. Rep. 740; People v. Hidden, 32 Cal. 445. In some states the rule is in some cases changed by statute.

[70] State v. Bleekley, 18 Mo. 428; State v. Matthews, 88 Mo. 121; U. S. v. Eagan (C. C.) 30 Fed. 608; U. S. v. Lewis (D. C.) 192 Fed. 633.

[71] People v. Southwell, 46 Cal. 141; People v. Morgan, 133 Mich. 550, 95 N. W. 542.

[72] 2 Hawk. P. C. c. 25, § 16; 3 Bac. Abr. "Juries," A.; 1 Chit. Cr. Law, 309; U. S. v. Williams, 1 Dill. 492, Fed. Cas. No. 16,716; U. S. v. Blodgett, 35 Ga. 337, Fed. Cas. Nos. 14,611, 18,312; Mershon v. State, 51 Ind. 14; State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54; Com. v. Burton, 4 Leigh (Va.) 645, 26 Am. Dec. 337; Com. v. Smith, 9 Mass. 107;

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objection may in many cases be raised against the indictment by plea in abatement or motion to quash, if not waived by failure to challenge. In no case can it be raised after pleading to the indictment.[73]

In some states it is expressly provided by statute that objections to the qualifications of grand jurors, or to the organization of the grand jury, can only be taken by challenge to the array, or to the polls before the jury are sworn; that they cannot be raised against the indictment.[74]

It has been held in some jurisdictions that no personal disqualification of grand jurors can be made the ground of objection to an indictment.[75] The general rule, however, in the absence of a statute, is to the contrary, where the disqualification is not only pronounced by the common law or by statute, but is one that absolutely disqualifies, such as alienage.[76] If there is one person on the jury who is ab-

State v. Clarissa, 11 Ala. 57. But see, contra, as to objections by amicus curiæ, People v. Horton, 4 Parker, Cr. R. (N. Y.) 222; Hudson v. State, 1 Blackf. (Ind.) 318.

[73] Doyle v. State, 17 Ohio, 222; State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478; State v. Symonds, 36 Me. 128; Conkey v. People, 5 Parker, Cr. R. (N. Y.) 31; State v. Martin, 24 N. C. 101; Com. v. Williams, 5 Grat. (Va.) 702; State v. Carver, 49 Me. 588, 77 Am. Dec. 275; Vanhook v. State, 12 Tex. 252; State v. Clarissa, 11 Ala. 57; State v. Town of Newfane, 12 Vt. 422; McQuillen v. State, 8 Smedes & M. (Miss.) 587; State v. Borroum, 25 Miss. 203; Wilburn v. State, 21 Ark. 198; Byrne v. State, 12 Wis. 519; State v. Duncan, 7 Yerg. (Tenn.) 276.

[74] Under such a statute, even the nonresidence or alienage of a grand juror cannot be raised against the indictment. Lienburger v. State (Tex. Cr. App.) 21 S. W. 603; Lacy v. State, 31 Tex. Cr. R. 78, 19 S. W. 896. And see State v. Henderson, 29 W. Va. 147, 1 S. E. 225.

[75] Com. v. Smith, 9 Mass. 107 (but see Com. v. Parker, 2 Pick. [Mass.] 550); Com. v. Gee, 6 Cush. (Mass.) 174; Boyington v. State, 2 Port. (Ala.) 100; People v. Jewett, 3 Wend. (N. Y.) 314; Hardin v. State, 22 Ind. 347; Mershon v. State, 51 Ind. 14; People v. Beatty, 14 Cal. 566. As already stated, it is so provided by statute in some jurisdictions.

[76] State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54; State v. Sharp, 110 N. C. 604, 14 S. E. 504; State v. Rockafellow, 6 N. J. Law, 340; Com. v. Cherry, 2 Va. Cas. 20; Com. v. St. Clair, 1 Grat. (Va.) 556; Stanley v. State, 16 Tex. 557; Thayer v. People, 2 Doug. (Mich.) 417; State v. Ostrander, 18 Iowa, 438; State v. Middleton, 5 Port. (Ala.) 484; Barney v. State, 12 Smedes & M. (Miss.) 68; State v. Duncan, 7 Yerg. (Tenn.) 271; Huling v. State, 17 Ohio St. 583; Doyle v. State,

solutely disqualified, the indictment is bad.[77] Objections to an indictment have been sustained on the ground that one of the grand jurors was an alien;[78] that he was not a freeholder or elector;[79] that he had not paid his taxes as required by statute;[80] that he had served on a petit jury which convicted the defendant of the same offense.[81] On the other hand, objections to a grand juror on grounds which do not absolutely disqualify him, as because he had formed and expressed an opinion as to the guilt of the accused, or was related to the person killed by the accused, or to the prosecutor, cannot be raised against the indictment.[82] This is the generally accepted rule, though there are some cases to the contrary.

17 Ohio, 222 (but see State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478); Kitrol v. State, 9 Fla. 9. "It is certainly not reasonable to require a person, who has not been held to answer, to object to the juror before he is impaneled; for he may be on the other side of the globe, or he may have no reason to suppose he is going to be indicted, being guiltless. And, even if a person has been held to answer, he may be in prison, or sick at home, or, if in court, he may be ignorant without fault of the disqualification of the juror until after he has been sworn. Indeed, a person may be indicted for an offense committed pending the inquest. Moreover, the action of the grand jury is ex parte and preliminary, and it is contrary to principle to hold that a person shall forfeit his rights by not intervening in a proceeding to which he is not a party." State v. Davis, 12 R. I. 492, 34 Am. Rep. 704.

[77] Barney v. State, 12 Smedes & M. (Miss.) 68; State v. Cole, 17 Wis. 674; State v. Duncan, 7 Yerg. (Tenn.) 271; Kitrol v. State, 9 Fla. 9; State v. Jacobs, 6 Tex. 99.

[78] Reich v. State, 53 Ga. 73, 21 Am. Rep. 265.

[79] State v. Rockafellow, 6 N. J. Law, 332; State v. Davis, 12 R. I. 492, 34 Am. Rep. 704; Doyle v. State, 17 Ohio, 222.

[80] State v. Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231.

[81] U. S. v. Jones (C. C.) 31 Fed. 725.

[82] State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478; Tucker's Case, 8 Mass. 286; State v. Sharp, 110 N. C. 604, 14 S. E. 504; State v. Rickey, 10 N. J. Law, 83; Musick v. People, 40 Ill. 268; U. S. v. White, 5 Cranch, C. C. 457, Fed. Cas. No. 16,679; People v. Jewett, 3 Wend. (N. Y.) 314; U. S. v. Williams, 1 Dill. 485, Fed. Cas. No. 16,716; State v. Chairs, 9 Baxt. (Tenn.) 196; Lee v. State, 69 Ga. 705; Com. v. Brown, 147 Mass. 585, 18 N. E. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736; State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818; Com. v. Strother, 1 Va. Cas. 186; State v. Maddox, 1 Lea (Tenn.) 671. It was held in a late Massa-

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In many states it is provided that no indictment shall be deemed insufficient by reason of any defect in matter of form, and under such a statute it has been held that an indictment cannot be objected to because one of the grand jurors was not a qualified elector, as required by statute,[83] or assessed for taxes.[84] It has even been said that all personal disqualifications of grand jurors are matters of form, within the meaning of the statute.[85]

Secrecy as to Proceedings of Grand Jury

It has always been the policy of the law that the proceedings of grand juries should be kept secret. At common law, as well as under most of the statutes, the jurors are sworn to secrecy—that "the secrets of the cause, their own, and their fellows' they will duly observe and keep." "The secrets of the cause," it has been said, "relate to the persons accused, the witnesses, who they are, and what they testified. Their own and their fellows' secrets must refer to the deliberations and the votes of the grand jurors themselves." [86]

As a rule, therefore, no objection can be raised in a criminal case at any stage which must necessitate a disclosure of the proceedings before or by the grand jury. Grand jurors cannot ordinarily be compelled to testify to what was given in evidence before them, or as to irregularities in their proceedings; but there are exceptions to the rule, as where public justice requires such evidence, and there is some conflict in the authorities as to the extent of the rule.[87] It has

chusetts case that an indictment is not bad merely because one of the grand jurors, before the meeting of the jury, made a personal investigation into the guilt of the accused, and secreted himself in a room with an officer for the purpose of listening to declarations and admissions of the accused, and heard the same, and listened to statements of officers as to his guilt, and believed him guilty. Com. v. Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302.

[83] U. S. v. Ewan (C. C.) 40 Fed. 451.

[84] U. S. v. Benson (C. C.) 31 Fed. 896.

[85] U. S. v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16,550.

[86] State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

[87] State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54; State v. Fasset, 16 Conn. 465; Beam v. Link, 27 Mo. 261; People v. Hulbut, 4 Denio (N. Y.) 133, 47 Am. Dec. 244; Zeigler v. Com. (Pa.) 14 Atl. 237; State v.

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even been held that witnesses called before the grand jury cannot testify to what took place before that body, as this

Hayden, 45 Iowa, 11; State v. Gibbs, 39 Iowa, 318; Tindle v. Nichols, 20 Mo. 326; Perkins v. State, 4 Ind. 222; Ex parte Sontag, 64 Cal. 525, 2 Pac. 402. But see Com. v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894. The grand jury cannot be made to disclose "how any member voted, or the opinion expressed by their fellows or themselves upon any question before them, nor to disclose the fact that an indictment for a felony has been found against any person, not in custody or under recognizance, nor to state in detail the evidence on which the indictment is founded." Com. v. Hill, 11 Cush. (Mass.) 137. And see People v. Hulbut, supra; Freeman v. Arkell, 1 Car. & P. 137; Huidekoper v. Cotton, 3 Watts (Pa.) 56. But a grand juror is a competent witness to testify that a certain person did or did not testify before the grand jury. Com. v. Hill, supra; Ex parte Schmidt, 71 Cal. 212, 12 Pac. 55. And it has been held that the testimony of grand jurors is admissible to prove that one of the witnesses for the prosecution testified differently on his examination before them. It was said that, though the authorities on this point were not uniform, the weight of authority was in favor of the ruling. "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be to the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape, and elude arrest upon it, before the presentment is made. To accomplish these purposes, the rule excluding evidence, to the extent stated in Com. v. Hill, 11 Cush. (Mass.) 140, seems to be well established, and it is embodied substantially in the words of the oath of office which each grand juror takes on entering on the discharge of his duties. But, when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. 'Cessante ratione, cessat regula.' After the indictment is found and presented, and the accused is held to answer, and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts relevant and material to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defense, by enforcing a rule of exclusion, having its origin and foundation in public policy, after the

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would nullify the rule requiring the proceedings before the grand jury to be kept secret.[88]

Although there are some authorities to the contrary, it has been generally held that it is inadmissible to show the number of jurors who concurred in finding an indictment, for the purpose of an objection that it was found by less than the 12 required by law, since this could be shown only by the testimony or affidavits of the grand jurors themselves.[89]

In some cases grand jurors may be allowed to testify to what took place before them where the ends of justice require it, as in a prosecution of a person for perjury before them. And by statute in some jurisdictions it is expressly provided that grand jurors may be compelled to disclose the testimony of witnesses before them in certain cases.

INFORMATION

49. An information is a written accusation of crime preferred by the prosecuting officer without the intervention of a grand jury.

An information lies at common law for all misdemeanors. It will not lie for a felony, for, as we have seen, it has always been the policy of the common law that no man shall be put upon his trial for a felony until the necessity therefor has been determined by the oath of the grand jury.[90] As

reasons on which this rule is based have ceased to exist." Com. v. Mead, 12 Gray (Mass.) 169, 71 Am. Dec. 741. And see State v. Broughton, 29 N. C. 96, 45 Am. Dec. 507; Perkins v. State, 4 Ind. 222; Com. v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; People v. Reggel, 8 Utah, 21, 28 Pac. 955.

[88] State v. Fasset, supra. The obligation of secrecy is not removed by the discharge of the jury, and a breach of the obligation is a contempt of court. In re Atwell (D. C.) 140 Fed. 368.

[89] State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54; People v. Hulbut, 4 Denio (N. Y.) 133, 47 Am. Dec. 244; Green v. State, 28 Miss. 687; State v. Baker, 20 Mo. 347; Tindle v. Nichols, 20 Mo. 326; Imlay v. Rogers, 7 N. J. Law, 347. Contra, Low's Case, 4 Greenl. (Me.) 439, 16 Am. Dec. 271; Territory v. Hart, 7 Mont. 489, 17 Pac. 718.

[90] Ante, p. 125; 2 Hale, P. C. 151.

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we have seen, however, in speaking of indictments, there is nothing, in the absence of constitutional provisions requiring an indictment, to prevent the Legislature, if it sees fit, from doing away with indictments altogether, and substituting information as the mode of accusation. This the Legislature has done in some states. We have shown that in the Constitutions of the United States and of some of the states there are provisions requiring all prosecutions in certain cases to be by indictment, and that in such cases no other mode of accusation will do.[91]

An indictment, as we have seen, is sanctioned by the oath of the grand jury. An information, on the other hand, is the mere allegation of the prosecuting officer by whom it is preferred. The practice of filing informations existed at common law, and may be traced to the earliest period.[92] "As the king was bound to prosecute," it is said by Blackstone, "or, at least, to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace or good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of king's bench, by a suggestion on the record, and to carry on the prosecution in his majesty's name." [93]

Under the common law of England, informations were of two kinds. The first was filed by the Attorney General, as a rule, for offenses more immediately against the king or the public safety; but such an information could be filed by him for any other misdemeanor, though it were an offense more particularly against an individual.[94] The second was filed by the masters of the crown office, and it was the

[91] Ante, p. 125.

[92] 1 Chit. Cr. Law, 843; 2 Hawk. P. C. c. 26, § 85.

[93] 4 Bl. Comm. 309.

[94] 3 Bac. Abr. tit. "Informations," B; 2 Hawk. P. C. c. 26, § 1; Territory v. Cutinola, 4 N. M. (Johns.) 160, 14 Pac. 809; State v. Kelm, 79 Mo. 515.

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usual mode of proceeding by information for offenses against individuals. Formerly both of these informations could be filed without leave of court, and without further oath or affidavit than the oath of office of the officer preferring it. By an early English statute,[95] however, which is old enough to have become a part of our common law, if applicable to our conditions, it was provided that informations by masters of the crown office could only be filed by leave of court, and that they should be supported by the affidavit of the person at whose suit they were preferred.[96] The law remained that informations filed by the Attorney General (and as already stated, he could file them for any misdemeanor) need not be verified, and that he was the sole judge of the necessity or propriety of filing them. Leave of court was not necessary. Nor was the accused entitled to opportunity to show cause against the proceeding.[97] The Attorney General usually acted on affidavits of witnesses laid before him, but this was not necessary.

There is some authority for the proposition that the kind of information to be used at common law in this country is that which in England was filed by the masters of the crown office, and that this is the kind contemplated by statutes which show no intention to the contrary;[98] and, if this is so, leave of the court and affidavit would be necessary. But, by the better opinion, the other kind of information is the one in use with us. "In our states the criminal information should be deemed to be such, and such only, as in England is presented by the Attorney or Solicitor General. This part of the English common law has plainly become common law with us. As with us the powers which in England were exercised by the Attorney or Solicitor General are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prose-

[95] 4 & 5 W. & M. c. 18.

[96] Bac. Abr. 635, tit. "Informations."

[97] 1 Chit. Cr. Law, 845; 4 Bl. Comm. 312; 11 Harg. St. Tr. 270; State v. Town of Dover, 9 N. H. 468.

[98] State v. Gleason, 32 Kan. 245, 4 Pac. 363. And see U. S. v. Tureaud (C. C.) 20 Fed. 621.

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cute by information, as a right adhering to their office, and without leave of court." [99]

The mode of procedure is in many states almost entirely regulated by statute. In some the information must be under the oath of the prosecuting officer, or of some witness, and, if not so verified, it is invalid.[1] Unless verification is required by statute, however, it is not necessary; for, as we have seen, it was not required at common law. In some states it is necessary to the filing of an information that there shall have been a complaint on oath and preliminary examination before a magistrate, and a finding by the magistrate of probable cause for the prosecution.[2]

Though, in general, as stated above, the prosecuting officer is the sole judge of the necessity and propriety of filing an information, his action is now very much restricted by statute; and he must follow the statutory provisions. It has been held that even at common law he cannot prefer an information where the grand jury have inquired into the alleged offense, and found that the evidence did not justify an indictment, unless he has new evidence which was not brought before the grand jury.[3] But the soundness of this decision is doubtful.

In all cases, an information, to be valid, must be preferred by the proper prosecuting officer, and not by a private person.[4]

[99] 1 Bish. Cr. Proc. §§ 144, 604, 606; Whart. Cr. Pl. & Prac. § 87; State v. Kelm, 79 Mo. 515; State v. Moore, 19 Ala. 514; Territory v. Cutinola, 4 N. M. (Johns.) 160, 14 Pac. 809; State v. Keena, 64 Conn. 212, 29 Atl. 470. By statute in some states leave of court is required. Walker v. People, 22 Colo. 415, 45 Pac. 388; State v. Cole, 38 La. Ann. 843.

[1] State v. Hayward, 83 Mo. 303; State v. Calfer (Mo.) 4 S. W. 418; Wadgymar v. State, 21 Tex. App. 459, 2 S. W. 768; Lackey v. State, 14 Tex. App. 164.

[2] O'Hara v. People, 41 Mich. 623, 3 N. W. 161. See ante, p. 97.

[3] Richards v. State, 22 Neb. 145, 34 N. W. 346.

[4] People v. Kelm, 79 Mo. 515. But an information filed by another may be adopted by the prosecuting officer, and his prosecution of such information is proof of his adoption of it. State v. Boogher, 8 Mo. App. 599.

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CORONER'S INQUISITION

50. A coroner's inquisition is the record of the finding of the jury sworn by the coroner to inquire super visum corporis, concerning the death of a person.

On this a person might, at common law, be prosecuted for murder or manslaughter without the intervention of a grand jury, for the finding of the coroner's jury was itself equivalent to the finding of a grand jury. The accused is arraigned on the inquisition as on an indictment, and the subsequent proceedings are the same.[5] This practice does not obtain in the United States.[6] Indeed, it would seem to conflict with the constitutional provisions in many states requiring an indictment in cases of felony.[7]

The mode of conducting a coroner's inquest is generally regulated by statute. On receiving notice of a death under circumstances requiring investigation, the coroner causes a jury consisting of six men (in some jurisdictions perhaps more, and in some less) to be summoned. After the jury are sworn, they view the body. Witnesses are examined on oath, and their evidence is reduced to writing by the coroner. He has authority, like a magistrate, to cause the material witnesses to enter into a recognizance for their appearance to testify at court in case of a trial.

[5] Reg. v. Ingham, 9 Cox, Cr. Cas. 508.
[6] Ex parte Anderson, 55 Ark. 527, 18 S. W. 856; State v. Powell, 7 N. J. Law, 244.
[7] State v. Powell, supra.

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COMPLAINT

51. By statute in most states, certain minor offenses may be prosecuted before inferior courts upon a complaint or information made under oath by a private person.

This kind of a complaint or information is very different from the information which we have already explained. Instead of being presented by the prosecuting officer, it is made by a private person. It is more in the nature of a complaint made by a private person for the purpose of an arrest. It is allowed only in the case of petty misdemeanors. The prosecution is instituted in an inferior court, as before a justice of the peace or municipal court. In case of a conviction, an appeal to the higher court is provided for in some cases, and a trial de novo is there had on the same complaint or information.

TIME OF PROSECUTION

52. It is generally provided by statutes, known as the "statutes of limitation," that prosecutions shall be barred unless commenced within a certain time after the offense was committed. In the absence of such a provision, there is no period beyond which a prosecution may not be instituted.

53. In some states it is provided by statute that a person under arrest on a charge of crime shall be discharged from imprisonment unless a presentment, indictment, or information is found or filed within a prescribed time after his arrest. But these statutes do not operate as a bar to prosecutions.

Courts look with disfavor on unreasonable delay in commencing prosecutions,[8] but, in the absence of statutory lim-

[8] See Reg. v. Robins, 1 Cox, Cr. Cas. 114.

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itation, there is no time within which a prosecution must be commenced. In most jurisdictions, however, statutes have been enacted barring prosecutions unless commenced within a prescribed time after the offense is alleged to have been committed. These statutes are to be liberally construed in favor of the defendant.[9] It has been held that the statutes apply to offenses committed before their enactment,[10] but the general rule is otherwise.[11]

A statute extending the time within which prosecution must be begun does not, it seems, affect cases in which the period set by the previous statute had expired;[12] but it does extend the time for prosecution as to cases in which the time provided in the previous statute had not expired when the extending statute was passed.[13]

The statute commences to run on the day the offense is consummated,[14] unless the offense is continuous, in which case it commences when the act or omission constituting the

[9] Whart. Cr. Pl. & Prac. § 316. In a recent case it was held that such statute applies to proceedings for contempt not committed in the presence of the court, though such contempt proceeding may not be instituted by indictment or information. Gompers v. U. S., 233 U. S. 604, 34 Sup. Ct. 693, 58 L. Ed. 1115, Ann. Cas. 1915D, 1044.

[10] Johnson v. U. S., 3 McLean, 89, Fed. Cas. No. 7,418; U. S. v. Ballard, 3 McLean, 469, Fed. Cas. No. 14,507; Com. v. Hutchinson, 2 Pars. Eq. Cas. (Pa.) 453.

[11] Martin v. State, 24 Tex. 61; People v. Lord, 12 Hun (N. Y.) 282.

[12] See Com. v. Duffy, 96 Pa. 506, 42 Am. Rep. 554.

[13] Com. v. Duffy, 96 Pa. 506, 42 Am. Rep. 554. In this case the defendant had committed forgery when the statute of limitation required prosecution within two years. The two years had not expired when a statute was passed extending the time of prosecution in cases of forgery to five years. The prosecution was begun within five years, but not within two years, after the commission of the crime. It was held that the defendant was subject to prosecution. The court said: "The state makes no contract with criminals, at the time of the passage of an act of limitation, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They * * * may be changed or repealed altogether, as that [legislative] power may see fit to declare."

[14] Whart. Cr. Pl. & Prac. § 321; Gise v. Com., 81 Pa. 428; State v. Asbury, 26 Tex. 82; Scoggins v. State, 32 Ark. 205; U. S. v. Irvine, 98 U. S. 450, 25 L. Ed. 193.

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offense ceases.[15] Thus, in homicide, the statute begins to run from the date of the death, not the date of the blow;[16] in obtaining property by false pretense, from the date the property was actually obtained, not from the date on which the pretense was made;[17] in bigamy from the date of the illegal marriage, not from the date the illegal cohabitation ceases;[18] in seduction, from the date of the illicit intercourse, not from the date of the promise on which it was obtained.[19]

As said above, when the crime is a continuing one, the statute begins to run from the date that the act or omission constituting the offense ceased. Thus, in bigamous cohabitation, the statute does not begin to run from the date of the first act of illegal intercourse, but from the date when such intercourse ceased;[20] in obstructing a highway by maintaining a dangerous crossing, the statute does not begin to run from the date the obstruction began, but from the date it ceased.[21] The crime of abandonment of one's wife is held not to be a continuing offense, and must therefore be prosecuted within the statutory period from the date of deserting the wife.[22]

The commencement of the prosecution, stopping the running of the statute, is in some jurisdictions the finding of an indictment, filing of an information, or, in case of inferior misdemeanors prosecuted by complaint, filing of the complaint, and not the filing of a complaint for the issuance of a warrant of arrest or a preliminary hearing, or the issuance of a warrant.[23] In other jurisdictions the issuance

[15] Whart. Cr. Pl. & Prac. § 321; U. S. v. Irvine, supra.
[16] State v. Taylor, 31 La. Ann. 851.
[17] State v. Riley, 65 N. J. Law, 192, 46 Atl. 700.
[18] Gise v. Com., 81 Pa. 428.
[19] People v. Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.
[20] State v. Sloan, 55 Iowa, 217, 7 N. W. 516.
[21] State v. Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447.
[22] People v. Heise, 257 Ill. 443, 100 N. E. 1000; State v. Langdon, 159 Ind. 377, 65 N. E. 1. So withholding pension money from a client has been held not to be a continuing offense. U. S. v. Irvine, 98 U. S. 450, 25 L. Ed. 193.
[23] U. S. v. Slacum, 1 Cranch, C. C. 485, Fed. Cas. No. 16,311; Com. v. Sheriff, 3 Brewst. (Pa.) 394. The sending of an indictment to the

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of a warrant, at least where the arrest is made within a reasonable time afterwards,[24] or binding over or commitment,[25] will stop the running of the statute.

The statutes generally except from their operation cases in which the offender conceals himself or is a fugitive from justice or a nonresident of the state,[26] and may contain other exceptions. In some states the statute does not run until the offense is known.[27]

No other exceptions than those specified in the statute will defeat its operation.[28]

The statutes generally provide that if an indictment is found within the statutory period, and quashed or set aside

grand jury does not stop the running of the statute. State v. Tomlinson, 25 N. C. 32; State v. Morris, 104 N. C. 837, 10 S. E. 454. Presentment by a grand jury is sufficient, though the statutory period elapses before indictment. Brock v. State, 22 Ga. 98. But see U. S. v. Slacum, supra. If a nolle prosequi of an indictment is entered, the running of the statute is not interrupted. U. S. v. Ballard, 3 McLean, 469, Fed. Cas. No. 14,507. Contra, by statute, State v. Child, 44 Kan. 420, 24 Pac. 952. The sustaining of a demurrer to an indictment after the statutory period had expired, the indictment having been found within the period, does not bar the prosecution. Berkley v. Com., 164 Ky. 191, 175 S. W. 364.

[24] Reg. v. Parker, 9 Cox, Cr. Cas. 475; In re Clyne, 52 Kan. 441, 35 Pac. 23; Foster v. State, 38 Ala. 425; Ross v. State, 55 Ala. 177; People v. Clement, 72 Mich. 116, 40 N. W. 190. Filing complaint for issuance of warrant is not sufficient. In re Clyne, supra; People v. Clement, supra; State v. Miller, 11 Humph. (Tenn.) 505; People v. Clark, 33 Mich. 120; In re Griffith, 35 Kan. 377, 11 Pac. 174. The arrest need not be made within the statutory period. Id.

[25] Reg. v. Austin, 1 Car. & K. 621.

[26] As to these exceptions, see U. S. v. White, 5 Cranch, C. C. 116, Fed. Cas. No. 16,677; Robinson v. State, 57 Ind. 113; State v. Harvell, 89 Mo. 588, 1 S. W. 837; State v. Heller, 76 Wis. 517, 45 N. W. 307; Graham v. Com., 51 Pa. 255, 88 Am. Dec. 581; People v. McCausey, 65 Mich. 72, 31 N. W. 770. In Blackman v. Com., 124 Pa. 578, 17 Atl. 194, the court held that if the prosecution proved the commission of the offense, the issuing of the warrant, defendant's flight, and his absence from his usual place of residence within the state, it need not prove the negative fact that defendant was not an inhabitant or resident of the state until within the statutory period for finding an indictment.

[27] Dale v. State, 88 Ga. 552, 15 S. E. 287.

[28] Com. v. Sheriff, 3 Brewst. (Pa.) 394; In re Griffith, 35 Kan. 377, 11 Pac. 174.

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as defective, or judgment is arrested, the time during which the first indictment was pending is not to be computed as part of the time of limitation prescribed for the offense.[29] The same rule has been applied where the indictment was nolle pros'ed.[30] When the second indictment was found after the statutory period, the burden is on the state to show that a former indictment had been found within the statutory period.[31]

The effect of the statute cannot be avoided by charging a crime not barred, and convicting of an offense which is included in the charge, but which was barred. Thus, where a person is indicted for murder, for which no limitation is prescribed, and is found guilty of assault with intent to murder, which was barred when the indictment was found, a motion in arrest of judgment should be sustained.[32]

In some states it is provided that a person in jail on a criminal charge shall be dismissed from imprisonment if a presentment, indictment, or information be not found or filed against him before the end of the second term (the time varies in the different states) of the court at which he is held to answer. These statutes do not operate, like the statutes of limitation of which we have spoken, as a bar to the prosecution of the defendant. He must be discharged from imprisonment if not formally charged with-

[29] Foster v. State, 38 Ala. 425; State v. Johnson, 50 N. C. 221; State v. Hailey, 51 N. C. 42; Tully v. Com., 13 Bush (Ky.) 142; State v. Owen, 78 Mo. 367; State v. Child, 44 Kan. 420, 24 Pac. 952.

[30] State v. Child, 44 Kan. 420, 24 Pac. 952; Swalley v. People, 116 Ill. 247, 4 N. E. 379. In the absence of a provision that the time during which the first indictment was pending is not to be computed in the running of the statute, it has been held that, where an indictment found within the statutory period has been nol. pros'ed, the time within which the indictment was pending is not to be deducted. U. S. v. Ballard, 3 McLean, 469, Fed. Cas. No. 14,507.

[31] Gill v. State, 38 Ark. 524; White v. State, 103 Ala. 72, 16 South. 63.

[32] Fuecher v. State, 33 Tex. Cr. R. 22, 24 S. W. 292. This rule is not changed by a statute providing that, where one is indicted for a crime, he may be convicted of a lesser degree of the same crime, or of an attempt to commit it. People v. Di Pasquale, 161 App. Div. 196, 146 N. Y. Supp. 523.

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in the time prescribed, but he may be again arrested and tried upon any indictment that may be subsequently found against him.[33]

In most states, by statute, a person who has been indicted or informed against, and is in custody, must be brought to trial within a certain time, or he will be entitled to a discharge. This, however, relates to the time of trial, rather than of the prosecution.[34]

NOLLE PROSEQUI

54. A nolle prosequi is a formal entry upon the record by the prosecuting officer, by which he declares that he will no further prosecute the case, either as to some of the counts of the indictment, or part of a divisible count, or as to some of the defendants, or altogether. It may be entered at any time before judgment without the defendant's consent; but if entered after the trial has commenced, and without the consent of the defendant, and the indictment is sufficient, it will amount to an acquittal.

At common law, the state may at any time before judgment,[35] without the defendant's consent, voluntarily withdraw the indictment or other accusation altogether, or as to some counts which are objectionable, or as to part of a count which is divisible, or as to some of several defendants where the offense is joint and several.[36] This is done

[33] Waller & Bogg v. Com., 84 Va. 492, 5 S. E. 364. It is sufficient under such a statute that the defendant has been indicted at every term of court, though for a different crime from that for which he is finally indicted and tried. Waller & Bogg v. Com., supra.

[34] Post, p. 475.

[35] Com. v. Briggs, 7 Pick. (Mass.) 178; Com. v. Tuck, 20 Pick. (Mass.) 357; State v. Burke, 38 Me. 574; Levison v. State, 54 Ala. 520; State v. Roe, 12 Vt. 93.

[36] Com. v. Briggs, supra; Com. v. Tuck, supra; Com. v. Smith, 98 Mass. 10; U. S. v. Watson, 7 Blatchf. 60, Fed. Cas. No. 16,652; State v. Bruce, 24 Me. 71; State v. Roe, 12 Vt. 93; People v. Porter, 4 Parker, Cr. R. (N. Y.) 524; Wright v. State, 5 Ind. 290, 61 Am. Dec. 90;

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by the entry of such a withdrawal on the record. The entry is essential. Until the entry is made on the record, there is no binding withdrawal, but it may be retracted, and the prosecution may proceed on the same charge.[37] The entry of a nolle prosequi as to one count does not affect the right to proceed to judgment on the others, nor does such an entry as to one of several defendants affect the proceeding as to the others, where the offense is several as well as joint.[38] If the entry is made before the trial has commenced by the swearing of the jury, or even if made afterwards, where the indictment was fatally defective, a new prosecution may be instituted for the same offense;[39] but by the weight of authority, as we shall see, there can be no further prosecution if the indictment is sufficient to sustain a conviction, and the entry is made, without defendant's consent, after the jury have been sworn.[40]

In some states, by statute, the consent of the court to the entry of a nolle prosequi is necessary;[41] and in others it has been held necessary, in the absence of such a statute, after the jury are sworn, and before verdict;[42] but, by the better opinion, it was not necessary at all at common law.[43]

State v. Fleming, 7 Humph. (Tenn.) 152, 46 Am. Dec. 73; Lacey v. State, 58 Ala. 385.

[37] Com. v. Wheeler, 2 Mass. 172; Com. v. Tuck, supra; Wortham v. Com., 5 Rand. (Va.) 669.

[38] See the cases above cited.

[39] Post, p. 442; Com. v. Wheeler, 2 Mass. 172; Com. v. Briggs, 7 Pick. (Mass.) 179; State v. Benham, 7 Conn. 418; Lindsay v. Com., 2 Va. Cas. 345; Wortham v. Com., 5 Rand. (Va.) 669; U. S. v. Shoemaker, 2 McLean, 114, Fed. Cas. No. 16,279; State v. McNeill, 10 N. C. 183; State v. Haskett, 3 Hill (S. C.) 95.

[40] Post, p. 442.

[41] See People v. McLeod, 1 Hill (N. Y.) 404, 37 Am. Dec. 328.

[42] U. S. v. Shoemaker, 2 McLean, 114, Fed. Cas. No. 16,279; Com. v. Tuck, 20 Pick. (Mass.) 357; State v. I. S. S., 1 Tyler (Vt.) 178; State v. Moody, 69 N. C. 529.

[43] People v. McLeod, 1 Hill (N. Y.) 404, 37 Am. Dec. 328. The following is related of Sir John Holt, Chief Justice of the King's Bench in the reigns of William and Anne: "There were some persons in London who pretended the power of foretelling future events, and who were called the 'French prophets.' Holt having, upon occasion, committed one of these to prison, a disciple of his came to the Chief Jus-

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tice's house, and desired to see him. On being admitted, he said: 'I come from the Lord, who bade me desire thee to grant a nolle prosequi for John Atkins, his servant, whom thou hast thrown into prison.' 'Thou art a false prophet and lying knave,' returned the Chief Justice. 'If the Lord had sent thee, it would have been to the Attorney General; for the Lord knoweth that it is not in my power to grant a nolle prosequi.'" 1 Hill (N. Y.) 405, from 1 Law & Lawy. (Phil. Ed.) 293, 294.

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CHAPTER V

PLEADING—THE ACCUSATION

55. Form of Indictment—In General.
56. The Commencement.
57. The Statement.
58. Name and Description of Defendant.
59. Statement of Offense—In General.
60. Stating Ingredients of Offense.
61. Facts to be Stated, and not Conclusions of Law.
62. Identifying Offense.
63. Mode of Averment—Argument and Inference.
64. Unnecessary Matter.
65. Facts Necessarily Implied from Facts Stated.
66. Facts Judicially Noticed.
67. Conclusions of Law from Facts Stated.
68. Matters of Evidence.
69. Matters of Defense.
70. Facts not Known.
71. Disjunctive or Alternative Allegations.
72. Repugnancy.
73. English Language.
74. Abbreviations.
75. Use of Videlicet or Scilicet.
76. Clerical or Grammatical Errors.
77. Inducement.
78. Innuendo.
79. Surplusage.

We have seen that no man can be put upon his trial for an offense without being formally accused, and we have explained the different modes of accusation; namely, by indictment, by information, and by complaint. It is not only necessary that there shall be an accusation, but it must be in the form required by law. Certain allegations are essential, and they must conform to certain rules. We will now show what these essential allegations are, and explain the rules of pleading which govern the construction of an accusation. We shall in terms speak of indictments only, but the rules apply with equal force to informations and

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complaints, except in so far as the difference in the nature of the accusations necessarily renders them inapplicable.

In general, the rules and principles of pleading with respect to the structure of a declaration in a civil action are applicable to an indictment, and therefore, where the criminal law is silent as to the form of an indictment in a particular case, resort may be had to decisions on the requisites of pleading in civil actions. There are many questions of pleading in criminal cases, however, which are peculiar to them, and, even where this is not the case, a correct knowledge of the principles and rules of pleading in criminal cases cannot be acquired by a study of the rules of pleading in civil actions only. A special discussion is necessary.

Record and Caption of Indictment

Every indictment must have a caption, but the caption is no part of the indictment itself; it is only a formal statement of the proceedings, describing the court before which the indictment was found, the time and place where it was found, and the jurors by whom it was found.[1] These particulars, as we shall see, must be set forth with sufficient certainty.[2] It has been said that the record of the prosecution will not be perfect without the caption, and would not be admissible in evidence, for it would not show by what authority the indictment was found;[3] but it has been held that the omission of a caption does not make the indictment itself bad, and that the omission may be supplied from other parts of the record.[4] The name of the county should

[1] 1 East, P. C. 113; State v. Gary, 36 N. H. 359; People v. Jewett, 3 Wend. (N. Y.) 319; Rose v. State, Minor (Ala.) 29; State v. Brickell, 8 N. C. 354; State v. Williams, 2 McCord (S. C.) 301; U. S. v. Bornemann (C. C.) 35 Fed. 824; McClure v. State, 1 Yerg. (Tenn.) 206; State v. Hunter, Peck (Tenn.) 166; Noles v. State, 24 Ala. 672; State v. Smith, 2 Har. (Del.) 533; State v. Jones, 11 N. J. Law, 289; State v. Smith, 148 Iowa, 640, 127 N. W. 988.

[2] 2 Hale, P. C. 165; 2 Hawk. P. C. c. 25, §§ 16, 17, 118–120; State v. Conley, 39 Me. 78; Reeves v. State, 20 Ala. 33; English v. State, 4 Tex. 125; State v. Hunter, supra.

[3] Cooke v. Maxwell, 2 Starkie, 183.

[4] State v. Gilbert, 13 Vt. 647; State v. Wasden, 4 N. C. 596; post, p. 161.

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appear in the caption, unless it is inserted in the margin, and is referred to in the body of the caption as "the county aforesaid." [5] If stated in the body of the caption, it may be omitted in the margin.[6]

The caption must set forth with sufficient certainty the court in which the indictment was found, so as to show that the court had jurisdiction.[7] It is not necessary, however, to set forth the foundation of the court's authority, if it be exercised in the course of ordinary jurisdiction,[8] but it is probably otherwise if the indictment is found in a special court.[9] An indictment with this caption: "Commonwealth of Massachusetts, Essex, to wit: At the court of common pleas, begun and holden at Salem, within and for the county of Essex, on the first day of ——— in the year of our Lord ———," is sufficient, and sufficiently shows that the court was held in the commonwealth.[10]

The place at which the court is held, including the name of the county, must be stated.[11] This is necessary to show that the place is within the limits of the court's jurisdiction. As already stated, the county may be stated in the margin, and merely referred to in the body of the caption as "the county aforesaid." Such a reference or an express statement of the county is essential.[12]

[5] 2 Hale, P. C. 165, 166.

[6] 1 Chit. Cr. Law, 327. It is enough if the county be stated in the body of the indictment. Tefft v. Com., 8 Leigh (Va.) 721; State v. Lane, 26 N. C. 113.

[7] 2 Hale, P. C. 166; 2 Hawk. P. C. c. 25, §§ 16, 17, 118–120; State v. Williams, 2 McCord (S. C.) 301; State v. Sutton, 5 N. C. 281; Dean v. State, Mart. & Y. (Tenn.) 127; Taylor v. Com., 2 Va. Cas. 94; Burgess v. Com., 2 Va. Cas. 483. In many states it is provided that defects in form may be amended or cured by verdict, and it has been held that omission of the name of the court from the caption is such a defect. State v. Brennan, 2 S. D. 384, 50 N. W. 625.

[8] Rex v. Royce, 4 Burrows, 2085; Rex v. Gilbert, 1 Salk. 200; 2 Hawk. P. C. c. 25, § 125.

[9] 1 Chit. Cr. Law, 329; Fost. 3; State v. Williams, 2 McCord (S. C.) 301.

[10] Com. v. Fisher, 7 Gray (Mass.) 492; State v. Conley, 39 Me. 78.

[11] 2 Hale, P. C. 166; 2 Hawk. P. C. c. 25, § 128; Lusk v. State, 64 Miss. 845, 2 South. 256. See State v. Conley, 39 Me. 78.

[12] 2 Hale, P. C. 166; 2 Hawk. P. C. c. 25, § 128; State v. Williams,

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The caption must also specify the day and year on which the indictment was presented, and if it state an uncertain, future, or impossible day, or merely lay a day of the week, or state the time with repugnancy, it will be fatally defective,[13] unless the omission or mistake is supplied by other parts of the record.[14]

It was formerly held that, in addition to the description of the court, and the time and place at which it is held, the caption must name the judges or justices, or so many of them as the law requires to constitute the court, and allude to the rest by the words "and others their fellows";[15] and this may still be necessary in some jurisdictions. There is no reason, however, why it should be required if the name of the judge otherwise appears on the record; and in some states it has been held not to be necessary, while in others the approved forms of caption do not contain it.[16]

The indictment must always be shown to have been found upon oath, or upon affirmation; and, if an allegation of this fact does not appear either in the caption or the commencement, the indictment will be bad.[17] The names of the jurors need not be specified in the caption, though they must appear somewhere on the record.[18] It should also appear on

2 McCord (S. C.) 301; Dean v. State, Mart. & Y. (Tenn.) 127; Taylor v. Com., 2 Va. Cas. 94; Burgess v. Com., 2 Va. Cas. 483; Com. v. James, 1 Pick. (Mass.) 375.

[13] 2 Hawk. P. C. c. 25, § 127; Rex v. Warre, 1 Strange, 698; 4 Coke, 48; Rex v. Fearnley, 1 Term R. 316, 1 Leach, Crown Cas. 425; Rex v. Roysted, 1 Ld. Keny. 255.

[14] Post, p. 161.

[15] 2 Hale, P. C. 116; 2 Hawk. P. C. c. 25, § 124; 1 Chit. Cr. Law, 331; State v. Zule, 10 N. J. Law, 348; State v. Price, 11 N. J. Law, 203. It is not necessary to show their appointment. Rex v. Royce, 4 Burrows, 2084.

[16] Com. v. Stone, 3 Gray (Mass.) 453.

[17] 2 Hale, P. C. 167; 2 Hawk. P. C. c. 25, § 126; Rex v. Evans, 1 Keb. 329; Roy v. Inhabitants of Yarton, 1 Sid. 140; Roe v. State (Ala.) 2 South. 459.

[18] 1 Chit. Cr. Law, 333; U. S. v. Insurgents, 2 Dall. 335, Fed. Cas. No. 15,443; Mahan v. State, 10 Ohio, 232. See Stone v. State, 30 Ind. 115; State v. Norton, 23 N. J. Law, 33.

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the record that the bill is found by at least 12 jurors,[19] though it need not appear in the caption.[20] It is usual to describe the jurors as "good and lawful men," and there is authority for saying that such a description is necessary.[21] But it has been held otherwise.[22] These words include every qualification required by law for grand jurors.[23] Where some of the jurors are affirmed instead of sworn, the record, it has been held, must show that this was authorized, as that they alleged that they had conscientious scruples against taking an oath;[24] but the weight of authority is to the contrary.

As we shall see, an indictment, being a finding of the grand jury on oath, cannot be amended by the court. The caption, however, being no part of the indictment, but merely a ministerial act to make up the record of the court, may, in the absence of a statutory provision to the contrary, be amended at any time, even after conviction, so as to cure defects, by making it conform to the other records of the term;[25] thus omissions or mistakes in the caption, in the description of the court, or the statement of time of the find-

[19] 2 Hale, P. C. 167; 2 Hawk. P. C. c. 25, §§ 16, 126; Clyncard's Case, Cro. Eliz. 654; Rex v. Darley, 4 East, 175.

[20] Young v. State, 6 Ohio, 435; Turns v. Com., 6 Metc. (Mass.) 225.

[21] 2 Hale, P. C. 167; Olly's Case, Cro. Jac. 635.

[22] State v. Yancey, 1 Tread. Const. (S. C.) 237; 1 Chit. Cr. Law, 333.

[23] Jerry v. State, 1 Blackf. (Ind.) 396; State v. Glasgow, 1 N. C. 264, 2 Am. Dec. 629; State v. Price, 11 N. J. Law, 203; Collier v. State, 2 Stew. (Ala.) 388; Bonds v. State, Mart. & Y. (Tenn.) 143, 17 Am. Dec. 795; Cornwell v. State, Mart. & Y. (Tenn.) 147.

[24] State v. Fox, 9 N. J. Law, 244; State v. Harris, 7 N. J. Law, 361. But see Mulcahy v. Reg., L. R. 3 Ir. 306; Com. v. Fisher, 7 Gray (Mass.) 492. It is also held now in New Jersey that such an omission is a defect of form, which under a statute in that state is waived if not objected to by demurrer or motion to quash. Engeman v. State, 54 N. J. Law, 247, 23 Atl. 676.

[25] 1 Chit. Cr. Law, 335, and old authorities there collected; Philips v. Smith, 1 Strange, 138; Rex v. Hayes, 2 Ld. Raym. 1518, 2 Strange, 843; Rex v. Darley, 4 East, 175; State v. Williams, 2 McCord (S. C.) 301; State v. Gilbert, 13 Vt. 647; Dean v. State, Mart. & Y. (Tenn.) 127; Com. v. James, 1 Pick. (Mass.) 375; Burgess v. Com., 2 Va. Cas. 483; Taylor v. Com., 2 Va. Cas. 94.

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ing of the indictment, or in any other respect, may be supplied or corrected by other parts of the record, as by the certificate of the clerk on the back of the indictment.[26]

In many states, the caption, instead of being made up by the clerk, is prefixed to the bill before it is submitted to the grand jury, and forms a part of the bill as presented by them. This, however, does not make it any part of the indictment proper.[27] Being a part of the bill, however, when submitted to the grand jury, and considered by them, the indictment proper may refer to it for the name of the county, just as it may refer to the county in the margin.[28]

In North Carolina it has been held that a caption is not necessary unless the court is acting under a special commission.[29]

[26] Com. v. Mullen, 13 Allen (Mass.) 551; Penn'a v. Bell, Add. (Pa.) 175, 1 Am. Dec. 298; Com. v. Hines, 101 Mass. 33; U. S. v. Bornemann (C. C.) 35 Fed. 824; Com. v. Stone, 3 Gray (Mass.) 453; Com. v. Colton, 11 Gray (Mass.) 1; State v. Robinson, 85 Me. 147, 26 Atl. 1092; State v. Jones, 9 N. J. Law, 357, 17 Am. Dec. 483; State v. Brickell, 8 N. C. 356; State v. Gilbert, 13 Vt. 647 (in this case it was held that the entire omission of a caption might be supplied by the minutes of the clerk on the bill, and the general records of the term). An indictment which purports in its caption to have been found on the first day of the term, but charges an offense of a later day, may be shown, by reference to the clerk's certificate indorsed thereon, to have been actually returned into court after this date. Com. v. Stone, supra.

[27] Ante, p. 158.

[28] Com. v. Edwards, 4 Gray (Mass.) 1; Com. v. Fisher, 7 Gray (Mass.) 492.

[29] State v. Brickell, 8 N. C. 354; State v. Haddock, 9 N. C. 462. "Inasmuch as a prosecution, in this state, is never removed from one to a higher tribunal, a caption can be of no benefit to an indictment, and is universally dispensed with." State v. Marion, 15 La. Ann. 495.

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FORM OF INDICTMENT

55. An indictment is divided into three parts, namely:
(a) The commencement.
(b) The statement.
(c) The conclusion.

An indictment for larceny at common law would be in the following form:

State of ———, County of ———, to wit:

The jurors for the county aforesaid upon their oath present (a) that John Doe, at B———, in the county aforesaid, on the first day of January, in the year of our Lord 1895, one overcoat, of the value of one hundred dollars, of the goods and chattels of Richard Roe, feloniously did steal, take and carry away, (b) against the peace and dignity of the state.

From the beginning to the letter (a) is the commencement; from the letter (a) to the letter (b) is the statement; and from the letter (b) to the end is the conclusion.

We shall in the following pages take up and explain each of these parts separately and in detail, but before doing so it is necessary to say something about the form of indictments generally, and to call attention to the variance between the forms used in the different states, and to the effect of modern statutes on the common-law rules. The form of indictment given above is sufficient at common law; and it is therefore sufficient in all of our states unless there is something in the statutes, decisions, or peculiar practice requiring a different form. It must not be supposed that these exact words are essential, and that no other words will do, for this is not true. It is required, as we shall see, that certain matters shall appear in an indictment, and that they shall be stated in a certain manner. If these requirements are met, nothing more is necessary. It is best that there should be a particular form of indictment, and that it should in practice be followed in all cases, but a departure from the exact form which is generally used does

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not necessarily, and should not, make an indictment bad. The fact that certain averments are found in precedents of forms which have been used does not show that they may not be dispensed with. "It would be giving too much force to mere precedents of forms, which often contain unnecessary and superfluous averments, to hold that a particular allegation is essential to the validity of an indictment, because it has sometimes, or even generally, been adopted by text writers or by cautious pleaders." [30] Nor, on the other hand, does the fact that an indictment follows the form which has been in general use necessarily show that it is good. Convictions may be had on 99 indictments, all of which are in exactly the same form, simply because no objection is made to a defect therein, or because an objection is erroneously overruled by the court. This, however, is no reason why the one hundredth indictment should be sustained, if it is in fact defective. The rules of pleading must be applied to every indictment, and it is by those rules (in connection with the statutes, of course) that its sufficiency is to be determined. If the pleader adopts a form, he should first test it by these rules. "If, upon inquiry, it is found that a form which has long been pursued is inconsistent with the rules of law and good pleading, it cannot be too soon reformed; and the consequences, which are suggested to be so alarming in prospect, appear to amount to no more than to require that in the future the pleader should attend to the language of the statute upon which the proceeding is adopted, instead of copying a faulty precedent." [31]

The forms of indictment and information vary more or less in the different states, because of particular constitutional or statutory provisions, or because of local usage. In some states the word "state" is used in the commence-

[30] Com. v. Hersey, 2 Allen (Mass.) 179; Com. v. Wright, 1 Cush. (Mass.) 64. And see State v. Brooks, 94 Mo. 121, 7 S. W. 24.

[31] Rex v. Morley, 1 Younge & J. 221. A conviction is bad where the charge does not in terms show a legal offense, though it is in a form used time out of mind in the court before which the party was so charged. Ex parte Hopkins, 61 Law J. Q. B. 240, 66 Law T. (N. S.) 53, 17 Cox, Cr. Cas. 444.

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ment and conclusion, while in others the word "commonwealth" is used, and in others the words "the people of the state" are used. In many of the states forms of indictment are prescribed by statute. The object of the Legislature is to simplify the drawing of indictments and other accusations, and dispense with the necessity of purely formal and technical averments, which, though really useless, are considered essential at common law, and the omission of which would often defeat an indictment which is perfectly good in substance. These statutes merely do away to some extent with the strictness required by the common law; they do not, as a rule, render insufficient an indictment which would have been good at common law.[32]

The English parliament has plenary power to prescribe any form of accusation it may see fit, but with us the power of Congress and of the state Legislatures is greatly restricted by constitutional provisions. Some of the Constitutions, as we have seen, require certain prosecutions to be by indictment. Most of them require the accusation, in whatever form it may be, to be sufficient in substance to fully inform the accused of the specific charge against him; and most, if not all, provide that no person shall be deprived of life, liberty, or property without due process of law. None of these provisions prevent the Legislature from abolishing common-law forms of accusation (except, of course, that there must be an indictment when it is required by the Constitution), or from dispensing with particular allegations which are necessary at common law, provided the form substituted or allowed is sufficient to give the accused reasonable notice of the charge against him.[33] No form, however, will suffice, even though it may be authorized by

[32] State v. Brooks, 94 Mo. 121, 7 S. W. 24.

[33] State v. Corson, 59 Me. 137; Morton v. People, 47 Ill. 468; State v. Learned, 47 Me. 426; State v. Comstock, 27 Vt. 553; State v. Hodgson, 66 Vt. 134, 28 Atl. 1089; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; State v. Morgan, 112 Mo. 202, 20 S. W. 456; State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26. That a statute may dispense with the necessity to state the means, manner, and circumstances of the killing in an indictment for homicide, see Newcomb v. State, 37 Miss. 383; Cathcart v. Com., 37 Pa. 108; Noles v. State, 24

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statute, if it fails to set forth any essential element of the offense;[34] or if it fails to state such particulars of the offense, as distinguished from its essential legal elements, as may be necessary to inform the accused of the specific offense charged; it is not sufficient that it inform him merely of the character of the offense.[35]

THE COMMENCEMENT

56. The commencement of the indictment must state:

(a) The venue. This is the name of the county from which the grand jury have come, and in which the trial is to be had, and generally of the county in which the offense was committed.[36]

(b) The fact of presentment by the grand jurors upon oath or affirmation.

The commencement of an indictment at common law in England was: "Middlesex, to wit. The jurors for our lord, the king, upon their oath present," etc. And in this country a proper form would be: "State (or Commonwealth) of ———, County of ———, to wit. The jurors for the

Ala. 672; Wolf v. State, 19 Ohio St. 248; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

[34] State v. Mace, 76 Me. 64; Com. v. Harrington, 130 Mass. 35; Hewitt v. State, 25 Tex. 722; McLaughlin v. State, 45 Ind. 338; State v. Learned, 47 Me. 426; State v. Startup, 39 N. J. Law, 432; People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386.

[35] State v. Mace, 76 Me. 64; Bradlaugh v. Reg., 3 Q. B. Div. 607; Murphy v. State, 24 Miss. 590, Id., 28 Miss. 637; McLaughlin v. State, 45 Ind. 338; Kilrow v. Com., 89 Pa. 480; State v. Meyers, 99 Mo. 107, 12 S. W. 516; State v. Learned, 47 Me. 426; People v. Dumar, 106 N. Y. 502, 13 N. E. 325; People v. Stark, 136 N. Y. 538, 32 N. E. 1046; State v. Daugherty, 30 Tex. 360; Com. v. Buzzard, 5 Grat. (Va.) 694; State v. Comstock, 27 Vt. 553; Blumenberg v. State, 55 Miss. 528; Williams v. State, 35 Ohio St. 175; State v. Fleming, 117 Mo. 377, 22 S. W. 1024; State v. Reynolds, 106 Mo. 146, 17 S. W. 322. As to what are mere matters of form, and what are matters of substance, see post, pp. 365, 366, 373.

[36] The venue need not be stated in the commencement if it appears in the caption.

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state (or commonwealth, or the people of the state, according to the practice) of ———, in and for the body of the county of ——— (or for the state and county aforesaid, or the county aforesaid), upon their oath present," etc. By statute or usage, the form used varies in the different states, but the above form would be sufficient in most of them.[37]

Subsequent counts of an indictment commence: "And the jurors aforesaid upon their oath aforesaid further present," etc.[38]

Statement of Venue

The statement of the venue is usually said to be a statement of the county in which the offense was committed and the trial is to be had. In effect this is generally true, but it is more accurate to say that it is a statement of the county from which the grand jury have come, and for which they are to inquire. It is also the county in which the offense was committed, because generally a grand jury for any other county would have no authority to present the indictment, and the county in which the trial is to be had, for the trial is generally had in the county where the offense was committed.

The county is usually stated in the margin of the indictment, but it need not be if it appears in the body of the commencement or in the body of the caption; and in the latter case is referred to in the commencement as the "county aforesaid." [39]

It has been held that the omission of the name of the state does not render the indictment defective,[40] unless the Constitution or a statute requires it to be stated.[41] Even if

[37] See State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135; Hurley v. State, 6 Ohio, 399; Woodsides v. State, 2 How. (Miss.) 655.

[38] A second or third count so commencing sufficiently refers to the statement in the first count that the jurors are for the county therein named. The statement need not be repeated. State v. Vincent, 91 Mo. 662, 4 S. W. 430.

[39] 2 Hale, P. C. 165; Com. v. Quin, 5 Gray (Mass.) 478; Tefft v. Com., 8 Leigh (Va.) 721.

[40] State v. Lane, 26 N. C. 113; Greeson v. State, 5 How. (Miss.) 33; Woodsides v. State, 2 How. (Miss.) 655; note 48, p. 169.

[41] State v. Hazledahl, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150.

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it should be deemed necessary to name the state, the name alone without the words "State of" would be sufficient.[42]

Showing as to Presentment

It is essential that it appear that the indictment is presented by a grand jury. Since no other jury can find an indictment, the word "jurors" in the commencement will be taken to mean "grand jurors," and will be sufficient. It is not necessary to use the latter term.[43] It need not appear in the body of the indictment that the grand jury was authorized to inquire into the offense, and therefore they need not be described as the "jurors for the county of ———," or "for the county aforesaid," where the county is mentioned in the margin or caption.[44] Therefore, though it is usual to state in the commencement the county from which the jury have come, it is not essential. But it is essential that the record shall show that they come from the proper county.[45] In some states it is usual to state that the grand jury are "inquiring for," or are "sworn to inquire for," the county, or in and for the body of the county, etc. This, however, is not necessary, for the law presumes as much from the fact that the grand jury can be impaneled and sworn for no other purpose.[46] The number of the grand jurors should, as we have seen, appear on the record, but they need not be specified in the indictment itself.[47] A formal statement in the indictment that it is found by the authority of the state is not necessary, if

[42] See State v. Anthony, 1 McCord (S. C.) 285.

[43] Com. v. Edwards, 4 Gray (Mass.) 1.

[44] The form of the caption and commencement in Massachusetts is as follows: "Commonwealth of Massachusetts, Suffolk, to wit: At the superior court holden at [Boston], within and for the county of [Suffolk], for the transaction of criminal business, on the ——— day of ——— in the year of our Lord one thousand ———, the jurors for the said commonwealth on their oath present that," etc. St. Mass. 1899, c. 409, § 28.

[45] Tipton v. State, Peck (Tenn.) 308; Cornwell v. State, Mart. & Y. (Tenn.) 147.

[46] Hurley v. State, 6 Ohio, 399; State v. England, 19 Mo. 386.

[47] Ante, p. 160; Young v. State, 6 Ohio, 435.

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it appears from the record that the prosecution is in the name of the state.[48]

It is essential that it shall appear that the indictment is presented by the jurors under oath, or under oath and affirmation when some are affirmed;[49] and this must appear in every count, either by direct allegation or by a proper reference to a preceding count.[50] It is therefore stated that the jurors "upon their oath (or oath and affirmation) present." The use of the word "oaths" instead of "oath" does not render the indictment defective; either word will do.[51] It has been held that an indictment purporting to be presented upon oath and affirmation need not state the reasons why some of the jurors affirmed instead of being sworn, so as to show that affirmation was authorized,[52] but there is some authority to the effect that the reasons must appear on the record.[53]

A statement that the indictment was found on oath when in fact some of the jurors affirmed, is not such a defect as can be taken advantage of on a motion in arrest of judgment.[54]

The fact of presentment must be expressed by the use of the word "present," or of some other appropriate word showing that the grand jury charge the defendant;[55] and

[48] Greeson v. State, 5 How. (Miss.) 33; State v. Devine, 6 Wash. 587, 34 Pac. 154; State v. Kerr, 3 N. D. 523, 58 N. W. 27.

[49] Cro. Jac. 635; Huffman's Case, 6 Rand. (Va.) 685; Curtis v. People, Breese (Ill.) 256.

[50] State v. McAllister, 26 Me. 374; State v. Wagner, 118 Mo. 626, 24 S. W. 219; post p. 344. In State v. McAllister, supra, the first count of the indictment alleged that the jurors "upon their oaths present," etc. The third count merely alleged that "the jurors aforesaid for the state aforesaid do further present," etc., and it was held that this was not a sufficient reference to the allegation of the first count of a finding upon oath, as it did not say "as aforesaid, or in manner aforesaid."

[51] Com. v. Sholes, 13 Allen (Mass.) 554; Jerry v. State, 1 Blackf. (Ind.) 395; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270.

[52] Com. v. Fisher, 7 Gray (Mass.) 492; Anon., 9 Car. & P. 78; ante, p. 161.

[53] State v. Harris, 7 N. J. Law, 361; ante, p. 161.

[54] Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568.

[55] Vanvickle v. State, 22 Tex. App. 625, 2 S. W. 642.

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it must be expressed in the present tense. If an indictment were to read "did present," it would be fatally defective.[56]

Mere clerical and grammatical errors in the commencement, as where the indictment commences, "The grand jurors within and the body of the county," omitting the word "for," will not vitiate the indictment.[57]

THE STATEMENT

57. The statement is that part of the indictment which charges the offense. For convenience in treatment we shall divide it into two parts:

(a) The description of the defendant, and

(b) The statement of the offense.

NAME AND DESCRIPTION OF THE DEFENDANT

58. The indictment should describe the accused by his Christian name and surname, if they are known. At common law a misnomer of the defendant is fatal to the particular indictment, if the objection is taken by plea in abatement before pleading to the merits; but it can only cause delay, for a new indictment may be presented.[58] Objection on this ground cannot be made after pleading to the merits.

The indictment must correctly state the name of the defendant. By the weight of authority his full Christian name must be set out, if his name is known.[59] If a man has

[56] 1 Chit. Cr. Law, 202.

[57] State v. Brady, 14 Vt. 353. See post, p. 205, as to clerical errors.

[58] Hinktom v. State, 9 Ala. App. 27, 64 South. 193. In some jurisdictions, by statute, the indictment may be amended in this respect. A new indictment is not necessary. Post, p. 363.

[59] Rex v. Shakespeare, 10 East, 83; Com. v. Perkins, 1 Pick. (Mass.) 388; Com. v. Hall, 3 Pick. (Mass.) 262; Turner v. People, 40

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initials for his Christian name, or is in the habit of using initials therefor, and is known by them, they may be used to describe him.[60] In some states a middle name or initial is not recognized as a part of the name, and need not be stated; nor by the weight of authority, if it is unnecessarily stated, need it be proven;[61] and if erroneously stated it is immaterial.[62] Some courts, while holding that a middle name or initial need not be stated, hold that, if it is stated, it becomes part of the description, and cannot be

Ill. App. 17; Enwright v. State, 58 Ind. 567; Pickens v. State, 6 Ohio, 274; State v. Hand, 6 Ark. 165; Gerrish v. State, 53 Ala. 476; State v. Webster, 30 Ark. 166. See Pancho v. State, 25 Tex. App. 402, 8 S. W. 476. If the defendant's name is stated with repugnancy, as where it is differently stated in two places, the indictment is fatally defective. Kinney v. State, 21 Tex. App. 348, 17 S. W. 423. Contra, under a statute providing that an error in stating the name shall not vitiate the indictment. Combast v. Com., 137 Ky. 495, 125 S. W. 1092. Where, by statute, an indictment is not to be held invalid for a defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits, the substitution of initials for the Christian name of the defendant does not render the indictment bad. State v. Johnson, 93 Mo. 317, 6 S. W. 77; post, p. 379.

[60] Reg. v. Dale, 17 Q. B. 64; Tweedy v. Jarvis, 27 Conn. 42; City Council of Charleston v. King, 4 McCord (S. C.) 487; State v. Black, 31 Tex. 560 (statutory); State v. Kean, 10 N. H. 347, 34 Am. Dec. 162; Vandermark v. People, 47 Ill. 122; State v. Johnson, 93 Mo. 73, 317, 5 S. W. 699, and 6 S. W. 77; State v. Johnson, 67 N. C. 58; State v. McMillan, 68 N. C. 440; State v. Appleton, 70 Kan. 217, 78 Pac. 445. In some jurisdictions the initials are sufficient in all cases. Eaves v. State, 113 Ga. 749, 39 S. E. 318.

[61] Choen v. State, 52 Ind. 347, 21 Am. Rep. 179; Franklin v. Talmadge, 5 Johns. (N. Y.) 84; Roosevelt v. Gardinier, 2 Cow. (N. Y.) 463; Edmundson v. State, 17 Ala. 179, 52 Am. Dec. 169; Thompson v. Lee, 21 Ill. 242; Erskine v. Davis, 25 Ill. 251; Bletch v. Johnson, 40 Ill. 116; Wood v. Fletcher, 3 N. H. 61; State v. Martin, 10 Mo. 391; Dilts v. Kinney, 15 N. J. Law, 130; Isaacs v. Wiley, 12 Vt. 674; Allen v. Taylor, 26 Vt. 599; State v. Feeny, 13 R. I. 623; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Bratton v. Seymour, 4 Watts (Pa.) 329; Keene v. Meade, 3 Pet. 1, 7 L. Ed. 581; McKay v. Speak, 8 Tex. 376; State v. Manning, 14 Tex. 402; State v. Williams, 20 Iowa, 98; People v. Lockwood, 6 Cal. 205.

[62] Langdon v. People, 133 Ill. 382, 24 N. E. 874; Timberlake v. State, 100 Ga. 66, 27 S. E. 158.

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rejected as surplusage.[63] Other courts seem to regard the middle name or initial as a part of the name necessary to be stated.[64]

The words "junior," "senior," etc., are no part of a person's name, and their omission can ordinarily make no difference.[65] It has been said that where a father and son have the same name, and are both indicted, some such mode of distinguishing them should be adopted.[66]

If the true name and the name given in the indictment are idem sonans—that is, if the sound is not affected by the mistake in spelling it—there is no misnomer;[67] and it has been said that if the two names are the same in original derivation, and are taken promiscuously in common use, there is no misnomer, though they may differ in sound.[68] If a person is known by more than one name, either may be used.[69] Whether he is so known or not is for

[63] Price v. State, 19 Ohio, 423; State v. Hughes, 1 Swan (Tenn.) 261.

[64] Jones v. Macquillin, 5 Term R. 195; Com. v. Perkins, 1 Pick. (Mass.) 388; Com. v. Hall, 3 Pick. (Mass.) 262; Com. v. Shearman, 11 Cush. (Mass.) 546.

[65] Com. v. Perkins, 1 Pick. (Mass.) 388; De Kentland v. Somers, 2 Root (Conn.) 437; Kincaid v. Howe, 10 Mass. 205; Cobb v. Lucas, 15 Pick. (Mass.) 7; State v. Grant, 22 Me. 171; Brainard v. Stilphin, 6 Vt. 9, 27 Am. Dec. 532; People v. Collins, 7 Johns. (N. Y.) 549; Padgett v. Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Allen v. Taylor, 26 Vt. 599; Headley v. Shaw, 39 Ill. 354; Com. v. Parmenter, 101 Mass. 211; post, p. 276. But see State v. Vittum, 9 N. H. 519; Jackson ex dem. Pell v. Prevost, 2 Caines (N. Y.) 164.

[66] 1 Chit. Cr. Law, 211. See State v. Vittum, 9 N. H. 519; Rex v. Bailey, 7 Car. & P. 264. But by the better opinion, it is not necessary. Rex v. Peace, 3 Barn. & Ald. 579; Com. v. Parmenter, 101 Mass. 211. And see cases cited in the preceding note.

[67] Rex v. Shakespeare, 10 East, 84; Dickinson v. Bowes, 16 East, 110; Petrie v. Woodworth, 3 Caines (N. Y.) 219; State v. Upton, 12 N. C. 513. See post, p. 392, note 75, where illustrations are collected.

[68] 2 Rolle, Abr. 135; Bac. Abr. tit. "Misnomer"; 1 Chit. Cr. Law, 203. "Jack" for John, Walter v. State, 105 Ind. 589, 5 N. E. 735; "Geo." for George, Patterson v. People, 12 Hun (N. Y.) 137.

[69] 1 Chit. Cr. Law, 203; Com. v. Gale, 11 Gray (Mass.) 320; State v. Pierre, 39 La. Ann. 915, 3 South. 60. He need not be as well known by one as by the other. State v. Pierre, supra.

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the jury.[70] And if a man, by his words or conduct, holds out a name as his, he is answerable under that name.[71] In case of doubt a second name may be given after an alius dictus.[72]

If the name of the defendant (either his Christian name, or both Christian name and surname) is unknown, and he refuses to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before them by the jailer, will be sufficient.[73] The general practice is to use an assumed name, and drive the defendant to a plea in abatement, which, as we shall see, must give his true name. If he does not plead in abatement, the conviction, as we shall see, is good; while if he does so plead, a new indictment may be presented, or in some states the indictment may be amended.[74]

A corporation is indicted by its full corporate name, which must be accurately stated, and the names of the natural persons composing it are not mentioned.[75] If a corporation

[70] Lott v. State, 24 Tex. App. 723, 14 S. W. 277; Com. v. Warren, 167 Mass. 53, 44 N. E. 1073.

[71] People v. Leong Quong, 60 Cal. 107; City Council of Charleston v. King, 4 McCord (S. C.) 487; State v. Bell, 65 N. C. 313; Newton v. Maxwell, 2 Cromp. & J. 215.

[72] State v. Graham, 15 Rich. (S. C.) 310; Evans v. State, 62 Ala. 6. In Goodlove v. State, 82 Ohio St. 365, 92 N. E. 491, 30 L. R. A. (N. S.) 134, 19 Ann. Cas. 893, it was held that when the indictment charged defendant with having killed "Percy Stuckey, alias Frank McCormick," proof that defendant killed a person commonly known as Frank McCormick, would not sustain a verdict of guilty, unless it was also shown that the Frank McCormick killed and Percy Stuckey were one and the same person.

[73] 1 Chit. Cr. Law, 203; Rex v. ———, Russ. & R. 489; State v. Angel, 29 N. C. 27; Bryant v. State, 36 Ala. 270; Kelley v. State, 25 Ark. 392. Merely to state that his name is unknown, without any statement to identify him, is not sufficient. Rex v. ———, Russ. & R. 489. Such a description is bad, and a misnomer, if the grand jury knew the defendant's real name. Jones v. State, 63 Ala. 27; post, p. 390.

[74] Post, pp. 176, 364. In some states the statute prescribes this practice. See Geiger v. State, 5 Iowa, 484.

[75] Reg. v. Birmingham & G. Ry. Co., 3 Q. B. 223; Rex v. Patrick, 1 Leach, Crown Cas. 253; Com. v. Demuth, 12 Serg. & R. (Pa.) 389. And it has been held that there must be an averment that the cor-

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is commonly known by a name other than its full legal name, it would seem by analogy to the rule stated above that an indictment in which its commonly known name is used should be sufficient.[76] The general rule above stated applies not only to private corporations, but also to cities, towns, and other municipal corporations. The city or town by its corporate name, and not the inhabitants thereof, is indicted.[77] The inhabitants of a county or unincorporated town are generally indicted simply as such, and not by the name of the county, nor by their individual names.[78] It is allowable, however, to indict them by the name of the county or town.[79]

Addition of Defendant

Even at common law, in England, it was necessary to state the rank and degree of the defendant, in addition to his name, if he was a knight, or of any higher dignity. And at common law, where a person is indicted in respect of his office, that addition is necessary.[80] The necessity for additions was extended to other cases by the statute of 1 Henry V, c. 5, known as the "Statute of Additions." It required that additions should be made in indictments in the name of the defendants "of their estate, or degree, or mys-

poration is in esse; for instance, thus: "The Vermont Central Railroad Company, a corporation existing under and by force of the laws of this state, duly organized and doing business." State v. Vermont C. R. Co., 28 Vt. 583. But see State v. Great Works Milling, etc., Co., 20 Me. 41, 37 Am. Dec. 38; Com. v. President, etc., of Swift Run Gap Turnpike Co., 2 Va. Cas. 362; Clark, Cr. Law, 78. See post, p. 277, note.

[76] It has been so held in cases where the corporation was not itself indicted, but was necessarily mentioned in the indictment, and as we shall see the rule in regard to stating the names of third persons is quite as rigid as that in regard to stating the name of the defendant. See Putnam v. U. S., 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118; Rogers v. State, 90 Ga. 463, 16 S. E. 205.

[77] City of Lowell v. Morse, 1 Metc. (Mass.) 473; Com. v. Inhabitants of Dedham, 16 Mass. 141.

[78] 2 Rolle, Abr. 79.

[79] See Com. v. Inhabitants of Dedham, supra; City of Lowell v. Morse, supra.

[80] 1 Chit. Cr. Law, 204; 2 Inst. 666.

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tery, and of the towns, or hamlets, or places and counties, of which they were, or be, or in which he or they were conversant." By the terms "estate" and "degree" were meant the title, rank, condition, etc., of the defendant; as knight, laborer, widow, spinster, etc. By "mystery" was meant his calling, trade, or profession; as merchant, tailor, broker, hostler, baker, etc.[81] This statute is old enough to be a part of our common law, but in most jurisdictions it has either been abrogated by statute or is not recognized.[82] In some states, however, it or a similar statute has been or still is in force.[83] A woman is described as the wife of some person properly described, or as a widow, or spinster, where an addition is necessary; but in many states no such addition is required.[84] In some jurisdictions it is still necessary, and in others it is at least customary, to add the residence of the defendant as required by the statute of additions; but it is usual to give as his residence the place where the offense was committed, even though he may in fact live elsewhere, because he is considered as having been conversant in that place.[85]

Repeating Name and Description of Defendant

Where the defendant has been once fully named and described, he may afterwards be referred to as the said ——— (giving his Christian name only).[86] It has been held that this applies to indictments containing several counts; that, if the defendant is fully described in the first count, he may be described as the said ——— (giving his Christian name)

[81] 1 Chit. Cr. Law, 204–208; 2 Hawk. P. C. c. 33, § 111.

[82] The Statute of Additions was repealed in England by the statute of 14 & 15 Vict. c. 100, § 24. Where the addition of the defendant's degree, etc., is necessary, the omission is cured by his pleading to the indictment, Rex v. Hannum, 1 Leach, C. C. 420; and a fortiori, by verdict, Com. v. Jackson, 1 Grant, Cas. (Pa.) 262.

[83] State v. Bishop, 15 Me. 122; State v. Hughes, 2 Har. & McH. (Md.) 479; Haught v. Com., 2 Va. Cas. 3; Com. v. Clark, 2 Va. Cas. 401.

[84] State v. Guest, 100 N. C. 410, 6 S. E. 253.

[85] 1 Chit. Cr. Law, 210; Com. v. Taylor, 113 Mass. 1.

[86] State v. Pike, 65 Me. 111.

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in the subsequent counts.[87] Where there is only one count in the indictment, a previous description of a person so referred to need not be repeated;[88] but it has been held that such a reference in a second count cannot import a description contained in the first count; that, where there are several counts, the description must be repeated.[89]

Effect of Misnomer

Misnomer of the defendant does not render the indictment fatally defective, so that a conviction cannot be had thereon. Objection can be taken only by a plea in abatement before pleading to the merits. The effect is merely to delay the trial, for the plea must give the true name of the defendant, and a new indictment may be presented.[90] Or the state may join issue on the plea, or reply that the defendant was as well known by one name as the other.[91] If the defendant, instead of pleading in abatement, pleads to the merits, he cannot afterwards object on the ground of misnomer.[92]

Under the statute of additions above mentioned, the same rule applies where an addition is omitted or misstated. The defect can only be taken advantage of by plea in abatement.[93]

[87] Com. v. Hagarman, 10 Allen (Mass.) 401; Com. v. Clapp, 16 Gray (Mass.) 237. See State v. Pike, 65 Me. 111.

[88] Com. v. Sullivan, 6 Gray (Mass.) 477.

[89] Reg. v. Martin, 9 Car. & P. 215; Reg. v. Waters, 3 Cox, Cr. Cas. 300.

[90] State v. Hughes, 1 Swan (Tenn.) 261. The accused will be concluded by the name given by him. 1 Chit. Cr. Law, 208. In some states, by statute, the same indictment may be amended in this respect.

[91] Com. v. Gale, 11 Gray (Mass.) 320; ante, p. 173.

[92] Com. v. Inhabitants of Dedham, 16 Mass. 141; Turns v. Com., 6 Metc. (Mass.) 224; Turner v. People, 40 Ill. App. 17; post, p. 433.

[93] 1 Chit. Cr. Law, 204; State v. Bishop, 15 Me. 122; State v. McGregor, 41 N. H. 407; Com. v. Cherry, 2 Va. Cas. 20; Com. v. Lewis, 1 Metc. (Mass.) 151; Com. v. Butler, 1 Allen (Mass.) 4.

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STATEMENT OF THE OFFENSE

59. The indictment must state the offense, and must state it with sufficient certainty—.

(a) To enable the court to say that, if the facts stated are true, an offense has been committed by the defendant.

(b) To enable the court to know what punishment to impose in case of conviction.

(c) To enable the court to confine the proof to the offense charged, so that the defendant may not be accused of one offense and convicted of another.

(d) To give the defendant reasonable notice of the particular charge he will be called upon to answer, and enable him to properly prepare his defense.

(e) To make it appear on the record of what particular offense the defendant was charged, for the purpose of review in case of conviction.

(f) To so identify the offense that an acquittal or conviction may be pleaded in bar of a subsequent prosecution for the same offense.

It has always been an established rule of the common law that the indictment must be certain—that is, that it must set forth the special manner of the whole fact, so that it can be clearly seen what particular crime, and not merely what nature of crime, is intended to be charged. This rule is recognized and declared by the Constitution of the United States, in the provision that "the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation." This applies only to prosecutions in the federal courts, but there are similar provisions in most of the state Constitutions. "The salutary rule of the common law," said the Massachusetts court, "that no one shall be held to answer to an indictment or information unless the crime with which it is intended to charge him is expressed with reasonable precision, directness, and fullness, that he may be fully prepared to meet, and, if he can, to answer

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and repel it, is recognized and enforced, and extended to every mode in which a citizen can be called to answer to any charge of crime in this commonwealth by the highest authority known to the laws; namely, an express provision in the bill of rights (article 12). It declares that no subject shall be held to answer for any crime or offense until the same is fully and plainly and substantially and formally described to him." [94]

It is generally stated in the books that there are three degrees of certainty in pleading: (1) Certainty to a common intent; (2) certainty to a certain intent in general; and (3) certainty to a certain intent in every particular. A pleading is certain to a common intent when it is clear enough according to reasonable intendment or construction, though not worded with absolute precision. Certainty to a certain intent in general means what upon a fair and reasonable construction may be called certain without recurring to possible facts which do not appear except by inference or argument. Certainty to a certain intent in every particular requires "the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving nothing to be supplied by argument, inference or presumption, and no supposable answer wanting. The pleader must not only state the facts of his own case in the most precise way, but must add to them such facts as will anticipate the case of his adversary." [95] The first is the lowest degree of pleading allowed, and is allowed only in pleas in bar, and in certain parts of the indictment other than the charge, which we shall presently explain. The second degree is required in that part of the indictment which charges the offense. The third degree is required in pleas in abatement and other dilatory pleas.

There are several reasons why certainty in indictments is required, and there is no better way to determine the degree of certainty that is necessary than by referring to

[94] Com. v. Phillips, 16 Pick. (Mass.) 211; Com. v. Blood, 4 Gray (Mass.) 31; ante, p. 122; post, p. 363.

[95] Shipm. Com. Law Pl. 249.

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them. If an uncertain charge were allowed, the defendant would not know what evidence he might be called upon to meet, and could not properly prepare his defense; there would be no way to determine whether the facts given in evidence are the same as those charged, so that a man might be put upon his trial for one offense and convicted on proof of another; the court could not know what punishment to impose in case of conviction; and, finally, the pendency of the indictment, or an acquittal or conviction under it, could not be pleaded in bar of another prosecution, for it could not be determined that the charges were the same, and so a man might be twice punished for the same offense.[96]

There are many decisions on the application of the rule that the indictment must be certain, and the degree of certainty, and in many of them very formal objections have been allowed to prevail. This has often been regretted by the judges. As early as Lord Hale's time, he observed that the strictness required in indictments was grown to be a blemish and inconvenience in the law, and the administration thereof; that more offenders escaped because of the overeasy ear given to exceptions to indictments than by the manifestation of their innocence; and that the grossest crimes had gone unpunished by reason of these unseemly niceties.[97] And Lord Mansfield, while admitting that tenderness ought always to prevail in criminal cases, so far at least as to take care that a man may not suffer otherwise than by due course of law, said that tenderness did not require such a construction of words perhaps not absolutely and perfectly clear and express as would tend to render the law nugatory and ineffectual, and destroy or evade the

[96] U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Com. v. Phillips, 16 Pick. (Mass.) 211; Rex v. Horne, 2 Cowp. 682; Com. v. Dean, 109 Mass. 352; People v. Taylor, 3 Denio (N. Y.) 91; Reg. v. Rowed, 3 Q. B. 180; White v. Reg., 13 Cox, Cr. Cas. 318; Com. v. Maxwell, 2 Pick. (Mass.) 143; Com. v. Child, 13 Pick. (Mass.) 202; U. S. v. Reese, 92 U. S. 225, 23 L. Ed. 563.

[97] 2 Hale, P. C. 193. And see observations of Lord Kenyon (Rex v. Suddis, 1 East, 314) and Lord Ellenborough (Rex v. Stevens, 5 East, 260; Rex v. Perrott, 2 Maule & S. 386).

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very end of it; nor did it require the courts to give in to such nice and strained critical objections as are contrary to its true meaning and spirit.[98] In civil cases, it is said by Chitty, it was considered the best policy to require technical accuracy in pleading; but in criminal cases, where the public security is so deeply interested in the prompt execution of justice, it has been held that technical objections should be overlooked.

Yet notwithstanding the remarks of these distinguished judges the most technical and frivolous objections have been allowed to prevail, and in a lesser degree continue to prevail in many jurisdictions, bringing the administration of the criminal law into disrepute in a practical age, when society demands efficiency and is intolerable of such scholasticism as "certainty to a certain intent in general" and "certainty to a certain intent in every particular." The most enlightened judges and legislators are realizing that a rigid adherence to the ancient technical rules governing indictments is subversive of justice, and are collaborating to bring about a more rational system.[99]

[98] 1 Chit. Cr. Law, 170.

[99] A statute in Minnesota provides that an indictment is sufficiently certain if the act charged as an offense is stated with such degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case, and formal defects, which do not tend to the prejudice of the substantial rights of the defendant upon the merits, must be disregarded. Rev. Laws 1905, §§ 5305, 5306. See, for a liberal application of the statute, State v. Preuss, 112 Minn. 108, 127 N. W. 438. The Massachusetts Statute (Rev. Laws 1902, c. 218, § 34) provides: "An indictment shall not be quashed or be considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defense; nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars as provided in section 39." This is a most enlightened statute and has enabled the Massachusetts court to go far in abolishing the technicalities of the common law as to indictments that have served for so long in obstructing a just administration of the criminal law. Section 4706, St. 1898, of Wisconsin, provides that no indictment or information in a criminal case shall be abated, quashed, or reversed for any error or mistake where the person and the case may be right-

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60. The indictment must show on its face that if the facts alleged are true, and assuming that there is no defense, an offense has been committed. It must therefore state explicitly and directly every fact and circumstance necessary to constitute the offense, whether such fact or circumstance is an external event, or an intention or other state of mind, or a circumstance of aggravation affecting the legal character of the offense.

Unless the indictment complies with this rule, it does not state the offense. The charge must always be sufficient to support itself. It must directly and distinctly aver every fact or circumstance that is essential, and it cannot be helped out by the evidence at the trial or be aided by argument and inference.[1] With rare exceptions, offenses consist of more than one ingredient, and in some cases of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested or be reversed on error. What facts and circumstances are necessary to be stated must be determined by

ly understood by the court, and the court may on motion order an amendment curing such defect. See State v. Brown, 143 Wis. 405, 127 N. W. 956. A recent decision of the Supreme Court of the United States seems to hold that an indictment is not void, though it fail to charge an offense—citing U. S. v. Ball, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300—but that even substantial defects must be objected to in the trial court. Serra v. Mortiga, 204 U. S. 470, 27 Sup. Ct. 343, 51 L. Ed. 571.

[1] 2 Hawk. P. C. c. 25, § 57; Vaux's Case, 4 Coke, 44b; State v. Brown, 7 N. C. 224; Com. v. Proprietors of Newburyport Bridge, 9 Pick. (Mass.) 142; Reg. v. Aspinall, 2 Q. B. Div. 56; Bradlaugh v. Reg., 3 Q. B. Div. 626; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Ex parte Hopkins, 61 Law J. Q. B. 240, 66 Law T. (N. S.) 53, and 17 Cox, Cr. Cas. 444; Reg. v. Dixon, 2 Ld. Raym. 971; Rex v. Perrott, 2 Maule & S. 379; Lambert v. People, 9 Cow. (N. Y.) 578; Com. v. Dudley, 6 Leigh (Va.) 613; Com. v. Whitney, 5 Gray (Mass.) 85; Com. v. Lannan, 1 Allen (Mass.) 590; State v. Perry, 2 Bailey (S. C.) 17; Com. v. O'Donnell, 1 Allen (Mass.) 593.

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reference to the definitions and the essentials of the specific crimes. Having ascertained them, every essential fact must not only have arisen, but it must be stated in the indictment.[2] To constitute the statutory offense of obtaining property by false pretenses,[3] there must have been a representation by the defendant of a past or existing fact or circumstance; it must have been in fact a false representation; it must have been known by him to be false; it must have been made with intent to defraud; it must have been believed by the other party; and he must have parted with his property to the defendant because of it. If an indictment for this offense fails to state any one or more of these facts or circumstances, it fails to charge the offense, and would not support a conviction, even though every essential fact were shown by the evidence to have existed.[4]

Where the circumstances are constituent parts of the offense, they must be set out. In other words, where the act is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters necessary to show its illegality must be stated.[5] To erect a building may be a nuisance, but it is not necessarily so, and therefore an indictment for a nuisance in erecting a building must show the circumstances which make it a nuisance.[6]

[2] People v. Gleason, 75 Hun, 572, 27 N. Y. Supp. 670; State v. Fancher, 71 Mo. 460; Garcia v. State, 19 Tex. App. 389; State v. Hall, 72 Iowa, 525, 34 N. W. 315; State v. Cleveland, C., C. & St. L. Ry. Co., 137 Ind. 75, 36 N. E. 713.

[3] Clark, Cr. Law (3d Ed.) 362.

[4] Rex v. Perrott, 2 Maule & S. 379; Hightower v. State, 23 Tex. App. 451, 5 S. W. 343. But in Goodlove v. State, 82 Ohio St. 365, 92 N. E. 491, 30 L. R. A. (N. S.) 134, 19 Ann. Cas. 893, it was held that, though the statute defining murder uses the words "human being," it is not necessary to state in the indictment that the deceased was a human being, if his name is given. See, also, Palmer v. People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

[5] 2 Hawk. P. C. c. 25, § 57; Lowe v. State, 59 Tex. Cr. R. 557, 129 S. W. 842. Under a statute punishing the bribing of an officer, an indictment for bribing X., "an assistant city attorney," is invalid, if there be no such officer known to the law.

[6] Id.; Higges v. Henwood, 2 Rolle, 345.

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So it has been held that an indictment for not serving in an office to which defendant had been elected, must set out the mode of his election; because, if he was not legally elected, it would not be a crime for him to refuse to serve.[7]

For the reasons above stated, where notice, knowledge, or request is necessary to raise the duty, the breach of which constitutes the crime charged, it should be averred.[8] And where a particular evil intent accompanying an act is necessary to make that act a crime, it must be alleged.[9] And where aggravating circumstances enter into the offense, and increase the punishment, they must be alleged, in order that the increased penalty may be inflicted.[10]

It was formerly held at common law that in indictments for homicide, where the death is alleged to have been caused by an incised wound or cut, the wound must be described, so that the court may see that it was an adequate cause of death. But this is not now considered necessary; it is sufficient to state that it was mortal.[11] It has never been deemed necessary to describe a bruise which does not make a technical wound.[12]

As we shall presently see, technical phrases and expressions are required to be used in describing certain offenses, to express the precise idea which the law entertains of the offense. Thus, in every indictment for a felony the word "feloniously" must be used, and in every indictment for burglary the words "burglariously and feloniously" are

[7] Rex v. Harpur, 5 Mod. 96.

[8] Post, p. 225.

[9] Post, p. 218.

[10] Post, p. 237.

[11] 3 Chit. Cr. Law, 734; 1 East, P. C. 342; 2 Hale, P. C. 185, 186; Com. v. Chapman, 11 Cush. (Mass.) 428; State v. Owen, 5 N. C. 452, 4 Am. Dec. 571; State v. Moses, 13 N. C. 452; State v. Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; State v. Sanders, 76 Mo. 35; State v. Green, 111 Mo. 585, 20 S. W. 304; West v. State, 48 Ind. 483; Com. v. Woodward, 102 Mass. 155; Stone v. People, 2 Scam. (Ill.) 326.

[12] Rex v. Mosley, 1 Moody, Crown Cas. 98; Turner's Case, 1 Lewin, Crown Cas. 177; Rex v. Tomlinson, 6 Car. & P. 370.

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necessary.[13] Except in these cases where precise technical expressions are necessary, there is no rule that any other words shall be employed than such as are in ordinary use, or that a different sense is to be put upon them than that which they bear in ordinary acceptation.[14]

It is often said without qualification that if every allegation in an indictment can be taken as true, and yet the defendant be guilty of no offense, then the indictment is insufficient;[15] but such a rule, though generally applicable, is not universal. In many cases it would mislead, and to many it is quite inapplicable.[16] As we shall see, for instance, it is never necessary to negative matters of defense.[17] Everything alleged in an indictment may be true, and yet there may be some fact which need not be negatived, but must be set up by the defendant, showing that no crime has been committed. The test "would prove to be equally fallacious in the case of a common assault. In such a case the party may have done all imputed to him by the indictment, and yet be innocent. He may have only corrected his child, or his servant; he may have committed the assault charged against him in necessary defense of his life or of his possession. Thus, this test is quite too wide." [18]

61. The acts which are relied upon as constituting the offense must be stated. The statement of a conclusion of law, without showing the facts, is bad.

Under this rule, for instance, to charge generally the violation of public decency, without setting forth the particular acts and the circumstances rendering them indecent; or

[13] Post, p. 228.

[14] Com. v. Inhabitants of Dedham, 16 Mass. 141; Com. v. Wentz, 1 Ashm. (Pa.) 269.

[15] Reg. v. Rowlands, 2 Denison, Crown Cas. 377; Reg. v. Harris, 1 Denison, Crown Cas. 466; Com. v. Harris, 13 Allen (Mass.) 539.

[16] Jones v. Reg., Jebb & B. 161.

[17] Post, p. 195.

[18] Jones v. Reg., supra. And see Com. v. Hersey, 2 Allen (Mass.) 181.

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the disturbance of a school or other assemblage, without showing the acts done;[19] or to charge an unlawful escape from prison, without showing the cause of imprisonment;[20] or to charge perjury, without setting forth the oath as an oath taken in a judicial proceeding, and before a proper person, so that it may appear that it was an oath which the court had jurisdiction to administer;[21] or to charge a forgery, the sending of a threatening letter, or the publication of a libel, without setting forth a copy of the instrument or writing,—would be to state a conclusion of law.[22] So where an indictment charges a conspiracy, without setting forth the object specifically, and showing that it is criminal, or the means to be used, and showing that they are criminal, it is bad.[23]

In a leading English case the defendant was charged with unlawfully soliciting one Hooper, a customhouse officer, to neglect his duty to seize goods. The information alleged that Hooper was a person employed in the customs service, and that it was his duty as such person, so employed, to arrest and detain goods, etc., and was held bad because it did not show the facts making it Hooper's duty to seize the goods. "The allegation," it was said by Lord Tenterden, "that Hooper was a person employed in the service of the customs, is an allegation of fact. The allegation that it was his duty to seize goods which upon importation were forfeited is an allegation of matter of law. That being so, the fact from which that duty arose ought

[19] State v. Butcher, 79 Iowa, 110, 44 N. W. 239; State v. Brunson, 2 Bailey (S. C.) 149; Com. v. Maxwell, 2 Pick. (Mass.) 139; State v. Scribner, 2 Gill & J. (Md.) 246; Randolph v. Com., 6 Serg. & R. (Pa.) 398; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; State v. Dent, 3 Gill & J. (Md.) 8. Contra, State v. Craddock, 44 Kan. 489, 24 Pac. 949; Jones v. State, 28 Neb. 495, 44 N. W. 658, 7 L. R. A. 325.

[20] Rex v. Freeman, 2 Strange, 1226; 2 Hawk. P. C. c. 25, § 57.

[21] Rex v. Horne, Cowp. 683; Stedman's Case, Cro. Eliz. 137; State v. Street, 1 N. C. 156, 3 Am. Dec. 682; State v. Ammons, 7 N. C. 123; State v. Mace, 76 Me. 64.

[22] Post, pp. 189, 239.

[23] Post, p. 189.

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to have been stated in the count. If, indeed, it could be said to be the duty of every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it is clearly not the duty of every such person; as, for instance, it is not the duty of a porter employed in the service of the customs to seize such goods." [24]

There is an exception to this rule in certain cases in which an act is allowed to be stated according to its legal effect, instead of according to the fact. Under the common-law principle, "qui facit per alium facit per se," a person whose servant unlawfully sells intoxicating liquor in the

[24] Rex v. Everett, 8 Barn. & C. 114. The case just cited is an illustration of the extent to which common sense was sacrificed—and it is still sometimes now sacrificed—to formalism in criminal pleading. It would be tolerable as a system if it had been even consistent with itself. But it was not. The principle on which this case was decided was that the allegation that it was Hooper's duty to seize goods was an allegation of matter of law, and therefore insufficient, without a statement of the facts from which that duty arose. Yet the statement that Hooper "was a person employed in the service of the customs" was said to be an allegation of fact, and sufficient. But that Hooper "was employed" might just as well be held to be a matter of law. His duty, if he had any duty, arose from his employment; if he was not "employed," he was under no duty. Whether Hooper was "employed" depended either on his being in a certain contractual relation with another, or on his being appointed to his position. Whether one stands in a contractual relation to another is, however, also a question of law, and a very difficult one; and whether one is appointed to an office depends on whether the person appointing him has legal authority so to do, also a question of law, depending on his own appointment or election. To have been consistent in this and similar cases the judges should have required the pleader to set forth in the indictment—if Hooper held his office under a contract—the terms of the alleged contract, the fact whether Hooper and the person employing him were sui juris, the consideration for the contract, etc. If the office Hooper held was an appointive one, the pleader should have been required to show that the person making the appointment had legal authority to make it, by showing his own appointment by one having authority to appoint him, and so on back to the king, whose authority to act as king should also be shown. Of course, no such consistency was practiced. The next paragraph in the text above shows the ease with which the principle was ignored without injury to the rights of the defendant, even in so serious charges as murder.

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course of his employment is regarded in law as selling it himself. The sale in such a case may be alleged to have been made by the principal, though this is a mere conclusion of law, and the indictment will be sustained by proof of a sale by the agent.[25] "It is a general rule in prosecutions for misdemeanors that, when an indictment alleges that a person did an act, such allegation is sustained by proof that he caused it to be done by another." [26] The rule also applies where an indictment charges the defendant with publishing a libel, and the evidence shows that he procured another person to publish it; [27] or where an indictment charges the defendant with selling lottery tickets, and the proof shows that they were sold by his servant.[28] So, also, an indictment for extortion from a person acting as agent may be alleged to have been from the principal.[29] And an unlawful sale of liquor to a person who is acting as agent for an undisclosed principal may be alleged to have been made to the principal.[30] And an indictment charging the defendant with himself committing a murder or other felony is supported by proof that he was present, aiding and abetting its commission by another, and was principal in the second degree only.[31]

Indictments for soliciting or enticing another to commit an act need not state the means used, but may charge the solicitation or enticement in general terms. "The act of enticing or soliciting consists of a variety of acts and circumstances, all originating in the same purpose, and is itself a fact which admits of no precise or definite description; and the particular means used need not, and indeed hardly could, be detailed. The general allegation that the defend-

[25] Com. v. Park, 1 Gray (Mass.) 553.
[26] Com. v. Park, supra.
[27] Rex v. Gutch, Mood. & M. 437.
[28] Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475.
[29] Com. v. Bagley, 7 Pick. (Mass.) 279.
[30] Com. v. McGuire, 11 Gray (Mass.) 460. Or it may be alleged to have been made to the agent. Com. v. Kimball, 7 Metc. (Mass.) 308.
[31] Reg. v. Crisham, 1 Car. & M. 187; Com. v. Chapman, 11 Cush. (Mass.) 428; Coal Heavers' Case, 1 Leach, Crown Cas. 64; Brister v. State, 26 Ala. 108; post, p. 349.

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ant did entice and solicit with the prohibited object is therefore sufficient." [32]

The rule has also been laid down that where the offense is made up of a number of minute acts, which cannot be enumerated upon the record without great prolixity and inconvenience, and the danger of a variance, they ought to be dispensed with. Under this rule it has been held that an indictment for fitting out a vessel in violation of the slave trade act need not specify the particulars of the fitting out, since "the fitting out is a compound of various minute acts, almost incapable of exact specification." [33]

62. The indictment, to be certain, must specify and describe the particular offense, so that it may be identified, and not charge the defendant with being an offender in general, or with having committed an offense of a certain nature and name, without identifying the particular act or acts relied upon.

This is clearly necessary in order that the defendant may know with what particular offense he is charged, and in order that he may plead his conviction or acquittal if again indicted for the same offense, and in order that the proof at the trial may be confined to the charge.[34]

To charge a man, for instance, with "burning" or "burglariously entering" a dwelling house, or with "stealing," without describing the house or the property stolen, would not be sufficient; for the defendant is entitled to know the

[32] Com. v. McGovern, 10 Allen (Mass.) 193; Rex v. Fuller, 1 Bos. & P. 180, 2 Leach, Crown Cas. 790.

[33] U. S. v. Gooding, 12 Wheat. 460, 6 L. Ed. 693.

[34] 2 Hawk. P. C. c. 25, § 59; State v. Mace, 76 Me. 64; Com. v. Pray, 13 Pick. (Mass.) 359; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Com. v. Phillips, 16 Pick. (Mass.) 211; Rex v. Horne, 2 Cowp. 682; Com. v. Dean, 109 Mass. 352; People v. Taylor, 3 Denio (N. Y.) 91; White v. Reg., 13 Cox, Cr. Cas. 318; Com. v. Maxwell, 2 Pick. (Mass.) 143; Com. v. Child, 13 Pick. (Mass.) 202; U. S. v. Reese, 92 U. S. 225, 23 L. Ed. 563; People v. Dumar, 106 N. Y. 502, 13 N. E. 325; People v. Stark, 136 N. Y. 538, 32 N. E. 1046; Com. v. Milby (Ky.) 24 S. W. 625; Luter v. State, 32 Tex. Cr. R. 69, 22 S. W. 140. As to when it is insufficient to follow the language of the statute, see post, p. 309.

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particular act of which he is accused, so that he may prepare his defense. And, under this rule, an indictment is insufficient if it charges the defendant generally with having spoken or published scandalous and defamatory words of a person, without stating what the words were;[35] or if it charges a person with the statutory offense of having failed to deliver to the recorder a chattel mortgage which he had executed, and with the delivery of which he had been intrusted, and fails to state by whom the mortgage was delivered to the accused;[36] or if it charges him with being a common disturber of the peace, and having stirred up divers quarrels,[37] or with being a common thief[38] or a common evildoer.[39]

On the same principle, an indictment for obtaining money by false pretenses is not sufficient if it merely states that the accused falsely pretended certain allegations; but it must expressly set out the representations, and state what part of them was false.[40] And indictments for forgery and threatening letters must set forth a copy of the instrument.[41] An indictment for a conspiracy is bad if it does not set forth the object specifically, and show that such object is criminal, or the means intended to be used, and show that they are criminal;[42] and an indictment under a statute providing that no innholder should entertain any persons, other than travelers, etc., on the Lord's day, under a

[35] Rex v. How, 2 Strange, 699; 2 Hawk. P. C. c. 25, § 59; Cook v. Cox, 3 Maule & S. 116.

[36] State v. Grisham, 90 Mo. 163, 2 S. W. 223.

[37] 2 Rolle, Abr. 79; 2 Hale, P. C. 182; Rex v. Cooper, 2 Strange, 1246.

[38] 2 Rolle, Abr. 79; 2 Hale, P. C. 182.

[39] 2 Hawk. P. C. c. 25, § 59.

[40] Rex v. Perrott, 2 Maule & S. 379, 387. See, also, People v. Waldhorn, 82 Misc. Rep. 238, 143 N. Y. Supp. 484.

[41] Rex v. Gilchrist, 2 Leach, Crown Cas. 661.

[42] Lambert v. People, 9 Cow. (N. Y.) 578; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; State v. Parker, 43 N. H. 83; State v. Keach, 40 Vt. 118; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; State v. Roberts, 34 Me. 320; U. S. v. Patterson (C. C.) 55 Fed. 605. See, also, People v. Arnold, 46 Mich. 268, 9 N. W. 406.

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penalty for each person so entertained, was held bad because it failed to state the precise number of persons entertained, but merely charged that he entertained "divers persons." [43] Sometimes time is a necessary ingredient of the offense, and must, of course, be stated in order to state the offense.

Some offenses, from their nature, it is said, form an exception to this rule. A person, for instance, may be charged generally with being a common barrator, or a common scold,[44] or a common seller of intoxicating liquors, or the keeper of a common bawdy or gaming house,[45] or a common nightwalker or prostitute, etc.[46] The indictment need not set out the particular acts, because the charges include in their nature a succession and continuation of acts which do not belong to any particular period, but form the daily habit and character of the individual offending.[47] The state, however, may be required before trial to give the de-

[43] Com. v. Maxwell, 2 Pick. (Mass.) 139.

[44] Rex v. Cooper, 2 Strange, 1246; 2 Hale, P. C. 182; 2 Hawk. P. C. c. 25, § 59; Com. v. Davis, 11 Pick. (Mass.) 432; Com. v. Pray, 13 Pick. (Mass.) 362; James v. Com., 12 Serg. & R. (Pa.) 220.

[45] 2 Hale, P. C. 182; 2 Hawk. P. C. c. 25, § 59; Rex v. Cooper, 2 Strange, 1246; Rex v. Humphrey, 1 Barn. & C. 272; James v. Com., 12 Serg. & R. (Pa.) 220; Com. v. Pray, 13 Pick. (Mass.) 359; Lambert v. People, 9 Cow. (N. Y.) 587; Com. v. Davis, 11 Pick. (Mass.) 432; U. S. v. Fox, 1 Low. 199, Fed. Cas. No. 15,156; State v. Patterson, 29 N. C. 70, 45 Am. Dec. 506; Stratton v. Com., 10 Metc. (Mass.) 217; Com. v. Odlin, 23 Pick. (Mass.) 275; State v. Collins, 48 Me. 217.

[46] State v. Dowers, 45 N. H. 543; State v. Russell, 14 R. I. 506.

[47] 1 Chit. Cr. Law, 230. This is the reason given in the books. We have seen, however, that an indictment is bad which charges defendant with being a common disturber of the peace or a common thief. It is difficult to understand why a charge of being a common thief does not "include in its nature a succession and continuation of acts which do not belong to any particular period, but form the daily habit and character of the individual offending," as well as the charge of being a common prostitute. It may be noted, also, that an indictment for the crime of affray was good at common law if it merely charged the defendant with committing an affray, without a statement of the acts constituting the affray. See Archbold, Cr. Pr. & Pl. (24th Ed.) p. 1224. The same is true of the crime of assault. State v. Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565.

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fendant notice of the particular instances that are meant to be proved.[48]

It has been held that an indictment is bad if it may apply to more than one offense, and does not show which is intended.[49] In Massachusetts, however, the contrary has been held. In that state there were two statutes, one of which declared it a crime to break and enter in the nighttime an office adjoining a dwelling house, with intent to steal therein, and the other of which declared it a crime, subject to the same punishment, to break and enter in the nighttime, with a like intent, an office not adjoining a dwelling house. An indictment for breaking and entering an office in the nighttime with such intent was held sufficient, though it failed to allege whether the office was or was not adjoining a dwelling house, and could therefore have applied to either offense.[50]

63. The offense must be stated positively, and every essential fact and circumstance must be alleged directly and distinctly. Nothing can be brought into the indictment by argument or other than necessary inference.

The offense must be stated positively. A statement by way of recital, and not in positive language, as where a statement is preceded by the words "whereas," is bad.[51]

[48] 2 Hawk. P. C. c. 25, § 59; Rex v. Mason, 2 Term R. 586; Com. v. Pray, 13 Pick. (Mass.) 359; Com. v. Davis, 11 Pick. (Mass.) 434; State v. Chitty, 1 Bailey (S. C.) 379; State v. Russell, 14 R. I. 506.

[49] Rex v. Marshall, 1 Moody, Crown Cas. 158.

[50] Larned v. Com., 12 Metc. (Mass.) 240.

[51] 2 Hawk. P. C. c. 25, § 60; Rex v. Crowhurst, 2 Ld. Raym. 1363; Rex v. Whitehead, 1 Salk. 371. In Rex v. Whitehead the indictment was: "Whereas, an order had been made that the parishioners should receive a bastard child, they in contempt did refuse to receive it." The fact that the participle is used does not render the statement defective. To charge, for instance, that the defendant, "being" an officer, did embezzle, sufficiently alleges that the defendant was an officer. State v. Manley, 107 Mo. 364, 17 S. W. 800. And see State v. Hooker, 17 Vt. 658; State v. Roberts, 52 N. H. 492; Zoborosky v. State, 180 Ind. 187, 102 N. E. 825.

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This does not apply to matter stated by way of inducement.[52] For the same reason an indictment is bad if the charge is stated argumentatively, instead of in express and positive language;[53] or if it is stated that "there is probable cause to suspect" that the accused has committed the crime, instead of that he did commit it.[54]

Every fact and circumstance which is essential to make out the offense must, as we have seen, be alleged.[55] And it must be alleged directly and distinctly. The charge must be sufficient to support itself. It cannot be helped out by argument or inference. This rule has been expressed in various ways, as that "an indictment must be certain to every intent, and without any intendment to the contrary"; that it "ought to be full, express, and certain, and shall not be maintained by argument or implication"; that "the want of a direct allegation of anything material in the description of the substance, nature, or manner of the crime cannot be supplied by any intendment or implication whatsoever"; that the law "requires the utmost precision, and will not permit a fact on which the life or liberty of a person depends to be made out merely by inference"; that the charge must be sufficiently explicit to support itself, for no latitude of intention can be allowed to include anything more than is expressed.[56] Where a statement of one fact necessarily implies that another fact or circumstance existed, the existence of the latter fact or circumstance need not be directly alleged.[57]

[52] Reg. v. Goddard, 2 Ld. Raym. 920; post, p. 207.

[53] Rex v. Knight, 1 Salk. 375. And cases hereafter cited.

[54] Com. v. Phillips, 16 Pick. (Mass.) 211.

[55] Ante, p. 181.

[56] 1 Chit. Cr. Law, 172; 2 Hawk. P. C. c. 25, § 60; Vaux's Case, 4 Coke, 44b; Rex v. Williams, 1 Leach, Crown Cas. 534; State v. Brown, 7 N. C. 224; State v. Paul, 69 Me. 215; Com. v. Proprietors of Newburyport Bridge, 9 Pick. (Mass.) 142; Com. v. Shaw, 7 Metc. (Mass.) 52; Com. v. Whitney, 5 Gray (Mass.) 85; Com. v. Lannan, 1 Allen (Mass.) 590, Com. v. O'Donnell, 1 Allen (Mass.) 594; State v. Bushey, 84 Me. 459, 24 Atl. 940; State v. Perry, 2 Bailey (S. C.) 17; Com. v. Dudley, 6 Leigh (Va.) 613; State v. Haven, 59 Vt. 399, 9 Atl. 841.

[57] Post, p. 193.

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64. It is not necessary or proper to state any other facts than such as are necessary to make out the offense with certainty.[58]

To set out unnecessary matter is bad pleading, and, while it may in many cases be rejected as surplusage, it may, on the other hand, as we shall presently see, result in repugnancy or absurdity in a material part, and so render the indictment bad, or may be matter of description, which will have to be proved as laid; thus an assault with intent to kill or to rob does not depend in any way upon the instrument or means used in making the assault, and it is therefore unnecessary to set it out.[59] Where an act constitutes a crime without regard to the circumstances surrounding its commission, it is not necessary to set forth the circumstances. They may, however, be alleged in aggravation.[60] The question of surplusage will be hereafter explained.

65. Facts which are necessarily implied or presumed as a matter of law or fact from facts stated need not be expressly alleged.

We have seen that every essential fact must be directly and distinctly alleged, and that nothing can be brought into an indictment by argument or inference.[61] This rule, however, does not require the express statement of facts which are necessarily implied from the facts which are stated.[62] Under a statute, for instance, providing that, when lands shall be rented or leased by agreement for agricultural purposes, the crops raised thereon shall be deemed to be vested in possession of the lessor at all times until the rents are paid, and all stipulations in the lease or agreement per-

[58] 1 Chit. Cr. Law, 227; State v. Ballard, 6 N. C. 186.

[59] Rogers v. Com., 5 Serg. & R. (Pa.) 463; State v. Dent, 3 Gill & J. (Md.) 8; People v. Bush, 4 Hill (N. Y.) 133.

[60] Rex v. Horne, 2 Cowp. 683.

[61] Ante, p. 191.

[62] Rex v. Tilley, 2 Leach, 662; Holloway v. Reg., 17 Q. B. 325, 2 Denison, Crown Cas. 293; Rex v. Chard, Russ. & R. 488.

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formed; and that any lessee who shall remove the crop without the consent of the lessor, etc., "before satisfying all liens held by the lessor on said crop, shall be guilty of a misdemeanor"—an indictment for removal of a crop, which charges that the lease was made, is sufficient, without charging specifically that the lessor had a lien, since the statute implies a lien arising by virtue of the relation charged.[63]

66. The indictment need not state facts of which the court must take judicial notice.[64]

We find a good illustration of this rule in indictments under statutes. It is never necessary to recite or expressly state the particular statute upon which the indictment is founded. The court must take judicial notice of the public statutes, and all that is necessary, therefore, is to state the facts bringing it within the statute, and allege in the conclusion that the offense was committed "contrary to the form of the statute in such case made and provided." [65] An indictment for larceny, as we shall see, must generally state the value of the property stolen;[66] but an indictment charging the larceny of "eighty dollars in money, consisting of ten-dollar bills and twenty-dollar bills, currency of the United States," need not aver that the money was of the value of $80, for the court will take judicial notice that such bills are worth their face value.[67]

[63] State v. Smith, 106 N. C. 653, 11 S. E. 166 (Davis, J., dissenting).
[64] Gady v. State, 83 Ala. 51, 3 South. 429; Damron v. State (Tex. Cr. App.) 27 S. W. 7.
[65] Post, p. 300.
[66] Post, p. 264.
[67] Gady v. State, 83 Ala. 51, 3 South. 429.

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67. It is not necessary to state a conclusion of law resulting from the facts stated, but it suffices to state the facts and leave the court to draw the inference.[68]

In a Massachusetts case, an indictment under a statute declaring a building used as a house of ill fame to be a common nuisance was objected to because, though it charged the defendant with keeping a house of ill fame, it did not allege that she kept and maintained a common nuisance. The court held that this was a conclusion of law which it was not necessary to state.[69] So, under a statute declaring a person who should utter counterfeit money, having in his possession at the same time other counterfeit money, knowing it to be such, to be a common utterer of counterfeit money, it was held not necessary for the indictment, after alleging the uttering of counterfeit money by the defendant and his possession at the same time of other money knowing it to be counterfeit, to further allege that the defendant was a common utterer of counterfeit money, since this was a conclusion of law.[70]

68. It is never necessary to allege mere matter of evidence, unless it alters the offense.[71]

Under this rule it has been held that an indictment charging the defendants with conspiring "by divers false pretenses and undue means and devices to obtain money from

[68] Wells v. Com., 12 Gray (Mass.) 326; Rex v. Smith, 2 Bos. & P. 127, 1 East, P. C. 183, and Russ. & R. 5; Rex v. Michael, 2 Leach, Crown Cas. 938, Russ. & R. 29; Melton v. State, 3 Humph. (Tenn.) 389; Territory v. O'Donnell, 4 N. M. (Johns.) 66, 12 Pac. 743; Ball v. State, 48 Ark. 94, 2 S. W. 462; Leftwich v. Com., 20 Grat. (Va.) 716.

[69] Wells v. Com., supra.

[70] Rex v. Smith, supra. But the indictment must contain a formal conclusion, stating that the acts charged are against the peace of the state (post, p. 356), though this would seem to be a conclusion of law.

[71] Rex v. Turner, 1 Strange, 139, 140. Thus, it is not necessary to show on the face of an indictment for forgery in what manner a person is to be defrauded, as that is a matter of evidence at the trial.

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A. B., and to cheat and defraud him thereof," is sufficient without setting out the particular means or pretenses.[72] It is often difficult to say what is mere matter of evidence, as distinguished from facts necessary to be stated in order to render the indictment sufficiently certain to identify the offense.[73]

Thus it is sometimes held that the means by which a crime was committed must be specifically stated, as the nature of the blow in indictments for murder,[74] the particular acts constituting the alleged riot in indictments for riot,[75] and the manner of causing the disturbance in indictments for disturbing a public meeting;[76] while in the case of other crimes it is held that the means employed in committing the crime are merely matter of evidence, and need not be stated.[77]

69. Matters of defense must come from the defendant, and they need not be anticipated and negatived in the indictment.[78]

"It is an elementary principle of pleading (except in dilatory pleas, which are not favored) that it is not necessary to allege matter which would come more properly from the

It is sufficient to show an instrument which on its face is capable of being used to defraud. Mead v. State, 53 N. J. Law, 601, 23 Atl. 264.

[72] Rex v. Henry, 2 Barn. & Ald. 204; Rex v. Mawbey, 6 Term R. 628.

[73] Ante, p. 188.

[74] Drye v. State, 14 Tex. App. 185.

[75] Whitesides v. People, Breese (Ill.) 21.

[76] State v. Butcher, 79 Iowa, 110, 44 N. W. 239; Contra, Jones v. State, 28 Neb. 495, 44 N. W. 658, 7 L. R. A. 325.

[77] Thus it has been held that it is not necessary to mention the weapon used in an indictment for assault with a deadly weapon, People v. Congleton, 44 Cal. 92; or for assault with intent to kill, Murphey v. State, 43 Neb. 34, 61 N. W. 491.

[78] Rex v. Baxter, 5 Term R. 84, 2 Leach, Crown Cas. 580; Com. v. Hart, 11 Cush. (Mass.) 137. Under a statute providing that when a public offense is committed on the boundary line of two or more counties, etc., the jurisdiction is in either county, an indictment for such a crime need not aver that the accused has not been prosecuted in the other county. State v. Niers, 87 Iowa, 723, 54 N. W. 1076.

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other side; that is, it is not necessary to anticipate the adverse party's answer, and forestall his defense or reply. It is only when the matter is such that the affirmation or denial of it is essential to the apparent or prima facie right of the party pleading that it must be affirmed or denied by him in the first instance." [79]

It is not necessary to allege in the indictment that the defendant was of sound mind, or that he was over seven years of age. In an indictment for disobeying a justice's order it need not be averred that the order was not revoked.[80] And in an indictment for rape it need not be alleged that the defendant was a male, or over the age of 14 years, or, if under that age, that he possessed physical ability, since incapacity to commit the crime is matter of defense.[81] And it is never necessary to negative all the exceptions which, by some other statute than that which creates the offense, might render the act legal, for these must be shown by the defendant.[82] We shall hereafter consider when it is necessary to negative exceptions contained in a statute in an indictment under that statute.

This rule is well illustrated by a Massachusetts case, to which we shall presently refer in another connection. It is the rule, as we shall see, that an intent to commit a criminal act is inferred from its commission, and need not be alleged. In a case in which it was held that an indictment for murder by knowingly administering a deadly poison need not allege an intent to take life, because the law would infer such intent from the act, it was urged by counsel for the defendant that every fact stated in the indictment might have been done by the defendant, and yet he might have committed no offense; that is, that a person may administer to another what he knows to be a deadly poison innocently, and without any intent to do bodily harm, as where a physician administers poison honestly, and in the exer-

[79] Com. v. Hart, 11 Cush. (Mass.) 137.
[80] 1 East, P. C. 19, 20.
[81] People v. Wessel, 98 Cal. 352, 33 Pac. 216.
[82] Rex v. Pemberton, 2 Burrows, 1036; Rex v. Baxter, 2 Leach, Crown Cas. 580; Com. v. Maxwell, 2 Pick. (Mass.) 141.

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cise of due care, but with fatal results. The court said that this was also true with homicide by stabs or cuts with a knife; that a surgeon may accidentally kill in performing an operation. But it was held that this did not make it necessary to expressly allege the criminal intent in an indictment for murder by poison or by cuts or stabs with a knife. If death is thus caused by accident, or is otherwise justifiable or excusable, that is a matter of defense to be proven by the defendant.[83]

70. Though the law requires certainty in describing the offense, it generally requires such certainty only as the circumstances of the case will permit.[84]

An indictment for murder at common law should, if possible, state the means by which the death was caused, but, if the means are unknown, failure to state them cannot render the indictment bad.[85] An indictment for a conspiracy to defraud should, if possible, name the persons whom it was intended to defraud;[86] but if the particular persons have not been ascertained by the conspirators, or are not known to the grand jurors, an indictment which does not name them is good,[87] provided, at least, it shows the excuse for not naming them.[88] The rule also applies to the descriptions of property, allegations of ownership, names of persons, describing lost instruments, etc.[89] Of course ig-

[83] Com. v. Hersey, 2 Allen (Mass.) 181.

[84] State v. Gray, 29 Minn. 142, 12 N. W. 455; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Com. v. Ashton, 125 Mass. 384; People v. Taylor, 3 Denio (N. Y.) 91. Lost instruments, Com. v. Martin, 125 Mass. 394.

[85] Com. v. Webster, 5 Cush. (Mass.) 322, 52 Am. Dec. 711; Cox v. People, 80 N. Y. 500; State v. Williams, 52 N. C. 446, 78 Am. Dec. 248.

[86] Reg. v. King, 7 Q. B. 782.

[87] Rex v. De Berenger, 3 Maule & S. 67; Reg. v. Aspinall, 2 Q. B. Div. 59.

[88] Reg. v. King, supra.

[89] Post, pp. 250, 267, 170, 239. The rule that the indictment should state these facts—the cause of death, the persons defrauded, the description of property stolen, etc.—was that otherwise the defendant

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norance could not excuse an omission to state an essential element of the offense. The excuse for failure to state particulars should be shown by the express statement that they are unknown to the grand jurors.

71. The offense must not be stated in the disjunctive, for, if the rule were otherwise, it would always be uncertain which of the two accusations is intended.[90]

Under this rule it has been held that an indictment which charges that the defendant "murdered, or caused to be murdered," or that he "murdered or wounded," is bad for uncertainty.[91] The same is true of charges that the defendant "burned or caused to be burned";[92] that he "forged or caused to be forged" an instrument;[93] that he "erected or caused to be erected" a nuisance;[94] that he "published or caused to be published" a libel;[95] that he "took or caused to be taken";[96] that he "carried and conveyed or caused to be

would not be able to prepare his defense. How easily this consideration, on which numberless indictments have been quashed, could be ignored, is shown by the rule announced in the text. Of course, the defendant was not aided in preparing his defense in any degree by the statement in the indictment that a description of the property, etc., was unknown to the grand jury.

[90] 2 Hawk. P. C. c. 25, §§ 57, 58; Speart's Case, 2 Rolle, Abr. 81; Davy v. Baker, 4 Burrows, 2471; Com. v. Perrigo, 3 Metc. (Ky.) 5; State v. Stephenson, 83 Ind. 246; Davis v. State, 23 Tex. App. 637, 5 S. W. 149; Hammel v. State, 14 Tex. App. 326; Angel v. Com., 2 Va. Cas. 231; State v. Jones, 1 McMul. (S. C.) 236, 36 Am. Dec. 257; State v. Charlton, 11 W. Va. 332, 27 Am. Rep. 603. But see State v. Van Doran, 109 N. C. 864, 14 S. E. 32, in which an indictment charging a physician with practicing or attempting to practice without a license was sustained.

[91] 2 Hawk. P. C. c. 25, §§ 57, 58; Rex v. Stocker, 5 Mod. 137.

[92] People v. Hood, 6 Cal. 236.

[93] Rex v. Stocker, 5 Mod. 137, 1 Salk. 342, 371; Rex v. Middlehurst, 1 Burrows, 399; Com. v. Perrigo, 3 Metc. (Ky.) 5; People v. Tomlinson, 35 Cal. 503.

[94] Rex v. Stoughton, 2 Strange, 900.

[95] Rex v. Brereton, 8 Mod. 330.

[96] State v. O'Bannon, 1 Bailey (S. C.) 144.

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carried and conveyed" a person having a contagious disease;[97] or that he suffered a game of cards to be played "in a house or on premises in the county aforesaid."[98] And, since all intoxicating liquor is not spirituous, an indictment charging the sale of "spirituous or intoxicating" liquor is bad.[99] The rule applies also to such averments as that the defendant administered "a drug or poison," or that he broke into "a barn or stable," etc.[1]

The rule does not apply where the charges are the same. As explained in a Massachusetts case,[2] where the word "or" in a statute is used in the sense of "to wit"—that is, in explanation of what precedes—and making it signify the same thing, an indictment which adopts the words of the statute is sufficient. Thus, an indictment charging in the words of a statute that the defendant had in his custody and possession 10 counterfeit "bank bills or promissory notes," payable to the bearer thereof, and purporting to be signed by the president and directors of a certain bank, was held sufficient, since the words "promissory note," in the statute, were used merely as explanatory of "bank bill," and meant the same thing.[3] So an information alleging that the defendant stole a mare "of a bay or brown color" was held sufficient on the ground that the colors were the same.[4] And, in the case mentioned above, the indictment charging the sale of "spirituous or intoxicating" liquors would have

[97] Rex v. Flint, Cas. t. Hardw. 370. And see Noble v. State, 59 Ala. 73; State v. Naramore, 58 N. H. 273.

[98] Com. v. Perrigo, 3 Metc. (Ky.) 5.

[99] Com. v. Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476. Or of "beer or ale." Rex v. North, 6 Dowl. & R. 143. See, however, Cunningham v. State, 5 W. Va. 508; Morgan v. Com., 7 Grat. (Va.) 592; Thomas v. Com., 90 Va. 92, 17 S. E. 788.

[1] State v. Drake, 30 N. J. Law, 422; State v. Green, 3 Heisk. (Tenn.) 131; Horton v. State, 60 Ala. 72. An allegation that defendant carried a pistol "on or about his person" is bad. Harris v. State, 58 Tex. Cr. R. 523, 126 S. W. 890.

[2] Com. v. Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476. And see State v. Hester, 48 Ark. 40, 2 S. W. 339.

[3] Brown v. Com., 8 Mass. 59; Russell v. State, 71 Ala. 348; State v. Ellis, 4 Mo. 474; State v. Flint, 62 Mo. 393.

[4] State v. Gilbert, 13 Vt. 647.

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been sufficient if the two terms were the same. All spirituous liquor is intoxicating, but all intoxicating liquor is not spirituous.[5]

Where a statement in the disjunctive is superfluous and immaterial, it will be rejected as surplusage.[6]

72. An indictment which is repugnant in a material part is altogether bad.[7]

Under this rule, an indictment which charged the defendant with having forged a certain writing, whereby one person was bound to another, was held bad, because it was impossible for any one to be bound by a forgery.[8] And an indictment alleging that the defendant caused to be issued to a person a false and fraudulent certificate of ownership of certain stock, signed in blank, and of the following tenor (setting it out), was held bad for repugnancy, as a blank certificate could not certify or purport ownership, nor have a tenor.[9] So, an indictment for forging a bill of exchange, stating it as directed to John King, by the name and addition of John Ring, Esq., was held bad.[10] And an indict-

[5] Com. v. Grey, supra.

[6] 1 Hale, P. C. 535; State v. Corrigan, 24 Conn. 286; post, p. 209. Under statutes in some states different crimes of the same nature and subject to the same punishment may be charged disjunctively. See Wickard v. State, 109 Ala. 45, 19 South. 491.

[7] 2 Hawk. P. C. c. 25, § 62; Rex v. Gilchrist, 2 Leach, Crown Cas. 660; Reg. v. Harris, 1 Denison, Crown Cas. 461; State v. Hardwick, 2 Mo. 226; State v. Johnson, 50 N. C. 221; State v. Haven, 59 Vt. 399, 9 Atl. 841; Com. v. Lawless, 101 Mass. 32. An indictment for manslaughter, alleging that the defendant "willfully" and "with culpable negligence" killed the deceased, is bad for repugnancy. State v. Lockwood, 119 Mo. 463, 24 S. W. 1015. But in Overstreet v. Com., 147 Ky. 471, 144 S. W. 751, it was held that an indictment naming, in one part, the offense as arson, and in another part describing the offense as a statutory burning, was not demurrable under a statute providing that a conviction shall not be reversed for error when the court is satisfied that the substantial rights of accused have not been prejudiced.

[8] 2 Hawk. P. C. c. 25, § 62; Rex v. ———, 8 Mod. 104.

[9] State v. Haven, 59 Vt. 399, 9 Atl. 841.

[10] Rex v. Reading, 2 Leach, Crown Cas. 590.

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ment is repugnant if the description of a written instrument varies from the instrument as set out therein;[11] or if it states that the offense, or an act constituting a part of the offense, was committed at "said A.," or at "A. aforesaid," where A. has not been previously mentioned.[12]

So, where one was indicted for compounding the felony of uttering a counterfeit bill, and the bill was stated to have been issued on the 5th day of November, 1802, and the indictment continued that "afterwards, to wit, on the 1st day of June, 1800," the felony was compounded, judgment was arrested.[13]

Where the contradictory or repugnant expressions do not enter into the substance of the offense, and the indictment may be good without them, they may be rejected as surplusage. Of this we shall speak more at length in treating of surplusage.[14]

Where a matter is capable of different meanings, that meaning will be taken which will support the indictment, and not that which will defeat it.[15] But it must be clearly capable of two meanings, for the court cannot, to support the indictment, arbitrarily give it a meaning with which the use, habits, or understanding of mankind would plainly disagree.[16] Words, taken by themselves, may be open to this objection, and yet, taken in connection with other words used, they may be sufficient. Words are not ambiguous if it sufficiently appears from the context in what sense they are intended, and repugnancy only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or, being apparently so, is not accompanied by anything to explain or define them.[17]

[11] Com. v. Lawless, 101 Mass. 32.

[12] Com. v. Pray, 13 Pick. (Mass.) 359; post, p. 288.

[13] State v. Dandy, 1 Brev. (S. C.) 395. But see Com. v. Roberts, 145 Ky. 290, 140 S. W. 313.

[14] State v. Staples, 126 Minn. 396, 148 N. W. 283. And see post, 211.

[15] Reg. v. Stokes, 1 Denison, Crown Cas. 307; Com. v. Butler, 1 Allen (Mass.) 4; Wright v. Rex, 1 Adol. & E. 448.

[16] Rex v. Stevens, 5 East, 257.

[17] 1 Chit. Cr. Law, 173; Reg. v. Craddock, 2 Denison, Crown Cas. 31; Jeffries v. Com., 12 Allen (Mass.) 145; Com. v. Kelly, 123 Mass. 417.

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73. The indictment must be in the English language.

Formerly, in England, indictments, like all other legal proceedings, were in the Latin language; but the rule for a long time has been that they must be in English. If, however, any document in a foreign language, as a libel or a forged instrument, be necessarily introduced, it should be set out in the original tongue, and then translated so as to show its application.[18]

74. Abbreviations ought never to be used except in setting forth the facsimile of a writing. An indictment is not bad, however, because the usual initials and figures are used for dates, nor because of the use of other abbreviations which are commonly used and understood.

By statute in England all indictments are required to be in words at length, and therefore no abbreviations can be used. Nor can any figures be allowed, but all numbers must be expressed in words at length.[19] There is an exception, of course, in those cases where, as in the case of forgery, a facsimile of an instrument must be given in an indictment.[20] In this country, as we shall see, it is held that the usual initials and figures may be used for dates.[21] Probably other abbreviations may be used if they have been so commonly used that they have acquired a meaning which is commonly known; but abbreviations of words employed by men of science or in the arts will not answer, without a full explanation of their meaning in ordinary language.[22]

[18] Post, p. 241.

[19] 1 Chit. Cr. Law, 176.

[20] Post, p. 239.

[21] Post, p. 287.

[22] U. S. v. Reichert (C. C.) 32 Fed. 142. It has been held that the mathematical signs for "degrees," etc., cannot be used. State v. Town of Jericho, 40 Vt. 121, 94 Am. Dec. 387. But "&" for "and" has been held not to vitiate the indictment. Pickens v. State, 58 Ala. 364.

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75. A videlicet or scilicet (e. g., to wit, or that is) may be used to render more particular and certain a statement before general or obscure. Its use, if the allegation is immaterial, will not prevent rejection of the allegation as surplusage; nor, on the other hand, if the allegation is material, will it allow such rejection, or dispense with strict proof.

In setting forth time, place, number, quantity, etc., it is very usual to introduce the statement under what is termed a videlicet or scilicet—as, "that afterwards, to wit, on," etc., or "at," etc., the accused did, etc., or a fact occurred. Lord Hobart speaking of a videlicet, says that its use is to particularize that which was before general, or to explain that which was before doubtful or obscure; that it must not be contrary to the premises, and neither increase nor diminish, but that it may work a restriction where the former words were not express and special, but so indifferent that they might receive such a restriction, without apparent injury.[23] "The precise and legal use of a videlicet in every species of pleading is to enable the pleader to isolate, to distinguish, and to fix with certainty that which was before general, and which, without such explanation, might with equal propriety have been applied to different objects." [24]

Respecting the effect of the use of this mode of statement, it has been said that where the time when a fact happened is immaterial, and it might as well have happened at another day, there, if alleged under a scilicet, it is absolutely nugatory, and therefore not traversable, and if it be repugnant to the premises, or not proved as laid, the defect will not vitiate, but will be rejected as superfluous.[25] But where the precise time, etc., is material and enters into the substance of the description of the offense, there the time, etc., though laid under a scilicet, is conclusive and traversable, and it will be intended to be the true time and no other, and, if impossible or repugnant or not proved, the defect

[23] Stukeley v. Butler, Hob. 172, quoted in 1 Chit. Cr. Law, 226. See State v. Brown, 51 Conn. 1.

[24] Com. v. Hart, 10 Gray (Mass.) 465.

[25] State v. Haney, 8 N. C. 460; State v. Heck, 23 Minn. 549.

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will vitiate.[26] Either the allegation must exactly correspond with the fact or it may vary. If the former, it will be well laid with a scilicet, which may be rejected; and if the latter, though the scilicet were omitted, evidence of a different day, quantity, or place may be admitted. Thus, in indictments for extortion, or taking a greater sum for brokerage than allowed by statute, though the sum be stated without a videlicet, it is not necessary to state it with precision.[27] And, on the other hand, where the true sum must be set forth, it will not dispense with strict proof to allege a different sum under a scilicet.[28]

Therefore it would seem that the use of a videlicit or scilicet is of no benefit to the pleader.[29]

76. Mere clerical or grammatical errors in drafting an indictment will not vitiate it, if the sense is not obscured or changed.[30]

Where, for instance, an information for arson charged that the accused theretofore, to wit, on a certain day, etc., and at a certain place, the inhabited dwelling of a certain person there situated "was willfully, maliciously, and feloniously set fire to, with intent then and there to burn," etc., it was held good on motion in arrest of judgment. The word "was" was considered a mere clerical error, and was

[26] Jansen v. Ostrander, 1 Cow. (N. Y.) 676; Gleason v. McVickar, 7 Cow. (N. Y.) 43; State v. Phinney, 32 Me. 440; Hastings v. Lovering, 2 Pick. (Mass.) 223, 13 Am. Dec. 420; Paine v. Fox, 16 Mass. 133.

[27] Rex v. Gillham, 6 Term R. 265, 1 Esp. 285.

[28] Grimwood v. Barrit, 6 Term R. 462.

[29] See Bishop, New Cr. Proc. § 406.

[30] People v. Duford, 66 Mich. 90, 33 N. W. 28; Rex v. Dowlin, 5 Term R. 317; Rex v. Beach, Cowp. 229; Morgan v. Edwards, 2 Marsh. 100; State v. Wimberly, 3 McCord (S. C.) 190; State v. Halder, 2 McCord (S. C.) 377, 13 Am. Dec. 738; Rex v. Hart, 1 Leach, 145; State v. Whitney, 15 Vt. 298; Com. v. Call, 21 Pick. (Mass.) 515; People v. Warner, 5 Wend. (N. Y.) 271; Langdale v. People, 100 Ill. 263; Fortenberry v. State, 55 Miss. 403; Ward v. State, 50 Ala. 120; State v. Edwards, 19 Mo. 674; State v. Davis, 80 N. C. 384; Lazier v. Com., 10 Grat. (Va.) 708; State v. Gilmore, 9 W. Va. 641; Shay v. People, 22 N. Y. 317; State v. Keener, 225 Mo. 488, 125 S. W. 747.

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read "did." [31] Where the meaning is not changed, and is clear, an indictment will not be held insufficient merely because a word is misspelled, or a letter is omitted,[32] or because a word is used which is grammatically wrong, or a word which is not essential is omitted.[33] If the error changes or destroys the sense or an essential word is omitted, it is otherwise.[34]

[31] People v. Duford, supra.

[32] Rex v. Beech, 1 Leach, Crown Cas. 134; Rex v. Hart, Id. 145; State v. Moller, 12 N. C. 263; Keller v. State, 25 Tex. App. 325, 8 S. W. 275; State v. Crane, 4 Wis. 400; State v. Hedge, 6 Ind. 330; Lefler v. State, 122 Ind. 206, 23 N. E. 154.

[33] State v. Whitney, 15 Vt. 298; People v. Warner, 5 Wend. (N. Y.) 271; McLaughlin v. Com., 4 Rawle (Pa.) 464; State v. Brady, 14 Vt. 353; State v. Freeman, 21 Mo. 481; Evans v. State, 58 Ark. 47, 22 S. W. 1026; Jackson v. State, 88 Ga. 784, 15 S. E. 677.

[34] People v. St. Clair, 56 Cal. 406; State v. Edwards, 70 Mo. 480; Strader v. State, 92 Ind. 376; Jones v. State, 21 Tex. App. 349, 17 S. W. 424; Moore v. State, 7 Tex. App. 42; State v. Rector, 126 Mo. 328, 23 S. W. 1074. Thus, under a statute punishing any person who shall cause a stallion to serve mares near a public highway, unless the place "is so surrounded by artificial or natural barriers" as to obstruct the view, etc., an indictment for causing such service near a public highway which alleges merely that the place was not so surrounded by "artificial and barriers" as to obstruct the view is bad. State v. Raymond, 54 Mo. App. 425. It is impossible to reconcile the decisions. Thus "Tebruary" has been read "February," Witten v. State, 4 Tex. App. 70; "eiget," for "eight," Somerville v. State, 6 Tex. App. 433; "mair" for "mare," State v. Myers, 85 Tenn. 203, 5 S. W. 377; "Janury" for "January," Hutto v. State, 7 Tex. App. 44; "rill" for "kill," Irvin v. State, 7 Tex. App. 109; "frausulently" for "fraudulently," St. Louis v. State (Tex. Cr. App.) 59 S. W. 889; "gol" for "gold," Grant v. State, 55 Ala. 201; "assalt" for "assault," State v. Crane, 4 Wis. 400. But "maice" for "malice" has been held bad, Wood v. State, 50 Ala. 144; "prom.," for "promise," Latham v. State, 63 Tex. Cr. R. 632, 141 S. W. 953; "larcey" for "larceny," People v. St. Clair, 56 Cal. 406; "malice aforethou" for "malice aforethought." Griffith v. State, 90 Ala. 583, 8 South. 812. Yet the word "fraudulently," for which "frausulently" was used in St. Louis v. State, supra, was as necessary as "malice," for which "maice" was used in Wood v. State, supra, and the context showed as clearly in the one case as the other what word was intended. In Evans v. State, 34 Tex. Cr. R. 110, 29 S. W. 266, the defendant was indicted for robbery, and the indictment stated the goods taken to be in the "possion" of one Barnard. The court quashed the indictment, saying: "The sufficiency of the word 'possion,' as used in the indictment,

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77. The inducement is a statement of preliminary facts which do not enter into the description of the offense, but which are necessary to be shown in order to show the criminal character of the acts charged. Not being a part of the description of the offense, it does not require the same certainty.[35]

In an indictment for dissuading, hindering, and preventing a witness from appearing at court, statements as to the summoning of the witness are merely by way of inducement to the substance of the charge against the defendant, and it need not be stated with certainty where the witness was summoned and when he was required to appear.[36] And, in an indictment for disobeying the order of justices, statements that the justices had jurisdiction to make the order, and that it was obligatory, are matter of inducement, which

instead of the word 'possession,' used in the statute defining robbery is thus presented for our consideration. We have examined the dictionaries, and nowhere find such a word as 'possion'; nor do we find it used as an abbreviation for 'possession' or any other word. It is not idem sonans with the word 'possession,' nor can we consider it simply as an instance of bad spelling [though that was clearly what it was, since the court admitted there was no such word, and that it was not an abbreviation]. Evidently the pleader intended to write in the indictment the word 'possession,' but with us it is not a question of what he means, but what did he do; and the word 'possession,' in defining the offense of robbery, is material, and we cannot supply it by intendment." In State v. Caspary, 11 Rich. (S. C.) 356, which was an indictment for failing to support a bastard child, it was stated in the indictment that the defendant was the "farther" of the bastard. The court held the indictment void, declaring it did not know what the "farther" of a bastard child could be, though in the jurisdiction "farther" and "father" are idem sonans; while in State v. Colly, 69 Mo. App. 444, the court sustained an indictment against the defendant for selling one bottle of "larger" beer. The Alabama court, that in Griffith v. State, 90 Ala. 583, 8 South. 812, held that an indictment alleging the killing to have been done with "malice aforethou," was insufficient, later held that "malice aforethougt" was not bad. Sanders v. State, 2 Ala. App. 13, 56 South. 69.

[35] Com. v. Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665; Reg. v. Wyatt, 2 Ld. Raym. 1191; Reg. v. Bidwell, 1 Denison, Crown Cas. 222.

[36] Com. v. Reynolds, supra.

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may be alleged generally. The offense is the disobedience of the order.[37] So, in an indictment for libel, where the writing as set out in the indictment is not necessarily libelous, a preliminary statement of facts is necessary, in order to show its libelous character.[38]

78. An innuendo is a statement, showing the application or meaning of matter previously expressed, the application or meaning of which would not otherwise be clear. It can only explain some matter already sufficiently expressed. It cannot add to or enlarge or change the sense of previous words.

We have just explained the necessity of an inducement in an indictment for libel where the matter written is not in itself prima facie libelous. If, after this, the matter alleged in the inducement and charge is not obviously libelous, or applicable to the party charged to have been libeled, it is necessary to render it so by explaining its real meaning by an innuendo.[39] This is necessary only where the intent may be mistaken, or where it cannot be collected from the libel itself. It is necessary where the words of the writing are general, ironical, or written by way of allusion or inference, so that, in order to show its offensive meaning, it connects the writing with some facts or associations not expressed in words, but which they necessarily present to the mind. In this case an explanation must be put upon the record, because the jury can take cognizance of nothing but what is there stated with legal precision.[40] The innuendo is only explanatory of matter already expressed, which it applies to the part that is ambiguous, but it neither alters nor enlarges the sense of previous averments.[41] It not only

[37] Reg. v. Bidwell, supra. [38] Post, p. 246.

[39] 3 Chit. Cr. Law, 875; post, p. 246.

[40] 3 Chit. Cr. Law, 875; State v. Corbett, 12 R. I. 288; State v. Mott, 45 N. J. Law, 494.

[41] 3 Chit. Cr. Law, 875b; Rex v. Greepe, 2 Salk. 513; Woolnoth v. Meadows, 5 East, 469; Goodrich v. Hooper, 97 Mass. 1, 93 Am. Dec. 49; Com. v. Keenan, 67 Pa. 203; State v. Spear, 13 R. I. 326; Mix v. Woodward, 12 Conn. 262; State v. Atkins, 42 Vt. 252.

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cannot supply what has not been alleged in the inducement or the libel as set out, but it cannot even render certain that which is there uncertain. Every fact necessary to show that the words are libelous must be stated in the inducement or libel. The libelous meaning of the words cannot be explained by an innuendo of a fact not previously stated with legal precision and certainty. Everything necessary to be stated must be stated previous to the innuendo. The office of the innuendo is to apply facts thus stated to the matter charged as libelous.[42] Whenever the innuendo is erroneous in consequence of its going beyond its office, if the libel be clear without it the defective part may be rejected as surplusage.[43]

The same rule applies to indictments for forgery. If extrinsic facts are necessary to show that the instrument alleged to have been forged, and set out in the indictment, was such an instrument as could be the subject of forgery, these facts must be stated by way of inducement, and, if necessary, applied to the instrument by innuendo.[44]

SURPLUSAGE

79. The introduction of averments which are superfluous and immaterial will not render the indictment bad. If it can be supported without them, they will be rejected as surplusage. But no allegation can be so rejected, even if it was unnecessary, where it is descriptive of the identity of that which is essential.

Superfluous and immaterial averments, not descriptive of the identity of what is essential, will generally be rejected

[42] 3 Chit. Cr. Law, 873, 875b; Woolnoth v. Meadows, 5 East, 469; Hawkes v. Hawkey, 8 East, 427; James v. Rutlech, 4 Coke, 17b; Com. v. Snelling, 15 Pick. (Mass.) 321; Thomas v. Croswell, 7 Johns. (N. Y.) 271, 5 Am. Dec. 269.

[43] Woolnoth v. Meadows, 5 East, 463; Hawkes v. Hawkey, 8 East, 427; Smith v. Cooker, Cro. Car. 512; Peake v. Oldham, Cowp. 275.

[44] Post, p. 246.

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as surplusage, and therefore will not render the indictment bad.[45]

As we have seen, an indictment cannot charge the offense in the disjunctive.[46] An indictment is not rendered bad, however, by a statement in the disjunctive if the statement is superfluous, for it will be rejected as surplusage. Thus an indictment for robbery is not bad because it charges that it was committed "in or near the highway," for the exact place of its commission is immaterial.[47]

Nor is an indictment rendered bad for duplicity by an allegation which is superfluous; as, for instance, where it charges that the defendant "did embezzle, steal, take, and carry away" certain goods. "This indictment is not bad for duplicity, as charging the two offenses of larceny and embezzlement in the same count. The term 'embezzle' is introduced into the count, but not in any such manner as to give to the count the character of a charge of embezzlement. It is without any of those technical allegations essential to a charge of embezzlement; and the indictment being perfect without it, as a charge of larceny, the word 'embezzle' may well be stricken out as surplusage." [48]

An indictment, as we have seen, is bad if it is repugnant

[45] 1 Hale, P. C. 535; State v. Kendall, 38 Neb. 817, 57 N. W. 525; State v. Broughton, 71 Miss. 90, 13 South. 885; State v. Ean, 90 Iowa, 534, 58 N. W. 898; People v. Laurence, 137 N. Y. 517, 33 N. E. 547; Turner v. Muskegon Circuit Judge, 95 Mich. 1, 54 N. W. 705; State v. Kern, 51 N. J. Law, 259, 17 Atl. 114. See Littell v. State, 133 Ind. 577, 33 N. E. 417; State v. Sovern, 225 Mo. 580, 125 S. W. 769. And see the cases hereafter particularly referred to.

[46] Ante, p. 199.

[47] 1 Hale, P. C. 535. And see State v. Gilbert, 13 Vt. 647; Moyer v. Com., 7 Pa. 439; Respublica v. Arnold, 3 Yeates (Pa.) 417; Ex parte Pain, 5 Barn. & C. 254; Raisler v. State, 55 Ala. 64; Rex v. Wardle, Russ. & R. 9; State v. Ellis, 4 Mo. 474; McGregor v. State, 16 Ind. 9.

[48] Com. v. Simpson, 9 Metc. (Mass.) 138; Com. v. Brown, 14 Gray (Mass.) 429; post, p. 829. In State v. Edwards, 19 Mo. 674, the indictment alleged that the defendant "assault, beat, and maltreat" one X. The word "did" was inadvertently omitted. The court held that the words "assault and maltreat" could be rejected as surplusage, and, being rejected, the word "did" was not necessary before the word "beat."

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or inconsistent in a material part; but where the repugnant or contradictory expressions do not enter into the substance of the offense, and the indictment may be good without them, they may be rejected as surplusage.[49] It has been laid down that where the repugnant matter is inconsistent with some preceding averment, it may be rejected as surplusage; but where the objectionable words are not contradicted by anything that goes before, but are merely irreconcilable with some subsequent allegation, they cannot be thus rendered neutral.[50] "I do not find any authority in the law," it was said by Lord Ellenborough in a case involving this point, "which warrants us in rejecting any material allegation in an indictment or information which is sensible and consistent in the place where it occurs, and is not repugnant to any antecedent matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected. * * * If the subsequent repugnant matter could be rejected at all (which in this case it cannot, for the reason before given), it might be so in favor of the precedent matter, according to what is said by Lord Holt in Wyatt v. Alard, Salk. 325, 'that, where matter is nonsense by being contradictory and repugnant to somewhat precedent, then the precedent matter, which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be re-

[49] 1 Chit. Cr. Law, 231; 2 East, P. C. 1028; Com. v. Pray, 13 Pick. (Mass.) 359; Rex v. Morris, 1 Leach, 109; Rex v. Gill, Russ. & R. 431; Trout v. State, 111 Ind. 499, 12 N. E. 1005. See Littell v. State, 133 Ind. 577, 33 N. E. 417. Where an indictment charged an offense against Matt Taylor, "whose Christian name is otherwise unknown," it was held not bad for repugnancy, as the words quoted could be rejected as surplusage. Taylor v. State, 100 Ala. 68, 14 South. 875. In Rex v. Morris, 1 Leach, 109, Francis Morris was indicted for receiving stolen goods. The indictment stated that Francis Morris received the goods, "he, the said Thomas Morris," * * * well knowing the goods to be stolen. It was held that the words "the said Thomas Morris" might be rejected as surplusage, and the indictment was sustained. See, also, State v. Staples, 126 Minn. 396, 148 N. W. 283.

[50] 1 Chit. Cr. Law, 231.

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jected.' But here the matter required to be rejected is precedent matter, and is also, in the place where it occurs, sensible, and liable to no objection whatever." [51]

The great difficulty in the application of the doctrine we are here discussing is to determine when a particular allegation is surplusage, and may be stricken out without affecting the validity of the indictment, and when it is not. If the allegation is wholly foreign to the charge, or, though not foreign, can be stricken out entirely, and yet leave the crime properly charged, it may generally be rejected as superfluous.[52] In an indictment for obtaining goods by false pretenses, for instance, the statement that the offense was committed by the defendant in his "capacity as a merchandise broker" is surplusage. "This is certainly an unusual and extraordinary allegation, but we think the maxim, 'Utile per inutile non vitiatur,' is applicable to it. Inasmuch as a man cannot ordinarily commit a crime in any particular capacity or in the exercise of any special occupation, it does not change or in any way affect the nature of the charge to aver that, when he was committing it, he purported or claimed to act, or actually did act, in a specific capacity, or by virtue of a certain employment. An allegation in due form that a person committed an assault and battery would not be vitiated by the addition of an allegation that he did it as a constable, nor would an averment in technical language that a defendant had committed larceny be rendered nugatory or insufficient by an additional allegation that he committed the act in his capacity as a common carrier. The rule of law as to matters which may be treated as surplusage is clear, intelligible, and consonant with good sense. It is this: When, in addition to facts which are essential to the charge, others are alleged which are wholly redundant and useless, the latter may be wholly disregarded. As the

[51] Rex v. Stevens, 5 East, 254; Wyatt v. Aland, 1 Salk. 325.

[52] Rex v. Jones, 2 Barn. & Adol. 611; Com. v. Wellington, 7 Allen (Mass.) 299; Rex v. Hollingberry, 4 Barn. & C. 329; Com. v. Gavin, 121 Mass. 54, 23 Am. Rep. 255; Com. v. Moseley, 2 Va. Cas. 154; State v. Bailey, 31 N. H. 521; Ryalls v. Reg., 11 Q. B. 781; State v. Corrigan, 24 Conn. 286; U. S. v. Elliot, 3 Mason, 156, Fed. Cas. No. 15,044.

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law does not require the superfluous circumstances to be alleged, so, although they have been improvidently stated, the law, in furtherance of its object, will reject them as mere surplusage, and will no more regard them than if they had not been alleged at all." [53]

Under this rule, where an indictment correctly describes an offense in the statement of facts, it will not be vitiated by the fact that it designates it, in the charging part or elsewhere, by the wrong name.[54] So, where an indictment charges the defendant with being a common seller of intoxicating liquors, that being all that is necessary under the statute, a further averment that he made certain specified sales may be rejected as surplusage.[55] And an indictment charging an offense on a particular day, and also on divers other days, is good; a day certain being alleged, the residue may be rejected.[56] So where a complaint alleged that the defendant, "not being first duly licensed, according to law, as an innholder, and without any authority or license therefor duly obtained, according to law, to sell intoxicating liquor," did sell, etc., and it appeared that he was duly licensed as an innholder, but was without authority to sell intoxicating liquor, it was held that the allegation that he was not licensed as an innholder should be rejected as surplusage, and that he was rightly convicted on the other allegations.[57] And an indictment for stealing a bank bill or note, which properly describes it by its denomination and value, is not bad because it adds "of the goods and chattels" of a person named, since, if bank bills or notes cannot properly be termed "goods and chattels," these words may be rejected as

[53] Com. v. Jeffries, 7 Allen (Mass.) 571, 83 Am. Dec. 712.

[54] State v. Shaw, 35 Iowa, 575; State v. Davis, 41 Iowa, 311; U. S. v. Elliot, 3 Mason, 156, Fed. Cas. No. 15,044; State v. Wyatt, 76 Iowa, 328, 41 N. W. 31; U. S. v. Lehman (D. C.) 39 Fed. 768; post, p. 304.

[55] Com. v. Pray, 13 Pick. (Mass.) 360; Com. v. Hart, 11 Cush. (Mass.) 130.

[56] People v. Adams, 17 Wend. (N. Y.) 475. And see Com. v. Bryden, 9 Metc. (Mass.) 137; Gallagher v. State, 26 Wis. 425; Wells v. Com., 12 Gray (Mass.) 326; U. S. v. LaCoste, 2 Mason, 129, Fed. Cas. No. 15,548.

[57] Com. v. Baker, 10 Cush. (Mass.) 405.

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surplusage.[58] So in a complaint alleging that the defendant did make an assault on Lucy Ann Leach, and her did strike with a ferule "divers grievous and dangerous blows upon the head * * * [of her, the said Lucy Ann Leach, whereby the said Lucy Ann Leach was cruelly beaten and wounded, and other wrongs to the said Lucy Ann Leach then and there did and committed], to her great damage," it was held that the words in brackets could be rejected as surplusage, leaving a sufficient charge of assault on Lucy Ann Leach.[59]

As we shall presently see, an indictment for a statutory offense should conclude "against the form of the statute," but it would be improper for an indictment for a common-law offense to so conclude. The insertion of the words in the latter case, however, will not render the indictment bad, for they may be rejected as surplusage.[60]

Unnecessary Matter of Description

Care must always be taken to distinguish between averments which are thus wholly foreign and immaterial, or which, though not wholly foreign, can be stricken out without destroying the accusation, and averments which, though they might have been omitted, enter into the description of the offense. If the whole averment may be rejected without injury to the pleading, it may be rejected; but it is otherwise with averments of essential circumstances stated with unnecessary particularity. No allegation, though it may have been unnecessary, can be rejected as surplusage, if it is descriptive of the identity of that which is legally essential to the charge.[61] The application of this rule often de-

[58] Eastman v. Com., 4 Gray (Mass.) 416; Rex v. Morris, 1 Leach. 109; Reg. v. Radley, 1 Denison, Crown Cas. 450; Com. v. Bennett, 118 Mass. 452.

[59] Com. v. Randall, 4 Gray (Mass.) 36. And see Com. v. Hunt, 4 Pick. (Mass.) 252; Reg. v. Crespin, 11 Q. B. 913; Rex v. Morris, 1 Leach, 109; Greeson v. State, 5 How. (Miss.) 33; State v. Wall, 39 Mo. 532.

[60] Rex v. Mathews, 5 Term R. 162; Com. v. Hoxey, 16 Mass. 385; Com. v. Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665.

[61] U. S. v. Howard, 3 Sumn. 12, Fed. Cas. No. 15,403; Alkenbrack v. People, 1 Denio (N. Y.) 80; Com. v. Atwood, 11 Mass. 93; State v. Noble, 15 Me. 476; Com. v. Hope, 22 Pick. (Mass.) 1; Dennis v.

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feats the ends of justice, and has been abrogated by statute in some jurisdictions.[62]

A few illustrations will make the rule clear. It has been held, for instance, that, though an indictment for stealing a sheet need not state the material of which it is composed, yet, if it does so, it must be proved as described; and an indictment for stealing "one white woolen flannel sheet" will not be sustained by proof of stealing a blanket made partly of cotton and partly of wool.[63] It is not necessary, as we shall see,[64] to describe third persons further than by their name; but, if an addition is stated, it must be proved. Thus, in an indictment for bigamy, if the woman whom it is alleged that the defendant bigamously married is described as a widow, and the evidence shows that she was a spinster, the variance is fatal.[65] "Whenever a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved; for they are essential to its identity. Thus, in an indictment for stealing a black horse, the animal is necessarily mentioned, but the color need not be stated, yet, if it is stated, it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal.[66] So, in respect to the larceny of lumber, the special

State, 91 Ind. 291; Com. v. Moriarty, 135 Mass. 540; State v. Sherburne, 59 N. H. 99; Gray v. State, 11 Tex. App. 411; Goodlove v. State, 82 Ohio St. 365, 92 N. E. 491, 30 L. R. A. (N. S.) 134, 19 Ann. Cas. 893; post, pp. 386, 389, 395, 401. As to ownership of property, see post, p. 389.

[62] See Goodall v. State, 22 Ohio St. 203.

[63] Alkenbrack v. People, supra. The reason for the rule is that, though it was unnecessary to describe the sheet (in which case it may be noted the defendant would be compelled to come prepared to disprove the taking of any kind of sheet that the prosecutor might introduce evidence of the taking of), yet if the sheet is described the defendant would be misled if evidence of any other kind of sheet was produced against him on the trial. The ends of justice would be furthered by allowing the description of the article to be stricken out, or amended, with leave to the defendant to postpone the trial, if he was in fact misled by the misdescription.

[64] Post, p. 227.

[65] Rex v. Deeley, 1 Moody, Crown Cas. 303.

[66] 1 Greenl. Ev. §§ 56, 65. But see State v. Gilbert, 13 Vt. 647.

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marks on it need not be described; but, if they are described, the omission or failure to prove them exactly as they are alleged would constitute an essential variance between the allegation and the proof, and would necessarily prevent a conviction.[67] And the authorities affirm that where place is stated, not as venue, but as matter of local description, the slightest variance between the description of it in the indictment and the evidence offered concerning it will be fatal.[68] And, in illustration of this rule, it is said that the slightest variance between the indictment and the evidence in the name of the place where the house is situate, or in any other description of it, will be fatal in indictments for stealing in a dwelling house, or burglary or arson, or for entering a close by night, being armed for the purpose of taking game. And therefore it is said by Story, J.,[69] that no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage. And the rule seems to be fully established, both in civil and criminal cases, with respect to what statements in the declaration or indictment are necessary to be proved, that if the whole of the statement can be stricken out without destroying the accusation and charge in the one case, and the plaintiff's right of action in the other, it is not necessary to prove the particular allegation; but, if the whole cannot be stricken out without getting rid of a part essential to the accusation or cause of action, then, though the averment be more particular than it need have been, the whole must be proved, or the action or indictment cannot be maintained."[70] In the case from which we have quoted, it was held that though an indictment for wrongfully desecrating and disfiguring a public burying ground need not describe the burying ground by metes and bounds, yet, if it does so, the metes and bounds must be proved as stated. In some states, by

[67] State v. Noble, 15 Me. 476.
[68] See Reg. v. McKenna, Ir. Circ. R. 416.
[69] U. S. v. Howard, 3 Sumn. 14, Fed. Cas. No. 15,403.
[70] Com. v. Wellington, 7 Allen (Mass.) 299.

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statute, an indictment for stealing money may describe it simply as money, without stating the kind. But, if it does unnecessarily state the kind, the statement is matter of description which must be proved.[71]

We have discussed in another connection the effect of allegations under a videlicit or scilicet. It is only necessary here to refer to what was there said.[72]

Not only may averments which are superfluous be rejected as surplusage on objection made by demurrer or otherwise before trial, but they may also be rejected at the trial, or, after the trial, on motion in arrest of judgment, or appeal, or error.[73]

[71] Lewis v. State, 113 Ind. 59, 14 N. E. 892.

[72] Ante, p. 204.

[73] U. S. v. Howard, 3 Sumn. 15, Fed. Cas. No. 15,403; Com. v. Keefe, 7 Gray (Mass.) 332; Rex v. Jones, 2 Barn. & Adol. 611; Com. v. Baker, 10 Cush. (Mass.) 405

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CHAPTER VI

PLEADING—THE ACCUSATION (Continued)

80. Allegation of Intent.
81. Allegation of Duty.
82. Allegation of Notice, Request, and Knowledge.
83. Technical Terms and Phrases.
84. Aggravating Circumstances—Second or Third Offense.
85–89. Setting Forth Writings.
90. Setting Forth Spoken Words.
91. Description of Real Property.
92. Description of Personal Property.
93. Ownership of Property.
94. Name and Description of Third Persons.

ALLEGATION OF INTENT

80. When a specific state of mind or specific intent is essential to constitute an offense or a crime is attempted, but not accomplished, and the attempt to carry out the evil intent only can be punished,[1] the intent must be distinctly and precisely alleged, and proved. But if the offense does not, by its definition, require a specific intent, or does not rest merely in tendency, or in an attempt to carry out an evil intent, the evil intention need not be alleged.[2]

[1] It has been said that the intent must be alleged where a criminal act is attempted, but not accomplished, "and the evil intent only can be punished." Heard, Cr. Pl. 145; Com. v. Hersey, 2 Allen (Mass.) 173. This is wrong. A criminal intent is never punished. There must be some act done in an attempt to carry out the criminal intent. The intent is not punished, but the act, because it is done with the criminal intent, is punished. The "attempt," not the "intent," constitutes the offense. See Clark, Cr. Law (3d Ed.) 48, 139.

[2] 1 Hale, P. C. 455; Rex v. Woodfall, 5 Burrows, 2667; Rex v. Philipps, 6 East, 473.

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The rule on this subject is well stated and illustrated in a Massachusetts case.[3] "There can be no doubt," it is there said, "that in every case, to render a party responsible for a felony, a vicious will or wicked intent must concur with a wrongful act. But it does not follow that, because a man cannot commit a felony unless he has an evil or malicious mind or will, it is necessary to aver the guilty intent as a substantive part of the crime, in giving a technical description of it in the indictment. On the contrary, as the law presumes that every man intends the natural and necessary consequences of his acts, it is sufficient to aver in apt and technical words that the defendant committed a criminal act, without alleging the specific intent with which it was done. In such a case, the act necessarily includes the intent." [4] Thus, in charging the crime of burglary, it is necessary to show in the indictment that the breaking and entry was with the specific intent to commit a felony in the house, for this intent is an essential element of the crime. [5]

[3] Com. v. Hersey, 2 Allen (Mass.) 173. In the above discussion other illustrations than those mentioned in the case cited are included.

[4] Rex v. Philipps, 6 East, 473; Reg. v. Taylor, 2 Ld. Raym. 879; State v. McCarter, 98 N. C. 637, 4 S. E. 553; State v. Hurds, 19 Neb. 316, 27 N. W. 139.

[5] Winslow v. State, 26 Neb. 308, 41 N. W. 1116; page 221, note 12, infra. It has been held, however, that this intent is sufficiently charged by alleging the breaking and entry, and the actual commission of the felony, on the ground that the fact that the felony is committed is the strongest possible evidence of the intent, and that the allegation of the commission of the felony is equivalent to an averment of an intent to commit it. 2 East, P. C. c. 15, § 24; Com. v. Hope, 22 Pick. (Mass.) 1, 5; Rex v. Furnival, Russ. & R. 445; Com. v. Brown, 3 Rawle (Pa.) 207. The correctness of this proposition is doubtful, to say the least. If a man breaks and enters a house without a felonious intent, and, after entering, forms and carries out a felonious intent, he does not commit burglary, for the intent must exist at the time of the breaking and entry. Clark, Cr. Law, 238. If an indictment merely charges a breaking and entry, and actual commission of a felony in the house, it does not charge a breaking and entry with intent to commit a felony, except argumentatively and inferentially, and nothing is better settled in the

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So, in an indictment for murder by blows or stabs with a deadly weapon, it is not necessary to expressly allege that the blows were inflicted with an intent to kill or murder. The law infers the intent from proof that the acts were committed, and that death ensued.[6] The principle also applies to indictments for murder by poison. It need not be alleged that the poison was administered with intent to kill. If a person administers to another that which he knows to be a deadly poison, and death ensues therefrom, the averment of these facts in technical form necessarily involves and includes the intent to take life. It is the natural and necessary consequence of the act done, from which the law infers that the defendant contemplated and intended the result which followed.[7] And, in an indictment for the crime of rape, it is not necessary to allege that the assault was made by the defendant with intent to ravish; it is sufficient to allege the assault, and that the defendant had carnal knowledge of the woman by force and against her will. The averment of the act includes the intent, and

criminal law than the rule that no material averment can be supplied by other than necessary inference. Everything stated in such an indictment may be true, and yet there may have been no burglary, for the intent to commit the felony may not have been entertained until after the breaking and entry. It is true that the intent may and must necessarily, in most cases, be inferred from the fact that the felony was committed. This is a matter of evidence, however. The rules of evidence allow the existence of one fact to be inferred from the existence of other facts proved, though the inference is not a necessary one, but the rules of criminal pleading do not allow averments of a fact or circumstance or a mental condition, which is necessary to constitute the crime sought to be charged, to be imported into an indictment by argument and inference, unless it is a necessary inference. Ante, p. 191; note 24, infra.

[6] Com. v. Hersey, 2 Allen (Mass.) 173. But see (statutory murder) People v. Antoniello (Co. Ct.) 146 N. Y. Supp. 799.

[7] Com. v. Hersey, supra. The rule stated in the text has received very general recognition in indictments for murder, but it seems not to be necessary to invoke it in such cases. The definition of murder requires, as the mental element "malice aforethought" only, and this element it is to be presumed was expressly averred in the indictment, since at common law, and under most statutes, an indictment for murder without this averment would be invalid.

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proof of the commission of the act draws with it the necessary inference of the criminal intent.[8]

If the act was done while the accused was insane,[9] or through noncriminal negligence,[10] the accused may show this on the trial, and entitle himself to an acquittal; but it is not necessary to negative any of these defenses in the indictment.

On the other hand, if, by the common law or by the provision of a statute, a particular intention is essential to an offense, or, as is included in the above proposition, if a crime is attempted, but not accomplished, so that the only offense punishable is the attempt to carry out the particular evil intent, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof.[11] Burglary is not committed unless the breaking and entry was with the specific intent to commit a felony in the house. To charge the crime, therefore, the indictment must either expressly allege such an intent, or perhaps, as stated above, allege the actual commission of a felony from which an intent to commit it may be implied.[12]

[8] Com. v. Hersey, supra. [9] See Clark, Cr. Law (3d Ed.) 64.

[10] See Clark, Cr. Law (3d Ed.) 59.

[11] Rex v. Philipps, 6 East, 473; Com. v. Hersey, 2 Allen (Mass.) 173; State v. Davis, 26 Tex. 201; Fergus v. State, 6 Yerg. (Tenn.) 345; Coffee v. State, 3 Yerg. (Tenn.) 283, 24 Am. Dec. 570; State v. Beadon, 17 S. C. 55; State v. Garvey, 11 Minn. 154 (Gil. 95); People v. Congleton, 44 Cal. 92; post, p. 224.

[12] 2 Hale, P. C. 513; State v. Lockhart, 24 Ga. 420; Winslow v. State, 26 Neb. 308, 41 N. W. 1116; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; State v. Brady, 14 Vt. 353; Murray v. State, 48 Ala. 675; Jones v. State, 11 N. H. 269; notes 5–7, supra. An indictment for burglary with intent to commit larceny need not allege the intent with the same particularity as would be required in an indictment for larceny. It need not, for instance, describe the property intended to be stolen, nor state its ownership or value. State v. Tyrrell, 98 Mo. 354, 11 S. W. 734; Lanier v. State, 76 Ga. 304; Stokes v. State, 84 Ga. 258, 10 S. E. 740; Wright v. Com., 82 Va. 183; Green v. State, 21 Tex. App. 64, 17 S. W. 262; State v. Jennings, 79 Iowa, 513, 44 N. W. 799; Reg. v. Clarke, 1 Car. & K. 421; Larned v. Com., 12 Metc. (Mass.) 240; Davis v. State (Tex. Cr. App.) 23 S. W. 687; Hamilton v. State (Tex. Cr. App.) 24 S. W. 32; Bigham v. State, 31 Tex. Cr. R. 244, 20 S. W. 577. The same is true in case

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As we have seen, an indictment for the consummated crime of rape need not allege that the assault was made with intent to rape. Where, on the other hand, the crime is not consummated, and it is sought to punish for the attempt to rape, or for the statutory crime of assault with intent to rape, the specific intent to rape must be alleged and proved. The attempted crime not being consummated, the gist of the offense consists in the intent with which the assault was committed. It must therefore be distinctly alleged and proved.[13] The same is true of attempts to murder, or assaults with intent to murder. It must be alleged and proved that the assault was made with that specific intent.[14] This general averment will be sufficient. By the weight of authority, the indictment need not contain an averment of the facts necessary to constitute the crime intended to be committed; as, in an indictment for murder, that the acts were done feloniously, willfully, and of malice aforethought.[15]

"The indictment should set out precisely all the facts and circumstances which render the defendant guilty of the offense charged. * * * If the intent with which an act is done constitutes the offense charged, that intent must be averred in the indictment. In Penhallo's Case, Cro. Eliz. 231, the defendant was indicted on 5 Edw. VI, c. 4, for drawing his dagger in a church against J. S., and doth not

of intent to rape, murder, etc. Cases above cited; Com. v. Doherty, 10 Cush. (Mass.) 52. It has even been said that the particular felony intended need not be specified. Slaughter v. Com. (Ky.) 24 S. W. 622.

[13] Com. v. Merrill, 14 Gray (Mass.) 415, 77 Am. Dec. 336.

[14] State v. Patrick, 3 Wis. 812; People v. Petit, 3 Johns. (N. Y.) 511; Bradley v. State, 10 Smedes & M. (Miss.) 618.

[15] People v. Petit, supra; Rex v. Higgins, 2 East, 5; Com. v. Doherty, 10 Cush. (Mass.) 52; Cross v. State, 55 Wis. 262, 12 N. W. 425; Porter v. State, 57 Miss. 300; Garner v. State, 31 Tex. App. 22, 19 S. W. 333; Com. v. McDonald, 5 Cush. (Mass.) 365; Rogers v. Com., 5 Serg. & R. (Pa.) 463; Taylor v. Com., 3 Bush (Ky.) 508; Martin v. State, 40 Tex. 19; State v. Ackles, 8 Wash. 462, 36 Pac. 597; note 12, supra. But see, contra, State v. Wilson, 7 Ind. 516; State v. Fee, 19 Wis. 562; Milan v. State, 24 Ark. 346; State v. Davis, 121 Mo. 404, 26 S. W. 568.

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say to the intent to strike him. The indictment was adjudged bad. So, if an offense at common law is by statute punishable with additional severity when committed with the intention to perpetrate another and greater offense, the criminal intention must be directly averred in the indictment, or the offender cannot be subjected to the additional punishment. It is not sufficient that the indictment concludes contra formam statuti. So, if a misdemeanor is declared to be a felony when committed with a certain criminal intent, it is not sufficient to aver in the indictment that the criminal act was done feloniously." In the case from which we have quoted, an indictment under a statute punishing the removal of a dead body with the intent to use or dispose of it for the purpose of dissection was held bad because it failed to allege this intent.[16]

An intent to defraud is an essential element in the crimes of forgery, obtaining goods by false pretenses, etc.; and an indictment for such an offense is fatally defective if it fails to allege such an intent.[17] At common law it is generally necessary to allege an intent to defraud some particular person, but, by statute, in many jurisdictions a general allegation of intent to defraud is sufficient.[18] Even where such a statute is in force, a special intent to defraud a particular person, if alleged, though unnecessarily, must be proved.[19]

[16] Com. v. Slack, 19 Pick. (Mass.) 307.

[17] Rex v. Rushworth, Russ. & R. 317; Rex v. Powner, 12 Cox, Cr. Cas. 235; People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788; Com. v. Bakeman, 105 Mass. 53; Com. v. Dean, 110 Mass. 64; People v. Getchell, 6 Mich. 496; Scott v. People, 62 Barb. (N. Y.) 62; Stoughton v. State, 2 Ohio St. 562; State v. Jackson, 89 Mo. 561, 1 S. W. 760; State v. Harrison, 69 N. C. 143; Cunningham v. State, 49 Miss. 685; State v. Stephen, 45 La. Ann. 702, 12 South. 883; Moore v. Com., 92 Ky. 630, 18 S. W. 833. But see State v. Rowlen, 114 Mo. 626, 21 S. W. 729; Hamilton v. Reg., 2 Cox, Cr. Cas. 11.

[18] Reg. v. Hodgson, Dears. & B. Crown Cas. 9; Com. v. Harley, 7 Metc. (Mass.) 509; Roush v. State, 34 Neb. 325, 51 N. W. 755; State v. Hart, 67 Iowa, 142, 25 N. W. 99; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594; State v. Tingler, 32 W. Va. 546, 9 S. E. 935, 25 Am. St. Rep. 830; State v. Adams, 39 La. Ann. 238, 1 South. 455; State v. Weaver, 149 Iowa, 403, 128 N. W. 559, 31 L. R. A. (N. S.) 1046, Ann. Cas. 1912C, 1137.

[19] Com. v. Harley, supra; Com. v. Kellogg, 7 Cush. (Mass.) 476.

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It has been held that, where it is necessary to allege an evil intent, it is sufficient if it be alleged in the prefatory part of the indictment. An indictment for indecent exposure, for instance, which alleges that the defendant, devising and intending the morals of the people to debauch and corrupt at a time and place named, in a certain public building there situate, in the presence of divers citizens, etc., unlawfully, scandalously, and wantonly did expose his person, etc., sufficiently alleges the intent with which the act was committed.[20] The rule is subject to this qualification, namely, that, if the intention is necessary to constitute the offense, it must be alleged in every material part where it so constitutes it.[21] Thus, where an indictment for obtaining money on a forged order, after charging that the accused presented the order with intent to cheat, and that he knowingly, etc., pretended it was genuine, proceeded to charge that the accused did obtain the money, without alleging that he obtained it with the intent to cheat, etc., or knowingly and designedly, it was held bad.[22] And an indictment for selling unwholesome meat, knowing it to be unwholesome, is bad if it fails to allege that the defendant knew it was unwholesome. It is not enough to allege that he did "knowingly sell" unwholesome meat, for a man may knowingly sell an article without knowing its condition.[23]

Like all other essential averments, the intent must be precisely and distinctly alleged. If not expressly alleged, it cannot be made out by inference and argument from the facts which are stated.[24]

Where the intent is thus material, it must be correctly alleged, for a variance between the allegation and the proof

[20] Com. v. Haynes, 2 Gray (Mass.) 72, 61 Am. Dec. 437; Rex v. Philipps, 6 East, 473; Miller v. People, 5 Barb. (N. Y.) 203.

[21] Curtis v. People, Breese (Ill.) 256, Id., 1 Scam. (Ill.) 285; Rex v. Rushworth, Russ. & R. 317; Com. v. Boynton, 12 Cush. (Mass.) 499; Com. v. Bakeman, 105 Mass. 53; Com. v. Dean, 110 Mass. 64.

[22] Rex v. Rushworth, Russ. & R. 317.

[23] Com. v. Boynton, 12 Cush. (Mass.) 499.

[24] Ante, p. 219; Reg. v. James, 12 Cox, Cr. Cas. 127; Rex v. Rushworth, Russ. & R. 317; Com. v. Lannan, 1 Allen (Mass.) 590; Com. v. Dean, 110 Mass. 64; note 5, supra.

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may prove fatal.[25] To avoid a possible variance in this respect, it is usual to allege the same act with different intents in the same or different counts of the indictment.[26]

If an intent is unnecessarily alleged, it cannot, as a rule, affect the validity of the indictment, nor need it be proved, for it will be rejected as surplusage.[27]

81. Allegation of duty.

Under the rule that every essential element of the crime must be stated, if the crime for which the defendant is indicted is predicated on the existence of a legal duty which he is charged with having violated, the indictment must show how the duty arose, unless it is a duty connected by law to an office which the defendant holds.[28] Thus an indictment for neglecting to keep a road in repair, must show how defendant's duty to keep the road in repair arises.[29]

ALLEGATION OF NOTICE, REQUEST, AND KNOWLEDGE

82. Whenever notice, request, or knowledge is necessary to constitute the crime, it must be alleged and proved.

If a special notice is necessary to raise the duty which the defendant is charged with having violated, it must be alleged.[30]

On the same principle, if a request or demand is necessary to raise the duty which the defendant is charged to have violated, it must be stated. Thus, an indictment for

[25] As to variance, see post, p. 379.

[26] As to joinder of counts and duplicity, see post, pp. 322, 331.

[27] Post, p. 381. But see note 19, supra.

[28] State v. Hageman, 13 N. J. Law, 314; State v. President, etc., of N. J. Turnpike Co., 16 N. J. Law, 222.

[29] State v. Haddonfield & C. Turnpike Co., 65 N. J. Law, 97, 46 Atl. 700.

[30] Crouther's Case, Cro. Eliz. 654.

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contempt in disobeying a justice's order must allege that the defendant was requested to perform the order, or that it was served on him.[31]

On the same principle, whenever a particular knowledge is essential to the constitution of an offense, it must be alleged, and it must be alleged in every material part of the description where it so constitutes it. Thus, under a statute imposing a penalty upon any person who shall knowingly sell unwholesome provisions, "without making the same fully known to the buyer," not only must the provisions be knowingly sold, but the seller must know that they are unwholesome, and an indictment is fatally defective if it does not allege such knowledge. It is not enough to allege that the defendant "did knowingly sell" unwholesome provisions, but it must be further expressly alleged that he knew at the time that they were unwholesome, since a person may knowingly sell an unwholesome article without knowing it to be unwholesome. The sale of itself is not made criminal, but it is the sale coupled with a knowledge of the condition of the article which constitutes the offense, and the scienter is essential.[32] So, also, an indictment for receiving stolen goods must allege that the defendant knew that they were stolen, for this knowledge is essential; it is not enough to state that he "knowingly received" stolen goods, for this might be true, and yet he might not have known they had been stolen.[33] Averment

[31] Rex v. Kingston, 8 East, 52; King v. Fearnley, 1 Term R. 316.

[32] Com. v. Boynton, 12 Cush. (Mass.) 499. And see Stein v. State, 37 Ala. 123 (selling unwholesome water). But in U. S. v. Clark (C. C.) 37 Fed. 106, an indictment charging that the defendant did knowingly deposit for mailing and delivery certain obscene pictures, etc., was held not subject to the objection that it did not allege that he knew that the pictures were obscene, since it was considered that the word "knowingly," as used in the charge, qualified the whole act. And see U. S. v. Nathan (D. C.) 61 Fed. 936. And it has been held that a charge that the defendant knowingly uttered a forged note is equivalent to an averment that he knew the note was forged. State v. Williams, 139 Ind. 43, 38 N. E. 339, 47 Am. St. Rep. 255.

[33] Com. v. Merriam, 7 Allen (Mass.) 356; Com. v. Cohen, 120 Mass. 198; Reg. v. Larkin, 6 Cox, Cr. Cas. 377; Huggins v. State, 41 Ala. 393.

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of knowledge is also essential in indictments for uttering forged instruments or counterfeit coin,[34] and other attempts to defraud;[35] in indictments under a statute punishing the stealing of bank bills or promissory notes, "knowing them to be such";[36] harboring or aiding a fugitive slave;[37] illegal voting;[38] assaulting, resisting, or obstructing an officer;[39] selling an obscene or libelous book;[40] and in all other cases where it is necessary to show knowledge in order to make out the offense.[41]

Where knowledge must be presumed, and the event, fact, or circumstance rendering the act criminal lies alike in the knowledge of all men, it is never necessary to state or prove it.[42] And whenever an act is unlawful and criminal without regard to the defendant's ignorance or knowledge of the facts, so that knowledge does not enter into the constitution of the offense, it is, of course, unnecessary to allege or prove knowledge. It was held, for instance, that an indictment under a statute against an unmarried man for adultery with a married woman need not allege that the defendant knew, at the time the offense was committed,

[34] Anderson v. State, 7 Ohio, 250, pt. 2; Rex v. Rushworth, Russ. & R. 317; Powers v. State, 87 Ind. 97; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788, People v. Smith, 103 Cal. 563, 37 Pac. 516; Gates v. State, 71 Miss. 874, 16 South. 342.

[35] Com. v. Bakeman, 105 Mass. 53; Com. v. Dean, 110 Mass. 64; State v. Gardner, 2 Mo. 23.

[36] Gatewood v. State, 4 Ohio, 386; Rich v. State, 8 Ohio, 111.

[37] Birney v. State, 8 Ohio, 230. But see State v. brown, 2 Speers (S. C.) 129.

[38] U. S. v. Watkinds (C. C.) 7 Sawy. 85, 6 Fed. 152.

[39] State v. Maloney, 12 R. I. 251; Horan v. State, 7 Tex. App. 183; Com. v. Kirby, 2 Cush. (Mass.) 577. Contra, People v. Haley, 48 Mich. 495, 12 N. W. 671.

[40] U. S. v. Clark (C. C.) 37 Fed. 106.

[41] State v. Carpenter, 20 Vt. 9; U. S. v. Buzzo, 18 Wall. 125, 21 L. Ed. 812; Powers v. State, 87 Ind. 97; Morman v. State, 24 Miss. 54; People v. Lohman, 2 Barb. (N. Y.) 216; State v. Gove, 34 N. H. 510; State v. Bloedow, 45 Wis. 279.

[42] Rex v. Hollond, 5 Term R. 621; 1 Hale, P. C. 561; 2 East, P. C. 51; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; Turner v. State, 1 Ohio St. 422; State v. Freeman, 6 Blackf. (Ind.) 248; Com. v. Stout, 7 B. Mon. (Ky.) 247; State v. Brown, 2 Speers (S. C.) 129.

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that she was a married woman.[43] So, in those jurisdictions where it is held that, under statutes punishing the sale of intoxicating liquors to minors and drunkards, and the sale of intoxicating or adulterated liquor or food, ignorance of the fact that the purchaser of the liquor was a minor or drunkard, or that the liquor or food was intoxicating or adulterated, is no defense, knowledge of these facts need not be alleged or proved.[44] There is much conflict as to when knowledge of fact is essential but the question is not within the scope of this work.[45]

In alleging knowledge, the word "knowingly" or the words "well knowing" may be used. They are equivalent to a positive averment that the accused knew the facts subsequently stated.[46]

If knowledge is unnecessarily stated, the allegation may be rejected as surplusage, and need not be proven.[47]

TECHNICAL TERMS AND PHRASES

83. Unless the necessity therefor is obviated by statute, the following technical terms and phrases must be used, and no periphrasis or circumlocution will supply their place:

(a) The term "traitorously" in all indictments for treason.

(b) The term "feloniously" in all indictments for felony.

(c) The terms "feloniously," "of his malice aforethought," did kill and "murder," in indictments for murder.

[43] Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.

[44] Com. v. Raymond, 97 Mass. 567; Com. v. Boynton, 2 Allen (Mass.) 160; People v. Kibler, 106 N. Y. 321, 12 N. E. 795; State v. Smith, 10 R. I. 258; People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; State v. Hartfiel, 24 Wis. 60; State v. Heck, 23 Minn. 549; Farmer v. People, 77 Ill. 322; State v. Hause, 71 N. C. 518; State v. Goodenow, 65 Me. 30; State v. Bacon, 7 Vt. 219.

[45] Clark, Cr. Law (3d Ed.) 90.

[46] Rex v. Lawley, 2 Strange, 904; Rex v. Rushworth, Russ. & R. 317; Com. v. Kirby, 2 Cush. (Mass.) 577. As to averment of knowledge in indictment for perjury, see note 88, infra.

[47] Post, p. 381.

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(d) The terms "feloniously ravished," and, perhaps, "carnally knew," in indictments for rape.
(e) The terms "feloniously" and "burglariously" in indictments for burglary.
(f) The terms "feloniously took and carried away" the property, or "feloniously took and led away" the cattle, in indictments for simple larceny.
(g) The terms "forcibly and against the will" in indictments for robbery.
(h) The terms "feloniously" and "piratically" in indictments for piracy.
(i) "Common barretors," etc., must be indicted by those words.
(j) The word "riot" must be used in indictments for riot.
(k) The word "maintained" in indictments for maintenance.
(l) The words "with strong hand" in indictments for forcible entry.
(m) As we shall see in treating of indictments under statutes, technical terms used in the statute must generally be used in the indictment.

There are certain technical phrases and terms of art which are so appropriated by the law to express the precise idea which it entertains of an offense that they must be used in describing it. No other terms, however synonymous they may seem, will be sufficient.[48] There are other technical expressions which, though usual, are not necessary.

The term "unlawfully," which is frequently used in the description of the offense, is unnecessary when the crime existed at common law, and is manifestly unlawful.[49] But, as we shall see; if a statute, in describing an offense which it creates, uses the word, an indictment founded on the stat-

[48] 2 Hawk. P. C. c. 25, § 55.

[49] 2 Hawk. P. C. c. 25, § 96; 2 East, P. C. 985; 2 Rolle, Abr. 82; Jerry v. State, 1 Blackf. (Ind.) 396; State v. Bray, 1 Mo. 180; Curtis v. People, Breese (Ill.) 256; Com. v. Byrnes, 126 Mass. 248; Com. v. Twitchell, 4 Cush. (Mass.) 74.

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ute will be bad if it omits to use it.[50] It can in no case be wrong to use the word, and it is in general better to insert it, for it precludes all legal cause of excuse for the crime.[51]

In every indictment for treason the word "traitorously" must be used.[52]

And at common law, in every indictment for felony, except in some cases of statutory felony, to be presently explained, the word "feloniously" is absolutely essential. Nothing can supply its place. This applies to all felonies at common law, and generally to statutory felonies also.[53] The term, of course, is not only unnecessary, but is improper, in indictments for attempts to commit felonies, or assaults with intent to commit them, for these offenses are misdemeanors only.[54] But, by the weight of authority, if it is thus erroneously inserted in an indictment for misdemeanor, it will not vitiate, but may be rejected as surplusage.[55] This phrase need not be inserted in any particular

[50] Post, p. 305.

[51] Rex v. Burnett, 4 Maule & S. 274; Com. v. Thompson, 108 Mass. 461.

[52] 3 Inst. 15; 4 Bl. Comm. 307; 2 Hale, P. C. 172, 184; 2 Hawk. P. C. c. 25, § 55; 1 East, P. C. 115.

[53] 2 Hale, P. C. 171, 184; 2 Hawk. P. C. c. 26, § 55; Dearing's Case, Cro. Eliz. 198; Long's Case, 5 Coke, 121; Rex v. Crighton, Russ. & R. 62; Reg. v. Gray, Leigh & C. Crown Cas. 365; Stout v. Com., 11 Serg. & R. (Pa.) 177; Curtis v. People, Breese (Ill.) 256, Id., 1 Scam. (Ill.) 285; Jane v. State, 3 Mo. 61; State v. Gilbert, 24 Mo. 380; State v. Murdock, 9 Mo. 739; Kaelin v. Com., 84 Ky. 354, 1 S. W. 594; Hall v. Com. (Ky.) 26 S. W. 8; Bowler v. State, 41 Miss. 570; Wile v. State, 60 Miss. 260; Com. v. Scannel, 11 Cush. (Mass.) 547; State v. Jesse, 19 N. C. 297; State v. Rucker, 68 N. C. 211; State v. Roper, 88 N. C. 656; Com. v. Welderhold, 112 Pa. 584, 4 Atl. 345; State v. Hang Tong, 115 Mo. 389, 22 S. W. 381; Williams v. State, 8 Humph. (Tenn.) 585; Scudder v. State, 62 Ind. 13; Edwards v. State, 25 Ark. 444; State v. Whitt, 39 W. Va. 468, 19 S. E. 873; State v. Bryan, 112 N. C. 848, 16 S. E. 909; State v. Caldwell, 112 N. C. 854, 16 S. E. 1010. In some states the term is declared by statute to be unnecessary. Com. v. Jackson, 15 Gray (Mass.) 187; Com. v. Sholes, 13 Allen (Mass.) 558.

[54] Stout v. Com., 11 Serg. & R. (Pa.) 177.

[55] Hess v. State, 5 Ohio, 12, 22 Am. Dec. 767; People v. Jackson, 3 Hill (N. Y.) 92; Com. v. Squire, 1 Metc. (Mass.) 258; People v. White, 22 Wend. (N. Y.) 175; Com. v. Gable, 7 Serg. & R. (Pa.) 423;

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part of the indictment. In an indictment for embezzlement, for instance, it is sufficient to state in the conclusion that the accused feloniously did steal, take, etc., though the word is not inserted in the former part of the indictment before the word "embezzlement." [56]

The crime of murder also has terms peculiarly appropriate to its description. Being a felony, the word "feloniously" must, of course, be inserted.[57] In addition to this, it must be alleged that the act which caused death was done "with malice aforethought," this being essential to the crime of murder at common law; and it must be stated, as a conclusion from the facts alleged, that so the defendant feloniously, "of his malice aforethought," did kill and "murder" the deceased. Without these terms the indictment will, at common law, charge manslaughter only.[58] In Massachusetts it has been held that the assault need not be alleged to have been made "with malice aforethought" if the term is used in the concluding part of the charge.[59] It has also been held that, where the death arose from a wounding, beating, or bruising, the words "struck" or "did strike" are essential; [60] and that the wound or bruise must be alleged to have been mortal; and that the latter word is not supplied by the allegation, which is also necessary,

Hackett v. Com., 15 Pa. 95; State v. Sparks, 78 Ind. 166. But see State v. Edwards, 90 N. C. 710; Black v. State, 2 Md. 376; People v. Wenk, 71 Misc. Rep. 368, 127 N. Y. Supp. 702.

[56] Rex v. Crighton, Russ. & R. 62.

[57] 2 Hale, P. C. 186, 187; Dearing's Case, Cro. Eliz. 193; Sarah v. State, 28 Miss. 268, 61 Am. Dec. 544; State v. Thomas, 29 La. Ann. 601; note 53, supra.

[58] Fost. Crown Law, 424; 1 Hale, P. C. 450, 466; 2 Hale, P. C. 184, 187; Bradley v. Banks, Cro. Jac. 283; 2 Hawk. P. C. c. 25, § 55; Com. v. Gibson, 2 Va. Cas. 70; Maile v. Com., 9 Leigh (Va.) 661; McElroy v. State, 14 Tex. App. 235; Witt v. State, 6 Cold. (Tenn.) 5; Simmons v. State, 32 Fla. 387, 13 South. 896; State v. Rector, 126 Mo. 328, 23 S. W. 1074; Sanders v. State, 2 Ala. App. 13, 56 South. 69. But see State v. Banks, 118 Mo. 117, 23 S. W. 1079.

[59] Com. v. Chapman, 11 Cush. (Mass.) 425.

[60] Long's Case, 5 Coke, 122; Rex v. Griffith, 3 Mod. 202; 2 Hawk. P. C. c. 23, § 82; White v. Com., 6 Bin. (Pa.) 179, 6 Am. Dec. 443.

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that the deceased died in consequence of the wound or bruise.[61]

In an indictment for rape, the words "feloniously ravished" and "carnally knew" are necessary; and the want of the former is not supplied by the insertion of the latter.[62] There is some authority to the effect that the words "carnally knew" are not absolutely necessary,[63] but it would be unsafe to omit them.[64] If these words are used, it is not necessary to further allege that the offense was committed forcibly and against the will of the woman.[65]

Every indictment for burglary, in addition to the allegation that the entry was made feloniously, must allege that it was made "burglariously." The use of this word is absolutely essential at common law,[66] though, as we shall see, it may sometimes be omitted in indictments for statutory burglaries.[67] It has been said that it is also necessary that the felony committed or intended shall be set forth in technical language, but, as we have seen in another connection, this is doubtful.[68]

By referring to the definition of larceny,[69] it will be seen that a taking and a carrying away, with a felonious intent,

[61] Rex v. Lad, 1 Leach, Crown Cas. 96; Reg. v. Mawgridge, J. Kel. 125; 2 Hale, P. C. 186; 2 Hawk. P. C. c. 23, § 82; State v. Wimberly, 3 McCord (S. C.) 190; Respublica v. Honeyman, 2 Dall. (Pa.) 228, 1 L. Ed. 359.

[62] 1 Hale, P. C. 628; 2 Hale, P. C. 184; 2 Inst. 180; 1 East, P. C. 447; 2 Hawk. P. C. c. 25, § 56; Harman v. Com., 12 Serg. & R. (Pa.) 69; Gouglemann v. People, 3 Parker Cr. R. (N. Y.) 15; Howel's Case, 5 Grat. (Va.) 672; Christian v. Com., 23 Grat. (Va.) 954.

[63] 1 East, P. C. 448; State v. Jim, 12 N. C. 142.

[64] 1 Chit. Cr. Law, 243; Davis v. State, 3 Har. & J. (Md.) 154.

[65] Harman v. Com., supra. But see State v. Jim, supra.

[66] Vaux v. Brook, 4 Coke, 39, 40; Long's Case, 5 Coke, 121; Ryle's Case, Cro. Eliz. 920; 2 Hale, P. C. 172, 184; 2 Hawk. P. C. c. 25, § 55; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; State v. McClung, 35 W. Va. 280, 13 S. E. 654; State v. McDonald, 9 W. Va. 456. As to indictments for statutory house-breaking, in which the term is not necessary, see post, p. 236.

[67] Post, p. 236.

[68] 1 Hale, P. C. 550; Com. v. Brown, 3 Rawle (Pa.) 207. But see State v. McClung, supra. And see ante, p. 222.

[69] Clark, Cr. Law (3d Ed.) 305.

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are absolutely essential to constitute the crime. A taking without an asportation, or an asportation by one who has lawful possession, is not larceny. In an indictment for simple larceny, therefore, the words "feloniously took and carried away" the property, or "feloniously took and led away" the cattle, are necessary.[70] It is not sufficient to allege that the defendant "feloniously took and carried," omitting the word "away."[71]

An indictment for robbery must allege that the assault was "feloniously" made,[72] and that the property was taken "from the person," or in the presence of the owner.[73] The words "against his will" are required in some jurisdictions.[74] The word "violently," or "by violence," is necessary.[75]

"Feloniously" and "piratically" are both necessary in an indictment for piracy.[76]

There are also some misdemeanors which must be described by particular terms.[77] Common barretors, common scolds, etc., must be indicted as such.[78] The word "riot"

[70] 1 Hale, P. C. 504; 2 Hale, P. C. 184; Com. v. Adams, 7 Gray (Mass.) 44; Gregg v. State, 64 Ind. 223; Green v. Com., 111 Mass. 418 (in this case it was held that the allegation "did feloniously take and steal" was sufficient, and that the defect was only formal); Rountree v. State, 58 Ala. 381.

[71] Com. v. Adams, supra. The indictment for larceny and other offenses has been simplified by statute in some states. In Massachusetts the form for larceny is: "That A. B. did steal one horse, of the value of more (or less) than one hundred dollars, of the property of C. D." St. 1899, c. 409.

[72] The word "feloniously" should characterize the assault, as well as the putting in fear and the taking of the property. 2 East, P. C. 783.

[73] State v. Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575; Stegar v. State, 39 Ga. 583, 99 Am. Dec. 472. And see People v. Ah Sing, 95 Cal. 654, 30 Pac. 796.

[74] Kit v. State, 11 Humph. (Tenn.) 167. Contra, State v. Kegan, 62 Iowa, 106, 17 N. W. 179; People v. Riley, 75 Cal. 98, 16 Pac. 544.

[75] Rex v. Smith, 2 East, P. C. 783. See Craig v. State, 157 Ind. 574, 62 N. E. 5.

[76] 1 Hawk. P. C. c. 37, § 15; 3 Inst. 112.

[77] As we have already stated, the word "feloniously" is out of place in an indictment for misdemeanor; but, if used, it may be rejected as surplusage. Ante, p. 230.

[78] Reg. v. Foxby, 6 Mod. 11, 178, 213, 239; Com. v. Davis, 11 Pick. (Mass.) 432.

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must be inserted in all indictments for rioting;[79] the word "maintained" in all indictments for maintenance;[80] the words "with strong hand" in an indictment for forcible entry.[81]

There are many technical expressions which, though usual, are not necessary. In cases of treason and felony, it was at one time usual, by way of inducement, to state that the accused, "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," perpetrated the crime for which he was indicted, but it was probably never necessary to insert these words. It certainly is not necessary now; and the same is true, in indictments for murder, of the statement that the deceased was in the peace of God and of the king.[82]

The words "with force and arms," anciently "vi et armis," were at common law necessary in indictments for offenses amounting to an actual disturbance of the peace, or consisting in any way of acts of violence,[83] and were formerly followed by the words "videlicet cum baculis cultellis arcubus et sagittis."[84] But 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 arcubus et sagittis' shall not, of necessity, be put in any indictment."[85] This

[79] Rex v. Johnson, 1 Wils. 325. [80] Id.

[81] Rex v. Wilson, 8 Term R. 357.

[82] 1 Chit. Cr. Law, 239; 2 Hawk. P. C. c. 25, § 73; 2 Hale, P. C. 186; Heyden's Case, 4 Coke, 41b; Rex v. Philipps, 6 East, 472; Com. v. Murphy, 11 Cush. (Mass.) 472.

[83] Hart's Case, Cro. Jac. 472; 2 Hale, P. C. 187; 2 Hawk. P. C. c. 25, § 90. But they were not necessary where the offense consisted of a cheat or nonfeasance or a mere consequential injury. Rex v. Burks, 7 Term R. 4, 5; 2 Hawk. P. C. c. 25, § 90.

[84] 2 Hawk. P. C. c. 25, § 90.

[85] Some of the old cases have held that this statute did not intend to abolish the necessity for the words "with force and arms" in indictments for offenses accompanied with actual violence, but that it intended merely to abolish the necessity for the words following the "videlicet"; and such indictments have been held insufficient for omitting the words "with force and arms." Rex v. Mariot, 2 Lev.

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statute is old enough to have become a part of our common law, and has been held to be in force in some of the states.[86]

The word "larceny" is not one of those terms of art which it is indispensable to use in an indictment, and as a substitute for which no synonymous word and no description or definition is admissible. Therefore, under a statute punishing the breaking and entering a house "with intent to commit the crime of * * * larceny," the indictment need not use the term "larceny" to describe the intent, but may state that the intent was "feloniously to steal, take, and carry away." [87]

In an indictment for perjury it must be charged that the defendant willfully and corruptly swore falsely.[88]

The terms "forge" and "counterfeit" have a definite meaning in the law. They imply the idea of falsity, and it is

221; Roy v. Inhabitants de Yarton, 1 Sid. 140; Collins v. Goldsmith, 1 Bulst. 205; Rex v. Gakes, 1 Keb. 101; Rex v. Singer, 2 Keb. 154. But other cases have held the contrary. Rex v. Sterling, 1 Lev. 126; Rex v. Cramlington, 2 Bulst. 208; Rex v. Burridge, 3 P. Wms. 464, 498. Chitty states that the latter seems the better opinion, "for otherwise the terms of the statute appear to be destitute of meaning." "It seems to be generally agreed," he continues, "that where there are any other words implying force, as, in an indictment for rescue, the word 'rescued,' the omission of 'vi et armis' is sufficiently supplied. But it is at all times safe and proper to insert them whenever the offense is attended with an actual or constructive force, or affects the interests of the public." 1 Chit. Cr. Law, 241.

[86] State v. Kean, 10 N. H. 347, 34 Am. Dec. 162; State v. Munger, 15 Vt. 290; Tipton v. State, 2 Yerg. (Tenn.) 542; Territory v. McFarlane, 1 Mart. (La.) 217.

[87] Josslyn v. Com., 6 Metc. (Mass.) 238.

[88] U. S. v. Edwards (C. C.) 43 Fed. 67; State v. Morse, 90 Mo. 91, 2 S. W. 137; State v. Day, 100 Mo. 242, 12 S. W. 365. Contra, by statute, State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Gates, 107 N. C. 832, 12 S. E. 319. The charge that he "willfully and corruptly" testified to what is averred to be untrue sufficiently alleges that the testimony was false to his knowledge. State v. Smith, 63 Vt. 201, 22 Atl. 604. And see State v. Stein, 48 Minn. 466, 51 N. W. 474; State v. Bush, 47 Kan. 201, 27 Pac. 836, 13 L. R. A. 607; Finney v. State, 29 Tex. App. 184, 15 S. W. 175. That "willfully" may be omitted where the indictment uses the words "feloniously," "falsely," "corruptly," "knowingly," and "maliciously," see State v. Spencer, 45 La. Ann. 1, 12 South. 135. But see U. S. v. Edwards, supra.

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not necessary to allege that the defendant "falsely" forged or counterfeited.[89]

The common-law rules requiring technical expressions do not always apply to statutory crimes. "We think the distinction is this," it was said in a Massachusetts case: "When the statute punishes an offense by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offense named at common law; as, for instance, Rev. St. c. 125, § 1, declares that every person who shall commit the crime of murder shall suffer the punishment of death. Here the statute does not enumerate the acts which constitute murder; it refers for that to the common law.[90] In such cases the forms and technical terms used at common law to describe and define the murder must be used. But we think this is not necessary when the statute describes the whole offense, and the indictment charges the crime in the words of the statute.[91] It was therefore held that an indictment under a statute imposing a penalty upon any person who should break and enter a dwelling house in the nighttime, with intent to commit a felony, but not defining the offense as "burglary," need not allege the offense to have been committed "burglariously." [92]

And in the Supreme Court of the United States, under an act of Congress which declared that any person who should commit certain enumerated acts, with intent to defraud the United States, should "be deemed and adjudged guilty of felony," it was held that the acts need not be alleged to have been committed "feloniously." After admitting the common-law rule in cases of felony where "the felonious intent

[89] 2 East, P. C. 985; People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788; State v. McKiernan, 17 Nev. 224, 30 Pac. 831.

[90] See Clark, Cr. Law (3d Ed.) 35; Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Pitcher v. People, 16 Mich. 142; Benson v. State, 5 Minn. 19 (Gil. 6).

[91] Tully v. Com., 4 Metc. (Mass.) 358; U. S. v. Staats, 8 How. 44, 12 L. Ed. 979.

[92] Tully v. Com., supra. And see State v. Meadows, 22 W. Va. 766; Sullivan v. State, 13 Tex. App. 462; People v. Rogers, 81 Cal. 209, 22 Pac. 592.

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is of the essence of the offense," the court said: "But in cases where this felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule can have no application in reason, however it may be upon authority. The statute upon which the indictment in question is founded describes the several acts which make up the offense, and then declares the person to be guilty of felony, punishable by fine and imprisonment. * * * The felonious intent is no part of the description, as the offense is complete without it. Felony is the conclusion of law from the acts done with the intent described, and makes part of the punishment, as, in the eye of the common law, the prisoner thereby becomes infamous and disfranchised. These consequences may not follow, legally speaking, in a government where the common law does not prevail; but the moral degradation attaches to the punishment actually inflicted." [93]

The necessity for an indictment under a statute to follow the language of the statute, and use the technical terms used in the statute, will be presently considered.[94]

AGGRAVATING CIRCUMSTANCES—SECOND OR THIRD OFFENSE

84. Where an increased punishment is imposed for an offense when it is accompanied by certain aggravating circumstances—as under statutes imposing a higher penalty for a second or third offense, assaults when committed with a specific intent to commit a certain crime, larceny when committed in a certain place, etc.—the aggravating circumstances must be alleged in the indictment.

[93] U. S. v. Staats, supra. And see Cundiff v. Com., 86 Ky. 196, 5 S. W. 486; Cohen v. People, 7 Colo. 274, 3 Pac. 385; People v. Olivera, 7 Cal. 403; Jane v. Com., 3 Metc. (Ky.) 18; State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

[94] Post, p. 305.

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This rule necessarily results from the rule already stated, that the indictment must state every fact and circumstance which enters into the offense. In most jurisdictions, by statute, a person who has been convicted of certain offenses, like larceny or the unlawful sale of intoxicating liquors or drunkenness, for instance, is rendered liable to an increased punishment for a second or third offense. The previous conviction enters into the second or third offense to the extent of aggravating it, and increasing the punishment; and, where it is sought to impose the greater penalty for a second or third offense, the previous conviction or convictions, like every other material fact, must be distinctly alleged in the indictment.[95]

"When the statute imposes a higher penalty upon a second and a third conviction, respectively, it makes the prior conviction of a similar offense a part of the description and character of the offense intended to be punished; and therefore the fact of such prior conviction must be charged as well as proved. It is essential to an indictment that the facts constituting the offense intended to be punished should be averred." [96] And in like manner, when a statute, besides imposing a higher penalty upon a second or third conviction than upon the first, provides that any person convicted of two or more offenses upon the same indictment shall be subject to the same punishment as if he had been successively convicted on two indictments, still the second and third offenses must be alleged in the indictment to be second and third offenses in order to warrant the increased punishment.[97] A verdict of guilty without the entry of a judgment thereon would not be such a prior conviction as could render the offender liable to the increased penalty, on a subsequent prosecution for a similar offense. An indictment, therefore, for a second

[95] Tuttle v. Com., 2 Gray (Mass.) 506; Com. v. Harrington, 130 Mass. 35; Reg. v. Willis, 12 Cox, Cr. Cas. 192; State v. Adams, 64 N. H. 440, 13 Atl. 785; Haynes v. Com., 107 Mass. 198.

[96] Tuttle v. Com., 2 Gray (Mass.) 505.

[97] Flaherty v. Thomas, 12 Allen (Mass.) 432; Garvey v. Com., 8 Gray (Mass.) 382.

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offense, must allege, not merely a conviction for a prior offense, but a judgment thereon.[98]

As we have already seen, an indictment for an aggravated assault—that is, an assault with intent to kill, to rape, etc.—must aver the intent, or it charges a simple assault only, and the defendant cannot be punished for aggravated assault.[99] The rule applies also to indictments for larceny from the person, from the dwelling house, from a shop, etc. Unless the aggravating circumstances are averred, the indictment charges simple larceny only. The same is true in all other cases where an act is punished more severely because accompanied by circumstances of aggravation.

SETTING FORTH WRITTEN INSTRUMENTS

85. When a written instrument forms part of the gist of the offense charged, as in case of forgery, libel, threatening letters, etc., it must be set out in the indictment according to its tenor, or verbatim. The rule is changed by statute in some jurisdictions.

86. When a written instrument must be mentioned or described in describing the offense, but is not of the gist of the offense, its substance or purport only need be given.

87. When an instrument is set out as having a certain purport, the meaning is that upon its face its legal effect is that which it is said to purport to be.

88. When an instrument is set out in an indictment "in substance as follows," "to the effect following," "in manner and form following," etc., the meaning is that the writing is in substance what it is alleged to be.

[98] Reg. v. Ackroyd, 1 Car. & K. 158; Reg. v. Stonnell, 1 Cox, Cr. Cas. 142.

[99] Ante, p. 221.

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89. When an instrument is set out in an indictment with the words "according to the tenor following," "in the words and figures following," "in these words," or "as follows," the meaning is that it is recited verbatim, though not so as to exclude misspelling.

At common law, whenever a writing is of the gist of the offense to be charged, it is absolutely essential, in describing the offense, to set out in the indictment the very words relied upon, if it is possible to do so, so that the court may see on the face of the indictment whether the offense has been committed. A failure to set out the writing word for word, if possible, will render the indictment fatally defective, not only on demurrer or motion to quash, but on motion in arrest of judgment, or on error.[1] Stating that the defendant published of a certain person a false and malicious libel, purporting thereby that such person had committed a crime, or had committed the crime of larceny, or that he was a person of bad moral character, without stating the exact words used, would not be sufficient.[2]

In an indictment for forgery, or uttering a forged instrument, it is not sufficient to set forth the writing according to its purport or in substance merely, but it must be set forth in words and figures according to its tenor; that is it must be given verbatim.[3] An exact copy is required, in

[1] Sacheverell's Case, 15 How. St. Tr. 466; Rex v. Gilchrist, 2 Leach, Crown Cas. 661; Rex v. Nield, 6 East, 418–426; Bradlaugh v. Reg., 3 Q. B. Div. 607; Com. v. Stow, 1 Mass. 54; Com. v. Wright, 1 Cush. (Mass.) 46; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; Rooker v. State, 65 Ind. 86; Smith v. State, 18 Tex. App. 399; Com. v. Tarbox, 1 Cush. (Mass.) 66; Com. v. Sweney, 10 Serg. & R. (Pa.) 173; State v. Townsend, 86 N. C. 676. And see the cases hereafter cited.

[2] Wood v. Brown, 1 Marsh. 522, 6 Taunt. 169; page 241, note 6, infra.

[3] Rex v. Powell, 1 Leach, Crown Cas. 78; 2 W. Bl. 787; 2 East, P. C. 976; Rex v. Gilchrist, 2 Leach, Crown Cas. 660, 661; Com. v. Houghton, 8 Mass. 110; Com. v. Stow, 1 Mass. 54; U. S. v. Britton, 2 Mason, 464, Fed. Cas. No. 14,650; Smith v. State, 29 Fla. 408, 10 South. 894; State v. Wheeler, 19 Minn. 98 (Gil. 70); State v. Riebe, 27 Minn. 315, 7 N. W. 262; Rooker v. State, 65 Ind. 86; Smith v. State, 18 Tex. App. 399. But see State v. Curtis, 39 Minn. 357, 40

order that the court may be able to determine on the face of the indictment whether the instrument is one the false making of which can constitute forgery, for every writing is not the subject of forgery.[4] The same rule applies, at common law, to indictments for sending threatening letters;[5] for publishing a defamatory libel against a private person,[6] or an obscene[7] or blasphemous[8] libel; or for having possession of a forged instrument or counterfeit bank note or other security, with intent to pass it.[9]

If the instrument is in a foreign language, it should be set out in that language, and then translated. The indictment is bad if the translation only is given.[10]

Where it is necessary to mention a written instrument in describing the offense, but the writing is not of the gist of the offense, it is not necessary to set it out verbatim in the indictment.[11]

N. W. 263. Contra, by statute, State v. Wright, 9 Wash. 96, 37 Pac. 313.

[4] Rex v. Hunter, 2 Leach, Crown Cas. 624; Rex v. Gilchrist, Id. 657, 661; 2 East, P. C. 975; People v. Kingsley, 2 Cow. (N. Y.) 522; People v. Wright, 9 Wend. (N. Y.) 193; U. S. v. Britton, 2 Mason, 464, Fed. Cas. No. 14,650; State v. Gustin, 5 N. J. Law, 862. A common statute in the United States abrogates the common-law rule requiring, in indictments for forgery, that the writing be set out verbatim. See State v. Childers, 32 Or. 119, 49 Pac. 801; Bostick v. State, 34 Ala. 266; State v. Pullens, 81 Mo. 387.

[5] 2 East, P. C. 976, 1122; Wood v. Brown, 1 Marsh. 522, 6 Taunt. 169; Rex v. Nield, 6 East, 418. Contra, State v. Stewart, 90 Mo. 507, 2 S. W. 790.

[6] Com. v. Wright, 1 Cush. (Mass.) 46; State v. Brownlow, 7 Humph. (Tenn.) 63; Com. v. Sweney, 10 Serg. & R. (Pa.) 173; State v. Townsend, 86 N. C. 676; State v. Walsh, 2 McCord (S. C.) 248; State v. Twitty, 9 N. C. 248.

[7] Com. v. Tarbox, 1 Cush. (Mass.) 66; Bradlaugh v. Reg., 3 Q. B. Div. 607. But see Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632. It need not be given if so obscene that it would be improper for it to appear or be perpetuated upon the record. Post, p. 242.

[8] Com. v. Kneeland, 20 Pick. (Mass.) 206; Sacheverell's Case, 15 How. St. Tr. 466.

[9] Stephens v. State, Wright (Ohio) 73; page 240, notes 3, 4, supra.

[10] Rex v. Goldstein, 7 Moore, 1, 3 Brod. & B. 201, and Russ. & R. 473; State v. Marlier, 46 Mo. App. 233.

[11] See cases hereafter cited. Where it is not necessary to set out

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An indictment for resisting or obstructing an officer while executing a warrant, for instance, need not set out the warrant, but may merely allege that he was acting under a lawful warrant.[12] And an indictment for the larceny of written instruments need not set them out in hæc verba. It is sufficient to merely describe them like any other chattel, with such certainty that it may clearly appear what is alleged to have been stolen.[13] So, in an indictment for obtaining property by false pretenses, it may be alleged that the defendant falsely pretended that a certain instrument was a valid promissory note, etc., without setting it out verbatim.[14] And an indictment for selling a lottery ticket need not set out the ticket.[15]

In some cases it is not necessary to set out the instrument or writing according to its tenor, even though the words constitute the gist of the offense. It is held with us, but not in England, that an obscene libel need not be set out if it is so obscene that it would be improper for it to appear on the record. A statement of its contents may be omitted altogether, and a description thereof, sufficient to identify it, substituted, provided the reason for the omission appears in the indictment by proper averments.[16] And in indict-

an instrument according to its tenor, care should be taken that the indictment does not purport to do so; for, if it does, the proof must correspond verbatim with the instrument as set out. Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; Clay v. People, 86 Ill. 147; State v. Townsend, 86 N. C. 676.

[12] State v. Dunn, 109 N. C. 839, 13 S. E. 881; State v. Copp, 15 N. H. 212; State v. Roberts, 52 N. H. 492; Bowers v. People, 17 Ill. 373; McQuoid v. People, 3 Gilman (Ill.) 76. It has been held, however, that an indictment against an officer for nonfeasance in failing to execute a warrant should set out the warrant according to its tenor. Rex v. Burroughs, 1 Vent. 305.

[13] Post, p. 257.

[14] Reg. v. Coulson, 1 Denison, Crown Cas. 592; Com. v. Coe, 115 Mass. 481.

[15] People v. Taylor, 3 Denio (N. Y.) 99; Freleigh v. State, 8 Mo. 613.

[16] Com. v. Holmes, 17 Mass. 336; Com. v. Tarbox, 1 Cush. (Mass.) 72; People v. Girardin, 1 Mich. 90; State v. Brown, 27 Vt. 619; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; Thomas v. State, 103 Ind. 419, 2 N. E. 808; State v. Hayward, 83 Mo. 299. Contra, Bradlaugh v. Reg., 3 Q. B. Div. 607.

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ments for forgery, counterfeiting, etc., the instrument need not be set out if "it has been destroyed by the defendant, or has remained in his possession, and perhaps in other cases, where the instrument cannot be produced and there are no laches on the part of the government or prosecutor"; but in every such case the reason of the omission must appear on the indictment.[17] In an indictment for perjury, only the substance of the false oath need be stated.[18]

If only a part of a writing constitutes the offense, that part only need be set out, provided the part omitted does not in any way alter the sense of the part which is set out.[19] And it is not necessary to set out the matter which, though appearing on the paper, constitutes no part of the writing or instrument.[20] In an indictment for a defamatory libel or an obscene libel, for instance, only the libelous or obscene portion of the writing need be shown, if it is not affected

[17] Com. v. Houghton, 8 Mass. 110; Com. v. Sawtelle, 11 Cush. (Mass.) 142; Hooper v. State, 8 Humph. (Tenn.) 93; Pendleton v. Com., 4 Leigh (Va.) 694, 26 Am. Dec. 342; People v. Kingsley, 2 Cow. (N. Y.) 522, 14 Am. Dec. 520; People v. Badgley, 16 Wend. (N. Y.) 53; People v. Bogart, 36 Cal. 245; Wallace v. People, 27 Ill. 45; State v. Potts, 9 N. J. Law, 26, 17 Am. Dec. 449; State v. Callahan, 124 Ind. 364, 24 N. E. 732; Munson v. State, 79 Ind. 541; Du Bois v. State, 50 Ala. 139; State v. Davis, 69 N. C. 313. If it is alleged that the instrument has been destroyed, when it has not, and is produced at the trial, the variance will be fatal. Smith v. State, 33 Ind. 159. The fact that the loss is due to the prosecutor's negligence does not change the rule, if the negligence was not so great as to show fraud. State v. Taunt, 16 Minn. 109 (Gil. 99).

[18] Rex v. May, 1 Leach, Crown Cas. 192, 1 Doug. 193; People v. Warner, 5 Wend. (N. Y.) 271; Campbell v. People, 8 Wend. (N. Y.) 636; State v. Hayward, 1 Nott & McC. (S. C.) 546; Weathers v. State, 2 Blackf. (Ind.) 278; People v. Phelps, 5 Wend. (N. Y.) 9.

[19] Rex v. Bear, 2 Salk. 417; Cartwright v. Wright, 5 Barn. & Ald. 615; Com. v. Harmon, 2 Gray (Mass.) 289; Buckland v. Com., 8 Leigh (Va.) 732; Perkins v. Com., 7 Grat. (Va.) 651, 56 Am. Dec. 123; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Langdale v. People, 100 Ill. 263. And see the cases hereafter referred to.

[20] Com. v. Ward, 2 Mass. 397; People v. Franklin, 3 Johns. Cas. (N. Y.) 299; Langdale v. People, 100 Ill. 263; State v. Wheeler, 35 Vt. 261; Wilson v. People, 5 Parker, Cr. R. (N. Y.) 178; Perkins v. Com., 7 Grat. (Va.) 651, 56 Am. Dec. 123; Miller v. People, 52 N. Y. 304, 11 Am. Rep. 706; Mee v. State, 23 Tex. App. 566, 5 S. W. 243; State v. Grant, 74 Mo. 33.

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by the other part.[21] And, in an indictment for forging a promissory note, a forged indorsement on the note need not be set out. "The indorsement is no part of the note, but an act presumed to be done after the note is completed. It need not be set out in the indictment, if forged." [22] An indictment for forging a draft need not set out the figures cut in the paper,[23] or the residence of the drawee, written thereon.[24] A name written on a forged note, to show in whose hands it was placed for collection, need not be recited in describing or reciting the note.[25] And an indictment for forging an order drawn by a county board need not set out the words "Not intended as a circulating medium," printed at the top of the order.[26] Clearly, it is never necessary to set out writing put upon a forged instrument subsequent to the forgery.[27] So, in an indictment for forging a bill of exchange, bank bill, or other instrument of this character, "it is not necessary to insert the marginal ciphers or marks in the indictment, for they make no part of the bill. It might as well be required that the water marks, and a facsimile of all the engraved ornaments used in a bank bill, for the more easy detection of forgeries, should be inserted in an indictment." [28]

[21] Tabart v. Tipper, 1 Camp. 350.

[22] Com. v. Ward, 2 Mass. 397; Com. v. Adams, 7 Metc. (Mass.) 51; Perkins v. Com., 7 Grat. (Va.) 651, 56 Am. Dec. 123. But, if the indictment is for forging the indorsement, the indictment must contain allegations showing affirmatively that the offense was committed. Cocke v. Com., 13 Grat. (Va.) 750; Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 668.

[23] White v. Territory, 1 Wash. St. 279, 24 Pac. 447.

[24] Trask v. People, 151 Ill. 523, 38 N. E. 248.

[25] State v. Jackson, 90 Mo. 156, 2 S. W. 128.

[26] Smith v. State, 29 Fla. 408, 10 South. 894.

[27] Hennessy v. State, 23 Tex. App. 340, 5 S. W. 215; State v. Jackson, 90 Mo. 156, 2 S. W. 128.

[28] People v. Franklin, 3 Johns. Cas. (N. Y.) 299; Griffin v. State, 14 Ohio St. 55; Buckland v. Com., 8 Leigh (Va.) 732; Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Com. v. Stevens, 1 Mass. 203; State v. Carr, 5 N. H. 367; Com. v. Searle, 2 Bin. (Pa.) 332, 4 Am. Dec. 446. The name of the state in the margin of a bank bill is a material part of it if not repeated in the body of the bill, as it fixes the situs of the bank, the place where the contract is made and to be per-

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The indictment must not only set out the tenor of the instrument where this is necessary, but it must, by a proper use of words, profess to do so.[29] This is done by the use of the words, "to the tenor following," or "in these words," or "as follows," or "in the words and figures following." Any one of these expressions will import that an exact copy is given.[30] The words "to the effect following" or "in substance as follows" would not be sufficient, for they import that the substance only is given.[31] "The word 'tenor' imports an exact copy—that it is set forth in the words and figures—whereas the word 'purport' means only the substance or general import of the instrument;"[32] so that the use of word 'purport' in an indictment does not purport to give the exact words.[33] Nor are mere marks of quotation sufficient to indicate that the words thus designated are an exact copy, for quotation marks are often used when it is

formed, and the law by which it is to be interpreted. Com. v. Wilson, 2 Gray (Mass.) 70. But where the words "three dollars" and the name of the state, in the margin of a bank note, are repeated in the body of the note, so that the contract is complete without them, they are no part of the note, and need not be stated. Com. v. Taylor, 5 Cush. (Mass.) 605. Where a revenue stamp is required by law to be affixed to an instrument, but the instrument is not void without such stamp, the presence of a stamp need not be alleged. Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; Horton v. State, 32 Tex. 79.

[29] Rex v. Lyon, 2 Leach, Crown Cas. 597; Rex v. Gilchrist, Id. 660, 661; State v. Brownlow, 7 Humph. (Tenn.) 63; State v. Twitty, 9 N. C. 441, 11 Am. Dec. 779; Com. v. Wright, 1 Cush. (Mass.) 65; Com. v. Tarbox, 1 Cush. (Mass.) 66; State v. Goodman, 6 Rich. Law (S. C.) 387, 60 Am. Dec. 132.

[30] Reg. v. Drake, 3 Salk. 225; Rex v. Powell, 1 Leach, Crown Cas. 77; Rex v. Gilchrist, 2 Leach, Crown Cas. 660; McDonnell v. State, 58 Ark. 242, 24 S. W. 105.

[31] Rex v. Bear, 2 Salk. 417; Withers v. Harris, Id. 600; Reg. v. Drake, 11 Mod. 78; Anon., Id. 84; Wood v. Brown, 1 Marsh. 522, 6 Taunt. 169; Wright v. Clements, 3 Barn. & Ald. 503; Cook v. Cox, 3 Maule & S. 115; Com. v. Sweney, 10 Serg. & R. (Pa.) 173; State v. Walsh, 2 McCord (S. C.) 248.

[32] 2 Gabb. Cr. Law, 201; Com. v. Sweney, supra; State v. Pullens, 81 Mo. 387; State v. Brownlow, 7 Humph. (Tenn.) 63; State v. Witham, 47 Me. 165; State v. Bonney, 34 Me. 383; Dana v. State, 2 Ohio St. 91.

[33] Com. v. Wright, 1 Cush. (Mass.) 65; Rex v. Wilkes, 4 Burrows, 2527.

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not intended to give an exact quotation.[34] Nor is the mere attaching of the original writing to the indictment sufficient, where the indictment does not show that it is the original.[35]

In setting forth in the same count different parts of a written instrument, not following each other, they should not be professedly stated continuously, and as immediately following each other; for if they are so stated, and a part is not proved, the whole count will fail. The proper course is to allege that in one part of the writing there were certain words, giving them, and in another part thereof there were certain words, giving them.[36]

As we have already seen, where the writing as set out does not on its face show that it is such that the crime was committed, the extrinsic facts showing that it is of such a character must be stated. This is done by an inducement or innuendo, or both. In an indictment for libel, for instance, if the matter written is not in itself prima facie libelous, but requires some explanatory facts to show that it is so, it is necessary to insert in the indictment a positive averment of such facts, by a formal inducement in the introductory part of the indictment. And if, after this, the matter alleged in the inducement and charge is not obviously libelous, or is not necessarily applicable to the party charged to have been libeled, it is necessary to render it so by explaining its meaning by an innuendo.[37]

The same is true of forgery. In order to maintain an indictment for forgery at common law, it must appear that the instrument is of such a character that it might defraud or deceive if used with that intent. If the fraudulent char-

[34] Com. v. Wright, supra.

[35] Com. v. Tarbox, 1 Cush. (Mass.) 66.

[36] 1 Chit. Cr. Law, 235; 3 Chit. Cr. Law, 875; Rex v. Leefe, 2 Camp. 134; Tabart v. Tipper, 1 Camp. 353.

[37] People v. Collins, 102 Cal. 345, 36 Pac. 669; People v. Jackman, 96 Mich. 269, 55 N. W. 809; Rogers v. State, 30 Tex. App. 462, 17 S. W. 548. In an indictment for mailing a letter giving information as to where, how, and by whom certain illegal operations would be performed, the letter set out need not be such that a stranger would know what information it gave. U. S. v. Breinholm (D. C.) 208 Fed. 492.

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acter of the instrument alleged to have been forged is not manifest on its face, the defect must be remedied by such averments as to extrinsic matter as will enable the court judicially to see that it has such a tendency.[38] Thus, an indictment for forging an instrument of the tenor following: "Boston, Aug. 6th, 1868. St. James Hotel. I hereby certify that L. W. Hinds & Co. have placed in my hotel a card of advertisements as per their agreement. J. P. M. Stetson, Proprietor"—without any averment of extrinsic matter to show how the instrument may be used to defraud, is bad.[39] And an indictment for forging an indorsement on a promissory note is bad if it contains no averments to show that the words alleged to have been forged bore such a relation to the note as to be the subject of forgery.[40] We have already explained the general use and effect of inducements and innuendoes.[41]

Many of the cases hold that an indictment for forgery must not only set out the instrument according to its tenor, but must state the character of the instrument, as that it was a bank bill, promissory note, order for the payment of money, etc., and that, where the indictment is founded on a statute punishing the forgery of certain instruments, it is necessary for the indictment to describe the instrument by one of the terms used in the statute.[42] Others, with more reason, hold that it is not necessary to do more than set out the instrument in the indictment, if it is such that its character may be seen on its face.[43]

[38] Rex v. Hunter, 2 East, P. C. 928; Rex v. Testick, Id. 925; Rex v. Martin, 7 Car. & P. 549; Com. v. Hinds, 101 Mass. 209; Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 668; Com. v. Dunleay, 157 Mass. 386, 32 N. E. 356; King v. State, 27 Tex. App. 567, 11 S. W. 525, 11 Am. St. Rep. 203; Fomby v. State, 87 Ala. 36, 6 South. 271; Shannon v. State, 109 Ind. 407, 10 N. E. 87.

[39] Com. v. Hinds, 101 Mass. 209.

[40] Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 668.

[41] Ante, pp. 207, 208.

[42] Rex v. Wilcox, Russ. & R. 50; State v. Stephen, 45 La. Ann. 702, 12 South. 883; State v. Ward, 6 N. H. 529; State v. Hayden, 15 N. H. 355.

[43] Reg. v. Williams, 2 Denison, Crown Cas. 61; Com. v. Castles, 9 Gray (Mass.) 124; Com. v. Bailey, 199 Mass. 583, 85 N. E. 857; State v. Wheeler, 19 Minn. 98 (Gil. 70).

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Though a statute in terms punishes the passing of any false, forged, or counterfeited instruments issued under authority of certain statutes, it means any writing purporting to be such an instrument, but which is not genuine or valid, and an indictment may describe the writing as a false, forged, and counterfeited writing, purporting to be such an instrument. Indeed, this is the better description. On the other hand, however, an indictment is not bad because it describes the writing as being, and not merely purporting to be, such an instrument, "false, forged, and counterfeited." The latter words necessarily imply that it is not a genuine instrument, just as the terms "void will" or "void note" imply that the instrument merely purports to be a will or note.[44]

If any part of a true instrument be altered, the indictment may allege it as a forgery of the whole instrument.[45] But where the forgery is of a mere addition to an instrument, like the indorsement on a bill or note, or interest coupons attached to a bond, or an acknowledgment to a deed, etc., and has not the effect of altering the instrument itself, but is merely collateral to it, the forgery must be specially alleged;[46] and it must, as we have seen, be expressly shown by proper allegations that the part thus forged bore such a relation to the instrument proper that it could be the subject of forgery. To charge the forgery of an indorsement on a note, merely describing it as such, without showing its relation to the note, is not enough.[47]

Ordinarily, where the instrument is given according to its tenor, it must be proven verbatim as laid. This question we shall hereafter consider.[48]

If the instrument as described by name in the indictment

[44] U. S. v. Howell, 11 Wall. 432, 20 L. Ed. 195; Rex v. Birch, 2 East, P. C. 980.

[45] 1 Hale, P. C. 684; 2 East, P. C. 978; Com. v. Woods, 10 Gray (Mass.) 480; Rex v. Atkinson, 7 Car. & P. 669; Com. v. Butterick, 100 Mass. 18. Or it may specially allege the alteration. Bittings v. State, 56 Ind. 101.

[46] Com. v. Woods, supra.

[47] Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 668.

[48] Post, p. 381.

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does not correspond with the instrument as set out, the inconsistency has been held fatal.[49] This, however, is erroneous in principle, and against the weight of authority.[50]

SETTING FORTH SPOKEN WORDS

90. When spoken words are the gist of the offense, they must be accurately set out in the indictment. The rules are substantially the same as in the case of written words.[51]

We have just explained the necessity of setting out written words where they constitute the gist of the offense charged. For the same reason, where the offense consists of spoken words, they must be set out, or the indictment will be fatally defective.[52] But, where the words do not constitute the gist of the offense, as in extorting money by threat of criminal accusation, only their substance need be stated.[53] The rules under this head are substantially the same as those just stated in treating of written words.

In indictments for attempting to extort money from a person by threatening to accuse him of a crime, it is sufficient to set out the exact words used by the defendant. If these clearly import a threat of accusation of crime, and they are alleged to have been uttered with the unlawful intent to extort money, the offense is sufficiently described. The indictment need not set out with technical accuracy the crime the accusation of which is alleged to have been threat-

[49] Com. v. Clancy, 7 Allen (Mass.) 537; Com. v. Lawless, 101 Mass. 32.

[50] People v. Kemp, 76 Mich. 410, 43 N. W. 439.

[51] Ante, p. 239.

[52] Bradlaugh v. Reg., 3 Q. B. Div. 607, 616; Sacheverell's Case, 15 How. St. Tr. 467; Updegraph v. Com., 11 Serg. & R. (Pa.) 394; State v. Bradley, 2 N. C. 403; State v. Caffey, 6 N. C. 320; State v. Brewington, 84 N. C. 783; Com. v. Moulton, 108 Mass. 307; Robinson v. Com., 101 Mass. 27; Walton v. State, 64 Miss. 207, 8 South. 171; McMahan v. State, 13 Tex. App. 220; State v. Townsend, 86 N. C. 676.

[53] Com. v. Moulton, 108 Mass. 307.

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ened.[54] The question of variance between the words set out in the indictment and the words proven to have been spoken will be considered when we come to treat of variance.[55]

DESCRIPTION OF REAL PROPERTY

91. When real property is the subject of the offense charged, the premises must be so described as to show their character and ownership or occupancy, where that is material; and, in addition to this, they must be described with sufficient particularity to identify them.

Whenever real property is the subject of the offense, it must be described to such an extent that the court may see on the face of the charge that the premises are such as could have been the subject of the offense; otherwise the indictment would fail to set out everything necessary to constitute the offense. An indictment for burglary or arson at common law, describing the premises simply as a certain house or building, would clearly be insufficient, for these offenses would not be committed by breaking into or burning a warehouse or store, or any building other than a dwelling house or outhouse used in connection with it.[56] And an indictment for the statutory offense of breaking and entering or burning a certain kind of building, as a warehouse, shop, schoolhouse, etc., must show that the building is within the statute.[57] One who burns, or breaks and enters with intent to commit a felony, a house owned or occupied by himself, does not commit arson or burglary; hence an in-

[54] Com. v. Murphy, 12 Allen (Mass.) 449; Com. v. Dorus, 108 Mass. 488.

[55] Post, p. 381.

[56] State v. Atkinson, 88 Wis. 1, 58 N. W. 1034; Thomas v. State, 97 Ala. 3, 12 South. 409; State v. Miller, 3 Wash. 131, 28 Pac. 375.

[57] State v. Bedell, 65 Vt. 541, 27 Atl. 208; State v. Atkinson, 88 Wis. 1, 58 N. W. 1034; Thomas v. State, 97 Ala. 3, 12 South. 409; Bigham v. State, 31 Tex. Cr. R. 244, 20 S. W. 577; Kincaid v. People, 139 Ill. 213, 28 N. E. 1060; State v. Fleming, 107 N. C. 905, 12 S. E. 131.

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dictment for these offenses must show the ownership or occupancy of the premises.[58]

Further than this, the premises must be so described, as to location and otherwise, as to identify the offense, and to apprise the defendant of the particular charge against him. In all indictments, therefore, for burglary and other housebreakings, arson and other malicious burnings, forcible entry and detainer, trespass, fraudulent conveyance of land, etc., the premises must be described and the description must be borne out by the evidence.[59]

An indictment for erecting a nuisance in a public highway which merely described the erections as "a number of sheds and buildings" was held bad for uncertainty.[60] But an indictment for a nuisance in keeping a house of ill fame, a gaming house, or house for the unlawful sale of intoxicating liquors, or other disorderly house, need not further describe the premises than as a certain house or tenement, giving the city and county in which it is located.[61]

DESCRIPTION OF PERSONAL PROPERTY

92. When personal property is the subject of the offense, it must be described; and in those cases in which the value is material, as in case of larceny, the value must be stated. Property may and should be described by the name usually appropriated to it; or, as it is sometimes expressed, the common acceptation governs the description.

In all indictments for offenses in relation to personal property it is necessary to describe the property. In some

[58] State v. Keena, 63 Conn. 329, 28 Atl. 522; post, p. 268.

[59] Com. v. Brown, 15 Gray (Mass.) 189; State v. Malloy, 34 N. J. Law, 410. As to the question of variance between the pleading and proof, see post, p. 384. In describing buildings, the description is usually by stating the parish or town in which the building is situated. State v. Burdett, 145 Mo. 674, 47 S. W. 796; Com. v. Tolman, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, 14 Am. St. Rep. 414.

[60] Com. v. Hall, 15 Mass. 240.

[61] Com. v. Skelley, 10 Gray (Mass.) 464; State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135.

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cases the particular kind, quantity, number, or value of the property enters into the nature of the offense, and must be stated for this reason. Some things, for instance, are not the subject of larceny,[62] and an indictment for larceny must, at the very least, so describe the thing stolen that the court may see that it could be the subject of larceny, or it does not state any offense. An indictment alleging the felonious taking and carrying away of a railroad ticket was held bad because it failed to state that the ticket was stamped, dated, and signed, since, unless it was, it was worthless, and not the subject of larceny.[63] And, as we shall presently see, an indictment for stealing animals which may have been feræ naturæ, or for stealing minerals, must show, in the first case, that the animals had been killed or reclaimed, and, in the second, that the minerals had been severed from the realty, and become personal property.[64]

Even, where the description is not necessary to show that an offense has been committed, it is necessary to describe the property with certainty, in order that the accused may know with what offense he is charged; in order that it may be seen that the property with reference to which the offense is proven to have been committed is the same as that with reference to which the offense is charged in the indictment; and in order that the accused may be able to plead an acquittal or conviction in bar of a subsequent indictment for the same cause.[65] An indictment charging that the accused took and carried away a certain person's goods and chattels, without describing them, or a case of merchandise, without further description of it, or a certain paper, without further description, is bad for uncertainty.[66] It has been held that an indictment under a statute for wounding or stealing cattle, without stating the species of the cattle, is

[62] Clark, Cr. Law (3d Ed.) 307.

[63] McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; State v. Holmes, 9 Wash. 528, 37 Pac. 283.

[64] Post, pp. 259, 264.

[65] 2 Hale, P. C. 182; Com. v. Strangford, 112 Mass. 289.

[66] 2 Hale, P. C. 182; State v. Dawes, 75 Me. 51; State v. Dowell, 3 Gill & J. (Md.) 310; Com. v. Kelly, 12 Gray (Mass.) 176; Com. v. Gavin, 121 Mass. 55, 23 Am. Rep. 255; State v. Edson, 10 La. Ann.

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insufficient.[67] And an indictment against a bankrupt for concealing his effects, describing a part of them as "100 other articles of household furniture," and "a certain debt due from one A. to the defendant to the value of £20 and upwards," was held bad.[68]

No satisfactory rule can be extracted from the cases as to the minuteness with which the property must be described. A description has been held sufficient by some courts that has been held insufficient by others. Thus one English court has held that a lamb is sufficiently described by the word "sheep," [69] and another English court has held that it is not;[70] and while the courts in Illinois [71] and Missouri [72] hold that a gelding is properly designated by the word "horse," the Kansas [73] and Montana [74] courts hold the contrary. The tendency of the courts, especially in recent years, is toward the allowance of greater latitude of description.[75]

229; Com. v. Strangford, 112 Mass. 289; Robinson v. Com., 32 Grat. (Va.) 866; State v. Silverman, 76 N. H. 309, 82 Atl. 536. In this case it was held that a statute authorizing a conviction of embezzlement on an indictment that does not describe the property embezzled was unconstitutional.

[67] Rex v. Chalkley, Russ. & R. 258. Contra, People v. Littlefield, 5 Cal. 355.

[68] Rex v. Forsyth, Russ. & R. 274. An indictment describing property embezzled as "furs of various kinds of the value of $965" was held bad, in State v. Silverman, 76 N. H. 309, 82 Atl. 536.

[69] Rex v. Spicer, 1 C. & K. 699.

[70] Rex v. Birket, 4 C. & P. 216.

[71] Baldwin v. People, 1 Scam. (Ill.) 304.

[72] State v. Donnegan, 34 Mo. 67.

[73] State v. Buckles, 26 Kan. 237.

[74] State v. McDonald, 10 Mont. 21, 24 Pac. 628, 24 Am. St. Rep. 25. In Marsh v. State, 3 Ala. App. 80, 57 South. 387, it was held that on an indictment for stealing a cow the accused could not be convicted of stealing a steer.

[75] Thus, in Roman v. State, 64 Tex. Cr. R. 515, 142 S. W. 912, it was held that, where a compound was made of cotton seed oil and oleostearine, and was known in the trade as "lard," it could be so styled in an indictment, though "lard," as defined in the dictionaries and the pure food laws, means a product of the hog. This is a very healthy development. The rule of pleading governing this matter, and in the application of which hundreds of indictments have been

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But minute details are not necessary. If the descriptive terms used are sufficient in their common and ordinary ac-

quashed, is that the defendant is entitled to be informed with what offense he is charged, so that he may prepare his defense, and so that he may be able to plead an acquittal or conviction in bar of a subsequent indictment for the same cause. But this principle is violated in innumerable cases and without complaint of miscarriage of justice. It has always been held that it is sufficient to describe the property taken as a "horse," a "cow," or a "pig," "of the goods and chattels" of X., without alleging the color, sex, or any other distinguishing feature of the property. X. may have a herd of cows or horses or a drove of pigs, a number of them may be missing, and if the accused knew that it was a black horse or a dun cow that he was thought to have stolen he might prepare one defense, as that X. had loaned it to him, and if a white horse or brindle cow, the defense that it was dead, or that it was in Y.'s possession, yet it is never held that he is entitled to such description that he may prepare his defense; also, having been indicted for stealing a "horse" and convicted, he may the next day be indicted for stealing a "horse" again, and cannot plead former conviction, for it may be another horse that he is charged with stealing in the second indictment. But not only does the rule of pleading, so strictly adhered to in some cases, not always enable the accused to prepare his defense, but this rule, taken in connection with the rules as to variance, may actually mislead him in preparing it. We shall presently see that at common law an indictment must always state the day, month, and year in which the defendant committed the crime. Yet, having charged it to be committed, say on July 1, 1916, and the defendant having come to trial prepared to show that on that day he was in a foreign country and could not have done the act in the place alleged, the prosecution may proceed to prove another day and month, though the accused may have been able to prove an alibi on that day also, if he had been informed by the indictment correctly as to the time of the alleged crime. The remedy in the last case is for the court to grant a continuance to allow the accused time to prepare his new defense. The same result could be obtained in the case of misdescription of property in the few cases in which the defendant is actually misled. A more complete remedy could be had by a statute allowing the indictment to be amended at the trial in cases both of misdescription of property and erroneous statement of date, with the granting of continuance where the erroneous misdescription or statement prejudiced the defendant. The amended indictment would then be more available to the defendant in pleading former jeopardy. The Canadian Code (section 889, subsec. 2) permits the amendment of the indictment even in cases where there is "an omission to state, or a defective statement of anything requisite to constitute the offence," provided "the accused has not been misled or prejudiced in his defense by such error or omission."

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ceptation to show what the property was and to fully identify it, they will be sufficient.[76] In describing a handkerchief or a sheet, for instance, it may be described simply by those terms, without stating the color or size, or the material of which it is made.[77] So where six handkerchiefs are in one piece, uncut, each being designated by the pattern, they may be described as six handkerchiefs.[78] And a 10-carat gold watch may be described simply as a gold watch, if it is commonly known as such, though it is not so known by jewelers.[79] And it has been held that a hide may be described as one hide, of a certain value, without stating the kind of animal from which it was taken.[80] And animals may be described, as "one mare, the property of W., of the value of," etc., or "a certain hog, said hog being the property and chattel of one L.," etc., without giving the color, kind, weight, mark, or brand. Such particularity is never required.[81]

If an article has acquired in common parlance a particular name, it is erroneous to describe it by the name of the material of which it is composed.[82] An indictment, therefore, for the larceny or embezzlement of cloth and other materials is not good as an indictment for the larceny or

[76] Rex v. Johnson, 3 Maule & S. 539; Alkenbrack v. People, 1 Denio (N. Y.) 80; Rex v. Gillham, 6 Term R. 267; Rex v. Burdett, 1 Ld. Raym. 149; Reg. v. Mansfield, Car. & M. 140; Widner v. State, 25 Ind. 234; Pfister v. State, 84 Ala. 432, 4 South. 395; Com. v. James, 1 Pick. (Mass.) 376; Com. v. Campbell, 103 Mass. 436; Com. v. Shaw, 145 Mass. 349, 14 N. E. 159.

[77] Rex v. Johnson, supra; Alkenbrack v. People, supra.

[78] Rex v. Gillham, 6 Term R. 267; Rex v. Burdett, 1 Ld. Raym. 149.

[79] Pfister v. State, supra.

[80] State v. Dowell, 3 Gill & J. (Md.) 310.

[81] People v. Stanford, 64 Cal. 27, 28 Pac. 106; State v. Friend, 47 Minn. 449, 50 N. W. 692; post, p. 259. But in a recent case it was held that an indictment for larceny was insufficient that described the property stolen as "100 pounds of seed cotton." Bright v. State, 10 Ga. App. 1, 7, 72 S. E. 519.

[82] Com. v. Clair, 7 Allen (Mass.) 527; Rex v. Edwards, Russ. & R. 497; Rex v. Hollaway, 1 Car. & P. 128; Reg. v. Mansfield, Car. & M. 140. In Com. v. Clair, supra, it was held that an overcoat could not be described as "cloth"; and in Rex v. Hollaway, supra, that a furnace that had been taken apart could not be described as a furnace.

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embezzlement of an overcoat into which the materials had been made.[83]

If articles have been chemically mixed, they should be described by the name of the mixture.[84] It has been held that, where articles have been mechanically mixed, they should be described as a certain mixture consisting of the specific articles, describing them, and not as a certain quantity of each article. Thus, an indictment for stealing "one bushel of oats, one bushel of chaff, and one bushel of beans" was held bad where these articles were mixed together. They should have been described, it was said, as mixed; as "a certain mixture, consisting of one bushel of oats," etc.[85] But this is at least doubtful.[86] If articles, when mechanically mixed, change their character, and are known by another name, as where wood and iron is manufactured into a wagon, or wool and silk into an overcoat, it is clear that they should be described as a wagon or an overcoat;[87] but where, though mixed, they still retain their nature and qualities, and are known by the same names, they should be described by those names. There seems no better way of determining the question than by applying the rule that the common acceptation governs the description.

The description of property is subject to the rule that the law only requires such certainty as the nature and circumstances of the case will permit.[88] In all cases, of course, the description must be sufficient to show that the offense was committed; but a more particular description than is necessary to meet this requirement is not essential if it is im-

[83] Com. v. Clair, supra.

[84] Reg. v. Bond, 1 Denison, Crown Cas. 521.

[85] Rex v. Kettle, 3 Chit. Cr. Law, 947a.

[86] In Reg. v. Bond, supra, Bayley, J., said: "I cannot help thinking that, if a man steal wine and water, he may be charged with stealing wine."

[87] See page 256, note 83, supra. "Upon an indictment for stealing printed books * * * it is not necessary to do more than to name so many printed books." Rex v. Johnson, 3 Maule & S. 555.

[88] Com. v. Grimes, 10 Gray (Mass.) 470, 71 Am. Dec. 666; Wilson v. State, 69 Ga. 224; Com. v. Sawtelle, 11 Cush. (Mass.) 142; Larned v. Com., 12 Metc. (Mass.) 240; Hamblett v. State, 18 N. H. 384; Low v. People, 2 Parker, Cr. R. (N. Y.) 37.

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possible. The excuse, however, should be stated, as that further particulars are unknown.[89]

Written Instruments

In indictments for the larceny or possession of written instruments, it is never necessary, as in the case of forgery, to set forth the instrument verbatim; but it is sufficient to describe it like any other chattel.[90] An indictment under a statute for the larceny of particular instruments therein specified must so describe the instrument as to bring it within the statute. Ordinarily, to designate it by the term employed in the statute will be sufficient.[91] Thus, where a statute punishes the larceny of bank notes, bank bills, promissory notes, receipts, acquittances, etc., these terms may be used in describing the instrument, and many of the cases hold that no further description is necessary. Under a statute punishing the larceny of bank notes, it has been held sufficient to describe the instrument simply as a bank note of a certain value;[92] but it would not do to describe it as "a note commonly called a 'bank note.'"[93] The statutes punishing the larceny of written instruments vary in the different states, and, besides this, there is much conflict in the cases. The scope and size of this work will not permit us to do more than refer to some of the authorities.[94]

[89] Hamblett v. State, 18 N. H. 384; Low v. People, 2 Parker, Cr. R. (N. Y.) 37.

[90] Rex v. Johnson, 3 Maule & S. 539; Com. v. Richards, 1 Mass. 337; State v. Cassel, 2 Har. & G. (Md.) 407; State v. Stevens, 62 Me. 284; Baldwin v. State, 1 Sneed (Tenn.) 411; McDonald v. State, 8 Mo. 283; State v. Williams, 19 Ala. 15, 54 Am. Dec. 184; Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95.

[91] Com. v. Richards, 1 Mass. 337; State v. Cassel, 2 Har. & G. (Md.) 407; McDonald v. State, 8 Mo. 283; Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95.

[92] Com. v. Richards, 1 Mass. 337.

[93] Rex v. Craven, Russ. & R. 14. And see Rex v. Chard, Id. 488; Damewood v. State, 1 How. (Miss.) 262.

[94] The student will find the question discussed and the cases collected in Whart. Cr. Pl. & Prac. §§ 184–202. Bank notes and bank bills, Com. v. Richards, 1 Mass. 337; Larned v. Com., 12 Metc. (Mass.) 240; Com. v. Ashton, 125 Mass. 384; People v. Holbrook, 13 Johns. (N. Y.) 90; Com. v. Boyer, 1 Bin. (Pa.) 201; State v. Cassel, 2 Har. & G. (Md.) 407; State v. Rout, 10 N. C. 618; McDonald v.

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Money

The term "money" includes everything that is legal tender and is current as money.[95] It does not cover bank notes, bank bills, promissory notes, etc., unless they have been made legal tender.[96] The cases are not in accord as to the minuteness with which money must be described. In the absence of statute, perhaps the weight of authority requires that the kinds and denominations of the separate pieces of money must be stated.[97] In these jurisdictions the money cannot be described simply as so many dollars in money, or money of a certain value, etc.,[98] but should state the kind of

State, 8 Mo. 283; Salisbury v. State, 6 Conn. 101; Craven's Case, 2 East, P. C. 601; State v. Stimson, 24 N. J. Law, 9; State v. Stevens, 62 Me. 284. Promissory notes, Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95; Spangler v. Com., 3 Bin. (Pa.) 533; Com. v. Ashton, 125 Mass. 384; Hobbs v. State, 9 Mo. 855; Stewart v. State, 62 Md. 413; Phelps v. People, 72 N. Y. 334. Bills of exchange, Reg. v. Harper, 44 Law T. (N. S.) 615; Reg. v. Cooke, 8 Car. & P. 582; Rex v. Birkett, Russ. & R. 251; Rex v. Wicks, Id. 149; People v. Howell, 4 Johns. (N. Y.) 296; Com. v. Butterick, 100 Mass. 12; Phelps v. People, 72 N. Y. 334. United States treasury notes, U. S. v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14,572; Com. v. Cahill, 12 Allen (Mass.) 540; Hummel v. State, 17 Ohio St. 628; State v. Thomason, 71 N. C. 146; Dull v. Com., 25 Grat. (Va.) 965. Receipts, Rex v. Martin, 1 Moody, Crown Cas. 483; Reg. v. Boardman, 2 Moody & R. 147; Rex v. Goldstein, Russ. & R. 473; Testick's Case, 2 East, P. C. 925; Com. v. Lawless, 101 Mass. 32; State v. Humphreys, 10 Humph. (Tenn.) 442. Acquittance, Com. v. Ladd, 15 Mass. 526. Checks, Bonnell v. State, 64 Ind. 498; Hawthorn v. State, 56 Md. 530; Whalen v. Com., 90 Va. 544, 19 S. E. 182. Railroad tickets, McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; ante, p. 251.

[95] Reg. v. West, 7 Cox, Cr. Cas. 183.

[96] Major's Case, 2 East, P. C. 1118; State v. Jim, 3 Murph. (N. C.) 3; Com. v. Swinney, 1 Va. Cas. 146, 5 Am. Dec. 512; McAuly v. State, 7 Yerg. (Tenn.) 526; Williams v. State, 12 Smedes & M. (Miss.) 58; Johnson v. State, 11 Ohio St. 324.

[97] People v. Bogart, 36 Cal. 245; State v. Denton, 74 Md. 517, 22 Atl. 305; Baggett v. State, 69 Miss. 625, 13 South. 816; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; Lord v. State, 20 N. H. 404, 51 Am. Dec. 231; State v. Longbottoms, 11 Humph. (Tenn.) 39.

[98] Rex v. Fry, Russ. & R. 482; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; Lavarre v. State, 1 Tex. App. 685; Smith v. State, 33 Ind. 159; State v. Stimson, 24 N. J. Law, 9; State v. Longbottoms, 11 Humph. (Tenn.) 39; People v. Ball, 14 Cal. 101, 73 Am. Dec. 631; Leftwich v. Com., 20 Grat. (Va.) 716; State v. Murphy, 6 Ala.

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coin or paper, though it need not describe each particular coin or bill. Other cases hold that it is sufficient to describe money as a certain amount of lawful money, without stating the kinds and denominations of the separate pieces.[99]

By statute in a growing number of states it is made unnecessary to state the species, number or denominations of money.[1] Some of these statutes apply only to indictments for certain named crimes; others to indictments for all crimes.[2]

In all jurisdictions, if the number, kind, or denomination of the money was unknown, this fact, if stated in the indictment, dispenses with the necessity of description.[3]

Animals, etc.

At common law, an indictment for stealing an animal must describe it specifically, and any substantial variance between the indictment and the proof will be fatal.[4] An indictment for stealing a colt, without stating whether it was

845; Wofford v. State, 29 Tex. App. 536, 16 S. W. 535; State v. Oakley, 51 Ark. 112, 10 S. W. 17. Thus, an indictment describing the stolen property as "$200 in United States bank notes, of the value of $200; $200 United States currency, of the value of $200; and $200 of United States treasury notes, of the value of $200"—is bad for not more particularly describing the property, or alleging that a more particular description is unknown. Baggett v. State, 69 Miss. 625, 13 South. 816. But see Goldstein v. State (Tex. Cr. App.) 23 S. W. 686.

[99] Lewis v. State, 28 Tex. App. 140, 12 S. W. 736; Porter v. State, 26 Fla. 56, 7 South. 145; State v. Knowlton, 11 Wash. 512, 39 Pac. 966.

[1] State v. Rush, 95 Mo. 199, 8 S. W. 221; People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080; State v. Fogerty, 105 Iowa, 32, 74 N. W. 754; Moore v. State, 179 Ind. 353, 101 N. E. 295.

[2] See State v. Palmer, 20 Wash. 207, 54 Pac. 1121; McDivit v. State, 20 Ohio St. 231; State v. Shonhausen, 26 La. Ann. 421; Cook v. State, 80 Ark. 495, 97 S. W. 683; People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080; Frederick v. State, 127 Ga. 35, 55 S. E. 1044; Rains v. State, 137 Ind. 83, 36 N. E. 532; Diaz v. State, 62 Tex. Cr. R. 317, 137 S. W. 377; St. Mass. 1899, c. 409, § 16.

[3] Hoskins v. People, 16 N. Y. 344; People v. Bogart, 36 Cal. 245; State v. Taunt, 16 Minn. 109 (Gil. 99); State v. Williams, 118 Iowa, 494, 92 N. W. 652.

[4] Post, p. 384.

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a mare or a horse, has been held bad.[5] And where the indictment charged the larceny of a gray horse, and the proof showed it was a gray gelding, the variance was held fatal.[6] And it has been held that an indictment for stealing a pig cannot be sustained under an act against stealing hogs.[7] At common law an animal may be described simply as "one horse," "one mare," "one hog," etc., giving the ownership and value. It is not necessary to go further into details, and give the color, size, kind, weight, or marks.[8]

This rule is qualified as applied to indictments under a statute. With regard to the description of animals under a statute punishing offenses in relation to them, the rule has been stated to be that, "where a statute uses a single general term, this term is to be regarded as comprehending the several species belonging to the genus; but that, if it specifies each species, then the indictment must designate specifically," and "that, when a statute uses a nomen generalissimum as such (e. g. cattle), then a particular species can be proved, but that when the statute enumerates certain species, leaving out others, then the latter cannot be proved under the nomen generalissimum, unless it appears to have been the intention of the legislature to use it as such." [9]

Where a statute punishes the stealing of cows, bulls, steers, and calves, and does not specifically mention heifers, an indictment for stealing a heifer may describe it as a cow.[10] But, if the statute mentions both cows and heifers,

[5] Rex v. Beaney, Russ. & R. 416. Nor is "a yearling" sufficient. Stollenwerk v. State, 55 Ala. 142.

[6] Hooker v. State, 4 Ohio, 350; Valesco v. State, 9 Tex. App. 76. But see Baldwin v. People, 1 Scam. (Ill.) 304, where it was held that proof of stealing a mare or gelding would sustain an indictment for stealing a horse; and in State v. Bassett, 34 La. Ann. 1108, that proof of stealing a hen sustained an indictment for stealing a chicken.

[7] State v. M'Lain, 2 Brev. (S. C.) 443. But see Lavender v. State, 60 Ala. 60.

[8] People v. Stanford, 64 Cal. 27, 28 Pac. 106; State v. Friend, 47 Minn. 449, 50 N. W. 692; State v. Crow, 107 Mo. 341, 17 S. W. 745; State v. Baden, 42 La. Ann. 295, 7 South. 582.

[9] Whart. Cr. Pl. & Prac. § 237; State v. Plunket, 2 Stew. (Ala.) 11.

[10] People v. Soto, 49 Cal. 70.

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it must be described as a heifer.[11] So, where a statute punishes the stealing of horses only, a mare or a gelding may be described as a horse,[12] though it is otherwise where the statute mentions mares and geldings.[13]

Where a statute punishes larceny or other offenses in relation to "cattle," "neat cattle," or "beasts," using one of those terms only, any description bringing the animal within the general term may be used, as horse, cow, sheep, hog, etc. It need not state, further, that the animal is a beast or cattle or neat cattle.[14] In such a case, however, it would not do to describe the animal as a beast or cattle, but the kind of beast or cattle would have to be specified. It cannot in reason be supposed that the legislature, in using so general a term, intended to so far do away with the requirement of certainty.[15] "Four head of neat cattle" is a sufficient description, for neat cattle means a particular kind of cattle; it applies to animals of the genus bos only.[16]

[11] Cooke's Case, 2 East, P. C. 616.

[12] People v. Pico, 62 Cal. 50; Jordt v. State, 31 Tex. 571, 98 Am. Dec. 550; State v. Plunket, 2 Stew. (Ala.) 11.

[13] State v. Plunket, 2 Stew. (Ala.) 11.

[14] Moyle's Case, 2 East, P. C. 1076; State v. Hambleton, 22 Mo. 452; Rex v. Whitney, 1 Moody, Crown Cas. 3; Rex v. Chapple, Russ. & R. 77; Mott's Case, 2 East, P. C. 1075; Taylor v. State, 6 Humph. (Tenn.) 285; State v. Bowers (Mo. Sup.) 1 S. W. 288.

[15] As we have already stated, "it is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.'" U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; ante, p. 188; post, p. 308. As shown in a previous note, ante, page 253, note 75, this principle, while responsible for grave miscarriages of justice in the quashing of indictments in cases where the defendant in fact knows the offense with which he is charged, by no means always safeguards the defendant. A. is charged with stealing "one beast" from X. The indictment would be invalid, though it were shown that X. possessed only one beast and that A. knew that fact; but if A. is charged with stealing "one cow" from X., the indictment would be valid, though X. possessed the "cattle on a thousand hills," and A. did not in fact know what cow it was intended to prove that he had stolen.

[16] State v. Hoffman, 53 Kan. 700, 37 Pac. 138. Under a statute punishing larceny of "neat cattle," to describe the property stolen as

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An indictment for stealing a dead animal should state that it was dead, for, in the absence of any averment to the contrary, it will be presumed that a live animal is intended, and proof that a dead animal was stolen will be a fatal variance. The presumption being that the animal was alive, an indictment for stealing a live animal need not state that it was alive. An indictment for stealing two turkeys, it has been held, will be taken to mean living turkeys, and will not be sustained by proof of stealing dead ones.[17] So, on indictment for stealing a pheasant, of the goods and chattels of the prosecutor, it was held that from the description it must be taken to be a pheasant alive, and so feræ naturæ, and not the subject of larceny; that, to show the offense, the indictment should have shown that the bird was dead or reclaimed, and the stating it to be the goods and chattels of the prosecutor did not supply the deficiency.[18]

A comparison of the case last cited with a more recent case in the same jurisdiction shows the tendency of enlightened courts away from the narrow, technical rules of criminal pleading. In the more recent case[19] the indictment charged that the defendant "one thousand pheasant eggs of the goods and chattels of and belonging to Sir Walter Gilbey feloniously did steal." It was contended that the indictment was bad, in that it did not allege that the eggs had been reduced into the possession of the prosecutor at the time of the stealing, and that the indictment ought to contain some expression to show that they had been collected from the wild pheasants' nests. Rough's Case was cited as authority. The court, without directly overruling Rough's Case, held the indictment sufficient, and added: "If we were to take any other view of the present indictment than that which we do, our decision would more properly "belong to a time when * * * the right and

"certain cattle, to wit, one cow," is sufficient. State v. Crow, 107 Mo. 341, 17 S. W. 745.

[17] Rex v. Halloway, 1 Car. & P. 128; Rex v. Edwards, Russ. & R. 497; Com. v. Beaman, 8 Gray (Mass.) 497.

[18] Rough's Case, 2 East, P. C. 607.

[19] Rex v. Stride, [1908] 1 K. B. 617.

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justice and substance of the thing were sacrificed to the science of artificial statement." [20]

This doctrine respecting the description of animals in an indictment applies only to living animals, not to dead animals or parts of the carcasses of animals.[21] An indictment for stealing a ham may describe it simply as a ham, without describing the animal of which it had been a part.[22] An indictment for stealing meat would not be sufficient.[23]

Where an animal or bird alleged to have been stolen exists in a wild state, like the fox or the pheasant, it is necessary to show that it had been killed or reclaimed, for animals feræ naturæ are not the subject of larceny.[24]

[20] The court said that the presence of the words in the indictment in Rex v. Stride, "of and belonging to" the prosecutor, added to the words in the indictment in Rough's Case, "of the goods and chattels of," distinguished the cases. If stating the eggs to be "of the goods and chattels of" the prosecutor does not amount to a statement that the eggs had been reduced to possession, it is difficult to see how the statement that they were "of and belonging to" him did so. If they were his goods and chattels, they were of and belonging to him, and the "of and belonging to" him was merely surplusage. A statute in Massachusetts provides that it shall be sufficient to describe the animal by such name as, in common understanding, embraces it, without stating its age or sex, or whether it be alive or dead. St. 1899, c. 409, § 20.

[21] Reg. v. Gallears, 1 Denison, Crown Cas. 501.

[22] Reg. v. Gallears, supra.

[23] State v. Morey, 2 Wis. 494, 60 Am. Dec. 439; State v. Patrick, 79 N. C. 656, 28 Am. Rep. 340.

[24] This was on the theory that it would be presumed that the animal or bird was wild. There was no valid reason for such a presumption; indeed, the grand jury having indicted the defendant for larceny, which could be committed only if the animal had been killed or reclaimed, it would seem that the presumption would be otherwise. Rough's Case, 2 East, P. C. 607; Clark, Cr. Law, 245; Reg. v. Cox, 1 Car. & K. 494. In this case an indictment for stealing eggs without otherwise describing them was held bad, because the eggs of birds feræ naturæ are not the subject of larceny. Alverstone, C. J., in commenting on Rex v. Cox in Rex v. Stride, [1908] 1 K. B. 617, said: "I am bound to say that, if at the present day a person were indicted for stealing eggs, I should be very slow to say that the indictment was insufficient because the eggs might conceivably have been 'adder's eggs, or some other species of eggs, which cannot be the subject of larceny.'"

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Minerals, Trees, etc.

Since only personal property is the subject of larceny, the indictment must show that the property stolen was personal. An indictment, therefore, for stealing coal or other minerals, must state that they had been severed from the realty.[25] And at common law an indictment for the larceny of trees, shrubbery, fruit, or vegetables must show that they had been severed.[26] As we have seen in another work, a severance and carrying away by the thief as part of one and the same transaction is not sufficient,[27] and it follows that the indictment must show a severance prior to the carrying away, and not as a part of the same transaction.

Number, Quantity, and Value

Not only must the kind of property be stated in an indictment for larceny or other offense in relation to personal property, but generally the number or quantity must also be stated; and, where several different kinds of property are alleged, the number or quantity of each must be given.[28] This is necessary in order to meet the requirement of certainty. Thus, an indictment for engrossing, which charged that the accused did engross and get into his hands by buying, etc., "a great quantity of fish, geese, and ducks," with intent to sell them again, was held bad, because it failed to state the quantity of each.[29] And so it has been held where an indictment charged the stealing of "twenty sheep and ewes," without stating the number of each,[30] and where it charged the sale of "diversas quantitates" of beer in unlawful measures.[31] "It is not sufficient to say 'felonice furatus

[25] People v. Williams, 35 Cal. 671; State v. Burt, 64 N. C. 619; Clark, Cr. Law, 243.

[26] State v. Foy, 82 N. C. 679.

[27] Clark, Cr. Law (3d Ed.) 312.

[28] 2 Hale, P. C. 182, 183; Rex v. Gilbert, 1 East, 583; Anon., Cro. Car. 381; Rex v. Foster, 1 Ld. Raym. 475; Rex v. Gibbs, 1 Strange, 497; Com. v. Maxwell, 2 Pick. (Mass.) 139, 143; Stewart v. Com., 4 Serg. & R. (Pa.) 194; Leftwich v. Com., 20 Grat. (Va.) 716.

[29] Rex v. Gilbert, 1 East, 583. And see Anon., Cro. Car. 381; Rex v. Foster, 1 Ld. Raym. 475.

[30] 2 Hale, P. C. 182.

[31] Rex v. Gibbs, 1 Strange, 497.

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est oves,' without saying how many." [82] A charge of stealing a "parcel of oats," however, was held sufficiently certain,[83] for a parcel is a unit.

Whenever the value of property is material, it must be stated; and, where several different kinds of property are described, the value of each should be given.[84] In case of larceny the value must be shown, not only in order that it may appear whether the offense is grand or petit larceny, but also that it may appear on the face of the indictment that the property has value, for property that is of no value is not the subject of larceny.[85]

And, where several articles of a different kind are alleged to have been stolen, the value of each article, and not the aggregate value of all the articles, should be stated; for, unless there is a conviction of the larceny of all the articles, the indictment will be insufficient,[86] for it will not appear that the articles proven to have been stolen had any value. With respect to indictments for larceny under statutes, it has been said that the statutes punish for larceny "with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long-established practice, the court are of opinion that the value of the property alleged to be stolen must be set forth in the indictment, and that where an indictment alleges a larceny in various articles, and adds only the collective value of the whole, such allegation is not sufficient, where the defendant is not found guilty of the larceny as to the whole." [87]

[82] 2 Hale, P. C. 183; Com. v. Maxwell, 2 Pick. (Mass.) 139, 143; Stewart v. Com., 4 Serg. & R. (Pa.) 194.

[83] State v. Brown, 12 N. C. 137, 17 Am. Dec. 562.

[84] 1 Hale, P. C. 531; 2 Hale, P. C. 185. And see the cases hereafter cited.

[85] 1 Hale, P. C. 531; 2 Hale, P. C. 185; Rex v. Fuller, Russ. & R. 407; Payne v. People, 6 Johns. (N. Y.) 103; State v. Tillery, 1 Nott & McC. (S. C.) 9; State v. Thomas, 2 McCord (S. C.) 527; Wilson v. State, 1 Port. (Ala.) 118; State v. Allen, R. M. Charlt. (Ga.) 518; People v. Wiley, 3 Hill (N. Y.) 194; State v. Goodrich, 46 N. H. 186; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; State v. Fenn, 41 Conn. 590.

[86] Com. v. Smith, 1 Mass. 245; Hope v. Com., 9 Metc. (Mass.) 134; Com. v. Cahill, 12 Allen (Mass.) 540; Collins v. People, 39 Ill. 233.

[87] Hope v. Com., supra.

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Where a number of articles of the same kind are alleged to have been stolen, and it is impossible to give the exact number, and the value of each, or probably even where the value of each can be given, they may be described and valued collectively. Thus, an indictment for stealing bank notes or coin may describe them as sundry bank notes, sundry gold coin, etc., of the aggregate value of a certain sum, and the indictment will be sustained by proof of the larceny of any of such articles if a sufficient value is shown.[38] As we have just seen, this does not apply where the articles are of a different kind.

In discussing the general rules of pleading, we saw that it is not necessary to state matters of which the court must take judicial notice.[39] If from the facts stated, or the character of the property described, the court must take judicial notice of its value, the value need not be alleged. Thus, an indictment for stealing "eighty dollars in money, consisting of ten dollar bills and twenty dollar bills, currency of the United States," need not state the value of the money, for the court will take judicial notice that such bills are worth their face value.[40]

When the value of property described in an indictment is altogether immaterial, it need not be stated. Thus, where a statute punishes the stealing of certain property, or property in a certain place, without regard to its value, the value need not be alleged.[41]

Accuracy of Description—Variance

We shall hereafter consider the necessity to prove the property as described in the indictment, and the number,

[38] Com. v. O'Connell, 12 Allen (Mass.) 451; Com. v. Grimes, 10 Gray (Mass.) 470, 71 Am. Dec. 666; Larned v. Com., 12 Metc. (Mass.) 240; State v. Taunt, 16 Minn. 109 (Gil. 99). But see Hamblett v. State, 18 N. H. 384; Low v. People, 2 Parker, Cr. R. (N. Y.) 37.

[39] Ante, p. 194.

[40] Gady v. State, 83 Ala. 51, 3 South. 429; Grant v. State, 55 Ala. 201; State v. Stimson, 24 N. J. Law, 9.

[41] Ritchey v. State, 7 Blackf. (Ind.) 168; State v. Hill, 46 La. Ann. 736, 15 South. 145. And see State v. Bowers (Mo. Sup.) 1 S. W. 288; Territory v. Pendry, 9 Mont. 67, 22 Pac. 760; Walker v. State, 50 Ark. 532, 8 S. W. 939; State v. Castor, 93 Mo. 242, 5 S. W. 906.

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quantity, and value stated, and the effect of a variance between the pleading and proof in this respect.[42]

OWNERSHIP OF PROPERTY

93. In indictments for offenses committed upon property, real or personal, the name of the general or special owner must be accurately stated.

To constitute larceny, robbery, embezzlement, obtaining money by false pretenses, etc., the property obtained must be that of another, and indictments for such offenses must name the owner; and a variance in this respect between the indictment and the proof will be fatal.[43] It is also necessary in order to identify the offense.

[42] Post, p. 384.

[43] 1 Hale, P. C. 512; 1 Chit. Cr. Law, 213; Rex v. Baxter, 2 Leach, Crown Cas. 578; Com. v. Morse, 14 Mass. 217; State v. Ryan, 4 McCord (S. C.) 16, 17 Am. Dec. 702; Flora v. State, 4 Port. (Ala.) 111; Haworth v. State, Peck (Tenn.) 89; Long v. State (Tex. Cr. App.) 20 S. W. 576; Boles v. State, 58 Ark. 35, 22 S. W. 887. Contra, in robbery, Clemons v. State, 92 Tenn. 282, 21 S. W. 525. But see Boles v. State, supra. An indictment for larceny alleging that the defendant stole certain property from a person named, without alleging that such person was the owner, is fatally defective. State v. Ellis, 119 Mo. 437, 24 S. W. 1017. It is generally held that it is not necessary to allege the ownership of property intended to be stolen, in an indictment for burglary. Johnson v. Com., 87 Ky. 189, 7 S. W. 927; James v. State, 77 Miss. 370, 26 South. 929, 78 Am. St. Rep. 527; State v. Simpson, 32 Nev. 138, 104 Pac. 244, Ann. Cas. 1912C, 115. By the better opinion, since the allegation of ownership is unnecessary, the averment of it is surplusage. Harris v. State, 61 Miss. 304; State v. Riddle, 245 Mo. 451, 150 S. W. 1044, 43 L. R. A. (N. S.) 150, Ann. Cas. 1914A, 884; State v. Hodgdon, 89 Vt. 148, 94 Atl. 301. In some jurisdictions however, it is held that, if the ownership is alleged, it must be proved as stated. Crosky v. State, 46 Fla. 122, 35 South. 153. Since naming the owner is only for the purpose of showing that the property taken, embezzled, burnt, etc., was the property of another, and as a means of describing the property, if it is otherwise sufficiently described and the defendant's ownership negatived, it should not be necessary to name the owner. See State v. Keena, 63 Conn. 329, 28 Atl. 522; Thomas v. State, 96 Ga. 311, 22 S. E. 956. Indeed, on principle, it would seem never nec-

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The property may be described as the real owner's, though he never had the actual possession.[44] And property may be laid in a special owner or possessor, as well as in the general owner. Property in the hands of a bailee, for instance, may be laid either in the bailor or bailee.[45] Personal property stolen from a corpse, or belonging to the estate of a dead person, should be laid, not in the decedent, but in the executor or administrator, or if necessary, in a person

essary in larceny to name the owner, for the word "steal," which is necessary in the indictment for larceny, itself negatives the ownership of the defendant, and charges the necessary element of ownership in another. Yet the courts have never allowed it this effect, though with no more reason they have allowed "steal" to charge equally important elements of the crime, such as the wrongfulness and fraud of the taking, the intent to deprive the owner permanently of his property, the lack of consent on the part of the owner, and the absence of right on the part of the defendant. Statutes in some states have removed the necessity of alleging ownership. Mass. St. 1899, c. 409, § 18; State v. Wright, 19 Or. 258, 24 Pac. 229.

[44] Rex v. Remnant, Russ. & R. 136.

[45] 2 Hale, P. C. 181; Rex v. Remnant, Russ. & R. 136; Rex v. Bramley, Id. 478; Rex v. Adams, Id. 225; Reg. v. Webster, 9 Cox, Cr. Cas. 13; Com. v. Morse, 14 Mass. 217; Fowler v. State, 100 Ala. 96, 14 South. 860; Kennedy v. State, 31 Fla. 428, 12 South. 858; Com. v. Blanchette, 157 Mass. 486, 32 N. E. 658; State v. MacRae, 111 N. C. 665, 16 S. E. 173; State v. Allen, 103 N. C. 433, 9 S. E. 626. A carrier, lessee for years, or a party to whom goods are pawned or bailed, may be described as owner, or the property may be laid in the person beneficially interested. 1 Hale, P. C. 512; 2 East, P. C. 652. Goods stolen from a laundress who has them in charge to wash them may be described as hers. 3 Chit. Cr. Law, 947b. So property of a guest stolen from an inn may be laid in the innkeeper or in the guest, 3 Chit. Cr. Law, 947b; property stolen from a coach, in the driver or in the owner, Rex v. Deakin, 2 Leach, Crown Cas. 862. A servant having custody of his master's property holds it for his master, and has not even a special property, and the property cannot be laid in him. 1 Hale, P. C. 513; Com. v. Morse, 14 Mass. 217; Norton v. People, 8 Cow. (N. Y.) 137; Poole v. Symonds, 1 N. H. 289, 8 Am. Dec. 71. If the owner be the thief, the ownership should be alleged to be in the bailee. Adams v. State, 45 N. J. Law, 448. In Martins v. State, 17 Wyo. 319, 98 Pac. 709, 22 L. R. A. (N. S.) 645, it was held that an indictment for obtaining money by false pretense from A. was not supported by proof that the money was obtained from A., but was owned by B., whose agent A. was.

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unknown.[46] Property of a corporation must be laid in the corporation.[47] At common law, if the goods stolen were the property of a partnership or of other joint owners, the names of all the partners or joint owners must be stated. If, therefore, an indictment lays the ownership of the goods stolen in A. B. "& Co.," without stating the names of the partners composing the firm, or alleging that A. B. & Co. is a corporation, it is bad.[48]

Property of a convicted felon, undergoing his sentence, is in England laid in the king or queen;[49] but in this country, where a conviction of crime does not cause a forfeiture of property, it would be otherwise. Property stolen from one who has himself stolen it may be laid in him.[50] At common law, a married woman's property must be laid in her husband, except where she is regarded under particular circumstances as owner at common law.[51] The married women's acts have had the effect of changing this rule to a great extent. Where a married woman's property does not vest in her husband, but remains in her, it may be laid in her in the indictment.[52] If the owner of property is unknown, it may be laid in a person to the jurors unknown;

[46] 1 Hale, P. C. 515; 2 Hale, P. C. 181; 2 East, P. C. 652; Hayne's Case, 12 Coke, 113; State v. Davis, 4 N. C. 271.

[47] Rex v. Patrick, 2 East, P. C. 1059, 1 Leach, Crown Cas. 253; Rex v. Wilkins, Id. 523; People v. Bogart, 36 Cal. 245.

[48] People v. Bogart, 36 Cal. 248; McCowan v. State, 58 Ark. 17, 22 S. W. 955. By the weight of authority, it is otherwise where the statute provides that an indictment is sufficient if it contains a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of ordinary understanding to know what is intended. Reed v. Com., 7 Bush (Ky.) 641; People v. Ah Sing, 19 Cal. 598. But see McCowan v. State, supra.

[49] Reg. v. Whitehead, 9 Car. & P. 429.

[50] Com. v. Finn, 108 Mass. 466; Ward v. People, 3 Hill (N. Y.) 396.

[51] 1 Hale, P. C. 513.

[52] Rollins v. State, 98 Ala. 79, 13 South. 280. Since the ownership may be alleged in the person in possession, a married woman's property may always be laid in the husband if he is in possession of it. See Kidd v. State, 101 Ga. 528, 28 S. E. 990; People v. Coyne, 116 Cal. 295, 48 Pac. 219.

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for, as we have seen, the law generally requires such certainty only as the circumstances will permit.[53]

The rule applies as well to offenses committed upon real property. Thus, the offense of burglary is not committed by one who breaks and enters his own house, nor by a woman who breaks and enters her husband's house; and therefore an indictment for burglary must designate the owner of the building, so that the court may see from the indictment itself that the offense has been committed, and any variance between the allegation and proof in this respect will be fatal. An allegation of ownership is also necessary in order to render the charge certain.[54] The same rule applies to statutory housebreakings and to statutory larcenies in buildings.[55] In like manner, and for like reasons, an indictment for arson at common law, and generally for statutory burnings, must state the ownership of the dwelling house or other building, and a variance between the indictment and the proof will be fatal.[56] Arson and burglary are offenses against the habitation, and must therefore describe the building as the dwelling house of the person in possession of it as his dwelling, and not of the

[53] 2 Hale, P. C. 181; State v. Hadcock, 2 Hayw. (N. C.) 162; ante, p. 198; post, pp. 274, 390.

[54] Rex v. White, 1 Leach, Crown Cas. 252; Rex v. Jenks, 2 Leach, Crown Cas. 774; Rex v. Stock, 2 Leach, Crown Cas. 1018; Rex v. Stock, Russ. & R. 185; Boggett v. Frier, 11 East, 301; 2 East, P. C. 514; People v. Parker, 91 Cal. 91, 27 Pac. 537; Winslow v. State, 26 Neb. 308, 41 N. W. 1116; Thomas v. State, 97 Ala. 3, 12 South. 409. An indictment for burglary, alleging the ownership of the burglarized house in the estate of a person deceased, was held insufficient. State v. Hammons, 226 Mo. 604, 126 S. W. 422. See, also, Beall v. State, 53 Ala. 460; People v. Hall, 19 Cal. 425.

[55] Com. v. Hartnett, 3 Gray (Mass.) 450, and cases there cited; 2 Hale, P. C. 244; Rex v. Rogers, 1 Leach, Crown Cas. 89; Rex v. Jenks, 2 Leach, Crown Cas. 774; Com. v. Perris, 108 Mass. 1; Rex v. Belstead, Russ. & R. 411. But see State v. Ferguson, 149 Iowa, 476, 128 N. W. 840.

[56] Rex v. Rickman, 2 East, P. C. 1034; People v. Gates, 15 Wend. (N. Y.) 159; People v. Fairchild, 48 Mich. 36, 11 N. W. 773; Carter v. State, 20 Wis. 650; Com. v. Mahar, 16 Pick. (Mass.) 120; State v. Keena, 63 Conn. 329, 28 Atl. 522; Smoke v. State, 87 Ala. 143, 6 South. 376.

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person who has the legal title, but is not in possession. The former is regarded as the owner for the purpose of the charge.[57] Where a building was described in an indictment for arson as the building of the owner, and the proof showed that it was in the possession of a tenant, the variance was held fatal.[58] An indictment for arson in burning a jail was held to properly describe the building as the dwelling house of the jailer who lived there. "If one be indicted for burning the dwelling house of another," it was said, "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 burnt. It is enough that it was his actual dwelling at the time." [59]

Where an indictment for an offense with reference to real or personal property, like arson or larceny, alleges the property to have been in one person, and the proof shows that such person was joint general or special owner with another, the variance is fatal at common law.[60] But in some jurisdictions this is changed by statute. In Massachusetts, for instance, it is provided that, in the prosecution of offenses in relation to or affecting real or personal estate, it shall be sufficient, and shall not be deemed a variance, if it is proved on the trial that either the actual or constructive possession or the general or special property in the whole or in part of such real or personal estate was in the person alleged to be the owner thereof.[61]

[57] People v. Gates, 15 Wend. (N. Y.) 159; Woodford v. People, 62 N. Y. 127, 20 Am. Rep. 464. Where an indictment charged defendant with burglarizing a house occupied by six persons, naming them, and the evidence showed occupancy by only five of them, it was held that defendant could not be convicted on the indictment. Grantham v. State, 59 Tex. Cr. R. 556, 129 S. W. 839.

[58] People v. Gates, supra.

[59] People v. Van Blarcum, 2 Johns. (N. Y.) 105.

[60] Com. v. Trimmer, 1 Mass. 476; Com. v. Arrance, 5 Allen (Mass.) 517. See page 269, note 48, supra.

[61] Com. v. Arrance, 5 Allen (Mass.) 517. This provision applies to the undivided property of tenants in common. Com. v. Arrance, supra; Com. v. Harney, 10 Metc. (Mass.) 426; Com. v. Goldstein, 114 Mass. 272. See, also, State v. Riley, 100 Mo. 493, 13 S. W. 1063; People v. Clark, 106 Cal. 32, 39 Pac. 53; Davis v. State, 63 Tex. Cr. R. 453, 140 S. W. 349.

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Ownership of personal property is usually alleged by using the words "of the goods and chattels of" the owner, or "of the moneys," "of the cattle," etc.[62] The words "belonging to" are sufficient.[63] No particular words are necessary in any case. Thus, it has been held that an indictment for burglarizing "a certain building of one N., there situate, the same being used and occupied by the said N. as a saloon," sufficiently alleged the ownership.[64]

DESCRIPTION OF THIRD PERSONS

94. The indictment must correctly state the Christian name and surname of the person against whom the offense was committed, or who must be described in order to state the offense with certainty, if his name is known, and, if his name is unknown, it must be so stated.

In some cases it is necessary to name third persons in order to show on the face of the indictment that an offense has been committed. This, as we have seen, is one of the reasons why it is necessary to state the name of the owner of the property in an indictment for an offense against property, or against the habitation. It is necessary not only in these cases, but in many other cases, for the further reason that without such statement the offense would not be identified with sufficient certainty.

Wherever, therefore, the name of the party injured by the offense, or of any other third person whom it is necessary to mention in describing the offense is known, it is absolutely necessary to state it, and to state it accurately. A failure to state it, or a material variance between the

[62] Long's Case, Cro. Eliz. 490; Rex v. Sadi, 1 Leach, Crown Cas. 468; Com. v. Morse, 14 Mass. 217; Com. v. Manley, 12 Pick. (Mass.) 173.

[63] Com. v. Hamilton, 15 Gray (Mass.) 480; State v. Fox, 80 Iowa, 312, 45 N. W. 874, 20 Am. St. Rep. 425.

[64] State v. Tyrrell, 98 Mo. 354, 11 S. W. 734.

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statement and the proof, will be fatal.[65] In an indictment for larceny, as we have seen, the goods may be laid to be the property of persons unknown, if that is actually the case; but, if the owner be really known, he must be named and correctly named, or the accused must be discharged from that indictment, and tried upon a new one rectifying the mistake.[66] And indictments for burglary, arson, and similar offenses must correctly state the name of the owner of the house entered or burned.[67] An indictment for murder, manslaughter, assault, rape, or any other offense against the person would be fatally defective if it failed to correctly name the person killed, assaulted, or raped. And an indictment for taking divers sums of money from divers persons for toll is fatally defective, and would not support a conviction.[68]

While it is generally necessary to name the person who is the victim of the crime, as the person struck, killed, defrauded, etc., it is not usually necessary to state the names of persons only indirectly connected with the offense. Thus it is not necessary, in an indictment for practicing medicine without a license, to name the person prescribed for,[69] or in

[65] 2 Hawk. P. C. c. 25, § 72; 1 Chit. Cr. Law, 213, and authorities there cited; Com. v. Shearman, 11 Cush. (Mass.) 546. An indictment for bigamy must accurately name the person to whom the defendant was bigamously married. Rex v. Deeley, 4 Car. & P. 579. But it has been held that it need not name his or her first wife or husband. Hutchins v. State, 28 Ind. 34; Com. v. Whaley, 6 Bush (Ky.) 266. But see, contra, State v. La Bore, 26 Vt. 765. Statutes in some jurisdictions have abolished the necessity for naming the person intended to be defrauded in indictments for certain offenses. Code Cr. Proc. N. Y. § 281.

[66] Ante, p. 269.

[67] Ante, pp. 250, 270.

[68] 1 Chit. Cr. Law, 211. But see Nemcof v. U. S., 202 Fed. 911, 121 C. C. A. 269, holding, on an indictment for conspiracy, that failure to name the person with whom defendant conspired was a mere formal defect, cured by verdict.

[69] State v. Little, 76 Mo. 52. The cases of Murphy v. State, 59 Tex. Cr. R. 479, 129 S. W. 138, and McLaughlin v. State, 45 Ind. 338, holding that an indictment for selling liquor without a license, and to intoxicated persons, must name the persons to whom the liquor was sold, and Com. v. Sheedy, 159 Mass. 55, 34 N. E. 84, holding that the purchaser must be named in an indictment for an illegal sale by

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an indictment for receiving stolen goods to name the person from whom the goods were received.[70]

If the names of third persons are unknown, it is sufficient to describe them as persons to the jurors unknown.[71] Thus, an indictment for harboring thieves unknown is sufficient from the necessity of the case.[72] So, upon the same ground, if the dead body of a person murdered be found, and it is impossible to discover who he was, an indictment for killing a person unknown would be sufficient.[73] And, as we have already seen, if stolen goods are found on a person, and it is not known to whom they belong, he may be indicted for stealing the goods of a person or persons unknown.[74] If a person is described as unknown, and it shall appear that he was known, the variance will be fatal.[75] There is authority for the further proposition that a person cannot be described as unknown if, though unknown, the grand jury have constructive notice of his name, and it may by reasonable diligence be ascertained; but some courts have held the contrary.[76]

lottery, seem to be erroneous. The contrary has been held, in indictments for the illegal sale of liquor, in Osgood v. People, 39 N. Y. 449; Rice v. People, 38 Ill. 435; State v. Gummer, 22 Wis. 441.

[70] Ream v. State, 52 Neb. 727, 73 N. W. 227.

[71] Com. v. Tompson, 2 Cush. (Mass.) 551; Rex v. Smith, 6 Car. & P. 151; Holford v. State, 2 Blackf. (Ind.) 103. This right to omit the description of persons and property by a simple statement in the indictment that the description is unknown shows that it is only in theory and not in practice that such descriptions are vital to the defendant's rights and necessary to the preparation of his defense. It is unthinkable that, if a description in the indictment were in fact necessary to prevent an innocent defendant from being convicted, as is assumed by the rule requiring such description and stated by the courts in quashing indictments for lack of such description, that omission of the description would be excused for any cause, much less by a mere statement that it was unknown to the grand jury or the prosecuting officer. Yet such statement, if true, is a sufficient excuse, even though it can be shown that the theoretically vital information could easily have been obtained. See Enson v. State, 58 Fla. 37, 50 South. 948, 138 Am. St. Rep. 92, 18 Ann. Cas. 940, and authorities there cited.

[72] 1 Chit. Cr. Law, 212; 2 Hale, P. C. 181.

[73] 1 Chit. Cr. Law, 212; 2 Hale, P. C. 181.

[74] Ante, p. 269. [75] Post, p. 391. [76] Post, p. 391.

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In naming a third person, all that is generally necessary is that he be described with such certainty that it is impossible to mistake him for any other. Nothing more than this is required.[77] He may, like the accused, be described by the name by which he is usually known;[78] and, if he is well known by more than one name, he may be described by either.[79] It has been held, for instance, that an indictment for an assault on John, parish priest of D., without giving his surname, was sufficiently certain;[80] and an indictment for larceny, laying the goods stolen to be the property of Victory Baroness Tuckheim, by which appellation she was generally known, was held good, though her real name was Selima Victoire.[81] So an indictment for forgery of a draft addressed to Messrs. Drummond & Co., Charing Cross, by the name of Mr. Drummond, Charing Cross, without stating the names of his partners, was held sufficient.[82] A mere statement of the Christian name, without any addition to show the precise individual, is bad for uncertainty.[83]

Much of what we have already said in treating of the name and description of the defendant applies as well to

[77] 1 Chit. Cr. Law, 215; Rex v. Sulls, 2 Leach, Crown Cas. 861; State v. Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117. But "John Smith" is a sufficient description, though there be any number of persons of that name in the locality, any one of whom might be the victim of the crime, and though the identification might be made perfect by adding "Junior," it is not necessary to do so. Post, note 87.

[78] Ante, p. 173; Rex v. Berriman, 5 Car. & P. 601; Rex v. Lovell, 1 Leach, Crown Cas. 248; Rex v. Norton, Russ. & R. 510; Willis v. People, 1 Scam. (Ill.) 401; Rex v. ———, 6 Car. & P. 408; Clark's Case, Russ. & R. 358; Com. v. Lampton, 4 Bibb (Ky.) 261; Rex v. Williams, 7 Car. & P. 298; State v. France, 1 Overt. (Tenn.) 434; Com. v. Gould, 158 Mass. 499, 33 N. E. 656; Slaughter v. State (Tex. Cr. App.) 21 S. W. 247; State v. Davis, 109 N. C. 780, 14 S. E. 55.

[79] Ante, p. 172; 2 Hale, P. C. 244, 245; Rogers v. State, 90 Ga. 463, 16 S. E. 205; State v. France, 1 Overt. (Tenn.) 434. And see the cases cited in the preceding note. This applies to names of corporations. Rogers v. State, supra.

[80] Anon., Dyer, 285a; 1 Chit. Cr. Law, 215.

[81] Rex v. Sulls, 2 Leach, Crown Cas. 861.

[82] Rex v. Lovell, 1 Leach, Crown Cas. 248; 1 Chit. Cr. Law, 215. See, also, Morville v. State, 63 Tex. Cr. R. 551, 141 S. W. 98.

[83] 1 Chit. Cr. Law, 215.

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the name and description of third persons. If a man has initials for his Christian name, or is in the habit of using initials therefor, and is known by them, they may be used to describe him.[84] In some states, as we have seen, a middle name or initial is recognized by the law as a part of the name, and its omission, or a mistake in stating it, will render the indictment defective.[85] But in most jurisdictions the law recognizes but one Christian name. The middle name or initial is no part of the name, and need not be stated.[86] The words "junior," "senior," etc., are no part of the name.[87]

Where it is necessary to state the name of a corporation,

[84] Reg. v. Dale, 17 Q. B. 64; Tweedy v. Jarvis, 27 Conn. 42; City Council of Charleston v. King, 4 McCord (S. C.) 487; State v. Kean, 10 N. H. 347, 34 Am. Dec. 162. The mere fact that initials are used in the indictment is not ground for quashing, as the court cannot judicially discern that they are initials and not names. People v. Reilly, 257 Ill. 538, 101 N. E. 54, Ann. Cas. 1914A, 1112.

[85] Com. v. Perkins, 1 Pick. (Mass.) 388; Com. v. Hall, 3 Pick. (Mass.) 262; Com. v. Shearman, 11 Cush. (Mass.) 546; Com. v. Buckley, 145 Mass. 181, 13 N. E. 368; Reg. v. James, 2 Cox, C. C. 227; State v. Woodrow, 56 Kan. 217, 42 Pac. 714.

[86] Choen v. State, 52 Ind. 347, 21 Am. Rep. 179; Franklin v. Talmadge, 5 Johns. (N. Y.) 84; Roosevelt v. Gardinier, 2 Cow. (N. Y.) 463; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Edmundson v. State, 17 Ala. 179, 52 Am. Dec. 169; Thompson v. Lee, 21 Ill. 242; Erskine v. Davis, 25 Ill. 251; Bletch v. Johnson, 40 Ill. 116; Wood v. Fletcher, 3 N. H. 61; State v. Martin, 10 Mo. 391; Dilts v. Kinney, 15 N. J. Law, 130; Isaacs v. Wiley, 12 Vt. 674; Allen v. Taylor, 26 Vt. 599; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Bratton v. Seymour, 4 Watts (Pa.) 329; Keene v. Meade, 3 Pet. 1, 7 L. Ed. 581; McKay v. Speak, 8 Tex. 376; State v. Manning, 14 Tex. 402; People v. Lockwood, 6 Cal. 205; Ross v. State, 116 Ind. 495, 19 N. E. 451; Tucker v. People, 122 Ill. 583, 13 N. E. 809; People v. Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344. But in a few states, if it is unnecessarily alleged, it becomes material matter of description. Price v. State, 19 Ohio, 423; State v. Hughes, 1 Swan (Tenn.) 261.

[87] Com. v. Perkins, 1 Pick. (Mass.) 388; Geraghty v. State, 110 Ind. 103, 11 N. E. 1; De Kentland v. Somers, 2 Root (Conn.) 437; Kincaid v. Howe, 10 Mass. 205; Cobb v. Lucas, 15 Pick. (Mass.) 7; State v. Grant, 22 Me. 171; Brainard v. Stilphin, 6 Vt. 9, 27 Am. Dec. 532; People v. Collins, 7 Johns. (N. Y.) 549; Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232; Headley v. Shaw, 39 Ill. 354; Com. v. Parmenter, 101 Mass. 211. But see State v. Vittum, 9 N. H. 519; Jackson ex dem. Pell v. Prevost, 2 Caines (N. Y.) 164.

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as in indictments for stealing the property of a corporation, the name of the corporation, it has been held, must be stated with absolute precision. To describe the "Boston & Worcester Railroad Corporation" as the "Boston & Worcester Railroad Company" was held a fatal variance.[88] But by the better opinion the name by which the corporation is commonly known is sufficient.[89]

What constitutes a variance between the name or description of third persons, as given in the indictment and as shown by the evidence, will be further considered when we come to treat of variance.[90]

Addition of Third Persons

The Statute of Additions (1 Hen. V, c. 5) [91] extends only to the accused, and does not at all affect the description either of the prosecutor, or any other individuals whom it may be necessary to name.[92] No addition, therefore, is necessary in any case unless two or more persons whose names are similar are referred to.[93] Even this does not seem absolutely necessary, for where, upon an indictment for assaulting Elizabeth Edwards, it appeared that there were mother and daughter of that name, and that the assault was upon the daughter, the indictment was held sufficient.[94]

[88] Com. v. Pope, 12 Cush. (Mass.) 272.

[89] Putnam v. U. S., 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118; Rogers v. State, 90 Ga. 463, 16 S. E. 205. As to necessity to allege fact of incorporation, see Thurmond v. State, 30 Tex. App. 539, 17 S. W. 1098; Duncan v. State, 29 Fla. 439, 10 South. 815. See ante, p. 174, note 76.

[90] Post, p. 390.

[91] Ante, p. 174.

[92] 1 Chit. Cr. Law, 211; 2 Hale, P. C. 182; Rex v. Sulls, 2 Leach, 861; Rex v. Ogilvie, 2 Car. & P. 230; Com. v. Varney, 10 Cush. (Mass.) 402.

[93] 1 Chit. Cr. Law, 211; 2 Hale, P. C. 182; Rex v. Sulls, 2 Leach, Crown Cas. 861.

[94] Rex v. Peace, 3 Barn. & Ald. 579. And see Rex v. Bailey, 7 Car. & P. 264.

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CHAPTER VII

PLEADING—THE ACCUSATION (Continued)

95. Statement of Time.
96. Statement of Place.
97. Repeating Time and Place.

STATEMENT OF TIME

95. At common law an indictment must state the day, month, and year in which the offense was committed; but a variance between the statement and the proof in this respect is immaterial, unless the time is of the essence of the offense.

Most crimes are crimes irrespective of the day, month, or year in which they were committed; a statement of the time at which the crime was committed is therefore, as to these crimes, not necessary in order that the indictment shall charge an offense. But, as we have seen, the indictment must not only technically charge an offense; it must also state sufficient facts and circumstances to identify the particular offense which is to be proved, so as to enable the defendant to prepare his defense, and to protect himself from a subsequent prosecution for the same offense. In accordance with this latter principle, it would seem to be necessary that the indictment should identify the offense charged by stating the day, month, and year in which the alleged offense was committed. Such is the rule.[1] Strangely enough,

[1] 2 Hale, P. C. 177; 2 Hawk. P. C. c. 25, § 77; Id. c. 23, § 88; 4 Bl. Comm. 306; State v. Roach, 3 N. C. 352; State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724; State v. Johnson, 32 Tex. 96; State v. Brown, 7 N. C. 224; State v. Baker, 34 Me. 52; Shelton v. State, 1 Stew. & P. (Ala.) 208; State v. Anthony, 1 McCord (S. C.) 285; State v. Hanson, 39 Me. 337; Allen v. Com., 2 Bibb (Ky.) 210; State v. Beaton, 79 Me. 314, 9 Atl. 728; State v. Dodge, 81 Me. 391, 17 Atl. 313; State v. Beckwith, 1 Stew. (Ala.) 318, 18 Am. Dec. 46; Roberts v. State, 19

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however, through the working of another rule equally well established—the rule that the time alleged need not be proved, but the defendant may be convicted on the indictment, though an entirely different date is proven—the rule requiring the day, month, and year not only fails utterly to accomplish the only object of its existence, but actually frustrates that object, inasmuch as it serves to mislead the defendant by stating a false date.[2] Statutes in many jurisdictions have done away with the necessity for stating the time, except in charging those crimes in which time is of the essence of the offense.[3]

In the absence of statute, the statement of the year alone is not enough, and, if the day and month alone be given, without the year, the indictment is bad, and cannot be aided by intendment.[4] An allegation, for instance, that an offense was committed "on the 10th day of September now past," is insufficient, for failure to state the year.[5] It has

Ala. 526; State v. Offutt, 4 Blackf. (Ind.) 355; Jane v. State, 3 Mo. 45; State v. O'Donnell, 81 Me. 271, 17 Atl. 66. An averment that the acts charged were committed "on sundry and divers days and times between" certain specified days has been held not sufficient. State v. Beaton, 79 Me. 314, 9 Atl. 728. But it has been lately held that, where time is not of the essence of the offense, the indictment is not bad because the day of the month is left blank. U. S. v. Conrad (C. C.) 59 Fed. 458; Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162. "On or about" a certain specified day is sufficient, since the words "on or about" may be rejected as surplusage, and the date remaining is a specified date. State v. McCarthy, 44 La. Ann. 323, 10 South. 673; Rawson v. State, 19 Conn. 292. See Pruitt v. State (Ark.) 11 S. W. 822; State v. Thompson, 10 Mont. 549, 27 Pac. 349.

[2] This requirement that the day, month, and year in which the act was done must be stated in the indictment, but that on the trial a different day, etc., may be proved, and the defendant convicted on the indictment, is another illustration of the sacrifice of substance for form in criminal procedure.

[3] See State v. Hoover, 31 Ark. 676; People v. Hawkins, 106 Mich. 479, 64 N. W. 736; Fleming v. State, 136 Ind. 149, 36 N. E. 154; Rema v. State, 52 Neb. 375, 72 N. W. 474.

[4] 1 Chit. Cr. Law, 217; Com. v. Griffin, 3 Cush. (Mass.) 523; Com. v. Hutton, 5 Gray (Mass.) 89, 66 Am. Dec. 352; Serpentine v. State, 1 How. (Miss.) 260; Clark v. State, 34 Ind. 436. Contra, by statute, where day of month is blank. State v. Parker, 5 Lea (Tenn.) 568.

[5] Com. v. Griffin, supra.

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been said that there is an exception to the rule that time must be stated in cases where a mere negative or omission is averred; that in such a case, as a rule, no time need be mentioned; [6] but this is doubtful. It cannot be, for instance, that an indictment against a public officer for neglect to perform his duty need not state a certain day on which, or certain days between which, he was guilty of the omission, or that time may be dispensed with in an indictment for manslaughter by negligence.[7] But where the offense is a continuing one, as failure to open a road, or keep a road in repair, it may be stated as committed between certain days.[8]

Generally, as we shall see, the time when the offense was committed need not be accurately stated. A time must always be stated at common law, but any time before the finding of the indictment and within the period of limitation may be given, and a different time may be shown at the trial. This, however, only applies where the precise time is not material. If the offense could only be committed at a certain time, it must be alleged to have been then committed. An act prohibited by statute on certain days only must be charged as having been committed on one of those days, for the time laid is a material element in the offense, and, unless laid on a day within the statute, no offense would be charged. Thus, where a statute prohibited the maintenance of closed weirs in certain waters on Saturdays and Sundays between the 1st of April and the 15th of July, and an indictment alleged that the offense was committed on the 1st day of June (Tuesday,) and "on divers other days" between the 1st of June and the 15th of July, the indictment was held bad, because it did not show on its face that the acts were done on Saturday or Sunday.[9] The rule also applies to indictments for violation of the Sunday laws. The

[6] Rex v. Hollond, 5 Term R. 616; 2 Hawk. P. C. c. 25, § 79; U. S. v. Smith, 2 Mason, 146, Fed. Cas. No. 16,338.

[7] See Com. v. Inhabitants of Sheffield, 11 Cush. (Mass.) 178; State v. Behm, 72 Iowa, 533, 34 N. W. 319; State v. McDowell, 84 N. C. 798.

[8] State v. City of Auburn, 86 Me. 276, 29 Atl. 1075.

[9] State v. Dodge, 81 Me. 391, 17 Atl. 313.

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acts must be shown by the indictment to have been committed on that particular day of the week.[10]

To constitute a punishable homicide at common law, the death must occur within a year and a day after the stroke, and an indictment for homicide must show that it did so occur, or it will state no offense.[11]

Sometimes it is of the essence of the offense that several acts shall have been simultaneous, and in such cases the indictment must show that they were so, or it will fail to describe the offense. An indictment under a statute, for instance, for having in possession ten or more counterfeit bank bills, must show that the accused had them in his possession at the same time, and an averment that he had them in his possession on the same day is not sufficient.[12]

Where the time of day at which an act is done is not necessary to ascertain the offense, the indictment need not set

[10] Megowan v. Com., 2 Metc. (Ky.) 3; State v. Land, 42 Ind. 311, "Sabbath" for "Sunday," or vice versa, has been held sufficient. State v. Drake, 64 N. C. 589. The proof need not show commission of the offense on the particular day stated, but some other day, on which the offense could be committed, may be proven. Post, p. 396.

[11] 1 Chit. Cr. Law, 223; Brassfield v. State, 55 Ark. 556, 18 S. W. 1040; State v. Luke, 104 Mo. 563, 16 S. W. 242; Palmer v. People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; State v. Blakeney, 33 S. C. 111, 11 S. E. 637; Timmerman v. Territory, 3 Wash. T. 445, 17 Pac. 624. The indictment, as will be seen from the above cases, need not allege in direct terms that death ensued within a year and a day from the fatal blow. The allegation of the respective dates of the injury and of the death are enough, if it appears from this that the death was within a year and a day from the blow. "This may be done either by stating that the deceased died instantly of the wound, or that he languished of the same till the day mentioned, when he died of the said mortal wound." 1 Hale, P. C. 343, 344. In an Arkansas case the indictment alleged that the blow was given on October 25, 1890, but did not expressly state when the death occurred. It did, however, allege that death ensued, and the caption of the indictment showed that it was returned by the grand jury at the February term, 1891, which term could not, under the law, have continued to October 26, 1891. It was held that it sufficiently appeared that the death occurred within a year and a day from the blow. Brassfield v. State, 55 Ark. 556, 18 S. W. 1040.

[12] Edwards v. Com., 19 Pick. (Mass.) 124.

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forth the hour of the day;[13] but when the time of day does give complexion to the crime the hour, or an hour, must be stated. Thus we find some courts holding that in indictments for burglary the hour must be averred.[14] This applies not only to burglary, but also to statutory offenses which must be committed in the nighttime or in the daytime, as the case may be.[15] Where the nighttime is defined by statute, it is clear that an indictment for burglary need not allege the hour at which the offense was committed, but it will be sufficient to state that it was committed in the nighttime, since, "whenever 'nighttime' is now used in an indictment, as descriptive of the time of the commission of an offense, it is to be understood of the nighttime as defined by this statute."[16]

It was said by Chitty, and it seems to be established by the weight of authority, that, where the time for the prosecution is limited by statute, the time averred in the indictment should appear to be within the limit, or else the facts necessary to take the case out of the operation of the statute should be alleged, otherwise the indictment shows on its face that the prosecution is barred.[17] In some states, how-

[13] 1 Chit. Cr. Law, 219; 2 Hawk. P. C. c. 25, § 76.

[14] State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724; Shelton v. Com., 89 Va. 450, 16 S. E. 355; State v. Bancroft, 10 N. H. 105. "The reason for this seems to have been that one might, with a felonious intent, have broken and entered a building at a time properly called in popular language 'nighttime,' and yet not have committed the crime of burglary; the time in which that offense can be committed being not so far extended as to embrace the nighttime in the ordinary use of that word, but a period when the light of day had so far disappeared that the face of a person was not discernible by the light of the sun or twilight." Com. v. Williams, 2 Cush. (Mass.) 589. But see People v. Burgess, 35 Cal. 115, and Bethune v. State, 48 Ga. 505, as giving the correct rule.

[15] 2 Hale, P. C. 179. "About the hour of eleven in the night of the same day" has been held sufficient. Methard v. State, 19 Ohio St. 363; State v. Seymour, 36 Me. 225.

[16] Com. v. Williams, 2 Cush. (Mass.) 589.

[17] 1 Chit. Cr. Law, 223; People v. Gregory, 30 Mich. 371; State v. Davis, 44 La. Ann. 972, 11 South. 580; State v. Robinson, 29 N. H. 274; State v. Beckwith, 1 Stew. (Ala.) 318, 18 Am. Dec. 46; Shelton v. State, 1 Stew. & P. (Ala.) 208; State v. Hobbs, 39 Me. 212; State v. Roach, 3 N. C. 352; McLane v. State, 4 Ga. 335; State v. Ingalls,

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ever, it has been held that the time laid in the indictment is wholly immaterial for all purposes, and that an indictment, therefore, at least on motion in arrest of judgment, is not defective because it alleges that the offense was committed at such a time that the prosecution appears to be barred by the statute of limitations, since a later time may have been shown at the trial.[18]

When the alleged offense may have continuance, as is the case, for instance, with the offense of keeping a disorderly house, the time may be laid with a continuando; that is, it may be alleged to have been on a single day certain and also on divers other days; but those other days must be alleged with the same legal exactness as is required in alleging a single day.[19] Such exactness is obtained by alleging that the offense was committed on a day certain and on each day from that time until another day certain. A form generally held sufficient is to allege that the offense was committed on a certain day and on divers other days between two days certain.[20] The fact that the continuando is not sufficiently certain will not render the whole indictment bad, if it can be rejected, as surplusage, and the indictment be sustained as to the day certain. "And the general rule is well established that when an offense, which may have con-

59 N. H. 88; Hatwood v. State, 18 Ind. 492; Lamkin v. People, 94 Ill. 501; People v. Miller, 12 Cal. 291. In some states it is held, contrary to some of the above cases, that an indictment need not state the facts bringing the case within the exceptions contained in the statute. Blackman v. Com., 124 Pa. 578, 17 Atl. 194. In some states the indictment is not necessarily the commencement of the prosecution, and for this reason it was held in Vermont that an indictment is not bad because it does not show that the offense was committed within the prescribed time before it was presented. State v. Stevens, 64 Vt. 590, 25 Atl. 838.

[18] People v. Van Santvoord, 9 Cow. (N. Y.) 655. And see Blackman v. Com., 124 Pa. 578, 17 Atl. 194; U. S. v. Cook, 17 Wall. 168, 21 L. Ed. 538.

[19] Wells v. Com., 12 Gray (Mass.) 326; Com. v. Adams, 4 Gray (Mass.) 27.

[20] Wells v. Com., supra; State v. Brown, 14 N. D. 529, 104 N. W. 1112; State v. Cofren, 48 Me. 364. To allege that the acts were committed "on sundry and divers days between" certain specified days is not enough. State v. Beaton, 79 Me. 314, 9 Atl. 728.

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tinuance, is alleged to have been committed on a day certain and on divers other days, which are uncertainly alleged, the indictment is effectual for the act alleged on the day certain, and void only as to the act alleged on the other days." [21] Cumulative offenses, which can be committed only by a repetition of acts of the same kind,—such as the offense of being a common seller of intoxicating liquors, to constitute which there must be at least three sales,—should be laid with a continuando. If an indictment for this offense alleges that the accused was a common seller on a single day certain, and on divers other days uncertainly alleged, it will not support a verdict and judgment, for the accused may have been found guilty, on proof, of sales, some or all of which were made on a day or days insufficiently alleged.[22] An indictment in such a case, alleging that the accused was a common seller on a single day only, omitting the continuando altogether, would be sufficient, for it would be presumed that three sales were proven on the day alleged.[23]

If the indictment lay the offense to have been committed on an impossible day, as on the 30th day of February, or the 31st day of June, or on a future day, it is just as bad as if no time at all were stated.[24] And the indictment will also

[21] Wells v. Com., supra; Rex v. Dixon, 10 Mod. 335; People v. Adams, 17 Wend. (N. Y.) 475; State v. Munger, 15 Vt. 290; State v. May, 15 N. C. 328; U. S. v. La Coste, 2 Mason, 140, Fed. Cas. No. 15,548.

[22] Com. v. Adams, 4 Gray (Mass.) 27.

[23] Wells v. Com., supra.

[24] 1 Chit. Cr. Law, 225; 2 Hawk. P. C. c. 25, § 77; Pennsylvania v. McKee, Add. (Pa.) 36; State v. Litch, 33 Vt. 67; State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584; Jacobs v. Com., 5 Serg. & R. (Pa.) 316; Serpentine v. State, 1 How. (Miss.) 256; State v. O'Donnell, 81 Me. 271, 17 Atl. 66; Com. v. Doyle, 110 Mass. 103; Markley v. State, 10 Mo. 291; Lee v. State, 22 Tex. App. 547, 3 S. W. 89; State v. Pratt, 14 N. H. 456; State v. Blaisdell, 49 N. H. 81; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; State v. Noland, 29 Ind. 212; State v. Smith, 88 Iowa, 178, 55 N. W. 198; Andrews v. State (Tex. App.) 14 S. W. 1014; Petty v. State, 60 Tex. Cr. R. 64, 131 S. W. 215; McKay v. State, 90 Neb. 63, 132 N. W. 741, 39 L. R. A. (N. S.) 714, Ann. Cas. 1913B, 1034. This is changed by statute in some states. See State v. Crawford, 99 Mo. 74, 12 S. W. 354; post, p. 288. As will be found from the cases above cited, an indictment charging the

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be insufficient if the same offense is alleged to have been committed at different times,[25] or otherwise on such a day as renders it repugnant.[26] And no defect of this nature is aided by verdict.[27] An indictment for murder is vitiated by a repugnancy in this respect in the conclusion, as, if the assault and stroke be alleged on the 10th of December, and the death on the 20th of December following, and it is then alleged that the accused so murdered the deceased on the 10th of December aforesaid, since the felony is not complete until the death occurs.[28]

offense to have been committed on the same day the indictment was found is bad if it does not show that it was committed before the finding of the indictment, since it may, so far as the charge shows, have been committed afterwards; and the indictment cannot be aided by argument or inference, ante, p. 191; but where it does expressly show commission of the offense before indictment, though on the same day, it is good. See Com. v. Miller, 79 Ky. 451; Gill v. State (Tex. Cr. R.) 20 S. W. 578. But see People v. Squires, 99 Cal. 327, 33 Pac. 1092. It was held in Kentucky that an indictment alleging that the offense was committed on a day subsequent to its return was not bad where it alleged that the defendant "did" do the acts alleged, since it was thought that this showed that the offense was committed before the indictment was found. Williams v. Com. (Ky.) 18 S. W. 1024; Vowells v. Com., 84 Ky. 52. This, however, is contrary to the cases cited above.

[25] 1 Term R. 316; State v. Dandy, 1 Brev. (S. C.) 395; Hutchinson v. State, 62 Ind. 556.

[26] 2 Hawk. P. C. c. 25, § 7; Rex v. Stevens, 5 East, 244; Jeffries v. Com., 12 Allen (Mass.) 145; State v. Jones, 8 N. J. Law, 307; McGehee v. State, 26 Ala. 154. The growing tendency away from technical rules is shown in Com. v. Roberts, 145 Ky. 290, 140 S. W. 313, where it was held that an indictment was not bad on demurrer, though it charged the commission of the offense of bribery on two different dates. The court said: "We do not, however, think the discrepancy in the dates mentioned in the indictment was sufficient to invalidate it. In place of the words and figures '27th day of February, 1911,' the words and figures '——— day of November, 1910,' should have been used, as it is manifest from the indictment that the offense intended to be charged was committed at the November election, 1910. The error in inserting the words and figures '27th day of February, 1911,' did not and could not mislead the accused."

[27] 1 Chit. Cr. Law, 225; 2 Hawk. P. C. c. 25, § 77; Rex v. Stevens, 5 East, 244; State v. Litch, 33 Vt. 67.

[28] Heydon's Case, 4 Coke, 42a; 2 Hawk. P. C. c. 23, § 88.

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An allegation that the offense was committed between a day certain and "the day of finding this indictment" fixes the time with sufficient certainty, notwithstanding the grand jury has power to find an indictment at any time during the term of the court, and even for an offense committed after the term has commenced. When there is nothing on the record showing the contrary, the time of finding the bill is to be taken to be the first day of the term. When, therefore, an averment is made that an offense was committed between a day certain and the day of finding the indictment, and there is nothing on the record showing the day when the indictment was found, it is equivalent to an averment that it was committed between the first day alleged and the day on which the term of the court commenced.[29] It is always competent to resort to the record for the purpose of fixing the exact day on which the indictment was found, whenever it becomes necessary to prove that it was found after the first day of the term, as it is sometimes done in order to avoid the objection that the offense was actually committed after the finding of the bill. The actual time can be shown by the certificate of the clerk indorsed on the indictment, or other proper entry.[30] Since the day of finding and presentment of an indictment by the grand jury is not necessarily, or by any reasonable intendment, identical with the day of the filing of it by the clerk, but, on the contrary, several days may elapse between them, an allegation that an offense was committed between a specified day and "the day of the finding, presentment, and filing of this indictment" is bad for uncertainty.[31]

The mere fact that the time is ungrammatically stated, if it is so stated that the time cannot be mistaken, will not vitiate the indictment; as, for instance, where an offense is alleged to have been committed on "the 1st March" instead of "the 1st day of March."[32] But an indictment laying the

[29] Com. v. Wood, 4 Gray (Mass.) 11.

[30] Com. v. Wood, supra; Com. v. Stone, 3 Gray (Mass.) 453.

[31] Com. v. Adams, 4 Gray (Mass.) 27; Com. v. Keefe, 9 Gray (Mass.) 290.

[32] Simmons v. Com., 1 Rawle (Pa.) 142; ante, p. 205.

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offense on the 2d day of March, A. D. "one thousand eight," instead of "eighteen hundred," [33] or an indictment omitting the words "in the year," or the letters "A. D.," or words "Anno Domini," before the number of the year,[34] has in older cases been held insufficient, though it is doubtful if courts would so hold to-day. The words "in the year" need not be used if the letters "A. D.," or words "Anno Domini," are used, as they mean "in the year of our Lord"; [35] nor need the latter be used if the word "year" is used, or the figures as generally used for dates, for it will be taken to mean "year of our Lord." [36] As we have already stated, by statute in England indictments must be in words at length, and abbreviations or figures cannot be used.[37] But in this country, in the absence of statute on the subject, it is generally held that the usual initials and figures may be used for dates.[38] "On the 1st day of January, A. D. 1895," for instance, would be sufficient.

Though the allegation of a specified time is necessary in nearly all cases, yet, except where the time enters into the nature of the offense, it is not necessary to prove that the offense was committed on the precise day or year mentioned in the indictment.[39] In other words, it is immaterial, except in those cases, whether the time is correctly stated or not.

[33] State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724.

[34] Com. v. McLoon, 5 Gray (Mass.) 91, 66 Am. Dec. 354; Wells v. Com., 12 Gray (Mass.) 326; State v. Lane, 26 N. C. 121; Whitesides v. People, Breese (Ill.) 21. But see, to the effect that the "year of our Lord," or its equivalent, may be omitted, note 36, infra.

[35] State v. Reed, 35 Me. 489, 58 Am. Dec. 727; State v. Hodgeden, 3 Vt. 481; Com. v. Clark, 4 Cush. (Mass.) 596; Rawson v. State, 19 Conn. 292; State v. Tuller, 34 Conn. 280; Winfield v. State, 3 G. Greene (Iowa) 339; State v. Seamons, 1 G. Greene (Iowa) 418.

[36] Com. v. Doran, 14 Gray (Mass.) 38; Hall v. State, 3 Ga. 18; Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494.

[37] Ante, p. 203.

[38] State v. Hodgeden, 3 Vt. 481; State v. Gilbert, 13 Vt. 647; Com. v. Clark, 4 Cush. (Mass.) 596; State v. Haddock, 9 N. C. 461; State v. Reed, 35 Me. 489, 58 Am. Dec. 727; Barnes v. State, 5 Yerg. (Tenn.) 186; State v. Munch, 22 Minn. 67; Hall v. State, 3 Ga. 18; Lazier v. Com., 10 Grat. (Va.) 708. For the conflict on this point, see the cases cited in the preceding notes.

[39] Post, p. 396.

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The rule applies to cases in which it is necessary to state the time of the day at which the offense was committed, as in an indictment for burglary.[40] It has been held not to apply, however, to continuing offenses, such as that of being a common seller of intoxicating liquors.[41]

In some states it is provided by statute that time need not be stated, unless time is of the essence of the offense; and if the time is imperfectly stated the indictment shall nevertheless be sufficient. Under such a statute, where an indictment for illegal voting, returned on November 3, 1886, charged that the offense was committed on November 4, 1886, "the same being the day upon which the general election was then and there held in said state * * * for the election of governor * * * as was then and there required and authorized by law," it was held that this portion of the indictment had reference to a past offense, and showed that the offense had been committed before the return of the indictment; and that, time not being of the essence of the offense, the indictment must be upheld.[42]

STATEMENT OF PLACE

96. The indictment must always state the place where the offense was committed with sufficient particularity to show that it was committed within the jurisdiction of the court. Where the particular place within the jurisdictional limits of the court is of the essence of the offense, it must be stated in order to state the offense. The particular place should also be stated, not as venue, but as matter of local description, in an indictment for a local offense, such as burglary, arson, larceny from a building, etc. Except where the particular place thus enters into

[40] Post, p. 396. [41] Post, p. 397.

[42] State v. Patterson, 116 Ind. 45, 10 N. E. 289, and 18 N. E. 270. And see State v. McDaniel, 94 Mo. 301, 7 S. W. 634. And under such a statute, indictments giving no date at all have been sustained. Fleming v. State, 136 Ind. 149, 36 N. E. 154. As to the constitutionality of such statutes, see ante, p. 165; post, pp. 364, 365.

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the nature of the offense, or is alleged as matter of local description, it is sufficient to prove that the offense was committed at any place within the jurisdiction of the court, though not at the place alleged.

The venue should be stated, not only in the margin and commencement of the indictment, as already explained, but also in the statement. Its omission will be fatal, and may be taken advantage of even in arrest of judgment.[43] This is necessary, in order that it may appear that the grand jury had jurisdiction to inquire into the offense and present the indictment, for a grand jury can only inquire into offenses committed within their county; and it is also necessary in order that it may appear that the court has jurisdiction to try the accused, for generally an offense must be tried in the county in which it was committed.[44] For this reason, if the offense is alleged to have been committed at a certain town or other place, without naming the county by reference or otherwise, the indictment will be fatally defective,[45]

[43] 2 Hawk. P. C. c. 25, §§ 34, 83; Rex v. Burridge, 3 P. Wms. 496; Rex v. Hollond, 5 Term R. 624; Reg. v. O'Connor, 5 Q. B. 16; Rex v. Haynes, 4 Maule & S. 214; McCoy v. State, 22 Neb. 418, 35 N. W. 202; Thompson v. State, 51 Miss. 353; People v. Craig, 59 Cal. 370; State v. Hobbs, 37 W. Va. 812, 17 S. E. 380; Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126; Jones v. Com., 86 Va. 950, 12 S. E. 950. Place must be repeated expressly or by reference in each count. Jones v. Com., 86 Va. 950, 12 S. E. 950; post, p. 344. In some states, however, it is provided by statute that it shall not be necessary to state any venue in the body of the indictment, but the jurisdiction named in the margin shall be taken to be the venue of all the facts alleged, except where a local description is required. People v. Schultz, 85 Mich. 114, 48 N. W. 293; State v. Arnold (Mo.) 2 S. W. 269; State v. Beaucleigh, 92 Mo. 490, 4 S. W. 666. And see Territory v. Pratt, 6 Dak. 483, 43 N. W. 711. And in some states the statute dispenses altogether with the necessity for a statement of venue, only requiring that it be proved at the trial. Toole v. State, 89 Ala. 131, 8 South. 95.

[44] Com. v. Reily, 9 Gray (Mass.) 1; U. S. v. Burns (C. C.) 54 Fed. 351.

[45] Com. v. Barnard, 6 Gray (Mass.) 488. It is not sufficient, however, merely to allege that the offense was committed "within the jurisdiction of the court," since that is a mere conclusion of law from

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and will not be aided by the statement of the county in the margin.[46] It is further necessary in some cases in order to make the accusation certain, and inform the accused of the charge against him.[47]

If the jurisdiction of the court does not extend over the entire county, the place of the commission of the offense must be laid with sufficient particularity to show that it was committed within the jurisdiction of the court.[48]

Where the county is mentioned in the margin or commencement, or perhaps even in the caption only, it will be sufficient to refer to it afterwards by the words, "in the county aforesaid," or "then and there."[49] It has been held that where two counties are mentioned—as where one is stated in the margin, and then a fact is alleged to have arisen in another county—a subsequent averment that the offense was committed at a certain place "in the county

facts which should be stated. Early v. Com., 93 Va. 765, 24 S. E. 936.

[46] Rex v. Burridge, 3 P. Wms. 496; 2 Hawk. P. C. c. 25, § 34; 2 Hale, P. C. 166; Reg. v. O'Connor, 5 Q. B. 16; Stephen's Case, 2 Leigh (Va.) 759; State v. Godfrey, 12 Me. 361. Otherwise by statute. Note 43, supra.

[47] Com. v. Barnard, 6 Gray (Mass.) 488. But see Tower v. Com., 111 Mass. 417. Where the indictment alleges that "P., of New Braintree, in county of Worcester, sold intoxicating liquor at New Braintree," it will be understood that he sold at the same New Braintree previously mentioned, and failure to repeat the county is not bad. Com. v. Cummings, 6 Gray (Mass.) 487.

[48] People v. Wong Wang, 92 Cal. 277, 28 Pac. 270; McBride v. State, 10 Humph (Tenn.) 615; Taylor v. Com., 2 Va. Cas. 94.

[49] 2 Hale, P. C. 180; 2 Hawk. P. C. c. 25, § 34; Rex v. Burridge, 3 P. Wms. 496; Haskins v. People, 16 N. Y. 344; Barnes v. State, 5 Yerg. (Tenn.) 186; Strickland v. State, 7 Tex. App. 34; State v. Conley, 39 Me. 78; Turns v. Com., 6 Metc. (Mass.) 224; State v. Ames, 10 Mo. 743; State v. Cotton, 24 N. H. 143; State v. Slocum, 8 Blackf. (Ind.) 315; Evarts v. State, 48 Ind. 422; State v. Bell, 25 N. C. 506; State v. Tolever, 27 N. C. 452; Noe v. People, 39 Ill. 96; Hanrahan v. People, 91 Ill. 142; State v. Salts, 77 Iowa, 193, 39 N. W. 167, 41 N. W. 620; State v. Reid, 20 Iowa, 413. An information that did not state in its body the place where the offense was committed was nevertheless held sufficient, where the county was mentioned in the caption, and the words of reference, "then and there," were used in charging the crime. State v. S. A. L., 77 Wis. 467, 46 N. W. 498.

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aforesaid" will be insufficient.[50] But it has been held that, where two counties are mentioned, and it is then alleged that the offense was committed at a certain town "in said county," the indictment is sufficient if the town is one created by statute, since the court will take judicial notice of the statute, and can determine the county.[51] If an indictment laid the offense in a certain town, without stating any county at all, it is doubtful whether this decision would be followed, even though there might be an incorporated town of that name in the county in which the indictment was found. There are many towns of the same name in the different states, and in some states there are more than one town of the same name. Such an indictment would certainly be uncertain under the rules of pleading. The statement that the offense was committed in the county must be certain, and cannot be aided by inference. Thus, where the offense was alleged to have been committed "near the town of Arizona City, in said county of Yuma, and territory of Arizona," Arizona City being situated near the boundary of the county, the averment was held not sufficiently certain, since the offense might have been committed near the town, and yet not in the county.[52]

Formerly the trial jury were summoned from the neighborhood in which the offense was committed, and not, as is now the practice, from the county at large. It was at that time necessary, therefore, to state in the indictment, not only the county, but also the particular parish, vill, hamlet, or other place within the county at which the offense was committed. It was not sufficient to give the county only.[53] The practice, though not necessary, still exists in England, but to a much less extent than formerly.[54] Unless place is an element of the offense, such place, less than the county, need not be stated in this country. Since the trial jury are

[50] 1 Chit. Cr. Law, 194; Reg. v. Rhodes, 2 Ld. Raym. 888; 2 Hale, P. C. 180; State v. McCracken, 20 Mo. 411; note 78, infra.

[51] People v. Breese, 7 Cow. (N. Y.) 429. And see Com. v. Inhabitants of Springfield, 7 Mass. 9.

[52] Territory v. Do, 1 Ariz. 507, 25 Pac. 472.

[53] 1 Chit. Cr. Law, 196; 2 Hawk. P. C. c. 25, § 83; 2 Hale, P. C. 180.

[54] 1 Chit. Cr. Law, 196.

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drawn from the county at large, and not from any particular neighborhood, the offense need only be laid in the county, and the charge will be sustained by proof that it was committed at any place in the county.[55] By the weight of authority, in indictments for robbery,[56] assaults,[57] homicide,[58] simple larceny,[59] disturbance of an assemblage for religious worship, or of any other public assemblage,[60] gaming,[61] etc., it is sufficient to allege that they were committed in the county, without stating the particular place in the county; and generally, if a particular place is stated, it need not be proved.[62]

Where the offense is of such a character that the place in which it is committed colors it, or "is of the essence of the crime," [63] the particular place within the county at which it was committed must be stated. Some offenses can only be committed in a certain place. Here, of course, the particular place must be stated in order to state any offense at all. Thus, where a statute punishes the keeping of closed

[55] Carlisle v. State, 32 Ind. 55; State v. Goode, 24 Mo. 361; State v. Smith, 5 Har. (Del.) 490; Com. v. Tolliver, 8 Gray (Mass.) 386, 69 Am. Dec. 252; Barnes v. State, 5 Yerg. (Tenn.) 186; State v. Lamon, 10 N. C. 175; Heikes v. Com., 26 Pa. 513; People v. Honeyman, 3 Denio (N. Y.) 121; Wingard v. State, 13 Ga. 396; Com. v. Lavery, 101 Mass. 207; Covy v. State, 4 Port. (Ala.) 186. In Massachusetts, however, it has been said that in indictments for capital offenses the strictness of requiring the indictment to lay the offense, not only in a certain county, but also in a certain town, has always been there adhered to, and in favor of life the court perhaps would not feel authorized to depart from the ancient rule. Com. v. Inhabitants of Springfield, 7 Mass. 9.

[56] Rex v. Wardle, Russ. & R. 9.

[57] Com. v. Tolliver, 8 Gray (Mass.) 386, 69 Am. Dec. 252.

[58] State v. Lamon, 10 N. C. 175; Carlisle v. State, 32 Ind. 55. Contra, Com. v. Inhabitants of Springfield, 7 Mass. 9.

[59] Rex v. Bullock, Moody, Crown Cas. 324, note; People v. Honeyman, 3 Denio (N. Y.) 121; Haskins v. People, 16 N. Y. 344; Com. v. Lavery, 101 Mass. 207.

[60] State v. Smith, 5 Har. (Del.) 490.

[61] Covy v. State, 4 Port. (Ala.) 186; Wingard v. State, 13 Ga. 396. Riot, Barnes v. State, 5 Yerg. (Tenn.) 186. Fornication and bastardy, Heikes v. Com., 26 Pa. 513.

[62] Post, p. 399.

[63] 1 Chit. Cr. Law, 200.

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weirs in a particular part only of a river, an indictment charging that they were kept in the river, without showing in what particular part of it, is insufficient. It states no offense, for they may, for all that appears, have been kept in a place where they were not prohibited.[64]

Again, there are offenses which, though they may be committed in different parts of the county, can only be committed in relation to property which has a fixed location. This property must be described in stating the offense, and its location must be stated, not as venue, however, but by way of description. By the weight of authority, burglary and house breaking,[65] arson,[66] statutory larcenies from a shop, warehouse, dwelling house, etc.,[67] nuisances with respect to highways,[68] such as failure to repair highways,[69] and, according to some of the cases, other nuisances,[70] including the keeping of a disorderly house, and similar offenses,[71] desecration of, disfiguring, and other offenses in relation to cemeteries,[72] being found armed in a

[64] State v. Turnbull, 78 Me. 392, 6 Atl. 1.

[65] Rex v. Bullock, Moody, Crown Cas. 324, note; Reg. v. St. John, 9 Car. & P. 40. But see State v. Meyers, 9 Wash. 8, 36 Pac. 1051.

[66] Rex v. Woodward, Moody, Crown Cas. 323; People v. Slater, 5 Hill (N. Y.) 401. Contra, State v. Meyers, 9 Wash. 8, 36 Pac. 1051.

[67] Rex v. Napper, 1 Moody, Crown Cas. 44; People v. Honeyman, 3 Denio (N. Y.) 121.

[68] Rex v. White, 1 Burrows, 333.

[69] Com. v. Inhabitants of North Brookfield, 8 Pick. (Mass.) 463; Rex v. Great Canfield, 6 Esp. 136; Rex v. Marchioness Dowager, 4 Adol. & E. 232; Rex v. Inhabitants of St. Weonard's, 6 Car. & P. 582.

[70] Com. v. Heffron, 102 Mass. 148; Cornell v. State, 7 Baxt. (Tenn.) 520. But see, contra, State v. Sneed, 16 Lea (Tenn.) 450, 1 S. W. 282; State v. Jacobs, 75 Iowa, 247, 39 N. W. 293.

[71] State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135; Com. v. Logan, 12 Gray (Mass.) 136. Unlawfully selling liquor. Murphy v. State, 59 Tex. Cr. R. 479, 129 S. W. 138. An indictment under a statute for soliciting a person to be at any "particular house, room, or place" for the purpose of having sexual intercourse need not state any particular house or room to which the person was invited. It is sufficient if it states the town and county. Sanders v. State, 60 Tex. Cr. R. 34, 129 S. W. 608. But see Nichols v. State, 127 Ind. 406, 26 N. E. 839.

[72] 1 Chit. Cr. Law, 201; Com. v. Wellington, 7 Allen (Mass.) 300.

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close at night,[73] etc., are offenses of this character. Place must be stated, not as venue but as matter of local description. As we shall see, the particular locality must not only be stated, but, being stated by way of local description, and not as venue, it must be proved as stated.[74]

As already stated, if the jurisdiction of the court does not extend over the whole county, then the place where the offense was committed must in all cases be more particularly alleged, for the indictment must show on its face that the offense was committed within the jurisdiction of the court.[75]

If the indictment fails to allege that the offense was committed in the county in which it was found and in which the trial is had, the defect is fatal, for the court acquires no jurisdiction; and the objection may, therefore, be raised at any time. It is not a defect that can be aided by verdict or judgment.[76] The same is true where the place is stated with repugnancy or uncertainty.[77] If, for instance, two places are named, and afterwards a fact is laid as having happened "then and there," the indictment is bad, because it is uncertain to which it refers.[78] So it is, also, where an indictment lays an offense at B. "aforesaid," when B. has not been previously mentioned;[79] or where an indictment for murder lays the stroke in one county, and the death in another, and concludes that so the accused murdered the deceased in the former county.[80]

The words "from" and "into" are construed in an exclusive sense. Thus an allegation from H. "into" G. has been held to exclude the latter place, and the words "to and from

[73] Rex v. Ridley, Russ. & R. 515. The common way of describing the monument, building, etc., in these cases, is to state the town in which it is located.

[74] Lee v. State, 114 Ark. 310, 169 S. W. 963; post, p. 401.

[75] Note 48, supra.

[76] Rex v. Cartwright, 4 Term R. 490; Rex v. Mathews, 5 Term R. 162; Rex v. Harris, 2 Leach, Crown Cas. 800; People v. Gregory, 30 Mich. 371. Cases cited in note 43, supra, and in the succeeding notes.

[77] 2 Hawk. P. C. c. 25, § 83; Jane v. State, 3 Mo. 61.

[78] 2 Hale, P. C. 180; cases cited in note 50, supra.

[79] Cholmley's Case, Cro. Car. 465; Wingfield's Case, Cro. Eliz. 739; 2 Hawk. P. C. c. 25, § 83; Com. v. Pray, 13 Pick (Mass.) 359.

[80] 2 Hawk. P. C. c. 25, § 83; Hume v. Ogle, Cro. Eliz. 196.

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the town of B." have been held to exclude that town itself.[81] The questions of repugnancy and of variance between the allegation and proof with respect to place are elsewhere considered.[82]

REPEATING TIME AND PLACE—"THEN AND THERE"

97. The statement of time and place should be repeated to every issuable and triable fact. It may be so repeated by using the words "then and there."

In general, the place ought not merely to be mentioned at the beginning of the indictment, or in connection with the first allegation of fact, but it should be repeated to every issuable and triable fact; and the same is true of time, for, as a rule, wherever a venue is necessary, time should be united with it.[83] The mere conjunction "and" will in many cases be insufficient to apply previous statements of time and place to an allegation following it. In an indictment for robbery, for instance, it has been held that it is not sufficient to allege that the accused made an assault on the person robbed at a certain time and place, "and" took the property from him; but the taking must also be alleged to have been at that time and place.[84] And in an indictment for murder it has been held that it is not sufficient to allege that the accused, at a certain time and place, made an assault on the deceased, "and" feloniously struck him, but the time

[81] 2 Rolle, Abr. 81; Rex v. Inhabitants of Gamlingay, 3 Term R. 513; Hammond v. Brewer, 1 Burrows, 376; State v. Bushey, 84 Me. 459, 24 Atl. 940; State v. Landry, 85 Me. 95, 26 Atl. 998.

[82] Post, p. 398; ante, p. 201.

[83] Rex v. Hollond, 5 Term R. 620; State v. Bacon, 7 Vt. 219; Critchton v. People, 6 Parker, Cr. R. (N. Y.) 363; Rex v. Haynes, 4 Maule & S. 214; State v. Welker, 14 Mo. 398; State v. Beckwith, 1 Stew. (Ala.) 318, 18 Am. Dec. 46; Roberts v. State, 19 Ala. 526; State v. Lyon, 45 N. J. Law, 272.

[84] 2 Hale, P. C. 178; 2 Hawk. P. C. c. 23, § 88; Wingfield's Case, Cro. Eliz. 739; State v. Willis, 78 Me. 70, 2 Atl. 848. But see Com. v. Bugbee, 4 Gray (Mass.) 206.

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and place must be repeated to the stroke.[85] In an indictment for homicide it is not sufficient merely to state the day and place of the stroke, but the day and place of the death must also be stated, so that it may appear that the death was within a year and a day of the stroke, and within the jurisdiction of the court.[86] And an indictment for a rescue must show the year and day both of the arrest and the rescue.[87]

In indictments for misdemeanors there is not the same strictness in requiring repetition of time and place as there is in cases of felony.[88] Thus, where a mere trespass was charged, it was held sufficient to state that the accused, at a certain place and time, made an assault on the prosecutor, and beat him, without saying that he beat him at that time and place, because the time and place mentioned in the beginning refer to all subsequent averments.[89] In some states the rule has been disregarded even in cases of felony;[90] and under statutes providing that it shall be sufficient if the indictment contain the charge against the accused expressed in a plain, intelligible, and explicit manner, it has been held that the strict rule of the common law does not apply.[91]

In repeating the place it is not necessary to repeat the whole description. Where the town and county, for instance, have once been mentioned, it will be sufficient to

[85] 2 Hale, P. C. 178, 180; 2 Hawk. P. C. c. 23, § 88. But see Com. v. Barker, 12 Cush. (Mass.) 186.

[86] 2 Hale, P. C. 179; 2 Hawk. P. C. c. 25, § 77; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377; State v. Orrell, 12 N. C. 139, 17 Am. Dec. 563; State v. Blakeney, 33 S. C. 111, 11 S. E. 637; ante, p. 239. But see Davidson v. State, 135 Ind. 254, 34 N. E. 972; Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122.

[87] 2 Hawk. P. C. c. 25, § 77.

[88] 1 Chit. Cr. Law, 221; 2 East, P. C. 780; 2 Hale, P. C. 178; Chamlington's Case, Cro. Jac. 345.

[89] 2 Hale, P. C. 178; Stout v. Com., 11 Serg. & R. (Pa.) 177. And in an indictment for a forcible entry it is enough to state that the accused entered and dispossessed, without a second statement of time and venue. Baude's Case, Cro. Jac. 41.

[90] Com. v. Bugbee, 4 Gray (Mass.) 206; Com. v. Barker, 12 Cush. (Mass.) 186; State v. Price, 11 N. J. Law, 210.

[91] State v. Cherry, 7 N. C. 7.

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use the words "at ——— [the town] aforesaid."[92] And the same is true in repeating time. And generally, after the time and place have once been named with certainty in the statement, it is sufficient to refer to them by the words "then and there," which will have the same effect as if the time and place were repeated in full.[93] An indictment for murder, for instance, instead of alleging that the accused, "on the ——— day of ———, A. D. 1895, at ———, in the county of ———, made an assault, and on the ——— day of ———, A. D. 1895, at ——— in the county of ———, feloniously struck" the deceased, may allege, after stating the assault, that he "then and there struck," etc. This, of course, cannot apply where two times or places have been previously mentioned, because it would be uncertain to which the words referred.[94] Nor can it apply where it is necessary to show the particular act to have been done, not merely on the day named before, but at a certain time of that day.[95]

The word "immediately" is too uncertain an allegation when time constitutes part of the offense, and therefore, where, on an indictment for robbery, the special verdict found the assault, and then in a distinct sentence that the prisoners then and there immediately took up the prosecutor's money, this was held to be insufficient to fix the prisoners with the offense of robbery, because of the great lati-

[92] People v. Baker, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276.

[93] 2 Hale, P. C. 178; 1 Chit. Cr. Law, 220; 2 Hawk. P. C. c. 25, § 78; Id. c. 23, § 88; Jacobs v. Com., 5 Serg. & R. (Pa.) 315; State v. Cotton, 24 N. H. 143; Stout v. Com., 11 Serg. & R. (Pa.) 177; State v. Johnson, Walk. (Miss.) 392; State v. Ferry, 61 Vt. 624, 18 Atl. 451; State v. Bacon, 7 Vt. 219; State v. Bailey, 21 Mo. 484; State v. Williams, 4 Ind. 235, 58 Am. Dec. 627; Davidson v. State, 135 Ind. 254, 34 N. E. 972; State v. Blakeney, 33 S. C. 111, 11 S. E. 637; Palmer v. People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

[94] 2 Hale, P. C. 180; Jane v. State, 3 Mo. 61; Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126; State v. McCracken, 20 Mo. 411; State v. Hayes, 24 Mo. 358; Com. v. Goldstein, 114 Mass. 272; State v. Jackson, 39 Me. 291; Bell v. Com., 8 Grat. (Va.) 600.

[95] Thus, in an indictment on a statute for having in possession 10 or more counterfeit bank bills, it is necessary to show that the defendant had them in his possession at the same time of the day, and

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tude of the word "immediately." [96] Nor is the word "instantly" or "whilst" equivalent to the words "then and there." [97] And it is said that the word "being" (existens) will, unless necessarily connected with some other matter, relate to the time of the indictment, rather than of the offense. It was therefore held that an indictment alleging a forcible entry on land "being" the prosecutor's freehold, without saying "then being," was insufficient.[98]

If the indictment allege that the defendant feloniously and of malice aforethought made an assault, and with a certain sword, etc., then and there struck, the previous omission will not be material; for the words "feloniously and of malice aforethought," previously connected with the assault, are by the words "then and there" sufficiently applied to the murder.[99] In a Massachusetts case, an indictment for manslaughter, which, after averring an assault at a certain time and place, alleged that the accused then and there struck the deceased, "giving" him a mortal wound, etc., was held sufficient.[1] In some cases the words "then and there" are even more certain than a repetition of the day and year, for the latter will not be sufficient where, in order to complete the offense, connected acts must be shown to have been done at the same time, but the terms "then and there" must be used.[2] Repetition of time and place in different counts is elsewhere considered.[3]

an averment that he had them in his possession on the same day is not sufficient. Edwards v. Com., 19 Pick. (Mass.) 124.

[96] 1 Chit. Cr. Law, 220; Rex v. Francis, 2 Strange, 1015.

[97] Reg. v. Brownlow, 11 Adol. & E. 119; Reg. v. Pelham, 8 Q. B. 959; Lester v. State, 9 Mo. 666; State v. Lakey, 65 Mo. 217.

[98] 1 Chit. Cr. Law, 220; Rex v. Ward, 2 Ld. Raym. 1467; Bridge's Case, Cro. Jac. 639. But see Rex v. Boyall, 2 Burrows, 832.

[99] 1 Chit. Cr. Law, 220; Heydon's Case, 4 Coke, 41b; 1 East, P. C. 346; Buckler's Case, 1 Dyer, 69a.

[1] Turns v. Com., 6 Metc. (Mass.) 224.

[2] 1 Chit. Cr. Law, 221; Rex v. Williams, 1 Leach, Crown Cas. 529; Com. v. Butterick, 100 Mass. 12; Com. v. Goldstein, 114 Mass. 272.

[3] Ante, p. 167; post, p. 844.

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CHAPTER VIII

PLEADING—THE ACCUSATION (Continued)

98. Indictments on Statutes.

INDICTMENTS ON STATUTES

98. An indictment based on a statute is subject to the following rules:

(a) It is generally subject to the rules already stated as applying to indictments at common law.

(b) It need not recite the statute upon which it is founded.

(c) It must state all the facts and circumstances which go to make up the offense as defined in the statute, so as to bring the defendant precisely within it; and the fact that it concludes "contra formam statuti" will not aid a defect in this respect.

(d) The exact offense defined in the statute must be described with precision and certainty, and it is therefore generally necessary to use the technical terms employed in the statute. Where, however, the offense may be exactly described by other expressions they may be used. It is always safer to follow the language of the statute.

(e) It is not always sufficient merely to follow the language of the statute, without more. It will be sufficient to do so if the indictment will thereby comply with rule (c) above stated, and will state the particulars of the offense sufficiently to meet the requirement of certainty, but not otherwise.

(f) Where the statute on which an indictment is founded, or some other statute, contains exceptions or provisos, which are not so connected with the clause defining the offense, generally called the "enacting clause," that they are a part of the de-

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scription of the offense, it is not necessary to negative them; but it is otherwise if they are so connected with that clause, either by being contained in it, or by being made a part of it by reference.

In treating of indictments founded on a statute, we shall only consider the particulars in which they differ from indictments at common law, and mention those rules which are peculiar to them. Generally the rules which we have discussed as applicable to indictments at common law also apply to indictments on statutes.

Reciting or Referring to the Statute

An indictment on a public statute need never recite the statute—that is, state its date, title, contents, etc.—or by any other express reference show the particular statute upon which it is based, for the court is bound to take judicial notice of all public statutes; and, as we have seen, it is never necessary to state facts of which the court must take judicial notice.[1] By recital of a statute is meant stating its contents, quoting it, referring to it by its title, etc. The statute must be counted upon, and must be pleaded; but this is very different from reciting it. By saying that the statute must be counted upon, we mean that the indictment must purport to be based upon it. This is done, as we shall see, by simply stating in the conclusion of the indictment that the offense was committed "contra formam statuti," or, as it is now generally expressed, "contrary to the form of the statute in such cases made and provided."[2] By saying that the statute must be pleaded, we mean simply that the indictment must state the facts necessary to bring the case within the statute, not that it must expressly refer to the statute. If the indictment does recite the statute, and counts upon that particular statute, as by concluding "contrary to the form of said statute," a variance will be fatal if it is ma-

[1] Ante, p. 194; 2 Hale, P. C. 172; 2 Hawk. P. C. c. 25, § 100; Reg. v. Pugh, 6 Mod. 140; Farr v. East, Cro. Eliz. 186; Vander v. Griffith, Id. 236; Com. v. Griffin, 21 Pick. (Mass.) 523; Com. v. Colton, 11 Gray (Mass.) 1; U. S. v. Nickerson, 17 How. 204, 15 L. Ed. 219; Com. v. Hoye, 11 Gray (Mass.) 462; Rex v. Sutton, 4 Maule & S. 542.

[2] Post, p. 356.

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terial, though not if it is immaterial; but if it concludes, "contrary to the form of the statute in such case made and provided," omitting any reference to the recital, the recital may be rejected as surplusage, and a variance will be disregarded.[3] If a statute, though unnecessarily recited, is so misrecited as to make it senseless, as where it is referred to as an act entitled an act concerning the manufacture and sale of "spritiuous and intoxicating" liquor, the indictment will be bad.[4] If, in any case, an indictment can be founded on a private statute, it must set out the act specially, since the court can take judicial notice of public acts only.[5]

It is never necessary to indicate in the indictment the particular statute, or section of the statute, on which it is founded. It is only necessary to set out such facts as bring the case within the provisions of some statute which was in force when the act was done, and when the indictment was found; and if the facts properly laid in the indictment, and found by the verdict, show that the act done was a crime punishable by any statute, it is sufficient to warrant the court in rendering judgment.[6]

Where by different statutes, or by different sections of the same statute, there is a gradation of offenses of the same species, as in the various degrees of punishment annexed to the offense of malicious burning of buildings, or in the various grades of the offense of larceny, it is not necessary to set forth a negative allegation that the case is not embraced in some other statute or section than that which, upon the evidence, may be found to apply, and by virtue of

[3] 2 Hale, P. C. 172, 173; 2 Hawk. P. C. c. 25, § 104; Platt v. Hill, 1 Ld. Raym. 382; Rex v. Hill, Cro. Car. 232; Rex v. Marsack, 6 Term R. 773; People v. Walbridge, 6 Cow. (N. Y.) 512; Reg. v. Westley, Bell, Crown Cas. 193; Com. v. Burke, 15 Gray (Mass.) 408; note 4, infra.

[4] Com. v. A Man Whose Name is Unknown, 6 Gray (Mass.) 489; The Nancy v. Fitzpatrick, 3 Caines (N. Y.) 38.

[5] 1 Chit. Cr. Law, 277; 2 Hale, P. C. 172; 2 Hawk. P. C. c. 25, § 103; Goshen & S. Turnpike Co. v. Sears, 7 Conn. 92; State v. Cobb, 18 N. C. 115.

[6] Com. v. Griffin, 21 Pick. (Mass.) 523; Com. v. Thompson, 108 Mass. 461.

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which the punishment is to be imposed.[7] So if certain acts are by force of the statute made punishable with greater severity when accompanied with certain aggravating circumstances, thus creating two grades of crime, it is no objection to an indictment that it charges the acts which constitute the minor offense, unaccompanied by any averment that the aggravating circumstances did not exist. In such cases the offense charged is to be deemed the minor offense, and punishable as such.[8] On this principle it has been held that, where there are two statutes, one punishing the offense of breaking in the nighttime into an office adjoining a dwelling house, and the other that of breaking in the nighttime into an office not adjoining a dwelling house, each imposing a similar punishment, it is not necessary to state in the indictment whether or not the office was adjoining a dwelling house.[9]

In no case is it necessary to state the time when the statute was enacted so that it may appear on the face of the indictment that it was enacted before the offense was committed. This is also a matter of which the court will take judicial notice.[10]

Description of the Offense

It is the rule that all indictments upon statutes must state all the facts and circumstances which go to make up the offense as defined in the statute, so as to bring the defendant precisely within it. "I take it for a general rule," it is said by Hawkins, "that, unless the statute be recited, neither the words 'contra formam statuti' nor any periphrasis, intendment, or conclusion will make good an indictment, which does not bring the fact prohibited or commanded, in the doing or not doing of which the offense consists, within

[7] Larned v. Com., 12 Metc. (Mass.) 241; Com. v. Squire, 1 Metc. (Mass.) 258. State v. Kane, 63 Wis. 260, 23 N. W. 488; Com. v. Thompson, 108 Mass. 461.

[8] Larned v. Com., supra; Com. v. Cox, 7 Allen (Mass.) 577.

[9] Larned v. Com., supra. And see Com. v. Hamilton, 15 Gray (Mass.) 480; State v. Kane, 63 Wis. 260, 23 N. W. 488. But see Rex v. Marshall, 1 Moody, Crown Cas. 158.

[10] Reg. v. Westley, Bell, Crown Cas. 193; Com. v. Keefe, 7 Gray (Mass.) 332; People v. Reed, 47 Barb. (N. Y.) 235; post, p. 305.

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all the material words of the statute." [11] Offenses created by statute, as well as offenses at common law,[12] must be accurately and clearly described in the indictment. It is a universal rule that no indictment, whether at common law, or under a statute, can be good if it does not accurately and clearly allege all the ingredients of which the offense is composed.[13]

Thus, under a statute making the failure to sound the whistle or ring the bell upon a locomotive, as it approaches a highway crossing, a public offense, an indictment charging that a railroad company "did unlawfully fail and neglect to ring the bell and sound the whistle," is bad, since it charges a failure to do both acts, when either one of them would have been a compliance with the law.[14] An indictment under a statute for violation of a written contract to serve as a laborer must set out the contract, and show that it was of such a character as that described in the statute.[15]

So, where a man was indicted for robbery "in a certain king's footway leading from London to Islinton," he was admitted to the benefit of clergy, because the statute which took it away from the crime described the place as "in" or "near a king's highway." [16] And, where a statute provided that if any person "shall, with any offensive weapon or instrument, unlawfully and maliciously assault, or shall by menaces, or in or by any forcible or violent manner, demand any goods or chattels, he shall be adjudged guilty of felony," it was held not enough to state an assaulting and menacing with intent to rob, but that it must be alleged either that the assault was made with an offensive weapon,

[11] 2 Hawk. P. C. c. 25, § 110; 2 Hale, P. C. 170; 2 East, P. C. 985; Brown v. Com., 8 Mass. 65; State v. Railroad Co., 54 Ark. 546, 16 S. W. 567; State v. O'Bannon, 1 Bailey (S. C.) 144; State v. Bagwell, 107 N. C. 859, 12 S. E. 254, 9 L. R. A. 840; Updegraff v. Com., 6 Serg. & R. (Pa.) 5; Giles v. State, 89 Ala. 50, 8 South. 121; State v. Jackson, 43 La. Ann. 183, 8 South. 440.

[12] Ante, p. 181.

[13] U. S. v. Cook, 17 Wall. 168, 21 L. Ed. 538.

[14] State v. Railroad Co., 54 Ark. 546, 16 S. W. 567.

[15] State v. Williams, 32 S. C. 123, 10 S. E. 876.

[16] 1 Chit. Cr. Law, 282; Fuliambe's Case, Moore, 5; 1 Hale, P. C. 535.

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or that money or goods were demanded.[17] And an indictment is bad if it charges the defendant with killing deer in a certain place where they are usually kept, without describing the place as "inclosed," as in the statute;[18] or with unlawfully killing fish, without adding, as in the statute, "without the consent of the owner of the water;" [19] or with having a gun in his house, when the words of the statute are, "use to keep a gun in his house;" [20] or with insuring a ticket in the lottery without saying "the state lottery." [21]

Where the scienter, or knowledge of particular facts, is by the statute expressly or impliedly made an essential ingredient of the offense, it must always be expressly alleged in the indictment.[22]

"Where a general word is used, and afterwards more special terms, defining an offense, an indictment charging the offense must use the most special terms; and if the general word is used, though it would embrace the special term, it is inadequate." [23]

If a statutory offense is correctly described in the indictment in the words of the statute, or their equivalent, or if the acts constituting it are stated, the indictment will not be vitiated by the fact that a name is given to the offense which is technically wrong, for the name may be rejected as surplusage.[24]

[17] 1 Chit. Cr. Law, 282; Rex v. Thomas, 1 Leach, Crown Cas. 330; 1 East, P. C. 419.

[18] Reg. v. Moore, 2 Ld. Raym. 791.

[19] Rex v. Mallinson, 2 Burrows, 679.

[20] Rex v. Lewellin, 1 Show. 48.

[21] Rex v. Trelawney, 1 Term R. 222.

[22] Ante, p. 225; Gatewood v. State, 4 Ohio, 386.

[23] Whart. Cr. Pl. & Prac. § 223; State v. Bryant, 58 N. H. 79; State v. Raiford, 7 Port. (Ala.) 101; Rex v. Cook, 1 Leach, 105; State v. Plunket, 2 Stew. (Ala.) 11; ante, pp. 188, 261. "When a statute uses a nomen generalissimum as such (e. g. cattle), then a particular species can be proved; but when the statute enumerates certain species, leaving out others, then the latter cannot be proved under the nomen generalissimum, unless it appears to have been the intention of the legislature to use it as such." Whart. Cr. Pl. & Prac. § 237; Rex v. Welland, Russ. & R. 494; Rivers v. State, 10 Tex. App. 177.

[24] U. S. v. Elliot, 3 Mason, 156, Fed. Cas. No. 15,044; U. S. v. Lehman (D. C.) 39 Fed. 768; State v. Shaw, 35 Iowa, 575; State v.

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It is said by Chitty that where the statute is recent it is usual to allege expressly that the offense was committed after the making of the statute, but where the statute is ancient this is not usual; and, he adds, it does not seem to be necessary in any case.[25] It is now well settled that it is not necessary.[26] The indictment, as we have seen, should state the time of the offense, and it would not do for the time to be laid prior to the enactment of the statute, for it would then appear on the face of the indictment that the act was not prohibited when committed. Where a particular time is limited for the prosecution, the indictment, as we have seen, need not expressly allege that the prosecution was commenced within that period, but this should appear on the face of the proceedings.[27] If the indictment shows on its face that the prosecution is barred, by the weight of authority, it is bad.[28]

Necessity to Follow Language of Statute

It is generally necessary, subject to exceptions which we shall explain, not only to set forth all the facts and circumstances which go to make up the offense as defined in the statute, but also to pursue the precise and technical language of the statute in which they are expressed. If the words are technical, and have no equivalent, it is well settled that no other words can be substituted for them, for no others are exactly descriptive of the offense.[29] So an indict-

Davis, 41 Iowa, 311; State v. Wyatt, 76 Iowa, 328, 41 N. W. 31; ante, p. 213.

[25] 1 Chit. Cr. Law, 285.

[26] Ball v. Cobus, 1 Burrows, 366; State v. Chandler, 9 N. C. 439; ante, p. 302.

[27] Lee v. Clarke, 2 East, 333; Rex v. Steventon, Id. 362.

[28] Ante, p. 282.

[29] 1 Chit. Cr. Law, 283; 2 Hale, P. C. 170; 2 Hawk. P. C. c. 25, § 110; Rex v. Johnson, 2 Leach, Crown Cas. 1107; U. S. v. Bachelder, 2 Gall, 15, Fed. Cas. No. 14,490; U. S. v. Lancaster, 2 McLean, 431, Fed. Cas. No. 15,556; U. S. v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; U. S. v. Staats, 8 How. 41, 12 L. Ed. 979; Com. v. Twitchell, 4 Cush. (Mass.) 74; Com. v. Burlington, 136 Mass. 435; State v. Brown, 4 Port. (Ala.) 410; State v. Briley, 8 Port. (Ala.) 472; Mason v. State, 42 Ala. 543; Com. v. Walters, 6 Dana (Ky.) 291; Com. v. Turner, 8 Bush (Ky.) 1; Respublica v. Tryer, 3 Yeates (Pa.)

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ment for rape must use the word "ravished," contained in the statute, and no expression of force and carnal knowledge will supply its omission.[30] And, by the better opinion, an indictment under a statute using the word "willfully" or "maliciously" or "wantonly," or two or more of such terms, in defining the offense, must also use the same term or terms, though at common law that precise term is not necessary, but may be supplied by others conveying the same idea.[31] The term "maliciously" will not supply the place of the term "willfully," or the term "wantonly," used in a statute to define an offense.[32] So, if the term "unlawfully" is used in a statute to define the offense, it is, by the weight of opinion, absolutely essential to use it in an indictment thereon.[33]

451; Hamilton v. Com., 3 Pen. & W. (Pa.) 142; Updegraff v. Com., 6 Serg. & R. (Pa.) 5; State v. Shuler, 19 S. C. 140; State v. Casados, 1 Nott & McC. (S. C.) 91; State v. Raines, 3 McCord (S. C.) 533; Chambers v. People, 4 Scam. (Ill.) 351; Whiting v. State, 14 Conn. 487, 36 Am. Dec. 499; State v. Cady, 47 Conn. 44; State v. Bougher, 8 Blackf. (Ind.) 308; State v. Rust, 35 N. H. 438; State v. Keneston, 59 N. H. 36; State v. Perkins, 63 N. H. 368; People v. Allen, 5 Denio (N. Y.) 76; Phelps v. People, 72 N. Y. 334; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. St. Rep. 452; State v. Stanton, 23 N. C. 424; Ike v. State, 23 Miss. 525; State v. Hover, 58 Vt. 496, 4 Atl. 226; Sharp v. State, 17 Ga. 290; Jackson v. State, 76 Ga. 551; Com. v. Hampton, 3 Grat. (Va.) 590; Howel v. Com., 5 Grat. (Va.) 664; State v. Buster, 90 Mo. 514, 2 S. W. 834; State v. Davis, 70 Mo. 467; Kinney v. State, 21 Tex. App. 348, 17 S. W. 423; People v. Murray, 67 Cal. 103, 7 Pac. 178; People v. Burke, 34 Cal. 661.

[30] 2 Hawk. P. C. c. 23, §§ 77, 110.

[31] 2 Hale, P. C. 87; 2 Hawk. P. C. c. 25, § 110; 3 Inst. 167; Rex v. Davis, 1 Leach, Crown Cas. 493; Lembro & Hamper's Case, Cro. Eliz. 147; Anon., Id. 201; Roberts v. Trenayne, Cro. Jac. 508; U. S. v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14,490; State v. Parker, 81 N. C. 548; State v. Massey, 97 N. C. 465, 2 S. E. 445; State v. Morgan, 98 N. C. 641, 3 S. E. 927; State v. Gove, 34 N. H. 510; State v. Nickleson, 45 La. Ann. 1172, 14 South. 134. But see, contra, Chapman v. Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565; State v. Brown, 41 La. Ann. 345, 6 South. 541.

[32] Rex v. Davis, 1 Leach, Crown Cas. 492; 1 East, P. C. 412. And see the cases above cited.

[33] 2 Hawk. P. C. c. 25, § 96; Rex v. Ryan, 2 Moody, Crown Cas. 15; Rex v. Turner, 1 Moody, Crown Cas. 239; Com. v. Twitchell, 4 Cush. (Mass.) 74. Contra, where there is a statute providing that the words

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All that is required in any indictment, whether under a statute or at common law, is that it shall describe the offense with sufficient certainty, as we have explained that term; that it shall state everything necessary to constitute the offense, and state it with certainty. To do this, technical words used in the statute to describe the offense must be used in the indictment. This is the reason, and the only reason, why the technical language of the statute must be followed. If it were necessary to use the exact language of the statute, other than the technical terms, in order to fully and certainly describe the offense as defined in the statute, then it would be necessary to use it; but this is not always the case. Technical terms must generally be used, because no other terms exactly express their meaning. Other expressions need not necessarily be followed with verbal accuracy. If the words substituted for them express the same meaning, and are an exact equivalent, they are sufficient.[34] It has been held, for instance, that in an indictment against an accessory before the fact in murder the words "excite, procure, and move" were equivalent to "command, hire, or counsel," which were used in the statute.[35] So, in an indictment for obtaining money by false pretenses, it is not necessary to allege, as in the statute, that the defendant "falsely pretended," but it may be alleged that he pretended, and then that the pretenses were false.[36] And under a statute

of a statute defining the offense need not be strictly followed. Davis v. People, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. Ed. 153.

[34] U. S. v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14,490; State v. Little, 1 Vt. 331; Rex v. Fuller, 1 Bos. & P. 180; State v. Hickman, 8 N. J. Law, 299; Tully v. People, 67 N. Y. 16; State v. Eames, 39 La. Ann. 986, 3 South. 93; People v. Enoch, 13 Wend. (N. Y.) 172, 27 Am. Dec. 197; State v. McGaffin, 36 Kan. 315, 13 Pac. 560; State v. Keen, 34 Me. 500; Eckhardt v. People, 83 N. Y. 462, 38 Am. Rep. 462; Williams v. State, 64 Ind. 553, 31 Am. Rep. 135; State v. Welch, 37 Wis. 196; McCutcheon v. People, 69 Ill. 601; State v. Shaw, 35 Iowa, 575; State v. De Lay, 30 Mo. App. 357; State v. Watson, 65 Mo. 115; Roberts v. State, 55 Miss. 421; State v. Thorne, 81 N. C. 558. It is sufficient to charge shooting "on" a highway, instead of "in" a highway. Woods v. State, 67 Miss. 575, 7 South. 495.

[35] 1 Hale, P. C. 521, 522; McDaniel's Case, Fost. Crown Cas. 130; 1 And. 195.

[36] Rex v. Airey, 2 East, 30; Rex v. Perrott, 2 Maule & S. 379.

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punishing the disinterment and removal of "the remains of any dead person" it is sufficient to charge disinterment and removal of "the dead body of" a person named.[37] And an indictment may use the word "violently" instead of "forcibly," as in the statute.[38]

We have already seen that where a statute employs a general term, and afterwards more specific terms, defining the offense, an indictment which uses the general term only is bad, though in its meaning it comprehends the special term.[39]

While, as we have seen, it is not always absolutely necessary to follow the exact language of the statute in describing the offense, it is always safer to do so, for by substituting other words and phrases there is danger of failing to describe the offense by employing terms which the court may not deem equivalent to those used in the statute. A few illustrations will show how great this danger is. An indictment charging that the defendant had possession of tools for the purpose of counterfeiting current silver coins "of this state and of the United States" was held bad because the statute used the words, "which shall be made current by the laws of this or the United States," since "money may be current in the United States that is not made so by any law."[40] And an indictment charging the defendant to have caused a vessel to sail away, with intent that she "should be employed" in the slave trade, was held bad because the statute used the words "with intent to employ," which import an intent on the defendant's part to employ her, whereas an intent that she should be employed by a third person would come within the indictment.[41] So, where a statute punished as a felony the shooting at a per-

[37] State v. Little, 1 Vt. 331.

[38] U. S. v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14,490. The words "set fire to" in an indictment have been held in some states equivalent to "burn," used in the statute. State v. Taylor, 45 Me. 322. In others, the contrary has been held. See Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; State v. Hall, 93 N. C. 571; Cochrane v. State, 6 Md. 400.

[39] Ante, pp. 261, 304; note 23, supra.

[40] State v. Bowman, 6 Vt. 594.

[41] U. S. v. Gooding, 12 Wheat. 460, 6 L. Ed. 693.

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son "willfully and maliciously," and the indictment used the words, "unlawfully, maliciously, and feloniously," it was held bad.[42]

When Sufficient to Follow Language of Statute

It is often said, and sometimes without qualification, that an indictment on a statute is sufficient if it sets out the offense in the language of the statute; but this is by no means true in all cases, for the rule that an indictment must state all the facts necessary to constitute the offense, and must state them with certainty, applies to indictments on statutes as well as to indictments at common law. There is no exception to this rule, nor, under most of our Constitutions, can there be any; and any rule that may be laid down in the text-books, or opinions of the judges, must be taken to be subject to it.[43] "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.'" [44]

Under a statute punishing any person "who shall act as the agent of any other person or persons for the sale of intoxicating liquors," it is not sufficient merely to follow the language of the statute, for this would leave the indictment uncertain. The indictment must go further, and name the person for whom the defendant acted, or aver that his name

[42] Rex v. Davis, 1 Leach, Crown Cas. 498.

[43] 1 Chit. Cr. Law, 275; 2 Hawk. P. C. c. 25, §§ 99, 111; Com. v. Pray, 13 Pick. (Mass.) 359; State v. Benjamin, 49 Vt. 101; State v. Bennett (Mo. Sup.) 11 S. W. 264; Com. v. Clifford, 8 Cush. (Mass.) 215; Com. v. Barrett, 108 Mass. 303; U. S. v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; Com. v. Bean, 11 Cush. (Mass.) 414; State v. Goulding, 44 N. H. 284; Com. v. Bean, 14 Gray (Mass.) 52; U. S. v. Goggin (C. C.) 9 Biss. 269, 1 Fed. 49; Com. v. Clark, 6 Grat. (Va.) 675; Com. v. Stout, 7 B. Mon. (Ky.) 248; U. S. v. Hess, 124 U. S. 488, 8 Sup. Ct. 571, 31 L. Ed. 516; Whiting v. State, 14 Conn. 487, 36 Am. Dec. 499; State v. Bierce, 27 Conn. 319; Lagrone v. State, 12 Tex. App. 426; Com. v. Milby (Ky.) 24 S. W. 625; ante, pp. 165, 188.

[44] U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Com. v. Chase, 125 Mass. 202; Rex v. Chalkley, Russ. & R. 258.

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is unknown.[45] So, also, an indictment under a statute, for disturbing a family by offensive conduct, must allege what constituted the offensive conduct, and not merely follow the language of the act;[46] and indictments under the statutes punishing the obtaining of money by false tokens or false pretenses must always set out the particular false tokens or pretenses used.[47] And under a statute making it a crime to break open, or to counsel, aid, or assist in breaking open, any jail or place of confinement, it certainly would not be enough to follow the words of the statute, without specifying how the defendant aided or assisted, or what counsel he gave.[48] And an indictment alleging in the words of a statute that the defendant did knowingly aid a person named in procuring intoxicating liquor, to be disposed of for other purposes than those recognized as lawful by the laws of the state, is bad for not setting out the facts, and for not alleging that the defendant knew that the liquor was to be disposed of for an unlawful purpose, and for not alleging what that purpose was.[49]

So an indictment on a statute prohibiting the use of the United States mails in furtherance of a "scheme or artifice to defraud" must allege not only that the defendants had devised a scheme or artifice to defraud but must also state facts showing what the artifice was, wherein the fraud consisted, and how it was to be accomplished.[50]

Sometimes the court holds that the words used by the Legislature in the statute do not convey the intent the Legislature had in enacting the statute, and that certain words must be added to express that intent and describe the crime. In such cases the indictment must contain these words in order to charge the crime.[51]

[45] State v. Higgins, 53 Vt. 191.

[46] Finch v. State, 64 Miss. 461, 1 South. 630.

[47] 2 East, P. C. 837; Rex v. Mason, 1 Leach, Crown Cas. 487, 2 Term R. 581; Rex v. Munoz, 2 Strange, 1127; Rex v. Perrott, 2 Maule & S. 379.

[48] State v. Benjamin, 49 Vt. 101.

[49] Id.

[50] Etheredge v. U. S., 186 Fed. 434, 108 C. C. A. 356.

[51] In addition to the cases hereafter referred to, see Com. v. Collins, 2 Cush. (Mass.) 556; State v. Griffin, 89 Mo. 49, 1 S. W. 87;

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A city by-law punished any person having the care of certain cattle who should "permit or suffer the same to go at large or stop to feed on any street" within the city. A complaint thereon alleged that the defendant, having the care of two cows, "did permit and suffer the same to stop and feed" in certain streets, and it was held insufficient. "The offense," it was said, "is charged nearly in the words of the by-law. But it is not always sufficient to charge the offense in the words of the statute. We are first to ascertain by a careful examination of the statute what act the Legislature had in view, and intended to make penal, and then see if that act, thus ascertained, is charged in the complaint or indictment. If there is nothing in the context, or in other parts of the statute, or in statutes in pari materia, to control or modify the sense and meaning of the terms in which the offense is defined, then it may be presumed that the terms in the complaint are used in the same sense with those in the statute, and whatever that prohibits the complaint charges. In such case the offense may be described and charged in the words of the statute; otherwise it may be necessary to frame the complaint in such terms as to designate the offense intended with precision. The effective words declaring the penalty in this law are, 'no owner or person having the care of any cows,' etc., 'shall permit or suffer the same to stop to feed in the public streets.' But in looking at the enumeration, it is, 'any horses, cows, or other grazing animals.' Then upon the ordinary rule of construction, taking the whole clause together, it is manifest that it was intended to prohibit cattle to go at large in the streets, or to stop to feed in the streets, by grazing, by permitting them to stop for the purpose of feeding on the grass growing in the street. If this is the act prohibited, and the offense intended by the by-law to be punished, the complaint, we think, should in some form charge that the accused suffered and permitted his cows to stop on their way for the purpose of feeding. But this complaint does not so charge. Suppose the defendant had suffered his

Com. v. Slack, 19 Pick. (Mass.) 304; State v. Turnbull, 78 Me. 392, 6 Atl. 1.

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cows to eat grain from a trough or bucket standing in the street named. Such an act would be within the words of this complaint, but not the offense prohibited by this by-law." [52]

And in another case, an indictment charging, in the language of the statute, the malicious breaking of glass "in a certain building," without stating that the glass was a part of the building, was held bad, because from the context of the statute it was evident that it was only intended to punish the breaking of glass which was in a building in the sense of being a part of the building.[53]

As a general rule, if every allegation in an indictment may be taken to be true, and yet the defendant be guilty of no offense, then the indictment is insufficient, though it follows the very words of the statute.[54] Of course, this rule must be taken subject to the rules that facts necessarily implied need not be stated, and matters of defense need not be negatived.[55]

Often the statute does not set out the facts and circumstances necessary to constitute the crime for which it prescribes a punishment, but merely describes it by its common-law name, as "murder," "rape," "larceny," "burglary," "robbery," etc. An indictment based upon the statute must therefore describe the offense as at common law. It is not enough to charge it simply in the language of the statute.[56] Thus, under a statute punishing any person who "shall by force or violence, or by assault and putting in fear, feloniously rob, steal, and take from the person of another any money," etc., an indictment must, instead of merely following the language of the statute, allege that the money was the property of the person robbed, or of some third person,

[52] Com. v. Bean, 14 Gray (Mass.) 52.
[53] Com. v. Bean, 11 Cush. (Mass.) 414.
[54] Com. v. Harris, 13 Allen (Mass.) 539.
[55] See Jones v. Reg., Jebb & B. 161.
[56] Reg. v. Nott, 4 Q. B. 783; Reg. v. Powner, 12 Cox, Cr. Cas. 235; Tully v. Com., 4 Metc. (Mass.) 358; State v. Simpson, 73 N. C. 269; State v. Higgins, 53 Vt. 191; State v. Absence, 4 Port. (Ala.) 397; State v. Stedman, 7 Port. (Ala.) 495; Bates v. State, 31 Ind. 72; Com. v. Stout, 7 B. Mon. (Ky.) 247; Davis v. State, 39 Md. 355.

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and that it was carried away by the defendant; since these facts are necessary to constitute the offense intended to be punished. The statute does not set forth, nor is it intended to set forth fully, directly, and expressly, all that is necessary to constitute the offense.[57]

It is sufficient to pursue the very words of the statute if, by doing so, the act in the doing of which the offense consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity. In many cases no allegation of anything more than the words of the statute ex vi terminorum import is necessary in order to show that the defendant has committed the offense, and to charge the offense with certainty. Here it is always sufficient to charge the offense in the words of the statute.[58] The indictment is sufficient in these cases, not because it uses the words of the statute, but because, in using those words, it states everything necessary to constitute the offense, and states it with sufficient certainty. Thus, under a statute declaring it an offense to "keep a house of ill fame, resorted to for the purpose of prostitution or lewdness," it was held sufficient to follow the language of the statute, without further alleging, according to precedents, that the house was resorted to by divers citizens, men as well as women, and that the defendant kept and maintained said house for her own lucre and gain.[59] So, where a statute punishes "every person, who

[57] Com. v. Clifford, 8 Cush. (Mass.) 215. But see Rex v. Rossiter, Jebb, Crown Cas. 50. In Sumpter v. State, 62 Fla. 98, 57 South. 202, it was held that an indictment for murder was not insufficient for failing to state that the act causing death was "an act imminently dangerous to another," the words used in the statute, but that it was sufficient to describe the act, leaving it to the law and the court to say whether such act was dangerous to another.

[58] 2 Hawk. P. C. c. 25, § 111; Com. v. Ashley, 2 Gray (Mass.) 357; U. S. v. Mills, 7 Pet. 142, 8 L. Ed. 636; People v. Taylor, 3 Denio (N. Y.) 91; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. St. Rep. 452; State v. Click, 2 Ala. 26; State v. Scribner, 2 Gill & J. (Md.) 246; State v. Cassel, 2 Har. & G. (Md.) 407; State v. Kessler-ing, 12 Mo. 565; Com. v. Harris, 13 Allen (Mass.) 534; Huffman v. Com., 6 Rand. (Va.) 685; U. S. v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; State v. Lockbaum, 38 Conn. 400; State v. Jackson, 39 Conn. 229.

[59] Com. v. Ashley, 2 Gray (Mass.) 356.

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shall willfully and maliciously administer poison" to any horse, the language of the statute is sufficient, because those words ex vi terminorum import all that is necessary to a legal description of the offense. It need not be further averred that the poison was administered with intent to kill or injure the horse, or with any other intent than the words "willfully and maliciously" import, nor that the horse was injured or killed.[60]

Negativing Exceptions and Provisos

We come now to treat of the necessity to negative in an indictment exceptions or provisos [61] contained in the statute on which it is founded, or in some other statute which applies to the offense. As we have seen, the indictment must state everything necessary to make out the offense.[62] This rule admits of no departure from it, and if, therefore, a statutory offense cannot be correctly described without negativing an exception or proviso, then such a negative is necessary. "Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment; and if they cannot be in any case without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed." [63] On the other hand as we have

[60] Com. v. Brooks, 9 Gray (Mass.) 302.

[61] "Doubtless there is a technical distinction between an exception and a proviso, as an exception ought to be of that which would otherwise be included in the category from which it is excepted; and the office of a proviso is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation. But there are a great many examples where the distinction is disregarded, and where the words are used as if they were of the same signification." U. S. v. Cook, 17 Wall. 168, 21 L. Ed. 538, citing Gurley v. Gurley, 8 Clark & F. 764; Minis v. U. S., 15 Pet. 445, 10 L. Ed. 791.

[62] Ante, p. 181.

[63] U. S. v. Cook, 17 Wall. 168, 21 L. Ed. 538; State v. Renkard, 150 Mo. App. 570, 131 S. W. 168.

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seen, an indictment need not anticipate and negative matters of defense, for they must come from the defendant.[64] By force of these two rules, the rule of pleading as regards the negativing of exceptions and provisos contained in a statute is as follows:

Where the statute on which an indictment is founded, or some other statute, contains exceptions or provisos which are not so incorporated with the clause or clauses of the statute which define the offense that they enter into the description of the offense, and cannot be separated from it, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos, for the offense can be accurately and clearly described without doing so. "A prima facie case is stated, and it is for the party for whom matter of excuse is furnished by the statute to bring it forward in his defense." [65]

Where, however, the exceptions are themselves stated in the clause which defines the offense, and, in addition to this, are so incorporated with it that one cannot be read without the other, or if, even when contained in a subsequent clause, section, or statute, they are clothed in such language, and so incorporated with the words used to define the offense, that they become a part of the definition, then it is necessary to negative them in order that the description of the offense in the indictment may correspond with the description in the statute.[66]

[64] Ante, p. 196.

[65] Com. v. Hart, 11 Cush. (Mass.) 130; 2 Hawk. P. C. c. 25, § 112; 2 Hale, P. C. 171; Rex v. Pemberton, 2 Burrows, 1035; Rex v. Bryan, 2 Strange, 1101; Rex v. Baxter, 5 Term R. 83; Gee Wo v. State, 36 Neb. 241, 54 N. W. 513; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249; Jefferson v. People, 101 N. Y. 19, 3 N. E. 797; Hewitt v. State, 121 Ind. 245, 23 N. E. 83; Matthews v. State, 2 Yerg. (Tenn.) 233; Com. v. Shannihan, 145 Mass. 99, 13 N. E. 347; State v. Adams, 6 N. H. 533; Com. v. Hill, 5 Grat. (Va.) 682; Carson v. State, 69 Ala. 235; State v. Sommers, 3 Vt. 156; Barber v. State, 50 Md. 170; Swartzbaugh v. People, 85 Ill. 457; Beasley v. People, 89 Ill. 571; State v. Jackson, 1 Lea (Tenn.) 680; State v. O'Brien, 74 Mo. 549; Kopke v. People, 43 Mich. 41, 4 N. W. 551; Nelson v. U. S. (C. C.) 30 Fed. 112; Harding v. People, 10 Colo. 387, 15 Pac. 727; State v. Maddox, 74 Ind. 105.

[66] Com. v. Hart, supra; 2 Hale, P. C. 170; Rex v. Jarvis, 1 Bur-

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"Text writers and courts of justice have sometimes said that, if the exception is in the enacting clause, the party pleading must show that the accused is not within the exception; but, where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defense, and must be shown by the accused.[67] Undoubtedly that rule will frequently hold good, and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute defining the offense may be so entirely separable from the exception that all the ingredients constituting the offense may be accurately and clearly alleged without any reference to the exception.[68] Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section, or statute. Obviously, such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for

rows, 148; Steel v. Smith, 1 Barn. & Ald. 99; Gee Wo v. State, 36 Neb. 241, 54 N. W. 513; Com. v. Maxwell, 2 Pick. (Mass.) 141; Hirn v. State, 1 Ohio St. 15; Com. v. Thurlow, 24 Pick. (Mass.) 374; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249; State v. Reynolds, 2 Nott & McC. (S. C.) 365; Jefferson v. People, 101 N. Y. 19, 3 N. E. 797; State v. Munger, 15 Vt. 290; Carson v. State, 69 Ala. 235; Matthews v. State, 2 Yerg. (Tenn.) 233; Barber v. State, 50 Md. 170; State v. Webster, 10 N. J. Law, 293; Beasley v. People, 89 Ill. 571; State v. Bloodworth, 94 N. C. 919; Jensen v. State, 60 Wis. 577, 19 N. W. 374; State v. O'Brien, 74 Mo. 549; People v. Telford, 56 Mich. 541, 23 N. W. 213; State v. Meek, 70 Mo. 355, 35 Am. Rep. 427; State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618; Chapman v. State, 63 Tex. Cr. R. 513, 140 S. W. 441.

[67] See U. S. v. Nelson (D. C.) 29 Fed. 202; Bell v. State, 104 Ala. 79, 15 South. 557.

[68] Citing Com. v. Hart, 11 Cush. (Mass.) 132.

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the want of clearness and certainty.[69] * * * Commentators and judges have been sometimes led into error by supposing that the words 'enacting clause,' as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and, if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading; but, if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is a matter of defense, and must be shown by the other party, though it be in the same section, or even in the succeeding sentence." [70]

Whether, therefore, exceptions in a statute are to be negatived in pleading, or whether they are a mere matter of defense, depends upon their nature, and not upon their location with reference to the enacting clause.[71] "In saying that an exception must be negatived when made in the enacting clause, reference is not made to sections of the statute, as they are divided in the act; nor is it meant that, because the exceptions are contained in the section containing the enactment, it must for that reason be negatived. This is not the meaning of the rule. The question is whether the exception is so incorporated with, and becomes a part of, the enactment, as to constitute a part of the definition or description of the offense; for it is immaterial whether the proviso be contained in the enacting clause of

[69] Citing State v. Abbey, 29 Vt. 66, 67 Am. Dec. 754; 1 Bish. Cr. Proc. (2d Ed.) § 639, note 3. See, also, State v. Carruth, 85 Vt. 271, 81 Atl. 922.

[70] U. S. v. Cook, 17 Wall. 168, 21 L. Ed. 538.

[71] State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754; U. S. v. Cook, supra; State v. O'Donnell, 10 R. I. 472; State v. Rush, 13 R. I. 198; State v. Walsh, 14 R. I. 507; and cases above cited.

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section, or be introduced in a different manner. It is the nature of the exception, and not its location, which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute. In either case, the only inquiry arises whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it should be negatived; otherwise it is a matter of defense." [72]

In an indictment, for instance, under a statute declaring that the receiver of stolen goods shall be liable as for a misdemeanor if the principal be not taken, it is not necessary to allege that the principal has not been taken.[73] So, under a statute in the time of Queen Elizabeth, punishing persons for not going to church, "having no reasonable excuse to be absent," it was held unnecessary to negative the existence of an excuse, since this was matter of defense.[74] And under a statute providing in the enacting clause that no person shall sell intoxicating liquors "without being duly authorized," and in a subsequent clause stating, "provided, that nothing in this act shall be construed to prevent the manufacture or sale of cider for other purposes than that of a beverage, or the sale and use of the fruit of the vine for the commemoration of the Lord's supper," and in another section providing that the act shall not apply to the importation of liquor in original packages, it would be necessary to allege that the defendant was not authorized to make the sales with which he is charged, but it would not be necessary to allege that the liquors were not imported in original packages, or that they were not cider for other purposes than a beverage, or were not the fruit of the vine for commemoration of the Lord's supper.[75]

[72] State v. Abbey, supra.

[73] Rex v. Taylor, 2 Ld. Raym. 1370. And see Rex v. Baxter, 5 Term R. 83, 2 Leach, Crown Cas. 578.

[74] 2 Hawk. P. C. c. 25, § 112.

[75] Com. v. Hart, 11 Cush. (Mass.) 130; Com. v. Byrnes, 126 Mass. 248.

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On the other hand, in an indictment under a statute which provided that if any person should take, receive, pay, or put off any counterfeit milled money, or any milled money whatsoever unlawfully diminished, "and not cut in pieces," for a lower rate than its nominal value, he should be guilty of a felony, it was held necessary to state that the money was not cut in pieces.[76] It would also be necessary to state that the money was milled money. So, where a statute provides that "no person shall do any manner of labor, business, or work, except only work of necessity or charity, on the Lord's day," or that "no person shall travel on the Lord's day, except from necessity or charity," the exception must be negatived. "Here the exception is in the enacting clause, and that clause cannot be read without reading the exception. In an indictment on either of these sections it is doubtless necessary to negative the exception, otherwise the case provided for is not made out. Labor or traveling merely is not forbidden, but unnecessary labor and traveling, and labor and traveling not demanded by charity. The absence of necessity and charity is a constituent part of the acts prohibited, precisely as if the statute had, in totidem verbis, forbidden unnecessary labor and traveling, and labor and traveling not demanded by charity."[77] So, also, an indictment under a statute making it unlawful to catch certain kinds of lobsters, and requiring them, if caught, to be liberated alive, under a certain penalty for each lobster "so caught * * * or in possession not so liberated," must negative that the lobsters were liberated alive.[78] And under a statute making it unlawful to remove buildings from land on which there is an unsatisfied mortgage, without first obtaining permission from the mortgagee, an indictment must negative such permission.[79]

[76] Rex v. Palmer, 1 Leach, Crown Cas. 102.

[77] Com. v. Hart, 11 Cush. (Mass.) 135. But under a statute prohibiting the keeping open of a shop on Sunday, and making, in a separate section, certain exceptions to the general provision, an indictment need not negative the exceptions. Com. v. Shannihan, 145 Mass. 99, 13 N. E. 347.

[78] State v. Trefethen (Me.) 8 Atl. 547.

[79] State v. Decker, 52 Kan. 193, 34 Pac. 780. And see Blackman v. State, 98 Ala. 77, 13 South. 316.

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The word "except," as will have been seen from these illustrations, is not necessary in the statute in order to constitute an exception within the rules stated. The words "unless," "other than," "not being," "not having," etc., have the same legal effect, and require the same form of pleading.[80]

It has been said that it is not necessary to negative exceptions and provisos simply because the purview or enacting clause expressly notices them.[81] This is sometimes—perhaps generally—true,[82] but it is not necessarily so.[83] The contrary has also been said to be the rule. "There is a middle class of cases," said the Massachusetts court, "namely, where the exception is not, in express terms, introduced into the enacting clause, but only by reference to some subsequent or prior clause, or to some other statute, as when the words 'except as hereinafter mentioned,' or other words referring to matter out of the enacting clause, are used. The rule in these cases is that all circumstances of exemption and modification, whether applying to the offense or to the person, which are incorporated by reference with the enacting clause, must be distinctly negatived. 'Verba relatur inesse videntur.'" [84] But neither is the rule thus stated necessarily true. Indeed, it is generally otherwise.[85] Each case must be determined by applying the rule heretofore stated, and will depend upon whether because of the language, or otherwise, the exception enters into and becomes a part of the definition of the offense.[86]

[80] Com. v. Hart, 11 Cush. (Mass.) 136; Gill v. Scrivens, 7 Term R. 27; Spieres v. Parker, 1 Term R. 141; Rex v. Palmer, 1 Leach, Crown Cas. 120; Com. v. Maxwell, 2 Pick. (Mass.) 139; State v. Butler, 17 Vt. 145.

[81] 1 Chit. Cr. Law, 283.

[82] 2 Hawk. P. C. c. 25, § 113; Steel v. Smith, 1 Barn. & Ald. 94; Ward v. Bird, 2 Chit. 582; Com. v. Tuttle, 12 Cush. (Mass.) 502; Hart v. Cleis, 8 Johns. (N. Y.) 41; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249; Fleming v. People, 27 N. Y. 330; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754.

[83] Rex v. Pratten, 6 Term R. 559; Vavasour v. Ormrod, 9 Dowl. & R. 597.

[84] Com. v. Hart, 11 Cush. (Mass.) 137.

[85] Note 83, supra; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249.

[86] Ante, p. 317.

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When Indictment Professedly on a Statute is Good at Common Law

It was at one time held that where an indictment was professedly framed upon a statute, and concluded contra formam statuti, if it was insufficient, under the statute, for failure to charge the statutory offense with accuracy, it could not be maintained at common law;[87] but it is now well settled that the conclusion may be rejected as surplusage, and that, where the indictment upon the facts stated may be supported at common law, judgment may be given against the defendant for the common-law offense.[88] It may be, however, that the common law is altogether superseded by the statute, so that the offense can no longer be punished except under the statute.[89]

Conclusion of Indictment—Statute or Common Law

We shall in another place consider the conclusion of indictments based upon statutes,[90] and the question whether an indictment must count upon a statute or be based upon the common law.[91]

[87] 1 Chit. Cr. Law, 286.

[88] 1 Chit. Cr. Law, 286; 2 Hale, P. C. 191; 2 Hawk. P. C. c. 25, § 115; Bennet v. Talbot, 1 Salk. 212, 213, 1 Ld. Raym. 149; Rex v. Mathews, 5 Term R. 162, 2 Leach, Crown Cas. 585; Reg. v. Wigg, 2 Salk. 460, 2 Ld. Raym. 1163; Rex v. Harris, 4 Term R. 202; Com. v. Hoxey, 16 Mass. 385; Haslip v. State, 4 Hayw. (Tenn.) 273; People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; State v. Phelps, 11 Vt. 116, 34 Am. Dec. 672; Gregory v. Com., 2 Dana (Ky.) 417; Davis v. State, 3 Har. & J. (Md.) 154; State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646; Southworth v. State, 5 Conn. 325; Kilbourn v. State, 9 Conn. 560.

[89] Clark, Cr. Law, 29, 30.

[90] Post, p. 356.

[91] Post, p. 358.

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CHAPTER IX

PLEADING—THE ACCUSATION (Continued)

99–103. Duplicity.
104–110. Joinder of Counts—Election.
111–113. Joinder of Parties.
114. Conclusion of Indictment.
115–116. Amendment.
117. Aider by Verdict.
118. Formal Defects Cured by Statute.

DUPLICITY

99. Duplicity is the joinder of two or more offenses in the same count. It renders the indictment bad on demurrer or on motion to quash the indictment, and in some cases even on motion in arrest of judgment or on error or appeal.

100. A count is not double because it charges more acts than one, or acts with respect to more persons than one, if such acts were all part of the transaction constituting the offense charged.

101. Nor is a count double where it charges, in addition to the specific act, aggravating circumstances, which merely affect the penalty.

102. Nor is a count double where one of the offenses is insufficiently charged.

103. Allegations which may be rejected as surplusage do not render a count double.

The question of duplicity is often treated with joinder of counts, under the head of "Joinder of Offenses," but this is confusing. And there are judgments of the courts in which the joinder of offenses in separate counts of an indictment is spoken of as duplicity. This is wrong. Duplicity is the

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joinder of more than one offense in the same count. The term does not apply to several counts, each of which charges only one offense, however distinct the offenses may be. An indictment consisting of a single count, charging that the defendant robbed and then murdered a person would be bad for duplicity, but an indictment charging the murder in one count and the robbery in another would not. There would be a misjoinder of counts, but no duplicity, as that term is used in the law.

It is well settled that an indictment is bad on motion to quash or demurrer if it charges more than one offense in a single count, even though the offenses are of the same nature, and arise out of the same facts.[1] This rule applies not only to indictments for common-law offenses, but to indictments for statutory offenses as well. Thus an indictment charging in the same count two distinct offenses, described in two distinct sections of a statute, and for which distinct and different fines are provided, is bad for duplicity. It was so held where an indictment charged in the same count the offense of rudely behaving in a house of public worship, which offense was defined in one section of a statute, and made punishable by a fine of not more than forty nor less than five shillings, and the interruption of public worship, which another section of the statute made punishable by a fine of not more than ten pounds, nor less than twenty shillings.[2]

[1] Com. v. Symonds, 2 Mass. 163; State v. Nelson, 8 N. H. 163; State v. Smith, 61 Me. 386; People v. Wright, 9 Wend. (N. Y.) 193; Miller v. State, 5 How. (Miss.) 250; Heineman v. State, 22 Tex. App. 44, 2 S. W. 619; State v. Haven, 59 Vt. 399, 9 Atl. 841; People v. Jackman, 96 Mich. 269, 55 N. W. 809; People v. Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578.

[2] Com. v. Symonds, 2 Mass. 163. So where one section of a statute punished any person who should, by application to a woman, of any means, procure an abortion, and another section punished as an accomplice any person who should furnish the means for procuring an abortion, an indictment charging that the defendant furnished to A., a pregnant woman, an instrument for the purpose, on A.'s part, of procuring an abortion of herself therewith, etc., and did, by means of such instrument, procure an abortion of A., was held bad for duplicity. Wandell v. State (Tex. Cr. App.) 25 S. W. 27.

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And since, under a statute prohibiting the sale of intoxicating liquors each sale is a separate offense, an indictment charging several sales, or laying a sale with a continuando, is bad for duplicity.[3]

This rule does not prevent the charging in one count of more acts than one, or of acts with respect to more persons than one, if such acts were all part of a transaction constituting one offense.[4] Thus, in an indictment for burglary, there is no duplicity in a count that charges a breaking and an entering; these two acts being necessary to constitute the crime of burglary. Nor is there duplicity in an indictment for fraudulently obtaining money because it embraces in one count various sums obtained, the sums so obtained making up the aggregate sum charged as having been fraudulently obtained.[5]

The rule was applied in Massachusetts to an indictment charging an offer to sell, and an actual sale of, a lottery ticket, either of which acts was made an offense by statute. "It is true," it was said, "that an offer to sell, without selling, a ticket, is an offense by the statute; but an offer to sell and actually selling is but one offense. A sale ex vi termini includes an offer to sell." [6] So, where an indictment charged the defendants with singing and publishing divers scandalous, obscene, and libelous songs, the court held that but one offense was charged; that, though the publishing of any one of the songs would have been an offense, several being published at the same time constituted but one offense.[7]

[3] People v. Hamilton, 101 Mich. 87, 59 N. W. 401. So of an indictment that on a certain day, and on divers days between that and a subsequent date, the defendant did carry on a lottery. State v. Dennison, 60 Neb. 192, 82 N. W. 628.

[4] Barnes v. State, 20 Conn. 232; State v. Palmer, 35 Me. 9; Farrell v. State, 54 N. J. Law, 416, 24 Atl. 723; Francisco v. State, 24 N. J. Law, 30; Jillard v. Com., 26 Pa. 169; State v. Hodges, 45 Kan. 389, 26 Pac. 676; State v. Parker, 42 La. Ann. 972, 8 South. 473; State v. Baldwin, 79 Iowa, 714, 45 N. W. 297; State v. Stout, 112 Ind. 245, 13 N. E. 715; Early v. Com., 86 Va. 921, 11 S. E. 795; U. S. v. Eccles (C. C.) 181 Fed. 906.

[5] Young v. State, 4 Ga. App. 827, 62 S. E. 558.

[6] Com. v. Eaton, 15 Pick. (Mass.) 273.

[7] Rex v. Benfield, 2 Burrows, 980.

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And in an indictment for libel the defendant may be charged in one count with writing, publishing, and causing to be published a libel.[8]

If, therefore, an offense, whether it be a statutory or a common-law offense, is cumulative with respect to the acts done, although any one of those acts may be sufficient to constitute the crime, the cumulative offense may be charged.[9] Under this rule, a complaint alleging that the defendant permitted swine "to go upon and injure" the sidewalks in violation of a city by-law forbidding any person to permit swine "to go upon any sidewalk in the city, or otherwise occupy, obstruct, injure, or incumber any such sidewalk," was sustained against objection for duplicity.[10] And, under a statute prescribing a punishment for any person who should "willfully destroy, deface, or injure" a register of baptisms, etc., it was decided that a single offense only was charged in an indictment which alleged that the defendant willfully destroyed, defaced, and injured such a register.[11] So, under a statute prescribing a punishment for every person who should "buy, receive, or aid in the concealment of any stolen money, goods, or property, knowing the same to have been stolen," it was held that an indictment which alleged that the defendant did buy, receive, and aid in the concealment of certain enumerated goods, knowing them to be stolen, charged only one offense.[12] And where a statute provides a punishment for forging, causing to be forged, or assisting in the forgery of instruments, an indictment charging a person with forging, and causing to be forged, and assisting in the forgery of an instrument,

[8] Rex v. Horne, Cowp. 672.

[9] State v. Haney, 19 N. C. 403; State v. Nelson, 29 Me. 329; State v. Matthews, 42 Vt. 542; State v. Conner, 30 Ohio St. 405; Hoskins v. State, 11 Ga. 92; Comer v. State, 26 Tex. App. 509, 10 S. W. 106; Com. v. Hall, 4 Allen (Mass.) 305; State v. Murphy, 47 Mo. 274; Hinkle v. Com., 4 Dana (Ky.) 518; State v. Wood, 14 R. I. 151; State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

[10] Com. v. Curtis, 9 Allen (Mass.) 266.

[11] Reg. v. Bowers, 1 Denison, Crown Cas. 22.

[12] Stevens v. Com., 6 Metc. (Mass.) 241; State v. Nelson, 29 Me. 329. But see State v. Murphy, 6 Ala. 845.

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charges but one offense.[13] There are many similar decisions.[14]

When one crime is included within another, so that it is necessary, in charging the greater offense, to charge the lesser, the indictment for the greater is not double because it charges the lesser.[15] A familiar example is the crime of assault and battery. A battery includes an assault. An indictment in one count for an assault and battery growing out of the same transaction is therefore not bad for duplicity.[16] A count for assault, with a deadly weapon, with

[13] Rex v. Fauntleroy, 1 Moody, Crown Cas. 52; State v. Morton, 27 Vt. 314, 65 Am. Dec. 201.

[14] See 2 Gabb. Cr. Law, 234; Com. v. Hope, 22 Pick. (Mass.) 1; Hinkle v. Com., 4 Dana (Ky.) 518. Charge that the defendant "did unlawfully keep, offer for sale, and sell" adulterated milk, Com. v. Nichols, 10 Allen (Mass.) 199; that he "unlawfully did expose and keep for sale intoxicating liquors," Com. v. Curran, 119 Mass. 206; that he "did set up and promote" an unlawful exhibition, or a lottery, etc., Com. v. Twitchell, 4 Cush. (Mass.) 74; Com. v. Harris, 13 Allen (Mass.) 534; charge of assault with intent to rape, and a battery, Com. v. Thompson, 116 Mass. 346; charge of administering or causing to be administered poison, Ben v. State, 22 Ala. 9, 58 Am. Dec. 234; charge of selling liquor in a place where women are both employed and allowed to assemble, State v. Marion, 14 Mont. 458, 36 Pac. 1044; charge of having in custody a forged writing and uttering the same, State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550; charge of "shoot, wound and kill" cattle, State v. Currier, 225 Mo. 642, 125 S. W. 461; charge of being a "pickpocket and thief and having no visible means of support," Com. v. Ellis, 207 Mass. 572, 93 N. E. 823; charge of receiving an order for liquor, and contracting for the sale of same, State v. Sherman, 81 Kan. 874, 107 Pac. 33, 135 Am. St. Rep. 403. But distinct acts of adultery, though committed with the same person, cannot be charged in one count, for they are separate crimes. Com. v. Fuller, 163 Mass. 499, 40 N. E. 764.

[15] The rule is thus expressed in Com. v. Tuck, 20 Pick. (Mass.) 360: "Where two crimes are of the same nature, and necessarily so connected that they may, and, when both are committed, they must, constitute but one legal offense, they should be included in one charge."

[16] Com. v. Tuck, supra; Bull. N. P. 15; Com. v. Eaton, 15 Pick. (Mass.) 275. And see State v. Inskeep, 49 Ohio St. 228, 34 N. E. 720. But an indictment charging an assault and battery and an aggravated assault with a dangerous weapon with intent to do great bodily harm was held bad. State v. Marcks, 3 N. D. 532, 58 N. W. 25; as was an indictment charging monopolizing, and attempting to monopolize, U. S. v. American Naval Stores Co. (C. C.) 186 Fed. 592.

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intent to murder, is not double, though it charges that which, separately, might be three distinct offenses.[17] So a count charging assault, battery, and false imprisonment has been held not to be open to the objection of duplicity.[18]

It is on a mistaken application of this principle that the rule has become established that in burglary and statutory breakings an indictment is not double that charges in one count a breaking and entering with intent to commit a felony—larceny, for instance—and the actual commission of the felony.[19] An indictment is not double because it charges both conspiracy and the overt act, for the conspiracy is merged in the act.[20] Where two or more persons are injured by one blow, one offense only is committed, and a charge of assault and battery on both of them is not double.[21] And if a person assaults two persons, and robs one of them of one shilling, and the other of two shillings, at the same time, he may be charged in the same count with the assault upon and the robbery of both of them.[22]

[17] People v. Beam, 66 Cal. 394, 5 Pac. 677.

[18] Francisco v. State, 24 N. J. Law, 30.

[19] Com. v. Hope, 22 Pick. (Mass.) 1; Jennings v. Com., 105 Mass. 587; Rex v. Withal, 1 Leach, Crown Cas. 102; Reg. v. Bowen, 1 Denison, Crown Cas. 28; Speers v. Com., 17 Grat. (Va.) 570; Vaughan v. Com., 17 Grat. (Va.) 576; State v. Johnson, 3 Hill (S. C.) 1; State v. Brady, 14 Vt. 353; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340; Walker v. State, 97 Ala. 85, 12 South. 83; Farris v. Com., 90 Ky. 637, 14 S. W. 681; Turner v. State, 22 Tex. App. 42, 2 S. W. 619; Becker v. Com. (Pa. Sup.) 9 Atl. 510; State v. Nagle, 136 Mo. 45, 37 S. W. 821; Contra, State v. Smith, 2 N. D. 515, 52 N. W. 320; State v. Robertson, 48 La. Ann. 1024, 20 South. 166. A general verdict of guilty is a conviction of the burglary, and judgment may be entered for that offense. On the other hand, on such a verdict, the prosecuting attorney may enter a nolle prosequi on so much of the indictment as charges the breaking and entering, and the defendant may be sentenced for the larceny. Jennings v. Com., supra; State v. Smith, 2 N. D. 515, 52 N. W. 320.

[20] Hoyt v. People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239; State v. Grant, 86 Iowa, 216, 53 N. W. 120; Anthony v. Com., 88 Va. 847, 14 S. E. 834.

[21] Rex v. Benfield, 2 Burrows, 980 (overruling Rex v. Clendon, 2 Ld. Raym. 1572); Com. v. McLaughlin, 12 Cush. (Mass.) 619; Com. v. O'Brien, 107 Mass. 208; Anon., Lofft, 271.

[22] Steph. Dig. Cr. Proc. 153; Reg. v. Giddins, Car. & M. 634.

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There is no duplicity in a count for libel on several persons by the same publication;[23] nor by the weight of authority, in a count for the larceny of several articles from the same person, or even from different persons, at the same time and place;[24] nor in a count for the unlawful sale of liquor to several persons at the same time and place.[25]

And if an act is made criminal by the common law or by statute when committed with any one of several specific intents—as is the case with burglary—a count charging the act with several intents is not double.[26] Under a statute punishing any one who shall bring into a town intoxicating liquor "with intent to sell the same himself, or have the same sold by another, or having reasonable cause to believe that the same is to be sold in violation of law," an indictment may charge all of these intents in a single count.[27]

[23] Rex v. Jenour, 7 Mod. 400; Rex v. Benfield, 2 Burrows, 983; Tracy v. Com., 87 Ky. 578, 9 S. W. 822.

[24] Com. v. Williams, 2 Cush. (Mass.) 588; State v. Stevens, 62 Me. 284; State v. Cameron, 40 Vt. 555; State v. Williams, 10 Humph. (Tenn.) 101; State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253; State v. Wagner, 118 Mo. 626, 24 S. W. 219; Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179. Some courts hold that it is otherwise if the articles are charged to have been stolen from different persons. State v. Thurston, 2 McMul. (S. C.) 382; Com. v. Andrews, 2 Mass. 409; State v. Newton, 42 Vt. 537. But see, contra, State v. Nelson, 29 Me. 329; State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253; Ben v. State, 22 Ala. 9, 58 Am. Dec. 234; Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179; State v. Morphin, 37 Mo. 373; State v. Merrill, 44 N. H. 624; State v. Warren, 77 Md. 121, 26 Atl. 500, 39 Am. St. Rep. 401; Fisher v. Com., 1 Bush (Ky.) 212, 89 Am. Dec. 620; State v. Egglesht, 41 Iowa, 574, 20 Am. Rep. 612; Fulmer v. Com., 97 Pa. 503; State v. Ward, 19 Nev. 297, 10 Pac. 133; Alexander v. Com., 90 Va. 809, 20 S. E. 782; People v. Johnson, 81 Mich. 573, 45 N. W. 1119; State v. Smith (Ohio Com. Pl.) 23 Wkly. Law Bul. 85. If the articles are charged to have been stolen at different times, the count is bad for duplicity. State v. Newton, 42 Vt. 537.

[25] State v. Bielby, 21 Wis. 206; State v. Boughner, 5 S. D. 461, 59 N. W. 736; State v. Anderson, 3 Rich. (S. C.) 172. But see Com. v. Holmes, 119 Mass. 198.

[26] State v. Christmas, 101 N. C. 749, 8 S. E. 361; State v. Fox, 80 Iowa, 312, 45 N. W. 874, 20 Am. St. Rep. 425.

[27] Com. v. Igo, 158 Mass. 199, 33 N. E. 339. See, also, People v. Swaile, 12 Cal. App. 192, 107 Pac. 134.

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There is no duplicity in a count that charges one offense to have been committed by different methods or means.[28]

Certainly a count can never be bad for duplicity where it merely charges, in addition to the specific act, aggravating circumstances, which merely affect the penalty, as, for instance, where it charges a former conviction for a similar offense.[29]

Allegations which may be rejected as surplusage cannot render an indictment bad for duplicity.[30] And if an indictment attempts to set out two distinct offenses in a single count, but sets out one of them insufficiently, it is not double, for duplicity is charging two crimes, and a crime insufficiently charged is not charged at all.[31]

Where the charge is such that it would be sustained by proof of any one of a number of similar offenses the court should not allow them all to be proved and submitted to the jury, but should at the proper time require the prosecuting officer to elect upon which act he will rely. This question

[28] In Andersen v. U. S., 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116, an indictment for murder charged in one count that the defendant assaulted the deceased with a pistol by the discharge of which he inflicted on him several "grievous, dangerous, and mortal wounds," and that he did "cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown" the deceased, of which said mortal wounds, casting, throwing, plunging, sinking and drowning the deceased "then and there instantly died." The court held the count was not bad for duplicity. See, also, Com. v. Brown, 14 Gray (Mass.) 419; Thomas v. State (Tex. Cr. App.) 26 S. W. 724; State v. McDonald, 67 Mo. 13; Heath v. State, 91 Ga. 126, 16 S. E. 657; State v. O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; People v. Casey, 72 N. Y. 393. Charge of use of different means in committing abortion. Com. v. Brown, supra. The different means so charged must not render the indictment repugnant. State v. O'Neil, supra. If they are inconsistent, different counts should be used. Post, p. 331.

[29] State v. Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542; Reg. v. Clark, 6 Cox, Cr. Cas. 210.

[30] Com. v. Simpson, 9 Metc. (Mass.) 138; Com. v. Tuck, 20 Pick. (Mass.) 356; Green v. State, 23 Miss. 509; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340; State v. Comings, 54 Minn. 359, 56 N. W. 50; Com. v. Brown, 14 Gray (Mass.) 429; State v. Flanders, 118 Mo. 227, 23 S. W. 1086; Griffin v. State (Tex. Cr. App.) 20 S. W. 552.

[31] State v. Palmer, 35 Me. 9; State v. Henn, 39 Minn. 464, 40 N. W. 564. And see the cases above cited.

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frequently arises in prosecutions for unlawful sale of intoxicating liquors. By the weight of authority, the prosecuting officer cannot go to the jury on proof of a number of separate and distinct sales, either one of which would sustain the charge; but should, when the evidence discloses several sales, be required to elect upon which sale he will rely.[32] This, of course, could not apply to prosecutions for liquor nuisance.[33] The question will be further considered in another place.[34]

Effect of Duplicity

There is some conflict of opinion as to the effect of duplicity. By the weight of authority, where the two offenses charged are distinct in kind, and require distinct punishments, the objection may be raised even after a verdict of guilty, by motion in arrest of judgment, or on error or appeal.[35] On the other hand, where the two offenses are simi-

[32] King v. State, 66 Miss. 502, 6 South. 188; State v. Crimmins, 31 Kan. 376, 2 Pac. 574; State v. Chisnell, 36 W. Va. 659, 15 S. E. 412; Lebkovitz v. State, 113 Ind. 26, 14 N. E. 363, 597. There is some conflict of opinion on this point. Sanders v. State, 88 Ga. 254, 14 S. E. 570. The rule does not prevent evidence of several sales, but merely requires an election after the several sales have been disclosed. State v. Chisnell, supra.

[33] State v. Estlinbaum, 47 Kan. 291, 27 Pac. 996; State v. Lund, 49 Kan. 209, 30 Pac. 518. "In the present case it was not necessary for the state to prove any sale, but only to prove that the defendant kept a place for the unlawful sale of intoxicating liquors; but in order to prove that the defendant kept such a place, and that the liquors were in fact kept for sale, the state had the right to prove that the defendant actually sold them at such place. In a case like the present the state may prove as many sales as it chooses, provided they are unlawful sales of intoxicating liquors made by the defendant at the place charged." State v. Estlinbaum, supra.

[34] Post, p. 398.

[35] Com. v. Holmes, 119 Mass. 198; Com. v. Symonds, 2 Mass. 163; State v. Nelson, 8 N. H. 163; People v. Wright, 9 Wend. (N. Y.) 193. This rule has been applied, for instance, where a count charged the offense of rudely behaving in a church, which offense was defined in one section of a statute, and made the subject of a certain fine as punishment, and also the offense of interrupting public worship, which another section of the statute made punishable by a different fine, Com. v. Symonds, 2 Mass. 163; and where a count charged the forging of a mortgage and of a receipt indorsed thereon, which were distinct offenses, subject to different punishments, People v. Wright,

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lar, the only reason against joining them in one count is that it subjects the defendant to confusion and embarrassment in his defense, and the objection is not open after a verdict of guilty. It must be raised by demurrer, motion to quash the indictment, or to compel the prosecutor to elect upon which charge he will proceed; and the fault is cured by his electing to proceed upon one charge only, and entering a nolle prosequi as to the other, or by verdict.[36] This distinction is not expressly drawn in all of the cases, but is based on sound reasons, and will, no doubt, be generally applied in proper cases. The student should consult the statutes and decisions in his own state.

JOINDER OF COUNTS—ELECTION

104. SAME OFFENSE—Any number of counts charging the same offense in different ways may be joined in the same indictment, in order to meet the evidence, and avoid a variance in the proof; and the prosecutor cannot be required to elect upon which count he will proceed.

105. DIFFERENT OFFENSES—Any number of counts charging the same transaction as constituting different offenses may be joined, provided the offenses charged are cognate, or of the same nature, and the mode of trial is the same, but not otherwise; and in such a case an election will not ordinarily be required.

9 Wend. (N. Y.) 193; and where a count charged ordinary larceny and horsestealing, for which different punishments were prescribed, State v. Nelson, 8 N. H. 163.

[36] Com. v. Holmes, 119 Mass. 198; Com. v. Tuck, 20 Pick. (Mass.) 356; State v. Merrill, 44 N. H. 624; Com. v. Powell, 8 Bush (Ky.) 7; State v. Brown, 8 Humph. (Tenn.) 89; State v. Cooper, 101 N. C. 684, 8 S. E. 134; State v. Henn, 39 Minn. 464, 40 N. W. 564; State v. Miller, 24 Conn. 522; Aiken v. State, 41 Neb. 263, 59 N. W. 888; State v. Armstrong, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361; Tomlinson v. Territory, 7 N. M. 195, 33 Pac. 950; State v. Lamb, 81 N. J. Law, 234, 80 Atl. 111. This rule has been applied, for instance, where a count charged a number of sales of intoxicating liquors to different persons. Com. v. Holmes, supra.

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106. By the great weight of authority, a person cannot be tried for separate and distinct felonies at the same time; but where distinct felonies of the same nature are committed at the same time, or as part of the same transaction, the court will not quash the indictment, or compel an election before hearing the evidence, though it will, after hearing the evidence, confine the prosecutor to one charge.

EXCEPTION—In Massachusetts and a few other states distinct felonies may be joined in the same indictment, and the defendant may be convicted on each count, where the offenses are of the same nature, and the mode of trial and nature of the punishment is the same, subject to the power of the court, in its discretion, to compel an election where the defendant may be embarrassed in his defense.

107. By the weight of authority, any number of misdemeanors, though separate and distinct, may be thus joined, and the defendant may be convicted on each count. But it is believed that the court may, in the exercise of its discretion, compel an election as in other cases.

EXCEPTION—In a few states joinder of separate and distinct misdemeanors is not allowed, but they are placed, in this respect, on the same footing as felonies.

108. FELONY AND MISDEMEANOR—At common law, felonies and misdemeanors could not be joined in the same indictment, and this rule has been recognized in some of our states. In most states, however, the rule either is not recognized, or has been changed by statute, so that it is no longer any objection that one count charges a felony and the other a misdemeanor, provided, as in other cases, they are cognate offenses.

109. EFFECT OF MISJOINDER—Misjoinder of counts charging separate and distinct offenses does not render the indictment bad as a matter of law. Objection, therefore, must be taken by motion to

quash, or to compel the prosecutor to elect upon which count he will proceed. The objection cannot be raised by demurrer, nor, where there has been no motion to quash or compel an election, can it be raised in arrest of judgment, or on writ of error.

110. STATUTES—The rules above stated have been more or less changed by statute in some of the states.

Same Offense

Whenever it is uncertain what facts may be shown by the evidence, it is advisable to insert two or more counts, charging the offense in different ways, so as to meet the facts as they may appear, and thus avoid the effect of a variance between the pleading and proof.[37] Each count is a separate and distinct charge, and is, in effect, a separate indictment.[38] In an indictment for a homicide, for instance, it may be alleged in one count that the death was caused by striking with a stone or stick; in another, that it was caused by shooting; in another, by poison, etc.[39] And in an indictment for larceny, embezzlement, burglary, or arson the ownership of the goods or of the premises may be laid differently in several counts.[40] And in an indictment for burglary, where it is uncertain whose goods the evidence may show that the defendant intended to steal, or whether the evidence may show that he intended to steal or to commit some other felony, the offense may be charged in different

[37] 2 East, P. C. 515; Castro v. Reg., 6 App. Cas. 229; Kane v. People, 8 Wend. (N. Y.) 210; Mershon v. State, 51 Ind. 14; State v. Early, 3 Har. (Del.) 562; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State v. Haney, 19 N. C. 390; State v. Hogan, R. M. Charlt. (Ga.) 474.

[38] Post, p. 344.

[39] Smith v. Com., 21 Grat (Va.) 809; Lazier v. Com., 10 Grat. (Va.) 708; Reg. v. O'Brien, 1 Denison, Crown Cas. 9; Hunter v. State, 40 N. J. Law, 495; Donnelly v. State, 26 N. J. Law, 463, 601; Merrick v. State, 63 Ind. 327; Mershon v. State, 51 Ind. 14; Webster v. Com., 5 Cush. (Mass.) 386.

[40] Com. v. Dobbins, 2 Pars. Eq. Cas. (Pa.) 380; Reg. v. Trueman, 8 Car. & P. 727; State v. Nelson, 29 Me. 329; Newman v. State, 14 Wis. 393.

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ways in different counts, to meet the evidence. In one count it may be charged that the breaking and entry were with intent to steal the goods of one person; in another count that they were with intent to steal the goods of another person; in another count that they were with intent to commit murder; in another that they were with intent to commit rape, etc.[41]

If the counts do not charge separate and distinct offenses, but charge the same offense in different ways, to meet the evidence as it may appear at the trial—as, where a murder is alleged in different counts to have been committed in different ways, or an indictment for larceny, burglary, etc., lays the ownership of the goods or the premises, as the case may be, in different persons in different counts—the prosecutor will not be required to elect upon which count he will proceed. The defendant will be put to his trial upon all of them, and convicted upon that one upon which he is shown to be guilty.[42]

Different Offenses

Not only may the same offense be thus charged in different ways to meet the evidence, but the same transaction may, when it is uncertain what the evidence will show, be charged in different counts, as constituting different offenses, provided the offenses are of the same nature, and the mode of trial is the same. The offenses, though different, are not actually distinct. The same transaction is relied upon, and the charge is varied merely to avoid a possible variance between the pleading and proof. In such cases the prosecutor will not generally be required to elect, for the defendant cannot well be embarrassed in his defense by the

[41] 2 East, P. C. 515.

[42] State v. Nelson, 29 Me. 329; Upshur v. State, 100 Ala. 2, 14 South. 541; Stewart v. State, 58 Ga. 577; Newman v. State, 14 Wis. 393; Carleton v. State, 100 Ala. 130, 14 South. 472; Hunter v. State, 40 N. J. Law, 495; State v. Bailey, 50 Ohio St. 636, 36 N. E. 233; Vaden v. State (Tex. Cr. App.) 25 S. W. 777; Thompson v. State (Tex. Cr. App.) 26 S. W. 987; State v. Harris, 106 N. C. 682, 11 S. E. 377; Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; State v. Franzreb (Ohio Com. Pl.) 29 Wkly. Law Bul. 129; Murray v. State, 25 Fla. 528, 6 South. 498; State v. Mallon, 75 Mo. 355; State v. Jones, 86 S. C. 17, 67 S. E. 160.

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multiplicity of charges.[43] Thus an election will not be required where one count charges larceny and another count charges the receiving of the same goods knowing them to have been stolen, and another count charges the aiding another person to conceal the same goods knowing them to have been stolen.[44] In such a case the offenses are legally different, but the charges are not actually distinct, and cannot confound the defendant, or distract the attention of the jury; and, where this is the case, an election will not be required. For this reason the courts have also allowed the joinder of counts for burglary, larceny, and forcible entry and detainer;[45] of counts for robbery and stealing privately from the person;[46] of counts for arson at common law and statutory burnings;[47] counts for embezzlement and larceny;[48] counts for embezzlement and false pretenses;[49]

[43] Dowdy v. Com., 9 Grat. (Va.) 727, 60 Am. Dec. 314; Kane v. People, 8 Wend. (N. Y.) 211; People v. Rynders, 12 Wend. (N. Y.) 425; Com. v. Gillespie, 7 Serg. & R. (Pa.) 479, 10 Am. Dec. 475; Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Com. v. Hills, 10 Cush. (Mass.) 530; Young v. Rex, 3 Term R. 106, 1 Leach, Crown Cas. 510; Rex v. Kingston, 8 East, 41; Beasley v. People, 89 Ill. 571; People v. Costello, 1 Denio (N. Y.) 83; Armstrong v. People, 70 N. Y. 38; State v. Daubert, 42 Mo. 242; State v. Jackson, 17 Mo. 544, 59 Am. Dec. 281; Miller v. State, 51 Ind. 405; State v. Flye, 26 Me. 312; State v. Bell, 27 Md. 675, 92 Am. Dec. 658; Mayo v. State, 30 Ala. 32; Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; People v. Weil, 243 Ill. 208, 90 N. E. 731, 134 Am. St. Rep. 357.

[44] Dowdy v. Com., 9 Grat. (Va.) 727, 60 Am. Dec. 314. And see Owen v. State, 52 Ind. 379; Keefer v. State, 4 Ind. 246; State v. Daubert, 42 Mo. 242; State v. Barber, 113 N. C. 711, 18 S. E. 515; Womack v. State (Tex. Cr. App.) 25 S. W. 772; Sanderson v. Com. (Ky.) 12 S. W. 136; Kennegar v. State, 120 Ind. 176, 21 N. E. 917; State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96; Hampton v. State, 8 Humph. (Tenn.) 69, 47 Am. Dec. 599.

[45] 2 Hale, P. C. 162, 173; McCullough v. State, 132 Ind. 427, 31 N. E. 1116; Speers v. Com., 17 Grat. (Va.) 570; Com. v. Birdsall, 69 Pa. 482, 8 Am. Rep. 283; Lyons v. People, 68 Ill. 271.

[46] Rex v. Sterne, 1 Leach, Crown Cas. 473; Womack v. State (Tex. Cr. App.) 25 S. W. 772.

[47] Rex v. Pedley, 1 Leach, Crown Cas. 244.

[48] Rex v. Johnson, 2 Leach, Crown Cas. 1108, 3 Maule & S. 539; Griffith v. State, 36 Ind. 406; State v. Porter, 26 Mo. 201; Coats v. People, 4 Parker, Cr. R. (N. Y.) 662.

[49] State v. Lincoln, 49 N. H. 464.

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counts charging the defendant as accessory after the fact, and accessory before the fact, to the same felony;[50] counts for forging an instrument and for uttering it;[51] counts for obtaining money by false pretense and by the confidence game.[52]

By the weight of authority, it is no objection that one count charges a statutory offense, while the other charges an offense at common law.[53]

If the offenses are not cognate—that is, of the same nature—or the mode of trial is different, they cannot be joined. If they are joined, and the court refuses to compel the prosecutor to elect upon which count he will proceed, a conviction on one of the counts will be set aside. Clearly, it would not be permissible to charge murder and robbery, or rape and robbery, or murder and burglary in the same indictment, for the offenses are not cognate; and in a late Rhode Island case a conviction of burglary on an indictment charging in one count burglary and in another assault with intent to rape was set aside because the court refused to compel an election.[54]

In some states it is expressly provided by statute that an indictment must charge but one crime, and in one form, except that the crime may be charged in separate counts to have been committed in a different manner or by different means. It has been held, however, that it was not the intention of the legislature to change the common-law rule that the same transaction may be alleged in different ways

[50] Rex v. Blackson, 8 Car. & P. 43; Tompkins v. State, 17 Ga. 356.

[51] State v. Nichols, 88 Iowa, 110; Barnwell v. State, 1 Tex. App. 745; People v. Adler, 140 N. Y. 331, 35 N. E. 644.

[52] People v. Weil, 243 Ill. 208, 90 N. E. 731, 134 Am. St. Rep. 357.

[53] Rex v. Sterne, 1 Leach, Crown Cas. 473; Rex v. Johnson, 2 Leach, Crown Cas. 1103, 1108, 3 Maule & S. 539; State v. Smalley, 50 Vt. 736; State v. Thompson, 2 Strob. (S. C.) 12, 47 Am. Dec. 588; People v. Rynders, 12 Wend. (N. Y.) 425; State v. Williams, 2 McCord (S. C.) 301; Com. v. Sylvester, 6 Pa. Law J. 283; and cases cited in notes 48, 49, supra. But see, contra, Marler v. Com. (Ky.) 24 S. W. 608; Combs v. Com. (Ky.) 25 S. W. 276.

[54] State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

in separate counts, so as to meet the evidence, though this may result in charging different offenses. And it was therefore held that with a count charging the forgery of an instrument could be joined a count charging the uttering of the same instrument at the same time and place.[55]

Same—Distinct Offenses

Generally, where the offenses are actually separate and distinct, both in fact and in law, and are felonies, the indictment should be quashed on motion of the defendant, or the prosecutor should be required to elect upon which charge he will proceed. A person should not be tried for two separate and distinct felonies at one time. And if a motion to quash or to compel an election is denied, and the defendant is convicted on one of the counts, the conviction should be set aside.[56] A conviction was thus set aside, for instance, where the information contained two counts, charging criminal abortion under a statute, and an additional count charging manslaughter at common law, committed upon a day subsequent to the time mentioned in the former counts.[57]

There are cases, even of felony, where the court will not quash the indictment, nor compel an election at the opening of the trial, though the offenses charged in the different counts are separate and distinct in law, and, to some extent, in fact. These are cases in which the offenses are of the same general nature, and were committed at the same time, or as part of the same transaction. The court will not let the defendant be tried and convicted for separate offenses, but it will not compel an election at the beginning of the

[55] People v. Adler, 140 N. Y. 331, 35 N. E. 644.

[56] People v. Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; People v. Rohrer, 100 Mich. 126, 58 N. W. 661; State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766; Mayo v. State, 30 Ala. 32; State v. Smith, 8 Blackf. (Ind.) 489; Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; McGregg v. State, 4 Blackf. (Ind.) 101; Baker v. State, 4 Ark. 56; Kane v. People, 8 Wend. (N. Y.) 203; People v. Rynders, 12 Wend. (N. Y.) 425; State v. Nelson, 8 N. H. 163; State v. Flye, 26 Me. 312; State v. Fowler, 28 N. H. 184; Bailey v. State, 4 Ohio St. 440; Bainbridge v. State, 30 Ohio St. 264; People v. Austin, 1 Parker, Cr. R. (N. Y.) 154; State v. Henry, 59 Iowa, 391, 13 N. W. 343.

[57] People v. Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

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trial. It will hear the evidence, and at the proper time confine the prosecutor to one of the charges. "When the several offenses charged, though distinct in point of law, yet spring out of substantially the same transaction, or are so connected in their facts as to make substantially parts of the same transaction, or connected series of facts, the defendant cannot be prejudiced in his defense by the joinder, and the court will neither quash nor compel an election." [58] A motion to quash or compel an election has been denied, for instance, where the defendant was charged in separate counts with robbing two different persons, it appearing that the offenses were committed at the same time, and as part of the same transaction; [59] where different counts charged separate and distinct burglaries on the same night, and in the same neighborhood; [60] where two murders were charged in separate counts, but it appeared that they were so closely connected in point of time, place, and occasion that it would be difficult, if not impossible, to separate the proof of one from the proof of the other; [61] and where the defendant was charged with burning several houses, it appearing that one of them had been set on fire and the fire had communicated to the others. "As it was all one transaction," it was said in the case last mentioned, "we must hear the evidence; and I do not see how, in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may, therefore, be likely to embarrass the prisoner in his defense." [62]

[58] People v. McKinney, 10 Mich. 94; People v. Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; and see Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Reg. v. Giddins, Car. & M. 634; Rex v. Trueman, 8 Car. & P. 727; Rex v. Folkes, 1 Moody, Crown Cas. 354; Martin v. State, 79 Wis. 165, 48 N. W. 119.

[59] Rex v. Giddins, Car. & M. 634.

[60] Martin v. State, 79 Wis. 165, 48 N. W. 119.

[61] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

[62] Reg. v. Trueman, 8 Car. & P. 727.

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It has been held that in cases of misdemeanor no objection at all can be made because of the joinder of separate and distinct offenses, and this is the general rule. "In point of law," it has been said, "there is no objection to a man being tried on one indictment for several offenses of the same sort. It is usual, in felonies, for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanors. It is the daily usage to receive evidence of several libels, and of several assaults, upon the same indictment." [63] It is believed, however, that even in cases of misdemeanor the court should, in the exercise of its discretion, quash the indictment, or put the prosecutor to an election, where the defendant may be prejudiced in his defense.[64] In some states misdemeanors are put, in this respect, upon the same footing as felonies, and a conviction on one of several counts for separate and distinct misdemeanors has been set aside on the ground that there was a misjoinder, and the prosecutor should, on the defendant's motion, have been required to elect before trial.[65]

Same—Exceptional Doctrine in Massachusetts and Other States

In Massachusetts and a few other states it is allowed, even in cases of felony, to charge in different counts separate and distinct offenses of the same general description,

[63] Rex v. Jones, 2 Camp. 131. And see Rex v. Kingston, 8 East, 41; 1 Chit. Cr. Law, 254; Rex v. Levy, 2 Starkie, 458; Rex v. Benfield, 2 Burrows, 984; People v. Costello, 1 Denio (N. Y.) 83; Kane v. People, 8 Wend. (N. Y.) 211; Harman v. Com., 12 Serg. & R. (Pa.) 69; State v. Gummer, 22 Wis. 441; Quinn v. State, 49 Ala. 353; Com. v. McChord, 2 Dana (Ky.) 242; State v. Kibby, 7 Mo. 317; Kroer v. People, 78 Ill. 294; Waddell v. State, 1 Tex. App. 720. Distinct sales of intoxicating liquors. Barnes v. State, 19 Conn. 398; Mullinix v. People, 76 Ill. 211; Com. v. Tuttle, 12 Cush. (Mass.) 505.

[64] Castro v. Reg., 6 App. Cas. 229; State v. Farmer, 104 N. C. 887, 10 S. E. 563.

[65] People v. Rohrer, 100 Mich. 126, 58 N. W. 661. In this case the information charged in one count that the defendant kept open his saloon on Sunday, and in another count that he kept his windows curtained on the same day.

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where the mode of trial and the nature of the punishment is the same, and the defendant may be convicted of any one or more of the felonies charged. Whether the offenses shall be tried separately or together is a matter within the discretion of the presiding judge, and, if they are tried together, and a general verdict of guilty is returned, and no inquiry is made of the jury as to the counts upon which they found their verdict, the general verdict will apply to each count.[66] This, as we have seen, is an exceptional doctrine. Even here the court should require the prosecutor to elect, if it sees that there is danger that the defendant may be embarrassed by the multiplicity of the charges against him; but the matter rests within its discretion.[67]

Joinder of Felony and Misdemeanor

At common law, as we have shown, the general rule was to allow several felonies or several misdemeanors to be charged in different counts of the same indictment, but a count for felony could not be joined with a count for misdemeanor. The reason for the rule was that persons indicted for misdemeanors were entitled to certain advantages at the trial, such as the right to make a full defense by counsel, to have a copy of the indictment, and to have a special jury,—privileges not accorded to those indicted for a felony.[68] The rule has been recognized as in force in a few of our states.[69] In most states, however, the courts have refused to recognize the rule, on the ground that the rea-

[66] Benson v. Com., 158 Mass. 164, 33 N. E. 384; Com. v. Costello, 120 Mass. 358; Com. v. Jacobs, 152 Mass. 276, 25 N. E. 463; Speers v. Com., 17 Grat. (Va.) 570. And see State v. Tuller, 34 Conn. 280; Cash v. State, 10 Humph. (Tenn.) 111; Davis v. State, 85 Tenn. 522, 3 S. W. 348.

[67] Benson v. Com., supra.

[68] 2 Hale, P. C. 173; Rex v. Fuller, 1 Bos. & P. 180; Rex v. Benfield, 2 Burrows, 980; 1 Chit. Cr. Law, 208, 254; Rex v. Gough, 1 Moody & R. 71; Rex v. Johnson, 3 Maule & S. 550; Castro v. Reg., 6 App. Cas. 229; Hunter v. Com., 79 Pa. 503, 21 Am. Rep. 83; Storrs v. State, 3 Mo. 9; Scott v. Com., 14 Grat. (Va.) 687; Harman v. Com., 12 Serg. & R. (Pa.) 69; State v. Smalley, 50 Vt. 736.

[69] See U. S. v. Scott, 4 Biss. 29, Fed. Cas. No. 16,241; Hilderbrand v. State, 5 Mo. 548; State v. Montague, 2 McCord (S. C.) 257; Davis v. State, 57 Ga. 66; Scott v. Com., 14 Grat. (Va.) 687.

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sons upon which it was based do not exist here, or else the rule has been expressly abrogated by statute, so that now, in most states, counts for cognate offenses may be joined, though one may be a felony and the other a misdemeanor.[70]

The decisions on the question of joinder of felonies and misdemeanors are not uniform, but by the weight of authority they may be joined "in all cases, 'except where the offenses charged are repugnant in their nature and legal incidents, and the trial and judgment so incongruous as to deprive the defendant of some legal advantage.' In other words, the general rule is that felonies and misdemeanors forming part of the development of the same transaction may be joined in the same indictment." [71]

Where the offenses are cognate, whether or not an election will be required rests in the discretion of the court. But where they are not cognate offenses—as where one count charges burglary, and the other charges assault with intent to commit rape—a refusal to compel an election has been held to be ground for setting aside a conviction on one of the counts.[72]

In sustaining an indictment joining a count for common assault, which was a misdemeanor, with a count for assault with intent to rob, which was a statutory felony, the Massachusetts court said: "It is true that, generally speaking, offenses differing in their natures, one being a felony and the

[70] Burk v. State, 2 Har. & J. (Md.) 426; Herman v. People, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182; Stevick v. Com., 78 Pa. 460; Hunter v. Com., 79 Pa. 503, 21 Am. Rep. 83; State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766; State v. Smalley, 50 Vt. 736; Henwood v. Com., 52 Pa. 424; Harman v. Com., 12 Serg. & R. (Pa.) 69; State v. Bell, 27 Md. 675, 92 Am. Dec. 658; Wall v. State, 51 Ind. 453; Com. v. McLaughlin, 12 Cush. (Mass.) 612; State v. Lincoln, 49 N. H. 464; Stevens v. State, 66 Md. 202, 7 Atl. 254; Cawley v. State, 37 Ala. 152; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State v. Sutton, 4 Gill (Md.) 494; Dowdy v. Com., 9 Grat. (Va.) 727, 60 Am. Dec. 314; Com. v. Adams, 7 Gray (Mass.) 43; State v. Daubert, 42 Mo. 243; State v. Hood, 51 Me. 363; People v. Rynders, 12 Wend. (N. Y.) 426.

[71] State v. Fitzsimon, supra; Herman v. People, supra; and other cases above cited.

[72] State v. Fitzsimon, supra.

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other a misdemeanor, ought not to be joined. But the practice in this commonwealth has fully sustained a joinder of such counts where they have been a kindred line of offenses. It is allowed always where several counts are introduced for the purpose of meeting the evidence as it may transpire on the trial, all the counts being substantially for the same offense. * * * Certainly, where the offense charged in the second count is necessarily embraced in the charge in the first count, and all the evidence to sustain it might have been given under the first count, and a conviction of the charge well authorized as a substantive part of the first count, it cannot be objected that the same is stated in a second count; nor is a verdict of not guilty on the first count inconsistent with a verdict of guilty on the second count." [73]

Effect of Misjoinder

A few of the cases hold, or seem to hold, that felonies arising from distinct transactions, even though they may be of the same nature—as, for instance, where several counts charge distinct larcenies—cannot be joined without making the indictment bad as a matter of law.[74] By the great weight of authority, however, an indictment is never bad, as a matter of law, because of the joinder of several separate and distinct offenses in different counts, where they are of the same general nature, and where the mode of trial and the nature of the punishment is the same.[75] An

[73] Com. v. McLaughlin, 12 Cush. (Mass.) 612. In many jurisdictions statutes provide for the joinder of counts in certain specified cases. These statutes should be consulted by the student.

[74] State v. Montague, 2 McCord (S. C.) 257; McKenzie v. State, 32 Tex. Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795; James v. State, 104 Ala. 20, 16 South. 94; Davis v. State, 57 Ga. 66.

[75] Dowdy v. Com., 9 Grat. (Va.) 727, 60 Am. Dec. 314; Young v. Rex, 3 Term R. 106; Kane v. People, 8 Wend. (N. Y.) 211; People v. Rynders, 12 Wend. (N. Y.) 425; Castro v. Reg., 6 App. Cas. 229; 1 Chit. Cr. Law, 253; 2 Hale, P. C. 173; Rex v. Johnson, 2 Leach, Crown Cas. 1103; Rex v. Kingston, 8 East, 41; 2 East, P. C. 515; Rex v. Jones, 2 Camp. 131; Ketchingman v. State, 6 Wis. 426; Com. v. Hills, 10 Cush. (Mass.) 530; Carlton v. Com., 5 Metc. (Mass.) 532; Lazier v. Com., 10 Grat. (Va.) 708; Com. v. Brown, 121 Mass. 69; State v. Nelson, 14 Rich. (S. C.) 172, 94 Am. Dec. 130; State v. Scott,

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indictment may, therefore, join several distinct felonies or several distinct misdemeanors, without being bad as a matter of law. Since such a joinder does not render the indictment bad as a matter of law, it is no ground for demurrer, motion in arrest of judgment, or writ of error. The only way in which the objection can be raised is by motion to quash the indictment, or to compel the prosecutor to elect upon which count he will proceed. It has been held, for instance, that demurrer, motion in arrest, or writ of error will not lie because of the joinder of a count for burglary with a count for larceny;[76] counts for separate and distinct arsons;[77] counts for separate and distinct receipts of stolen goods;[78] forgery of an instrument, and the uttering of it;[79] counts for separate embezzlements;[80] counts for larceny and obtaining money by false pretenses.[81]

It has been held that a misjoinder of counts is cured by a verdict of acquittal on the count improperly inserted; that, "having been negatived by the jury, it is as if it had never been inserted in the indictment."[82] But, except in Massachusetts and a few other states, where, as we have seen, the doctrine as to joinder of counts is exceptional, and a person is allowed to be tried, in the discretion of the court, for separate and distinct offenses at the same time, an error in overruling a motion to compel an election would not be

15 S. C. 435; Benson v. Com., 158 Mass. 164, 33 N. E. 384; State v. Smalley, 50 Vt. 736; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; U. S. v. West, 7 Utah, 437, 27 Pac. 84; State v. Woodard, 38 S. C. 353, 17 S. E. 135; State v. Frazier, 79 Me. 95, 8 Atl. 347; Mills v. Com., 13 Pa. 631; Mershon v. State, 51 Ind. 14; Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; State v. Nelson, 29 Me. 329; State v. Hodges, 45 Kan. 389, 26 Pac. 676; Orr v. State, 18 Ark. 540; State v. Kibby, 7 Mo. 317.

[76] Carlton v. Com., 5 Metc. (Mass.) 532; State v. Woodard, 38 S. C. 353, 17 S. E. 135.

[77] State v. Smalley, 50 Vt. 736.

[78] Com. v. Hills, 10 Cush. (Mass.) 530.

[79] People v. Rynders, 12 Wend. (N. Y.) 425.

[80] State v. Hodges, 45 Kan. 389, 26 Pac. 676.

[81] Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383.

[82] Com. v. Packard, 5 Gray (Mass.) 103; Com. v. Chase, 127 Mass. 7.

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so cured.[83] Of course, it would be otherwise if no such motion was made.[84]

If offenses for which the punishment is different are joined, it would seem that a demurrer will lie, for, in case of a general verdict of guilty the court could not know what punishment to impose; and, after a general verdict of guilty, such a misjoinder is ground for motion in arrest of judgment. But judgment will not be arrested if the verdict specifies upon which count the defendant is found guilty, nor where the verdict is general, if one of the counts is insufficient, for, as we shall see, the verdict will be referred to the good count.[85]

Construction and Form of Separate Counts—Partial Insufficiency

Every separate count should charge the defendant as if he had committed a distinct offense, for it is upon the principle of the joinder of offenses that the joinder of counts is admissible;[86] and to each count should be prefixed a statement that the jury present upon oath, thus: "And the jurors aforesaid, upon their oath aforesaid, further present," etc.; and there should, by the weight of opinion, be added a formal conclusion, "against the peace of the state," or "against the peace of the state, and contrary to the form of the statute;"[87] for each count is in fact a separate indictment. The fact, however, that the former words are pre-

[83] See the cases cited in notes 56, 57, 65, supra.

[84] See the cases cited in notes 75–81, supra.

[85] James v. State, 104 Ala. 20, 16 South. 94; Adams v. State, 55 Ala. 143; State v. Montague, 2 McCord (S. C.) 257; Davis v. State, 57 Ga. 66.

[86] 1 Chit. Cr. Law, 249; Rex v. Jones, 2 Camp. 132; Young v. Rex, 3 Term R. 106, 107; U. S. v. Furlong, 5 Wheat. 201, 5 L. Ed. 64; Com. v. Burke, 16 Gray (Mass.) 33; Com. v. Carey, 103 Mass. 215.

[87] State v. McAllister, 26 Me. 374; State v. Wagner, 118 Mo. 626, 24 S. W. 219. As to the conclusion, see note 82, p. 360, infra. Under statutes in some states neither "the commencement nor conclusion" need be repeated in each count, if they appear at the beginning and end of the whole indictment. See West v. State, 27 Tex. App. 472, 11 S. W. 482; Alexander v. State, 27 Tex. App. 533, 11 S. W. 628.

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fixed to a statement does not necessarily show that it is a second count.[88]

Though every count should appear upon its face to charge the defendant with a distinct offense, yet one count may refer to matter in another count, so as to avoid unnecessary repetitions; as, for instance, to refer to the county stated in a prior count as "the county aforesaid," or to the time stated in a prior count as "on the day and date aforesaid," or to describe the defendant as "the said," giving merely his Christian name, where his full name has been stated in a preceding count.[89] And the fact that the count thus referred to is defective, or is rejected by the grand jury, will not vitiate the succeeding count.[90]

Statements in one count cannot aid defects and omissions in another, unless incorporated in the latter by some proper reference to them contained in the latter;[91] and the reference must be such as to draw to it the particular statement contained in the first count. Any qualities or adjuncts averred to belong to any subject in one count will not, if they are separable from it, be supposed to be alleged as belonging to it in a subsequent count, which merely introduces it by reference as the same subject "before mentioned," or "the said" subject, or the subject "aforesaid." There must be a repetition of or reference to the quality or adjunct, and not merely to the subject.[92] The words, "the said infant female child," in one count of an indictment, were held not

[88] Rex v. Haynes, 4 Maule & S. 221.

[89] State v. Hertzog, 41 La. Ann. 775, 6 South. 622; Boggs v. State (Tex. Cr. App.) 25 S. W. 770; Redman v. State, 1 Blackf. (Ind.) 431. And see, as to reference to other counts, People v. Graves, 5 Parker, Cr. R. (N. Y.) 134; People v. Danihy, 63 Hun, 579, 18 N. Y. Supp. 467.

[90] Phillips v. Fielding, 2 H. Bl. 131; Com. v. Miller, 2 Pars. Eq. Cas. (Pa.) 480. But see State v. Longley, 10 Ind. 482.

[91] People v. Smith, 103 Cal. 563, 37 Pac. 516; State v. McAllister, 26 Me. 374. Thus an allegation, in the first count of an indictment, as to the county in which the offense was committed, cannot aid the second count, which contains no averment, by reference or otherwise, as to place. Jones v. Com., 86 Va. 950, 12 S. E. 950.

[92] See Reg. v. Waverton, 2 Denison, Crown Cas. 339; State v. Nelson, 29 Me. 329; State v. Lyon, 17 Wis. 237; State v. Wagner, 118 Mo. 626, 24 S. W. 219.

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to import into that count a description of the child in a preceding count as being of tender years.[93] And the words "articles aforesaid," used in a count with reference to a prior count, will not draw into the count the allegations of value in the prior count.[94]

On the other hand, if one count is bad for failure to state any offense, or to state it with sufficient precision, this will not render a good count bad.[95] And, generally, a defect in some of the counts will not affect the validity of the remainder, or prevent judgment on a general verdict of guilty, for judgment may be rendered on those counts which are good.[96]

[93] Reg. v. Waters, 1 Denison, Crown Cas. 356.

[94] State v. Wagner, 118 Mo. 626, 24 S. W. 219.

[95] Com. v. Gable, 7 Serg. & R. (Pa.) 423; State v. Nelson, 8 N. H. 163; Miller v. State, 5 How. (Miss.) 250; People v. Wright, 9 Wend. (N. Y.) 193.

[96] Rex v. Fuller, 1 Bos. & P. 187; Reg. v. Jones, 8 Car. & P. 776; Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Brown v. Com., 8 Mass. 63; State v. Coleman, 5 Port. (Ala.) 40; Jennings v. Com., 17 Pick. (Mass.) 80; Mead v. State, 53 N. J. Law, 601, 23 Atl. 264; U. S. v. Furlong, 5 Wheat. 184, 5 L. Ed. 64; Kane v. People, 3 Wend. (N. Y.) 363; Curtis v. People, Breese (Ill.) 256; Townsend v. People, 3 Scam. (Ill.) 328; Hudson v. State, 1 Blackf. (Ind.) 318; Harman v. Com., 12 Serg. & R. (Pa.) 69; State v. Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; Turk v. State, 7 Ohio, 240, Pt. 2; Hornsby v. State, 94 Ala. 55, 10 South. 522. But see Mowbray v. Com., 11 Leigh (Va.) 654; Clere v. Com., 3 Grat. (Va.) 615; Jones v. Com., 86 Va. 950, 12 S. E. 950. In this respect there is a difference between an indictment and a declaration in a civil action, for, if one part of a declaration is bad, and the jury find entire damages, the judgment must be arrested; and the reason of the distinction is that the court cannot apportion the damages, whereas it can impose such a sentence as is warranted by the good counts in an indictment. 1 Chit. Cr. Law, 249; Reg. v. Ingram, 1 Salk. 384. This was the common-law rule in England at the time this country was settled, and became a part of our common law. Since then the rule has been changed in England, and the rule in civil cases is also applied in criminal cases. O'Connell v. Reg., 11 Clark & F. 155. But the old rule is still recognized with us. U. S. v. Furlong, 5 Wheat. 201, 5 L. Ed. 64; U. S. v. Plumer, 3 Cliff. 28, Fed. Cas. No. 16,056; People v. Curling, 1 Johns. (N. Y.) 320; Jennings v. Com., 17 Pick. (Mass.) 80; Com. v. Hawkins, 3 Gray (Mass.) 463. Where, on the trial of an indictment containing two counts, one of which is defective, evidence pertinent to both is received under a ruling that both are good, a verdict cannot be sus-

Some early English cases held that the court could not quash one count without vitiating the whole indictment, on the ground that the court cannot alter the finding of the grand jury.[97] The modern English doctrine is that one or more counts may be quashed, leaving others to stand.[98] The authorities in the United States are not in accord on this question. The majority permit the quashing of some counts;[99] others follow the early English doctrine.[1]

JOINDER OF PARTIES

111. Where several persons join in the commission of an offense, whether it be a felony or a misdemeanor, they may be joined in the same indictment, and one or all may be convicted.

112. Some offenses—perjury, for instance—are of such a nature that one person only can commit them, and every person who commits any such offense must be indicted separately.

113. Some offenses—conspiracy and riot, for instance—cannot be committed by one person alone, and one defendant only could not be convicted and the others acquitted.

Where the act constituting the offense was such that several persons could join in its commission as principals in the first or second degree,[2] all who so joined in it may be

tained because the evidence is sufficient to sustain a conviction on the count which is good. People v. Smith, 103 Cal. 563, 37 Pac. 516. See post, p. 571.

[97] Rex v. Pewtress, 2 Strange, 1026; Rex v. Pewteruss, Cas. t. Hardw. 203.

[98] Reg. v. Bell, 12 Cox, C. C. 37.

[99] State v. McKiernan, 17 Nev. 224, 30 Pac. 831; State v. Woodward, 21 Mo. 265; Com. v. Stevenson, 127 Mass. 446.

[1] Rose v. State, Minor (Ala.) 28.

[2] It must be remembered that these terms apply, in case of treason or misdemeanor, to all persons who join in the commission of the offenses, for they are all guilty as principals. It is in felonies only that there are accessories. A person who so joins in treason or a

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indicted either jointly or severally. And a joint indictment against them all is also an indictment against each of them severally.[3] Thus a joint indictment will lie against the par-

misdemeanor that, if the offense were a felony, he would be an accessory before the fact, is a principal. See Clark, Cr. Law, (3 Ed.) 109.

[3] 2 Hale, P. C. 173; 2 Hawk. P. C. c. 25, § 89; Rex v. Benfield, 2 Burrows, 984; Rex v. Hollond, 5 Term R. 607; Kane v. People, 8 Wend. (N. Y.) 203; State v. Gay, 10 Mo. 440; Com. v. Weatherhead, 110 Mass. 175; State v. O'Brien, 18 R. I. 105, 25 Atl. 910; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; State v. Woodard, 38 S. C. 353, 17 S. E. 135; State v. Wadsworth, 30 Conn. 55; State v. Nowell, 60 N. H. 199; Fletcher v. People, 52 Ill. 395; Casily v. State, 32 Ind. 62; Weatherford v. Com., 10 Bush (Ky.) 196; note 44, infra. Husband and wife are no exception to the rule. Com. v. Murphy, 2 Gray (Mass.) 510; Reg. v. Cohen, 11 Cox, Cr. Cas. 99; Reg. v. Williams, 1 Salk. 384; Com. v. Tryon, 99 Mass. 442; Com. v. Ray, 1 Va. Cas. 262. Whether a wife can be convicted separately or jointly with her husband depends solely on whether she was coerced by him. Clark, Cr. Law, 102; Com. v. Murphy, supra. "Notwithstanding the offense of several persons cannot but in all cases be several, because the offense of one man cannot be the offense of another, but every one must answer severally for his own crime, yet if it wholly arise from any such joint act which in itself is criminal, without any regard to any particular personal default of the defendant, as the joint keeping of a gaming house, or the unlawful hunting and carrying away of a deer, or maintenance, or extortion, etc., the indictment or information may either charge the defendants jointly and severally, * * * or may charge them jointly only, without charging them severally, because it sufficiently appears, from the construction of law, that if they joined in such act they could but be each of them guilty; and from hence it follows that on such indictment or information some of the defendants may be acquitted and others convicted, for the law looks on the charge as several against each, though the words of it purport only a joint charge against all. But where the offense indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offense—as the following a joint trade without having served a seven-year apprenticeship required by the statute, in which case it must be the particular defect of each trader which must make him guilty, and one of them may offend against the statute and the others not—the indictment or information must charge them severally, and not jointly; for it is absurd to charge them jointly, because the offense of each defendant arises from a defect peculiar to himself. And for the like reason a joint indictment against several for not repairing the street before their houses hath been quashed." 2 Hawk. P. C. c. 25, § 89.

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ties to an act of adultery, or to illicit cohabitation, and similar offenses,[4] for conspiracy or riot,[5] for extortion,[6] for libel, where all join in publishing it,[7] for obtaining money by false pretenses,[8] for selling intoxicating liquors without a license,[9] or for being common sellers of intoxicating liquors,[10] for receiving stolen goods,[11] for violation of the law against labor on Sunday.[12] And in all cases of felony, such as murder, assaults, robbery, burglary, arson, etc., where several were present aiding or abetting, they may be joined with the principal in the first degree, and charged in the indictment either as actual perpetrators or as aiders and abettors.[13]

The parties need not necessarily act jointly in all cases, but it is sufficient if one and the same offense is committed by each. In the case of a nuisance, for instance, occasioned by the several acts of a number of persons, all of them may be jointly indicted.[14]

[4] Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; State v. Mainor, 28 N. C. 340.

[5] State v. Allison, 3 Yerg. (Tenn.) 428; People v. Howell, 4 Johns. (N. Y.) 296; Turpin v. State, 4 Blackf. (Ind.) 72; Com. v. Manson, 2 Ashm. (Pa.) 31.

[6] Reg. v. Atkinson, 1 Salk. 382, 2 Ld. Raym. 1248.

[7] Rex v. Benfield, 2 Burrows, 984. And for jointly singing libelous words. "Cannot several persons join in singing one and the same song? Forty people may join in the same chorus. And if such song or chorus be libelous, the doing so is one joint act, criminal in itself, without regard to any peculiar personal default." Rex v. Benfield, supra.

[8] Rex v. Young, 1 Leach, Crown Cas. 505, 3 Term R. 98.

[9] Com. v. Sloan, 4 Cush. (Mass.) 52; State v. Brown, 49 Vt. 437; State v. Simmons, 66 N. C. 622; Peterson v. State, 32 Tex. 477.

[10] Com. v. Brown, 12 Gray (Mass.) 135.

[11] Reg. v. Dovey, 2 Denison, Crown Cas. 92; Com. v. Slate, 11 Gray (Mass.) 63. To sustain a joint charge of receiving stolen goods, there must have been a joint receipt at one and the same time. Com. v. Slate, supra.

[12] Com. v. Sampson, 97 Mass. 407.

[13] 2 Hawk. P. C. c. 25, § 64; Young v. Rex, 3 Term R. 98; Coal-Heavers' Case, 1 Leach, Crown Cas. 64; Rex v. Taylor, Id. 360; Rex v. Young, Id. 505; 2 Hale, P. C. 173; Com. v. Chapman, 11 Cush. (Mass.) 428; State v. Blan, 69 Mo. 317; White v. People, 32 N. Y. 465; State v. Pile, 5 Ala. 72.

[14] Rex v. Trafford, 1 Barn. & Adol. 874.

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The parties, however, must commit the same crime, and not merely similar crimes, by their several acts.[15] If two persons play at the same game of cards at the same time, they may be jointly indicted;[16] but, if neither is present when the other plays, a joint indictment will not lie.[17] So, if two persons assault a third at the same time, they may be jointly indicted;[18] but it is otherwise if one of them commits the assault on one day, and the other commits it on another day.[19] So, if two persons at the same time, acting together, kill a man, they may be jointly indicted for the murder; but it is otherwise if they each inflict a mortal blow at different times, and not acting in concert.[20]

Many offenses are of such a nature that they cannot be jointly committed; so that, even though several parties commit them at the same time, the indictments must be several.[21] A joint indictment will not lie against two persons for jointly exercising a trade, as partners, for instance, without having served an apprenticeship, "for not being apprentices is that which occasions the crime, and that must of necessity be several."[22] Nor will a joint indictment lie for perjury, though it may have been committed by swearing to the same thing at the same time.[23] Nor will it lie for

[15] Elliott v. State, 26 Ala. 78; Stephens v. State, 14 Ohio, 386; Baker v. People, 105 Ill. 452; People v. Hawkins, 34 Cal. 181; Reg. v. Devett, 8 Car. & P. 639; Lindsey v. State, 48 Ala. 169.

[16] Com. v. M'Guire, 1 Va. Cas. 119; Covy v. State, 4 Port. (Ala.) 186.

[17] Elliott v. State, 26 Ala. 78; State v. Homan, 41 Tex. 155; Galbreath v. State, 36 Tex. 200. But see Com. v. McChord, 2 Dana (Ky.) 242.

[18] Fowler v. State, 3 Heisk. (Tenn.) 154.

[19] Reg. v. Devett, 8 Car. & P. 639.

[20] Id.

[21] 2 Hawk. P. C. c. 25, § 89. And see the quotation therefrom in note 3, p. 348, supra. See, also, Elliott v. State, 26 Ala. 78; State v. Deaton, 92 N. C. 788.

[22] 2 Rolle, Abr. 81; Reg. v. Atkinson, 1 Salk. 382, 2 Ld. Raym. 1248. But see State v. McAninch, 172 Iowa, 96, 154 N. W. 399, holding that two may be jointly indicted for practicing medicine without a certificate.

[23] Young v. Rex, 3 Term R. 103; Rex v. Philips, 2 Strange, 921; Rex v. Benfield, 2 Burrows, 983.

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being common barretors or common scolds,[24] or for drunkenness,[25] or against several persons holding different offices, and charged with different duties, like the judges, inspectors, and clerks of an election, for malfeasance in office.[26]

Where partners, as such, publish an obscene, seditious, or defamatory book or other libel, or, it has been held, where several persons jointly utter libelous words, as where they join in singing a libelous song, they may be jointly indicted.[27] But if several persons at different times, and not by one and the same joint act, publish the same libel, or utter the same obscene, blasphemous, seditious, or defamatory words, they must be indicted separately.[28] It is difficult to see how words can in any way be jointly uttered by several persons.

Where the principal in the second degree is not charged, as we have seen that he may be, as an actual perpetrator of the crime, but as an aider and abettor, it is not necessary to set forth in the indictment the means or manner by which he became thus guilty, but it is sufficient to merely charge that he was present, aiding and abetting, at the felony and murder (as the case may be), committed in the manner and form aforesaid.[29] It will not do to merely charge him with being present, for that is not enough to make him guilty.[30] It is not necessary to repeat, as to the principal in the second degree, the acts stated as constituting the crime.[31]

Several persons may be charged with different degrees of crime in the same indictment. Thus, if one person with malice abets another, who, without malice, unlawfully gives a blow causing death, it is murder in the former, and man-

[24] Rex v. Philips, 2 Strange, 921.
[25] State v. Deaton, 92 N. C. 788.
[26] Com. v. Miller, 2 Pars. Eq. Cas. (Pa.) 481.
[27] Rex v. Benfield, 2 Burrows, 985.
[28] State v. Roulstone, 3 Sneed (Tenn.) 107; Cox v. State, 76 Ala. 66.
[29] 1 Hale, P. C. 521, 522; 2 Hawk. P. C. c. 25, § 64; Id. c. 29, § 17; Heydon's Case, 4 Coke, 42b; Rex v. Towle, Russ. & R. 314.
[30] 2 Hawk. P. C. c. 25, § 64; Heydon's Case, 4 Coke, 42b.
[31] Everett v. State, 33 Fla. 661, 15 South. 543.

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slaughter in the latter, and it may be so charged in an indictment against them jointly.[32]

It seems that in some cases several persons who have committed different offenses of the same kind may be included in the same indictment, if the word "severally" is inserted, since that makes the indictment several as to each of them, though the court may, in its discretion, quash the indictment if it may cause inconvenience.[33] It has been held, for instance, that four persons could be joined for erecting four inns, which were common nuisances, where the word "severally" was inserted; and the rule has been applied to an indictment against several for keeping disorderly houses.[34]

"As, at common law, the accessory cannot be tried before the principal, without his own consent, and as the crime of the former depends upon the guilt of the latter, and an accessory must be convicted of a felony of the same species as the principal, it is both usual and proper to include them in the same indictment."[35] Both may be tried together, but at common law the principal must be first convicted. If he is acquitted, both must be acquitted.[36] The rules of the common law in this respect have been greatly modified by statutes.[37] These statutes, however, do not prevent joint indictments against principals and accessories. Where the principal and an accessory before the fact are thus joined as such in the same indictment, the proper course is to

[32] 1 Chit. Cr. Law, 270; Mackalley's Case, 9 Coke, 67b; Rex v. Cary, 3 Bulst. 206; Rex v. Taylor, 1 Leach, Crown Cas. 360.

[33] 1 Chit. Cr. Law, 271; Young v. Rex, 3 Term R. 106; Rex v. Kingston, 8 East, 46.

[34] 2 Hale, P. C. 174; Higges v. Henwood, 2 Rolle, 345; Rex v. Kingston, 8 East, 47; State v. Nail, 19 Ark. 563; Johnson v. State, 13 Ark. 684; Com. v. McChord, 2 Dana (Ky.) 242; Lewellen v. State, 18 Tex. 538.

[35] 1 Chit. Cr. Law, 272; 1 Hale, P. C. 623; 2 Hale, P. C. 173; Com. v. Adams, 7 Gray (Mass.) 44; State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877; Id., 41 S. C. 551, 19 S. E. 691; State v. Lang, 65 N. H. 284, 23 Atl. 432; Com. v. Devine, 155 Mass. 224, 29 N. E. 515. Thus a thief and the receiver of the stolen goods may be joined. Com. v. Adams, supra.

[36] 1 Hale, P. C. 624; 2 Hale, P. C. 222; 2 Hawk. P. C. c. 29, § 47.

[37] Clark, Cr. Law, (3 Ed.) 118.

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first state the offense committed by the principal, and then to aver that "C. D. (the accessory) before the committing of the said felony and murder (or other felony, as the case may be) in form aforesaid, to wit, on, etc., did maliciously and feloniously incite, move, procure, aid and abet (or counsel, hire, and command) the said A. B. (the principal) to do and commit the said felony in manner aforesaid, against the peace," etc.[38] And where a person is indicted as accessory after the fact together with his principal, the principal's offense is stated in the same way, and it is averred that the accessory did receive, harbor, and maintain, etc., the principal, well knowing that he had committed the felony, etc. The averment of knowledge is absolutely essential, for without it a person cannot be an accessory after the fact.[39] In no case is it necessary to use the word "accessory" in the indictment,[40] or to set forth the means by which the accessory before the fact incited the principal, or the accessory after the fact received, concealed, or assisted him.[41]

In an indictment against the accessory alone after the principal has been convicted, it is not necessary to aver that the latter committed the felony, or on the trial to enter in detail into the evidence against him. It is sufficient to recite with accuracy the record of the conviction, because the court will presume everything on the former occasion to have been rightly and properly transacted.[42] It is always open to the accessory, however, to show positively that the principal was innocent, and was erroneously convicted, in which case he must be acquitted.[43]

On an indictment against two or more persons, charging them with a joint offense, either may be found guilty; for

[38] 1 Chit. Cr. Law, 272.

[39] Ante, p. 225; 1 Hale, P. C. 622; 2 Hawk. P. C. c. 29, § 33; Rex v. Thompson, 2 Lev. 208.

[40] Rex v. Burridge, 3 P. Wms. 477.

[41] 1 Chit. Cr. Law, 273.

[42] 1 Chit. Cr. Law, 273; Holmes v. Walsh, 7 Term R. 465; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

[43] 4 Bl. Comm. 324; Rex v. Baldwin, 3 Camp. 265; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

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the charge is several, as well as joint, against all and each of them. All or part may be convicted, and all or part may be acquitted.[44] "Except in indictments for offenses necessarily joint, joint defendants may be convicted of different grades; and they may be convicted of different degrees of criminality in the same offense, where the defendants may act different parts in the same transaction." [45] Thus, on a joint indictment for burglary and larceny, one of the defendants may be convicted of burglary and larceny, and the other of simple larceny.[46] And on a joint indictment for larceny one may be convicted of larceny, and the other of an attempt to commit larceny.[47] And on a joint indictment for murder one may be convicted of murder and the other of manslaughter.[48]

The rule that one of several joint defendants may be convicted, and the others acquitted, does not apply to the full

[44] Com. v. Brown, 12 Gray (Mass.) 135; Rex v. Hempstead, Russ. & R. 344; Reg. v. Dovey, 2 Denison, Crown Cas. 86; Com. v. Slate, 11 Gray (Mass.) 63; 2 Hawk. P. C. c. 25, § 89; Brown v. State, 5 Yerg. (Tenn.) 367; Com. v. Griffin, 3 Cush. (Mass.) 523; State v. Smith, 37 Mo. 58; Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; State v. O'Brien, 18 R. I. 105, 25 Atl. 910; State v. Bradley, 9 Rich. (S. C.) 168. "The case of Reg. v. Dovey, 2 Denison, Crown Cas. 92, and other cases subsequent to that of Rex v. Messingham (1 Moody, Crown Cas. 257) explain and illustrate the principle and the extent to which it is to be carried in the matter of charging a joint felony in receiving stolen goods knowing them to be such. To sustain a joint charge against two for one and the same offense, there must be a joint receipt at one and the same time; and a receipt of goods by one of the parties at one time and place, and a subsequent receipt by another, will not sustain the joint charge, but will authorize the conviction of the party who first received them. He is properly found guilty of receiving stolen goods. So the entire acquittal of one of two parties charged exonerates that party, but leaves the indictment valid and effectual as against the one found guilty by the jury." Com. v. Slate, supra.

[45] Klein v. People, 31 N. Y. 229. See Shouse v. Com., 5 Pa. 83; Rex v. Butterworth, Russ. & R. 520; White v. People, 32 N. Y. 465.

[46] 1 Chit. Cr. Law, 270; Rex v. Butterworth, Russ. & R. 520. But see Rex v. Hempstead, Russ. & R. 344; Rex v. Quail, 1 Craw. & D. 191.

[47] Klein v. People, 31 N. Y. 229.

[48] U. S. v. Harding, 1 Wall. Jr. 127, Fed. Cas. No. 15,301; Mask v. State, 32 Miss. 406.

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extent in the case of crimes which cannot be committed by one person alone, as in the case of riot, which cannot be committed by less than three,[49] and conspiracy, which requires at least two.[50] If so many are acquitted that there remains less than the number necessary to commit the crime, all must be acquitted.[51]

Effect of Misjoinder of Parties

If the fact that there is a misjoinder of parties appears on the face of the indictment, the objection, at common law, may be raised by demurrer, or by motion in arrest of judgment, or on writ of error; or the court, in its discretion may quash the indictment on motion.[52] If the objection does not so appear, it may be raised by plea in abatement, or the defendants may wait until the fact of misjoinder appears from the evidence, and then claim an acquittal.[53] There is some conflict in the authorities on these points, and in some jurisdictions the common-law rules have been changed by statute.

Severance

Where several persons are rightly joined in one indictment, the court may, in its discretion, grant them a severance; that is, separate trials.[54]

Several Counts

The fact that several defendants are charged in different counts of the same indictment with different offenses of the same nature does not render the indictment bad in law, so that objection may be taken by demurrer, motion in arrest

[49] Clark, Cr. Law, 456.

[50] Id. 155.

[51] Rex v. Kinnersley, 1 Strange, 193; Rex v. Heaps, 2 Salk. 593; Rex v. Nichols, 13 East, 412, note; State v. O'Donald, 1 McCord (S. C.) 532, 10 Am. Dec. 691; State v. Allison, 3 Yerg. (Tenn.) 428; Pennsylvania v. Huston, Add. (Pa.) 334; Turpin v. State, 4 Blackf. (Ind.) 72; Stephens v. State, 14 Ohio, 388.

[52] Young v. Rex, 3 Term R. 103; Rex v. Weston, 1 Strange, 623; Reg. v. Devett, 8 Car. & P. 639; People v. Hawkins, 34 Cal. 181; Galbreath v. State, 36 Tex. 200; Elliott v. State, 26 Ala. 78.

[53] Elliott v. State, supra; Stephens v. State, 14 Ohio, 386; Lindsey v. State, 48 Ala. 169; Baker v. People, 105 Ill. 452.

[54] Post, p. 503.

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of judgment, or on writ of error; but the court, in the exercise of its discretion, may quash the indictment.[55] In overruling a demurrer to such an indictment it was said that "this would have been a good ground of application to the discretion of the court to quash the indictment for the inconvenience which may arise at the trial from joining different counts against different offenders; but where, to the offenses so charged in different counts, there may be the same plea and the same judgment, there is no authority for saying that such joinder in one indictment is bad in point of law, nor is there any legal incongruity on the face of it, to warrant us in giving judgment for the defendants on demurrer." [56]

CONCLUSION OF INDICTMENT

114. An indictment for an offense, either at common law or by statute, except for mere nonfeasance, must conclude, "against the peace of the state;" [57] and an indictment for an offense against a statute must also expressly count upon the statute, and must therefore conclude, "against the form of the statute, and against the peace of the state."

In the absence of statutory provision to the contrary, every indictment, whether under a statute or at common law, except for a mere nonfeasance,[58] must conclude, "against the peace of the state." In England it is, "against the peace of the king," and in some of our states it is the practice to use the word "commonwealth," or the words "people of the state," instead of "state." This conclusion is essential at common law, and its omission is fatal to the indictment.[59]

[55] Rex v. Kingston, 8 East, 41. [56] Rex v. Kingston, supra.

[57] Or "of the commonwealth," or "of the people of the state," where it is the practice in the particular state to use these terms.

[58] Reg. v. Wyat, 1 Salk. 380.

[59] 2 Hale, P. C. 188; 2 Hawk. P. C. c. 25, § 92; Holmes' Case, Cro. Car. 377; Palfrey's Case, Cro. Jac. 527; Reg. v. Langley, 3 Salk. 190; Rex v. Cook, Russ. & R. 176; Damon's Case, 6 Greenl. (Me.) 148;

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It is usual to use the words "against the peace and dignity of the state" but the word "dignity" is not necessary.[60] "Against the peace," without adding "of the state," would not be sufficient.[61] In some states a form of conclusion is prescribed by the Constitution or by statute, and the form so prescribed must be followed,[62] at least substantially, though an immaterial variance therefrom will not render the indictment bad.[63] In a few states a literal compliance with the Constitution has been held necessary.[64]

Whoever commits an offense indictable either by statute or common law is guilty of a breach of the peace of that government which exercises jurisdiction, for the time being, over the place where such offense is committed; and in setting forth the offense an omission to charge it as having been done against the peace of that government is fatal.[65] Thus, where an indictment, in England, for an offense committed in the reign of a previous sovereign, concluded against the peace of the sovereign reigning at the time of the indictment, the defect was held fatal.[66] And an indictment in Maine, after it had become a state, for an offense committed when its territory was a portion of Massachusetts, was held bad because it concluded against

State v. Evans, 27 N. C. 603; Rogers v. Com., 5 Serg. & R. (Pa.) 463; Com. v. Carney, 4 Grat. (Va.) 546; State v. Washington, 1 Bay (S. C.) 120, 1 Am. Dec. 601; Browne's Case, 3 Greenl. (Me.) 177; State v. Soule, 20 Me. 19; State v. Kean, 10 N. H. 347, 34 Am. Dec. 162; Thompson v. Com., 20 Grat. (Va.) 724. But see Gragg v. State, 3 Okl. Cr. 409, 106 Pac. 350.

[60] 2 Hale, P. C. 188; 2 Hawk. P. C. c. 25, § 94; 2 Rolle, Abr. 82; Com. v. Caldwell, 14 Mass. 330.

[61] 2 Hale, P. C. 188; Damon's Case, 6 Greenl. (Me.) 148.

[62] State v. Lopez, 19 Mo. 254; Com. v. Carney, 4 Grat. (Va.) 546; Anderson v. State, 5 Ark. 444; Rogers v. Com., 5 Serg. & R. (Pa.) 463. Contra, Chemgas v. Tynan, 31 Colo. 35, 116 Pac. 1045.

[63] State v. Kean, 10 N. H. 347, 34 Am. Dec. 162, supra; Anderson v. State, 5 Ark. 445; State v. Allen, 8 W. Va. 680; Zarresseller v. People, 17 Ill. 101.

[64] See page 357, note 62, supra.

[65] Damon's Case, 6 Greenl. (Me.) 148; Reg. v. Lane, 3 Salk. 190, 2 Ld. Raym. 1034; 2 Hawk. P. C. c. 25, § 95; 2 Hale, P. C. 188; Rex v. Lookup, 3 Burrows, 1903.

[66] Rex v. Lookup, supra.

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the peace of Maine, instead of against the peace of Massachusetts.[67]

Every indictment on a statute, except for mere nonfeasance,[68] must also have this conclusion.[69] In addition to this, every indictment founded on a statute, including indictments for nonfeasance, must conclude contra formam statuti, by the words "against the form of the statute in such case made and provided," or words to that effect.[70] Both of these conclusions are necessary. The latter will not supply an omission of the former, nor the former an omission of the latter.[71] The conclusion contra formam statuti is to show that the prosecution proceeds upon a statute in contradistinction to the common law, and is essential. "A judgment by statute shall never be given on an indictment at common law, as every indictment which doth not conclude contra formam statuti shall be taken to be. And therefore, if an indictment do not conclude contra formam statuti, and the offense indicted be only prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it." [72]

The conclusion contra formam statuti is necessary at

[67] Damon's Case, supra. [68] 1 Chit. Cr. Law, 246.

[69] 2 Hale, P. C. 188; Palfrey's Case, Cro. Jac. 527; Reg. v. Lane, 2 Ld. Raym. 1034; Reg. v. Langley, 3 Salk. 190; Rex v. Cook, Russ. & R. 176.

[70] 2 Hawk. P. C. c. 25, § 116. And see cases hereafter cited.

[71] Com. v. Town of Northampton, 2 Mass. 116; Rex v. Cook, Russ. & R. 176.

[72] 2 Hawk. P. C. c. 25, § 116; 1 Hale, P. C. 172, 189, 192; Rex v. Clerk, 1 Salk. 370; Rex v. Winter, 13 East, 258; Reg. v. Harman, 2 Ld. Raym. 1104; Wells v. Iggulden, 3 Barn. & C. 186; Com. v. Inhabitants of Springfield, 7 Mass. 9; State v. Soule, 20 Me. 19; State v. Evans, 7 Gill & J. (Md.) 290; McCullough v. Com., Hardin (Ky.) 102; State v. Jim, 7 N. C. 3; Crain v. State, 2 Yerg. (Tenn.) 390; State v. Humphreys, 1 Overt. (Tenn.) 307. The same is true of a complaint for violation of a city by-law or ordinance, where the prosecution can only be maintained by virtue of a statute. It must conclude, not merely "against the form of the by-laws of said city," but also "against the form of the statute." Com. v. Worcester, 3 Pick. (Mass.) 475; Com. v. Gay, 5 Pick. (Mass.) 44; Stevens v. Dimond, 6 N. H. 330.

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common law where an offense is entirely created by statute, and did not exist at common law;[73] or where an offense at common law is by statute made an offense of a higher nature, as where a misdemeanor is made a felony;[74] or where the statute expressly or impliedly repeals the common law in relation to the offense;[75] or where an increased punishment is prescribed by statute for an existing common-law offense accompanied by certain circumstances of aggravation.[76] But this conclusion is only necessary where the indictment is founded on a statute. It is not necessary where the offense exists at common law, and a statute merely deprives the offender, under particular circumstances, of some benefit to which he was entitled, as formerly of the benefit of clergy;[77] or where a common-law offense committed abroad is made punishable here;[78] or where a statute merely changes a rule of evidence in relation to a common-law offense;[79] or where a common-law offense is merely declared by statute;[80] or where the punishment of a common-law offense is merely fixed by statute.[81]

Where an indictment contains several counts, each count

[73] 2 Hawk. P. C. c. 23, § 99, Id. c. 25, § 116; 1 Hale, P. C. 172, 189, 192; Com. v. Town of Northampton, 2 Mass. 116; Com. v. Inhabitants of Springfield, 7 Mass. 13.

[74] 2 Hale, P. C. 189; 2 Hawk. P. C. c. 25, § 116; State v. Wright, 4 McCord (S. C.) 358; Anderson v. State, 5 Ark. 445; State v. Kean, 10 N. H. 347, 10 Am. Dec. 162; State v. Johnson, 1 Walk. (Miss.) 392; State v. Ripley, 2 Brev. (S. C.) 300; State v. Jim, 7 N. C. 3; State v. Evans, 7 Gill & J. (Md.) 290; State v. Soule, 20 Me. 19.

[75] Com. v. Cooley, 10 Pick. (Mass.) 37; Com. v. Ayer, 3 Cush. (Mass.) 152; Com. v. Dennis, 105 Mass. 162.

[76] State v. McKettrick, 14 S. C. 346; People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197.

[77] 2 Hale, P. C. 190; Rex v. Dickenson, 1 Saund. 135, note 3.

[78] Rex v. Sawyer, Russ. & R. 294.

[79] 2 Hale, P. C. 190, 288; 2 Hawk. P. C. c. 46, § 43; J. Kel. 32.

[80] 2 Hale, P. C. 189; People v. Enoch, 13 Wend. (N. Y.) 175, 27 Am. Dec. 197; State v. Evans, 7 Gill & J. (Md.) 290.

[81] Russel v. Com., 7 Serg. & R. (Pa.) 489; Rex v. Chatburn, 1 Moody, Crown Cas. 403; Williams v. Reg., 7 Q. B. 250; Rex v. Berry, 1 Moody & R. 463; State v. Burt, 25 Vt. 373; Chiles v. Com., 2 Va. Cas. 260; State v. Ratts, 63 N. C. 503; Com. v. Searle, 2 Bin. (Pa.) 332, 4 Am. Dec. 446; White v. Com., 6 Bin. (Pa.) 179, 6 Am. Dec. 443. But see 2 Hale, P. C. 190; 2 Rolle, Abr. 82.

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is a separate charge, and must have a proper conclusion. By the weight of authority, the conclusion of one count cannot supply the omission of a conclusion in another.[82]

These exact words need not be used, but the words substituted must be an equivalent. "It may be going too far," it has been said, "to say that no other form of words can be devised which would be equivalent to contra formam statuti; but it is certain that no words would be sufficient unless they clearly and explicitly refer to the statute as the foundation of the suit." [83] The words "against the law in such case provided" have been held not sufficient,[84] but "against the peace and the statute" are sufficient.[85]

We have already seen that a conclusion contra formam statuti cannot aid an indictment which does not contain sufficient averments to bring the case within a statute.[86] We have also seen that an indictment need not recite the particular statute on which it is founded.[87]

"Where there are two statutes which relate to the offense, there have been various distinctions taken, respecting the conclusion against the form of the 'statutes' in the plural, or 'statute' in the singular, only. Thus it was formerly holden by several authorities that where an offense is prohibited by several independent statutes, it is necessary to conclude in the plural; [88] but now the better opinion seems to be that a conclusion in the singular will suffice, and it will be construed to refer to that enactment which is most

[82] State v. Soule, 20 Me. 19; State v. Johnson, Walk. (Miss.) 392. But see McGuire v. State, 37 Ala. 161.

[83] Com. v. Inhabitants of Stockbridge, 11 Mass. 279; Lee v. Clarke, 2 East, 333; State v. Holly, 2 Bay (S. C.) 262. But see State v. Turnage, 2 Nott & McC. (S. C.) 158; U. S. v. Smith, 2 Mason, 143, Fed. Cas. No. 16,338.

[84] Com. v. Inhabitants of Stockbridge, supra. But see Hudson v. State, 1 Blackf. (Ind.) 318; Fuller v. State, 1 Blackf. (Ind.) 65.

[85] Com. v. Caldwell, 14 Mass. 330.

[86] Ante, p. 302.

[87] Ante, p. 300.

[88] Broughton v. Moore, Cro. Jac. 142; Dormer's Case, 2 Leon. 5; Petchet v. Woolston, Aleyn, 49; Rex v. Cox, 2 Bulst. 258; State v. Cassel, 2 Har. & G. (Md.) 407.

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for the public benefit." [89] It has been held that where an offense is created by one statute, and the punishment prescribed or affixed by another, the conclusion should be in the plural; [90] but this is not necessary "where the statute creating the offense is only amended or regulated, or altered in parts thereof which do not relate to the offense or to the punishment thereof." [91] It has been held that where an indictment or information is founded on a single statute, a conclusion contra formam statutorum is fatal, [92] but on this point there is a direct conflict in the authorities, and the weight of opinion is to the contrary.[93]

Where the conclusion contra formam statuti is unnecessarily inserted, and the indictment may be sustained at common law, these words may be rejected as surplusage, and the judgment given as at common law.[94]

[89] 1 Chit. Cr. Law, 291; 1 Hale, P. C. 173; 2 Hawk. P. C. c. 25, § 117; Horthbury v. Levingham, Sid. 348; Owen, 135; Rex v. Collins, 2 Leach, Crown Cas. 827; 4 Coke, 48a; People v. Walbridge, 6 Cow. (N. Y.) 512; U. S. v. Furlong, 5 Wheat. 184, 5 L. Ed. 64; Kenrick v. U. S., 1 Gall. 268, Fed. Cas. No. 7,713; State v. Dayton, 23 N. J. Law, 49, 61, 53 Am. Dec. 270; State v. Berry, 9 N. J. Law, 374.

[90] 2 Hale, P. C. 173; Dormer's Case, 2 Leon. 5; Broughton v. Moore, Cro. Jac. 142; State v. Cassel, 2 Har. & G. (Md.) 407; Kane v. People, 8 Wend. (N. Y.) 212. But see 1 Chit. Cr. Law, 292; 2 Hawk. P. C. c. 25, § 117; Parker v. Webb, 3 Lev. 61; U. S. v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15,204; Butman's Case, 8 Greenl. (Me.) 113.

[91] Kane v. People, supra; Dingley v. Moor, Cro. Eliz. 750; Pinkney v. Inhabitants, 2 Saund. 377, note 12; Rex v. Dickenson, 1 Saund. 135, note 3.

[92] 2 Hawk. P. C. c. 25, § 117; Andrews v. Hundred of Lewknor, Cro. Jac. 187, Yel. 116.

[93] 2 Hale, P. C. 173; Com. v. Hooper, 5 Pick. (Mass.) 42; State v. Townley, 18 N. J. Law, 311; Kenrick v. U. S., 1 Gall. 268, Fed. Cas. No. 7,713; U. S. v. Gibert, 2 Sumn. 21, 89, Fed. Cas. No. 15,204.

[94] 2 Hale, P. C. 190; Reg. v. Wyat, 1 Salk. 381; 2 Hawk. P. C. c. 25, § 115; Rex v. Mathews, 5 Term R. 162, 2 Leach, Crown Cas. 584; Reg. v. Wigg, 2 Ld. Raym. 1163; Rex v. Harris, 4 Term R. 202; Com. v. Hoxey, 16 Mass. 385; Pennsylvania v. Bell, Add. (Pa.) 171, 1 Am. Dec. 298; State v. Gove, 34 N. H. 510; Haslip v. State, 4 Hayw. (Tenn.) 273; Respublica v. Newell, 3 Yeates (Pa.) 407, 2 Am. Dec. 381; Davis v. State, 3 Har. & J. (Md.) 154; Southworth v. State, 5 Conn. 325; Knowles v. State, 3 Day (Conn.) 103; Fuller v. State, 1 Blackf. (Ind.) 65; State v. Phelps, 11 Vt. 116, 34 Am. Dec.

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In England, and in some of our states, statutes have been enacted declaring in substance that no indictment, information, or complaint shall be held insufficient for want of a proper conclusion.[95] In some states, on the other hand, as we have seen, not only is there no such statute, but there are constitutional provisions declaring the formal conclusion necessary, so that no statute dispensing with the necessity for it would be valid.

Though it has sometimes been customary, it is altogether unnecessary, to insert in the conclusion of an indictment the words, "to the great damage of" the party injured by the crime, "to the evil example of all others," or "to the great displeasure of Almighty God." [96] Nor, it seems, is it necessary, though it is customary, to insert the words "to the common nuisance of the citizens of the state," or, in England, "of all the liege subjects of our lord the king," in indictments against common barretors, common scolds, and for other common nuisances, though on this point there is a conflict.[97]

672; Gregory v. Com., 2 Dana (Ky.) 417; State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646; State v. Burt, 25 Vt. 373; State v. White, 15 S. C. 381. But where an offense which was a misdemeanor at common law is made a felony by statute, there can be no judgment as for a misdemeanor at common law. See the cases cited in note 74, page 359, supra.

[95] See State v. Cadle, 19 Ark. 613; Com. v. Kennedy, 15 B. Mon. (Ky.) 531; State v. Dorr, 82 Me. 341, 19 Atl. 861.

[96] 1 Chit. Cr. Law, 245; Rex v. Cooper, 2 Strange, 1246.

[97] 2 Hawk. P. C. c. 25, § 59; Com. v. Haynes, 2 Gray (Mass.) 73, 61 Am. Dec. 437; Com. v. Reynolds, 14 Gray (Mass.) 91, 74 Am. Dec. 665; Com. v. Parker, 4 Allen (Mass.) 313. Contra, 1 Chit. Cr. Law, 245; Rex v. Pappineau, 2 Strange, 688; Rex v. Cooper, Id. 1246; Com. v. Faris, 5 Rand. (Va.) 691; Reg. v. Holmes, 6 Cox, Cr. Cas. 216; Com. v. Smith, 6 Cush. (Mass.) 81; Com. v. Buxton, 10 Gray (Mass.) 9.

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AMENDMENT

115. At common law, an information could be amended by the prosecuting officer at any time by leave of the court; but an indictment, being a finding by the grand jury on oath, could not be so amended.

116. By statute, in most jurisdictions, either an indictment or information may now be amended in various particulars.

Since an indictment is a finding by the grand jury upon oath, and, at common law, depends upon this fact, among others, for its validity, it follows that it cannot, at common law, be amended by the court, without the concurrence of the grand jury that presented it; and the rule, because of its reason, necessarily applies to every offense, whether it be a felony or merely a misdemeanor.[98] In some states it is held that it cannot even be amended, with the defendant's consent, as to matters of substance, where the prosecution is required to be by indictment.[99] It is, or was at one time, the practice in England for the grand jury to consent at the time they were sworn that the court should amend matters of form, altering no matter of substance; and mere informalities could be amended by the court at

[98] 1 Chit. Cr. Law, 298; 2 Hawk. P. C. c. 25, § 98; Rex v. Wilkes, 4 Burrows, 2570; State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584; People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; Com. v. Mahar, 16 Pick. (Mass.) 120; Patrick v. People, 132 Ill. 529, 24 N. E. 619; Com. v. Inhabitants of Phillipsburg, 10 Mass. 78; State v. Squire, 10 N. H. 558; Sanders v. State, 26 Tex. 119; State v. McCarthy, 17 R. I. 370, 22 Atl. 282; State v. Kennedy, 36 Vt. 563; Com. v. Buzzard, 5 Grat. (Va.) 694; State v. Terrebonne, 45 La. Ann. 25, 12 South. 315. But see Miller v. State, 68 Miss. 221, 8 South. 273.

[99] Com. v. Maher, 16 Pick. (Mass.) 120; People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386; Com. v. Adams, 92 Ky. 134, 17 S. W. 276. Contra, McCorkle v. State, 14 Ind. 39; State v. Faile, 43 S. C. 52, 20 S. E. 798; State v. Cody, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692; by statute, State v. McCarthy, 17 R. I. 370, 22 Atl. 282; Reynolds v. State, 92 Ala. 44, 9 South. 398.

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any time before trial, or perhaps during the trial.[1] Some of the courts in this country have held it competent for the court to amend matters of form, but others hold the contrary, where such an amendment is not expressly allowed by statute. The omission of an averment which is essential is fatal at common law, though the averment is purely technical and formal.[2]

The caption of an indictment may, as we have seen, be amended at any time, so as to conform to the other records of the court; but this is no violation of the rule, for the caption is no part of the indictment.[3]

Informations, since they are not found upon the oath of a grand jury, may, at common law, be amended by leave of the court, at any time before trial, even after plea. "There is a great difference," said Lord Mansfield in a leading case, "between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit. An officer of the crown has the right of framing them originally, and may, with leave, amend, in like manner as any plaintiff may do. If the amendment can give occasion to a new defense, the defendant has leave to change his plea." [4]

In England, and in many of our states, statutes have been enacted, allowing mistakes in the statement of time and place, names and description of persons, description of property, statements of ownership, etc., to be cured by amendment at the trial, in the discretion of the court, if the defendant cannot be prejudiced thereby in his defense on the merits. In some states it is merely provided that indict-

[1] 2 Hawk. P. C. c. 25, § 98.

[2] Com. v. Inhabitants of Phillipsburg, 10 Mass. 78; State v. Hughes, 1 Swan (Tenn.) 261.

[3] Ante, p. 158.

[4] Rex v. Wilkes, 4 Burrows, 2527, 2569. And see Anon., 1 Salk. 50; Rex v. Nixon, 1 Strange, 185; Rex v. Charlesworth, 2 Strange, 871; Rex v. Harris, 1 Salk. 47; Rex v. Holland, 4 Term R. 457; State v. Rowley, 12 Conn. 101; Com. v. Rodes, 1 Dana (Ky.) 595; State v. Terrebonne, 45 La. Ann. 25, 12 South. 315; State v. Weare, 38 N. H. 314; State v. White, 64 Vt. 372, 24 Atl. 250.

ments, etc., may be amended in matters of form, where the defendant cannot be prejudiced thereby. These statutes must be read in connection with, and subject to, the constitutional provisions of the particular state. In some states, as we have heretofore shown, the Constitution requires all prosecutions to be by indictment. Clearly, in these states, a statute cannot be so construed as to authorize an indictment to be amended by the court, even with the defendant's consent, either during the trial or before plea, in any matter of substance, for the accusation as amended would not be a finding by the grand jury.[5] In most, if not all, of the states, the Constitution guarantees to persons accused of crime the right to be fully and substantially informed of the charge against them, before they can be called upon to answer, either by an express provision to that effect, or impliedly by the provision that no person shall be deprived of life, liberty, or property without due process of law. In no state, therefore, can the Legislature authorize either an indictment or an information to be amended during the trial in matter of substance.[6] It may authorize amendments in matters of form.[7]

The difficulty is in determining what defects are mere matter of form and what are matter of substance, and the authorities are conflicting. We may state as a rule, that no omission or misstatement which prevents the indictment

[5] Ante, pp. 125, 165; People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386; State v. Ham, 72 N. J. Law, 4, 60 Atl. 41; State v. Armstrong, 4 Minn. 335 (Gil. 251); State v. Twining, 71 N. J. Law, 388, 58 Atl. 1098.

[6] Ante, p. 165, and cases there cited; People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386; Sharp v. State, 6 Tex. App. 650; Collins v. State, 25 Tex. Supp. 205; State v. Startup, 39 N. J. Law, 423; McLaughlin v. State, 45 Ind. 338; State v. Van Cleve, 5 Wash. 642, 32 Pac. 461; State v. McCarthy, 17 R. I. 370, 22 Atl. 282; Com. v. Harrington, 130 Mass. 35; Drummond v. State, 4 Tex. App. 150. But see note, 99, page 180.

[7] Com. v. Holley, 3 Gray (Mass.) 458; Peebles v. State, 55 Miss. 434; State v. Nulty, 57 Vt. 543; McKinley v. State, 8 Humph. (Tenn.) 72; State v. Schricker, 29 Mo. 265; State v. Chamberlain, 6 Nev. 257; Rough v. Com., 78 Pa. 495; State v. Manning, 14 Tex. 402; State v. Freeman, 59 Vt. 661, 10 Atl. 752; and cases hereafter referred to.

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from showing on its face that an offense has been committed, or from showing what offense is intended to be charged, is mere matter of form. It is matter of substance, and cannot be cured by amendment at the trial.[8] And in no case can an indictment or information be amended at the trial so as to change the identity of the offense.[9]

The name of the defendant is held mere matter of form, and may be amended, if a statute permits.[10] Some of the courts have allowed the names of third persons to be supplied or changed by amendment—as the name of the owner of property in an indictment or information for larceny, and similar crimes;[11] the name of the owner of the premises in an indictment for burglary or arson;[12] the name of the thief in an information for receiving stolen goods;[13] the name of the purchaser in an indictment for an unlawful sale of intoxicating liquors;[14] the name of the person assaulted in a complaint for assault and battery,[15] and murder;[16] the name of the woman in an indictment for adultery,[17] and seduction;[18] of the purchaser in an indictment for liquor selling.[19]

[8] State v. Learned, 47 Me. 426. And see Com. v. Harrington, 130 Mass. 35; McLaughlin v. State, 45 Ind. 338; State v. Startup, 39 N. J. Law, 423; Bates v. State, 12 Tex. App. 26; cases cited in note 6, supra. And see ante, pp. 122, 125, 165.

[9] Blumenberg v. State, 55 Miss. 528.

[10] State v. Manning, 14 Tex. 402; State v. Schricker, 29 Mo. 265; Shiflett v. Com., 90 Va. 386, 18 S. E. 838; People v. Kelly, 6 Cal. 210; State v. Johnson, 93 Mo. 317, 6 S. W. 77; Miller v. State, 68 Miss. 221, 8 South. 273.

[11] State v. Casavant, 64 Vt. 405, 23 Atl. 636; State v. Christian, 30 La. Ann. 367; State v. Hanks, 39 La. Ann. 235, 1 South. 458; State v. Ware, 44 La. Ann. 954, 11 South. 579; Baker v. State, 88 Wis. 140, 59 N. W. 570. Contra, State v. Van Cleve, 5 Wash. 642, 32 Pac. 461; State v. McCarthy, 17 R. I. 370, 22 Atl. 282.

[12] People v. Hagan, 60 Hun, 577, 14 N. Y. Supp. 233. Contra, State v. McCarthy, supra. And see, as contra, State v. Van Cleve, supra.

[13] State v. Jenkins, 60 Wis. 599, 19 N. W. 406.

[14] Rough v. Com., 78 Pa. 495.

[15] Rasmussen v. State, 63 Wis. 1, 22 N. W. 835; State v. Sovern, 225 Mo. 580, 125 S. W. 769.

[16] State v. Peterson, 41 La. Ann. 85, 6 South. 527.

[17] State v. Arnold, 50 Vt. 731.

[18] People v. Johnson, 104 N. Y. 213, 10 N. E. 690.

[19] Rough v. Com., 78 Pa. 495.

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Amendment has also been allowed to correct a mistake in the allegation of a former conviction in an indictment for a second offense,[20] but not to supply an entire omission of such an allegation;[21] to supply the certificate of oath to a complaint or information;[22] to change the description of property in an indictment or information for larceny;[23] to change the name of the county;[24] and to change the time at which the offense was alleged to have been committed.[25]

AIDER BY VERDICT

117. A defective statement in an indictment will, at common law, in most jurisdictions, be cured by a verdict of guilty, if the statement is sufficient to show that the offense has been committed, and to apprise the defendant of the charge against him, but not otherwise. In some states the doctrine of aider by verdict is not recognized in criminal cases.

When we speak of a defect in pleading being cured by verdict, or a pleading being aided by verdict, we mean "the healing or remission, by a verdict rendered, of a defect or error in pleading, which might have been objected to before verdict," or "the presumption of the proof of all facts necessary to the verdict as it stands, coming to the aid of a record in which such facts are not distinctly alleged." [26]

With respect to such imperfections as are aided by verdict

[20] Com. v. Holley, 3 Gray (Mass.) 458.

[21] See Com. v. Harrington, 130 Mass. 35.

[22] State v. Freeman, 59 Vt. 661, 10 Atl. 752.

[23] State v. Carter (La.) 9 South. 128; Baker v. State, 88 Wis. 140, 59 N. W. 570. Contra, People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386. And see, as contra, State v. McCarthy, supra; State v. Van Cleve, supra.

[24] State v. Chamberlain, 6 Nev. 257.

[25] Myers v. Com., 79 Pa. 308. By statute, State v. Anderson, 125 La. 779, 51 South. 846; State v. May, 45 S. C. 509, 23 S. E. 513; People v. Jackson, 111 N. Y. 362, 19 N. E. 54. Contra, Drummond v. State, 4 Tex. App. 150.

[26] Black, Law Dict. "Aider by Verdict."

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at common law, it has been said that: "Where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict." [27] "Where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given a verdict, there the want of stating that matter in express terms in the declaration (or indictment), provided the matter contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge or jury could have properly treated it in an unrestrained sense, it may be reasonably presumed, after verdict, that it was so restrained at the trial." [28]

The doctrine of aider by verdict is founded on the common law, and is independent of any statutory enactment. Defects in pleading are aided by intendment; that is, the court will, after verdict, presume or intend that the particular thing which is imperfectly stated was duly proved at the trial, when it was within the issue made by the pleadings, and must have been proved to authorize the verdict.

There is authority for the proposition that a defective indictment cannot be aided by verdict; that no fault which would have been fatal on demurrer can be cured by the verdict; and, consequently, that any such fault may be taken advantage of by motion in arrest of judgment, or by writ of error.[29] And such has been recognized as the rule in some of our states.[30] But in England it is well settled that the common-law doctrine of aider by verdict applies equally to

[27] Heymann v. Reg., L. R. 8 Q. B. 105.

[28] Jackson v. Pesked, 1 Maule & S. 234.

[29] 1 Starkie, Cr. Pl. 361. And see 2 Hale, P. C. 193.

[30] Com. v. Child, 13 Pick. (Mass.) 198; Com. v. Collins, 2 Cush. (Mass.) 557; Com. v. Bean, 14 Gray (Mass.) 52; People v. Wright, 9 Wend. (N. Y.) 193; State v. Gove, 34 N. H. 511; State v. Barrett, 42 N. H. 466.

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criminal as to civil cases,[81] and the same rule is recognized in some of our states.[82] Of course, the doctrine is affected to some extent by the requirement in most of our constitutions that no person shall be held to answer for a crime until the same is fully and plainly, formally and substantially, made known to him.[83] An indictment which fails to meet this requirement could not be aided by verdict, but defects which do not make the indictment insufficient in this respect can be so aided.

It will be noticed that the verdict cures imperfect and defective averments only, and it cures them because the facts alleged being in issue will be presumed to have been so proved as to warrant the verdict. The verdict cannot cure the total omission of an essential averment, for a fact not stated at all cannot have been in issue, and there can be no room for presumption or intendment.[84] The following statement with reference to pleading in civil cases clearly shows the distinction: "Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor; because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial, and it is therefore a fair presumption that they were so proved. But, where no cause of action is shown, the omission is not cured; and, if a necessary allegation is altogether omitted from the pleading, or if the latter contains matter adverse to the right of the party pleading it, and so clearly expressed that no reasonable construction can alter its meaning, a verdict will afford no help. A more simple statement of the rule is that

[81] Reg. v. Waters, 1 Denison, Crown Cas. 356; Reg. v. Goldsmith, L. R. 2 Crown Cas. 74; Reg. v. Aspinall, 2 Q. B. Div. 48; Bradlaugh v. Reg., 3 Q. B. Div. 607; Heymann v. Reg., L. R. 8 Q. B. 105.

[82] State v. Freeman, 63 Vt. 496, 22 Atl. 621; Nichols v. State, 127 Ind. 406, 26 N. E. 839; State v. Townsend, 50 Mo. App. 690; Lavelle v. State, 136 Ind. 233, 36 N. E. 135; Graeter v. State, 105 Ind. 271, 4 N. E. 461; State v. Dunn, 109 N. C. 839, 13 S. E. 881.

[83] Com. v. Child, 13 Pick. (Mass.) 198.

[84] Bradlaugh v. Reg., 3 Q. B. Div. 636.

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a verdict will cure the defective statement of a title, but not the statement of a defective title." [35]

In a prosecution for publishing an obscene book the indictment described the book by its title, but did not show its contents. This omission was held fatal, and not cured by a verdict of guilty. "The rule is very simple," it was said, "and it applies equally to civil and criminal cases. It is that the verdict only cures defective statements. In the present case the objection is not that there is a defective statement, but an absolute and total want in stating that which constitutes the criminal act namely, the words complained of. * * * Here we have not the substance set out, we have not a mere defective averment; we have an absolute omission to aver that which was relied upon as lewd and indecent. My opinion is that the defect is not a matter cured by the verdict, and it is perfectly open to the plaintiffs in error to rely on this as a fatal defect in the indictment even after verdict." [36]

On the other hand, where a complaint for profane swearing charged that the defendant "did profanely curse," without setting forth the language used, and no objection was made at the trial to the defect in the complaint, it was held that though the words should have been set out, and though the complaint would, because of the omission to do so, have been bad on demurrer, the defect was cured by a verdict of guilty.[37] So, where an information charged that the defendant had enticed a female of chaste character to a certain city, for the purpose of prostitution, it was held that, though the failure to state the particular place or house in the city to which she was enticed would have been fatal on motion to quash or demurrer, the defect was cured by a verdict of guilty, since the information contained all the essential elements of the offense.[38]

[35] Shipm. Com. Law Pl. 155.

[36] Bradlaugh v. Reg., 3 Q. B. Div. 607, 642. And see Reyes v. State, 34 Fla. 181, 15 South. 875.

[37] State v. Freeman, 63 Vt. 496, 22 Atl. 621.

[38] Nichols v. State, 127 Ind. 406, 26 N. E. 839. The omission or defective statement of time may be cured by verdict when time is not of the essence of the offense. Ledbetter v. U. S., 170 U. S. 606, 18 Sup.

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Cure of formal defects under the statute of jeofails and amendments and waiver of objections by failure to raise them in a certain way must be distinguished from aider by verdict. The doctrine of aider by verdict is founded, as we have seen, upon the common law, and is independent of any statutory enactment.

FORMAL DEFECTS CURED BY STATUTE

118. By statute, in most jurisdictions, objections because of formal defects in pleading must be raised at a certain time, or in a certain way, as by demurrer or motion to quash, or they will be waived. And by statute, in some states, no objection at all can be raised because of formal defects.

At an early day, statutes called the "statutes of jeofails and amendments" were passed in England, for the purpose of curing defects in civil pleadings. They provided, inter alia, that after verdict no judgment should be arrested or reversed for any defect in form. These statutes did not extend to criminal cases,[89] but in most, if not in all, jurisdictions there are modern statutes enacted for a similar purpose.

"Statutes of amendments and jeofails are distinct things, though a statute may be both of amendments and jeofails. One of amendments authorizes the cure of a defect by an amendment actually made in the record; of jeofails, directs

Ct. 774, 42 L. Ed. 1162; Conner v. State, 25 Ga. 515, 71 Am. Dec. 184. The omission to state the Christian name of defendant (Wilcox v. State, 31 Tex. 586), the imperfect description of third persons mentioned in the indictment (Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131), and misdescription of property stolen (State v. Hanshew, 3 Wash. 12, 27 Pac. 1029), have also been held to be cured by verdict.

[89] 1 Chit. Cr. Law, 297; 4 Bl. Comm. 375; 1 Hale, P. C. 193; 2 Hawk. P. C. c. 25, § 97; Reg. v. Tuchin, 1 Salk. 51, 2 Ld. Raym. 1061; State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584; Com. v. Tuck, 20 Pick. (Mass.) 356; Brown v. Com., 8 Mass. 65; State v. Squire, 10 N. H. 560; People v. Wright, 9 Wend. (N. Y.) 196.

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the court not to recognize the defect after a time or step mentioned." [40] "Jeofails" comes from the expression, "J'ai faillé," which was at one time used by pleaders when they found that they had made an error or slip in the proceedings. The statutes of jeofails were so called because, when a pleader discovered, and thus acknowledged, a slip in his proceedings, he was allowed by these statutes to amend it. The amendment was seldom actually made, but the benefit of the statute was attained by the court's considering the amendment as having been made, and overlooking the mistake.[41] Some statutes require an actual amendment, and are called "statutes of amendment." Others, even though they may in terms allow amendment, do not require actual amendment, but allow the court to overlook formal defects.[42] Others, in their terms, merely require the latter course. We have already dealt with statutes of amendment.[43] In addition to the statutes which may thus be described as statutes of jeofails there are modern statutes, in most jurisdictions, providing that certain objections must be raised, if at all, at a certain time, or in a certain way, or be deemed waived; as that objections for formal defects must be taken by demurrer or motion to quash before pleading to the merits.

As we have already shown, statutes thus curing merely formal defects are constitutional; [44] but it is not in the power of the legislature to thus cure defects in matter of substance. If an indictment omits an averment which is essential to the description of the offense, or fails to state the offense with such particularity as may be necessary in order to give the accused notice of the charge against him, the ob-

[40] 1 Bish. New Cr. Proc. § 705.

[41] Black, Law Dict. tit. "Jeofails"; 3 Bl. Comm. 407; Rex v. Landaff, 2 Strange, 1011; Steph. Pl. Append. 38.

[42] Rex v. Landaff, 2 Strange, 1011; Eakin v. Burger, 1 Sneed (Tenn.) 425; 1 Bish. New Cr. Proc. § 705, et seq.

[43] Ante, p. 363.

[44] Ante, pp. 165, 364; Com. v. Walton, 11 Allen (Mass.) 238; State v. Sides, 64 Mo. 383; Lambert v. People, 29 Mich. 71; State v. Smith, 63 N. C. 234.

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jection may be made at any time, notwithstanding a statute to the contrary.[45]

The following defects have been held to be merely formal, and therefore curable under the statutes: Failure of an information for embezzling mortgaged chattels to state where the crime was committed, or the value of the property, or that the crime was committed with intent to defraud the mortgagee, since these defects could have been cured by amendment if made at the trial before plea;[46] failure of an information for receiving stolen goods to allege when, where, and by whom they were stolen;[47] failure of an indictment alleging that the defendant "unlawfully solicited K. falsely to depose" to allege that he did so corruptly;[48] failure to allege the day or month on which the offense was committed, where time was not of the essence of the offense;[49] charging the offense in the alternative, where some of the alternative averments were good and some were bad;[50] duplicity.[51] Other illustrations of formal defects will be found under the head of "Amendment."[52]

[45] Collins v. State, 6 Tex. App. 647; Newcomb v. State, 37 Miss. 383; Pattee v. State, 109 Ind. 545, 10 N. E. 421; Com. v. Doyle, 110 Mass. 103; State v. Reynolds, 106 Mo. 146, 17 S. W. 322; Hawthorn v. State, 56 Md. 530; State v. Amidon, 58 Vt. 524, 2 Atl. 154; People v. McKenna, 81 Cal. 158, 22 Pac. 488; Phillips v. Com., 44 Pa. 197. But see Serra v. Mortiga, 204 U. S. 470, 27 Sup. Ct. 343, 51 L. Ed. 571, in which it was held, even in the absence of a statute, that if defendant did not object in the trial court to a defective indictment, and the proof showed him guilty of the offense which the indictment was intended to charge, and he was not misled by the defect in the indictment, the conviction would not be disturbed.

[46] People v. Schultz, 85 Mich. 114, 48 N. W. 293.

[47] People v. Smith, 94 Mich. 644, 54 N. W. 487.

[48] Com. v. Lane, 157 Mass. 462, 32 N. E. 655.

[49] Phillips v. State, 86 Ga. 427, 12 S. E. 650; State v. Peters, 107 N. C. 876, 12 S. E. 74; Arrington v. Com., 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242.

[50] Hornsby v. State, 94 Ala. 55, 10 South. 522.

[51] People v. Tower, 135 N. Y. 457, 32 N. E. 145. See ante, p. 199.

[52] Ante, p. 366.

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CHAPTER X

PLEADING AND PROOF—VARIANCE—CONVICTION OF MINOR OFFENSE

119–121. Pleading and Proof—Variance.
122. Conviction of Minor Offense.
123. Conviction of Higher Offense.

PLEADING AND PROOF—VARIANCE

119. An omission to prove any essential allegation of the indictment, or, what amounts to the same thing, any material variance between such allegation and the proof, will entitle the defendant to an acquittal.

120. An allegation which is wholly unnecessary and redundant, and is not descriptive of that which is essential, may be rejected as surplusage, and need not be proved. But if an unnecessary allegation is descriptive of the identity of anything which it is necessary to state and prove, it cannot be so rejected, but must be proved.

121. It is not necessary to prove the whole of the charge, if that which is proved is sufficient to constitute the offense, and the part not proved is not essential to the charge, and does not describe or limit that which is essential.

The rule governing variance is based on principles that we have already had occasion to refer to in other connections. These principles are: (1) No one can be convicted of an offense without an accusation. (2) The accusation must set forth the facts sufficiently to enable the defendant to prepare his defense. It follows, from the first principle, that to authorize a conviction it is absolutely essential to prove so much of the indictment as is sufficient to show that an offense charged in it has been committed by the de-

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fendant. The proof must correspond with the charge, for to put a person on trial for one offense and convict him of another offense would be to try him and convict him without an accusation. Any variance, therefore, between the allegations and the proof with respect to those facts and circumstances which are, in point of law, essential to the charge, will be fatal, and will entitle the defendant to an acquittal. It will not do to prove that some crime has been committed. It must be shown that a crime charged in the indictment has been committed.

It follows, from the second principle above noted, that when certain facts identifying the particular offense the defendant is alleged to have committed are set out in the indictment, the facts so set out must be proved; to allow a conviction on proof of other facts would be to mislead the defendant in preparing his defense. As said by the Massachusetts court:

"By the familiar rules of pleading, a party charged with an offense is entitled to a statement in the indictment of the facts which constitute the offense; and if an offense may be committed in either of various modes, the party charged is entitled to have that mode stated in the indictment which is proved at the trial; and when one mode is stated, and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of the variance." [1]

In a Massachusetts case, the indictment charged that the defendant "unlawfully and scandalously did print and publish certain obscene pictures of naked girls, manifestly tending to the corruption of the morals of youth." The court admitted evidence that the defendant took pictures of girls naked down to the waist, and instructed the jury that if they found such pictures to be obscene and indecent, and to have been published, they should convict the defendant. The conviction was set aside on the ground that the proof did not correspond with the allegation. "The government," it was said, "having described the pictures, is bound by the description, and the defendant could not be convicted upon

[1] Com. v. Richardson, 126 Mass. 34, 30 Am. Rep. 647.

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proof that he printed and published pictures substantially different from the description, though the jury might find such pictures to be obscene." [2]

So, where the defendant is charged with shooting "into" a dwelling house, and the proof shows that he shot "in" the house, he and the person at whom he shot both being in the dwelling, there is a fatal variance.[3]

In a prosecution for perjury, a description of the court and judge before whom, and the action or proceeding in which, the false oath was taken, is essential, and a variance in this respect between the indictment and the proof will be fatal.[4] So, on an indictment for malicious prosecution, the defendant is entitled to an acquittal if there is a variance between the description and the proof of the prosecution, or of the court in which the prosecution took place; [5] or on indictment for obtaining property by false pretenses, a variance between the allegation and proof of the pretenses used.[6]

[2] Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652. In Lanier v. State, 141 Ga. 17, 80 S. E. 5, the indictment charged a killing to have been done by "choking, strangling, beating, and striking." The trial court charged the jury in effect that defendant was guilty if he "choked or smothered" the deceased. Held error, as "smothering" was not equivalent to "strangling."

[3] State v. Kye, 46 La. Ann. 424, 14 South. 883.

[4] Rex v. Bellamy, 1 Ryan & M. 171; Rex v. Eden, 1 Esp. 98; Rex v. Alford, 1 Leach, Crown Cas. 150; Walker v. State, 96 Ala. 53, 11 South. 401. In the latter case the indictment described the action as being by G. against the defendant, and the proof showed that it was by "G. et al." See, also, State v. Peters, 107 N. C. 876, 12 S. E. 74. For variance as to authority under which the judge was sitting, see Rex v. Lincoln, Russ. & R. 421.

[5] Woodford v. Ashley, 2 Camp. 193; Thompson v. Richardson, 96 Ala. 488, 11 South. 728.

[6] Rex v. Plestow, 1 Camp. 494; Sharp v. State, 53 N. J. Law, 511, 21 Atl. 1026; State v. Metsch, 37 Kan. 222, 15 Pac. 251; Com. v. Wood, 142 Mass. 459, 8 N. E. 432. On indictment for obtaining credit under false representations, by mortgaging "a dark bay mare mule" and representing it to be defendant's, conviction cannot be had on proof of mortgaging a "mouse-colored mare mule, named Mag." Berrien v. State, 83 Ga. 381, 9 S. E. 609. But, as we shall presently see, part only of the pretense need be proved. Note 11, infra.

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On indictment for assault or homicide the means used must be substantially proved as stated. An indictment for assault or murder by poison would not be sustained by proof of assault or murder by shooting or stabbing, and an indictment for assault or murder by shooting would not be sustained by proof of an assault or murder by poison or with a knife or stick.[7]

Surplusage

It is never necessary to prove those allegations which are wholly redundant and useless, and may be rejected as surplusage.[8] We have already fully considered the question of

[7] Reg. v. Bird, 5 Cox, Cr. Cas. 11; Phillips v. State, 68 Ala. 469. And see Morgan v. State, 61 Ind. 447; Porter v. State, 57 Miss. 300. If the means are substantially proved, it is sufficient. Reg. v. Warman, 2 Car. & K. 195; Patterson v. State, 3 Lea (Tenn.) 575. Thus the charge of cutting with a knife would be sustained by proof of cutting with some other sharp instrument. Mackalley's Case, 9 Coke, 67a. See Hernandez v. State, 32 Tex. Cr. R. 271, 22 S. W. 972. And an allegation of shooting with a pistol will be sustained by proof of shooting with a gun, for the weapons are of the same character, and inflict the same kind of wound. Turner v. State, 97 Ala. 57, 12 South. 54. But see Morgan v. State, 61 Ind. 447. And a charge of assault and battery with a gun is not sustained by proof of a striking with the hand. Walker v. State, 73 Ala. 17. An allegation of strangling and choking with the hands is supported by proof of strangling and choking with a scarf. Thomas v. Com. (Ky.) 20 S. W. 226. The fact that the wound which caused death was in the throat, instead of on the head, as alleged, or that its size or shape was not exactly as alleged, does not constitute a variance. Com. v. Coy, 157 Mass. 200, 32 N. E. 4. Under an indictment charging murder by poison, by mingling it with water in a bucket, proof is admissible that the death was caused by poison mixed with coffee in a kettle. The manner in which the poison was administered is not descriptive of the offense, and need not be proved as charged. Johnson v. State, 29 Tex. App. 150, 15 S. W. 647. In Long v. State, 23 Neb. 33, 36 N. W. 310, the indictment charged the killing to be with a "bludgeon." The court instructed the jury that they might convict if the killing was done with "a bludgeon, bolt, or club." Held no error. But a charge of assault with "a pitchfork, a sharp, dangerous, weapon," is not sustained by proof of a striking with the handle of a pitchfork, since the handle is not a sharp, dangerous, weapon. Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143.

[8] Ante, p. 209, where the subject is explained at length; Scott v. Com., 6 Serg. & R. (Pa.) 224; Com. v. Randall, 4 Gray (Mass.) 36;

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surplusage, and it is unnecessary to do more than refer to what we have said on the subject. It will be remembered that allegations which, though altogether unnecessary, are descriptive of that which is essential, cannot be rejected, but must be proved as laid.[9]

Proof of Part of Charge

The fact that the whole charge is not sustained by the proof does not entitle the defendant to an acquittal, if enough is proved to make out the offense charged, and the part not proved is not essential to the charge, and does not describe or limit that which is essential.[10]

Upon an indictment for obtaining money by false pretenses, for instance, it is not necessary to prove the whole of the pretenses charged.[11] And on indictment for perjury it is sufficient to prove one of the assignments.[12]

Com. v. Adams, 127 Mass. 15; Stevens v. Com., 4 Leigh (Va.) 683; Com. v. Jeffries, 7 Allen (Mass.) 571, 83 Am. Dec. 712; Com. v. Baker, 10 Cush. (Mass.) 405. Allegation of intent as surplusage. Notes 20, 21, infra. Allegation of knowledge as surplusage. Note 24, infra. Allegation as to property as surplusage. Notes 49 et seq. infra. Allegation as to ownership of property. Notes 64–66, infra. Names and description of persons. Notes 81, 86–89, infra. Allegations as to time. Notes 91, 99. Allegations as to place. Notes 9–27.

[9] Ante, p. 214; post, pp. 386, 389, 395, 401; U. S. v. Howard, 3 Sumn. 12, Fed. Cas. No. 15,403; Alkenbrack v. People, 1 Denio (N. Y.) 80; State v. Moore, 33 N. C. 70; Com. v. Gavin, 121 Mass. 54, 23 Am. Rep. 255; Com. v. Luscomb, 130 Mass. 42.

[10] Com. v. Morrill, 8 Cush. (Mass.) 573; Reg. v. Rhodes, 2 Ld. Raym. 887; People v. Wiley, 3 Hill (N. Y.) 194; Haskins v. People, 16 N. Y. 344; State v. Cameron, 40 Vt. 555; Com. v. Williams, 2 Cush. (Mass.) 583; Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179; Rex v. Gillham, 6 Term R. 267; Com. v. McKenney, 9 Gray (Mass.) 114; Murphy v. State, 28 Miss. 638. In Bennett v. U. S., 194 Fed. 630, 114 C. C. A. 402, an indictment charging defendant with transporting X. and Y. for immoral purposes was held to be sustained by proof that he transported X.; the proof failing as to Y.

[11] Rex v. Hill, Russ. & R. 190; People v. Haynes, 11 Wend. (N. Y.) 557; Com. v. Morrill, 8 Cush. (Mass.) 573; Webster v. People, 92 N. Y. 422.

[12] Reg. v. Rhodes, 2 Ld. Raym. 887; Com. v. Johns, 6 Gray (Mass.) 274; Williams v. Com., 91 Pa. 493; State v. Hascall, 6 N. H. 358; De Bernie v. State, 19 Ala. 23; Marvin v. State, 53 Ark. 395, 14 S. W. 87; Harris v. People, 64 N. Y. 148.

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So, if an indictment charge that the defendant did and caused to be done a certain act, as that he forged and caused to be forged, it is enough to prove either, if the one proved is a crime in itself;[13] and the same is true where, on a charge of composing, printing, and publishing a libel, publication only is proved.[14]

And as we shall presently see more at length, it is not necessary in a prosecution for larceny to prove that all the property alleged was stolen. We shall find other illustrations of the rule in the following pages. Conviction of a distinct minor offense included in the charge will be separately considered.

Name and Addition of the Defendant

As we have already seen, a variance between the statement of the defendant's name and addition and the proof will not prevent a conviction. A misnomer or misdescription of the defendant can be taken advantage of only by plea in abatement.[15]

Intent

Where a particular intent is necessary to constitute the offense charged, it must not only be alleged, but must be proved. A material variance between the allegation and proof will be fatal.[16] On indictment for assault with intent to rape, there could be no conviction on proof of an intent to rob or to murder, nor on indictment for assault with intent to murder could there be any conviction on proof of intent to maim, or of an intent to kill under such circum-

[13] Rex v. Hunt, 2 Camp. 584; Rex v. Middlehurst, 1 Burrows, 399; People v. Rynders, 12 Wend. (N. Y.) 430; Hoskins v. State, 11 Ga. 92.

[14] Rex v. Hunt, 2 Camp. 584; Rex v. Williams, Id. 646; Com. v. Morgan, 107 Mass. 205.

[15] Ante, p. 176.

[16] Rex v. Williams, 1 Leach, Crown Cas. 529; Robinson v. State, 53 Md. 151, 36 Am. Rep. 399. But see Woodburne's Case, 16 How. State Tr. 54. An allegation of intent to defraud one person will not be sustained by proof of intent to defraud another person. Schayer v. People, 5 Colo. App. 75, 37 Pac. 43; State v. Reynolds, 106 Mo. 146, 17 S. W. 322; Com. v. Harley, 7 Metc. (Mass.) 506; Com. v. Kellogg, 7 Cush. (Mass.) 476; ante, pp. 223, 224. From some acts a criminal intent is presumed. Here proof of the act is sufficient proof of the intent. Ante, p. 218.

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stances that an actual killing would not have been murder. So, on indictments for attempts, the specific intent alleged must be proved.

In an indictment under a statute for an assault, where the intent laid in several counts was to murder, to disable, or to do some grievous bodily harm, and the intent found by the jury was to prevent being apprehended, the variance was held fatal, because the intent should be stated according to the fact.[17] So, on indictment for burglary, if the entry be alleged to have been made with intent to commit a specific felony, the indictment will not be sustained by proof of intent to commit some other and altogether different felony.[18]

To avoid a possible variance it is usual, as we have seen, to lay the same act with different intents in different counts of the indictment.[19]

It is not necessary to prove the whole intention as stated in the indictment if it is divisible, but it will be enough to prove so much as is sufficient to constitute the offense.[20]

[17] Rex v. Duffin, Russ. & R. 365.

[18] 1 Hale, P. C. 561; 2 East, P. C. 51; Rex v. Monteth, 2 Leach, Crown Cas. 702; Rex v. Jenks, Id. 774; Robinson v. State, 53 Md. 151, 36 Am. Rep. 399; People v. Crowley, 100 Cal. 478, 35 Pac. 84; State v. Carroll, 13 Mont. 246, 33 Pac. 688; State v. Halford, 104 N. C. 874, 10 S. E. 524; Neubrandt v. State, 53 Wis. 89, 9 N. W. 824; People v. Mulkey, 65 Cal. 501, 4 Pac. 507. It has been held that where the intent alleged and the intent proved are substantially the same, as where an intent to commit larceny is alleged, and an intent to commit robbery is proved, there is no variance. People v. Crowley, supra; State v. Halford, supra. But see State v. Carroll, supra, in which it was held that, where the indictment alleges intent to steal an overcoat, that specific intent must be proved. And see Neubrandt v. State, supra, in which it was held that an allegation of intent to steal the goods of a person named must be specifically proved.

[19] Ante, p. 331.

[20] 1 Chit. Cr. Law, 233; Rex v. Dawson, 3 Starkie, 62; State v. Dineen, 10 Minn. 407 (Gil. 325); State v. Moore, 12 N. H. 42; People v. Hall, 94 Cal. 595, 30 Pac. 7. Where an indictment for burglary alleges an intent to commit both grand and petit larceny, proof of an intent to commit either is sufficient. People v. Hall, supra. And see generally, as to conviction of minor offense not involving the whole intent charged, post, p. 403.

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On an indictment charging an assault with intent to abuse and to carnally know, the accused may be convicted of an assault with intent to abuse simply.[21]

And generally if the allegation of intent is wholly immaterial, it may be rejected as surplusage, and a variance between the allegation and the proof will not be fatal.[22]

Knowledge

When knowledge is necessary to constitute the offense it is not only necessary to allege it, but it is also essential that it be proved.[23] But where knowledge is unnecessarily stated, as where it must be presumed, because the event, fact, or circumstance lay alike in the knowledge of all men, or where it is not necessary at all to constitute the offense, the allegation may be rejected as surplusage, and need not be proved.[24]

Written Instruments and Spoken Words

When a written instrument is professedly given according to its tenor, as heretofore explained, in an indictment for forgery, threatening letters, libel, etc., it must be proven verbatim as laid. Any material variance between the instrument as set out and the instrument introduced in evidence will be fatal.[25] Thus, when an indictment alleges the forgery of an indorsement, "B. F. Humes, Mgr.," on a

[21] Rex v. Dawson, supra. In Veazle's Case, 7 Greenl. (Me.) 131, it was held that an indictment for forgery with intent to defraud A. was supported by proof of an intent to defraud A. and B.

[22] Rex v. Higgins, 2 East, 5.

[23] Ante, p. 225.

[24] Com. v. Squire, 1 Metc. (Mass.) 258; ante, p. 227.

[25] 2 East, P. C. 976; Rex v. Hunter, Russ. & R. 511; Rex v. Powell, 1 Leach, Crown Cas. 78; Rex v. Gilchrist, 2 Leach, Crown Cas. 660, 661; Rex v. Birkett, Russ. & R. 251; Com. v. Stow, 1 Mass. 54; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; Clay v. People, 86 Ill. 147; Reg. v. Drake, 2 Salk. 660; Id., 3 Salk. 224; Rex v. Beach, Cowp. 229, 1 Leach, Crown Cas. 133; Luttrell v. State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760; State v. Townsend, 86 N. C. 676; State v. Molier, 12 N. C. 263; State v. Weaver, 35 N. C. 491; Dana v. State, 2 Ohio St. 91; People v. Marion, 28 Mich. 255; Com. v. Kearns, 1 Va. Cas. 109; State v. Owen, 73 Mo. 440; State v. Snell, 9 R. I. 112.

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draft, the abbreviation, "Mgr.," being a material part of the indorsement, must be proved.[26]

As we shall presently see, the offense need not generally be shown to have been committed on the day alleged in the indictment. This rule, however, does not dispense with the necessity to prove the date of a written instrument as alleged in the indictment. The date is a part of the description of the instrument, and a variance will be fatal.[27]

The variance must be material. A mere variance of a letter, or even of a word, will not be fatal, if the meaning is not in any degree altered or obscured.[28]

On an indictment for forging a bill of exchange, where the tenor was "value received," but the bill introduced in evidence was "for value received," the variance was held immaterial.[29] So, where an indictment charged the forgery of an order signed "McNicole & Co.," and the order introduced in evidence was signed "McNicoll & Co.," and where an indictment charged the forgery of a note signed "C. R. Droun," and the note introduced was signed "C. R. Drown," the variances were disregarded.[30] If the sense is altered at all, a variance even in a letter or a word will be fatal.[31] Indeed, in an early English case it was held that any variance would be fatal, whether it altered the sense or not, as where the word "nor" was substituted for the word "not." [32]

We have seen that matter appearing on an instrument, but forming no part of it, need not be set out in the indict-

[26] Roush v. State, 34 Neb. 325, 51 N. W. 755.

[27] Whart. Cr. Ev. § 103a; Dill v. People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254.

[28] Rex v. Hart, 1 Leach, Crown Cas. 145; State v. Bean, 19 Vt. 530; State v. Bibb, 68 Mo. 286; State v. Weaver, 35 N. C. 491; State v. Leak, 80 N. C. 403; Com. v. Parmenter, 5 Pick. (Mass.) 279; Baker v. State, 14 Tex. App. 332; Allgood v. State, 87 Ga. 668, 13 S. E. 569; People v. Phillips, 70 Cal. 61, 11 Pac. 493.

[29] Rex v. Hart, 1 Leach, Crown Cas. 145.

[30] Reg. v. Wilson, 1 Denison, Crown Cas. 284; Com. v. Woods, 10 Gray (Mass.) 482. And see State v. Collins, 115 N. C. 716, 20 S. E. 452.

[31] Potter v. State, 9 Tex. App. 55.

[32] Reg. v. Drake, 2 Salk. 660; Id., 3 Salk. 224; Rex v. Kinnersley, 1 Strange, 201.

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ment, and of course a difference in this respect between the instrument as set out and the instrument introduced in evidence cannot constitute a variance.[33]

Where the purport or substance of a written instrument may be and is given in the indictment, verbal accuracy is not necessary. If the proof agrees in substance with the allegations it is enough.[34]

Where an instrument when introduced in evidence does not on its face appear to be that which the indictment states it purports to be, the variance is fatal.[35] Such is the case where an instrument is described as a bond, and it is not under seal.[36] So where an indictment for forging a railroad ticket describes the ticket as signifying to the holder that it must be used continuously, and without stopping at intermediate stations, after once entering the car, and the ticket introduced in evidence merely expresses on its face the limitation, "Good this day only," the variance is fatal.[37]

As we have seen, where the purport of an instrument is stated, and does not agree with the purport of the instru-

[33] Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Com. v. Stevens, 1 Mass. 203; People v. Franklin, 3 Johns. Cas. (N. Y.) 299; Com. v. Ward, 2 Mass. 397; Langdale v. People, 100 Ill. 263; State v. Wheeler, 35 Vt. 261; Wilson v. People, 5 Parker, Cr. R. (N. Y.) 178; Perkins v. Com., 7 Grat. (Va.) 651, 56 Am. Dec. 123; Miller v. People, 52 N. Y. 304, 11 Am. Rep. 706; Mee v. State, 23 Tex. App. 566, 5 S. W. 243; State v. Grant, 74 Mo. 33; Tobart v. Tipper, 1 Camp. 350; Com. v. Adams, 7 Metc. (Mass.) 51; White v. Territory, 1 Wash. St. 279, 24 Pac. 447; Trask v. People, 151 Ill. 523, 38 N. E. 248; State v. Jackson, 90 Mo. 156, 2 S. W. 128; Smith v. State, 29 Fla. 408, 10 South. 894; Hennessy v. State, 23 Tex. App. 340, 5 S. W. 215; Griffin v. State, 14 Ohio St. 55; Buckland v. Com., 8 Leigh (Va.) 732; Com. v. Searle, 2 Bin. (Pa.) 332, 4 Am. Dec. 446; Com. v. Taylor, 5 Cush. (Mass.) 605; ante, pp. 243, 244.

[34] Edsall's Case, 2 East, P. C. 984; ante, p. 241.

[35] Rex v. Jones, Doug. 300; Edsall's Case, 2 East, P. C. 984; Com. v. Kearns, 1 Va. Cas. 109; Com. v. Ray, 3 Gray (Mass.) 441; State v. Moller, 12 N. C. 263; State v. Wimberly, 3 McCord (S. C.) 190; People v. Wiley, 3 Hill (N. Y.) 194; Downing v. State, 4 Mo. 572. An indictment for obtaining by false pretenses a note described as the note of S. P. is not sustained by proof of obtaining the joint note of S. P. and another. People v. Reed, 70 Cal. 529, 11 Pac. 676.

[36] People v. Wiley, supra. [37] Com. v. Ray, supra.

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ment as afterwards set out according to its tenor, the indictment is bad. This, however, is not a question of variance, but a question of repugnancy between the allegations of the indictment.[38]

By the weight of authority, where spoken words are alleged in the indictment, as in an indictment for perjury, slander, profane cursing, obtaining money by false pretenses, all that is necessary is to prove the words substantially as alleged, and to prove so much of them as is sufficient to make out the offense.[39] A variance in a word, or in several words, where the sense is not in any degree changed, will not be fatal. But if the sense is changed, or if the words proved are not in substance the same as the words alleged, even though they may be sufficient to constitute the offense, the variance will be fatal.[40]

Description of Real or Personal Property

Where real property is the subject of the offense charged, the description of it in the indictment must be borne out by the evidence. A variance between the description of the premises and the proof, on indictment for burglary, or statutory housebreakings, arson, or statutory burnings, forcible

[38] Becker v. State (Tex. App.) 18 S. W. 550; English v. State, 30 Tex. App. 470, 18 S. W. 94; State v. Horan, 64 N. H. 548, 15 Atl. 20; State v. Farrand, 8 N. J. Law, 333; ante, pp. 201, 249.

[39] Whart. Cr. Ev. § 120a; Reg. v. Drake, 2 Salk. 660; Re Crowe, 3 Cox, Cr. Cas. 123; People v. Warner, 5 Wend. (N. Y.) 271; Litman v. State, 9 Tex. App. 461; People v. Fay, 89 Mich. 119, 50 N. W. 752; Com. v. Morrill, 8 Cush. (Mass.) 573; People v. Haynes, 11 Wend. (N. Y.) 557; Rex v. Hill, Russ. & R. 190.

[40] Reg. v. Fussell, 3 Cox, Cr. Cas. 291; Reg. v. Bird, 17 Cox, Cr. Cas. 387; Riddle v. State, 30 Tex. App. 425, 17 S. W. 1073; Berry v. State, 27 Tex. App. 483, 11 S. W. 521; Frisby v. State, 26 Tex. App. 180, 9 S. W. 463; Wohlgemuth v. U. S., 6 N. M. 568, 30 Pac. 854; Sharp v. State, 53 N. J. Law, 511, 21 Atl. 1026; Leverette v. State, 32 Tex. Cr. R. 471, 24 S. W. 416; State v. Frisby, 90 Mo. 530, 2 S. W. 833; note 6, supra. Where an indictment for slander alleged words as spoken in English, and the proofs showed that they were spoken in German, the variance was held fatal, though when translated into English the words were substantially as alleged. Stichtd v. State, 25 Tex. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444.

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entry and detainer, etc., will be fatal, for the description of the premises is essential to the charge.[41]

The same rule applies to indictments for offenses relating to personal property. In prosecutions for larceny, embezzlement, false pretenses, etc., a description of the property stolen, embezzled, or obtained is essential to the charge, and must be borne out by the evidence. Any material variance will be fatal.[42] An indictment for the larceny or embezzlement of cloth and other materials is not supported by proof of the larceny or embezzlement of an overcoat made from such materials.[43] So where an indictment charged the larceny of "one bushel of oats, one bushel of chaff, and one bushel of beans," and the proof showed that they were all mixed together, the variance was held fatal. They should have been described, it was said, as "a certain mixture, consisting of one bushel of oats," etc.[44] So where an indictment charges the larceny of a gray horse and the proof shows that it was a gray gelding;[45] or the larceny of a pig, when it was a hog, or vice versa;[46] or of a live bird or animal, when it was dead when stolen.[47] So where an indict-

[41] Ante, p. 250, and cases there cited.

[42] Rex v. Furneaux, Russ. & R. 335; Rex v. Tyers, Id. 403; Com. v. Clair, 7 Allen (Mass.) 527; State v. Harris, 3 Har. (Del.) 559; State v. Cockfield, 15 Rich. (S. C.) 316; Com. v. Luscomb, 130 Mass. 42; McGee v. State, 4 Tex. App. 625. An indictment for obtaining by false pretenses the note of a certain person is not sustained by proof of obtaining the joint note of that person and another. People v. Reed, 70 Cal. 529, 11 Pac. 676.

[43] Com. v. Clair, 7 Allen (Mass.) 527. It has even been held that the defendant must be acquitted when the indictment charged larceny of a "pair of boots," and the proof showed a taking of two boots, being the right boot of two pair. State v. Harris, 3 Har. (Del.) 559.

[44] Rex v. Kettle, 3 Chit. Cr. Law, 947a. But see Roman v. State, 64 Tex. Cr. R. 515, 142 S. W. 912.

[45] Hooker v. State, 4 Ohio, 350; Valesco v. State, 9 Tex. App. 76. But see Baldwin v. People, 1 Scam. (Ill.) 304, where it was held that proof of stealing a mare or gelding would sustain a charge of stealing a horse.

[46] See State v. McLain, 2 Brev. (S. C.) 443.

[47] Rex v. Halloway, 1 Car. & P. 128; Rex v. Edwards, Russ. & R. 497; Rough's Case, 2 East, P. C. 607; Com. v. Beaman, 8 Gray (Mass.) 497.

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ment charged the larceny of a plowshare, and the proof showed the larceny of a plow, the variance was held fatal.[48]

The fact that the property is described with unnecessary particularity will not dispense with strict proof, for the description is of something which is essential.[49]

Where, for instance, a complaint charged the larceny of "one white woolen flannel sheet," and the evidence showed the larceny of a blanket made of cotton and wool, the warp being cotton and the filling woolen, the variance was held fatal. "A sheet," it was said, "may be composed of various substances, as linen, cotton, or wool, singly or in combination. The word has reference to the form and not the material of which the article is made; had this, therefore, been described by the term 'sheet' alone, it would have been sufficiently certain. But the accused was put on her trial for stealing a sheet composed wholly of wool, for it is described as 'one white woolen flannel sheet,' and she was convicted of stealing an article, part cotton and part wool, called a cotton and woolen blanket. The quality and description of the property stolen must be shown with accuracy and certainty. * * * If the property is described as a cow, and proved to be a heifer, the variance is fatal; so it is if described as a sheep and proved to be a lamb. And where a party was indicted for stealing one bushel of oats, one bushel of chaff, and one bushel of beans, and the proof was that they were mixed together when stolen, the variance was held to be fatal. Here the property was described with unnecessary minuteness and particularity, but, being so described, the proof must correspond with it."[50] So where an indictment charged the larceny of two "barrels of turpentine," and it was not shown that the turpentine was in barrels;[51] and where an indictment charged the larceny of a number of "bottles" of liquor, and the proof showed that the defendant drew the liquor from casks into bottles which he took

[48] State v. Cockfield, 15 Rich. (S. C.) 316. See, also, People v. Cronkrite, 266 Ill. 438, 107 N. E. 703.

[49] Ante, p. 214.

[50] Alkenbrack v. People, 1 Denio (N. Y.) 80.

[51] State v. Moore, 33 N. C. 70.

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with him for the purpose;[52] and where an indictment charged that the defendant had in his possession, with intent to sell the same "one pint of adulterated milk, to which milk water had been added," and the proof showed that the milk in question was adulterated by adding water to pure milk,[53]—the variance was in each case held fatal.

The fact that the indictment, in its description of property, is not sustained as to all the articles will not be fatal if it is sustained as to enough to make out the offense. An indictment for stealing two horses would be sufficiently supported to warrant a conviction, if the evidence corresponded with the description as to one of them, though it varied as to the other, for the larceny of one is sufficient to make out

[52] Com. v. Gavin, 121 Mass. 54, 23 Am. Rep. 255.

[53] Com. v. Luscomb, 130 Mass. 42. These decisions and numberless others of like character are the result of the application of the principle that the defendant must not be charged with one transaction and convicted of another. Yet the same courts find no difficulty in holding that on a charge of larceny, robbery, murder, or any other crime, stated to have been done on a particular day, month, and year, the defendant may be convicted on proof that it was done on an entirely different day, month, and year from that alleged. Yet it is clear that a larceny proved to have been done on one day is just as different a transaction from a larceny done on another day as is the larceny of a linen sheet from the larceny of a woolen sheet, or the larceny of a heifer from the larceny of a cow. The reason given for the variance not being fatal in the case of time—that the statement of time is a mere "formal statement," or that it is "immaterial"—is, of course, a begging of the question. If, in the language of the court quoted in the text, "the accused was put on her trial for stealing a sheet composed wholly of wool, for it is described as 'one white woolen sheet,' and she was convicted of stealing an article, part cotton and part wool," why should it not be said, if the variance had been in the date alleged and proven, "the accused was put on her trial for stealing a sheet on January 1st, and she was convicted of stealing a sheet on February 3d," an entirely different crime? The prosecutor may have had two sheets stolen, one on January 1st and another on February 3d; the grand jury may have intended to indict defendant for the first larceny, as they did, and not for the second larceny, for which, indeed, they may have refused to indict defendant, yet a conviction of defendant on proof of the second larceny is held to be no variance, though he is clearly convicted of a different crime from that for which he was indicted.

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the offense.[54] In like manner, though it is often necessary that the number or quantity of property shall be stated, in order to meet the requirement of certainty,[55] it is not necessary to prove the whole number or quantity, if, on the rejection of the part not proved, the offense will be complete.[56] On indictment for usury, for instance, it is not necessary to prove the exact sum laid in the indictment.[57] Nor is it necessary, on a prosecution for extortion, to prove the exact sum alleged to have been extorted.[58]

In like manner, it is often necessary—always in indictments for larceny—to state the value of the property with reference to which the offense was committed, but, in general, it is not necessary to prove the whole value as stated, provided the value proved is sufficient to constitute the offense.[59] Where, however, value to a particular amount is necessary to constitute the offense, and the value is ascribed to many articles of different kinds, collectively, the offense must be made out as to every one of those articles, for the grand jury has only ascribed that value to all the articles collectively.[60]

Where the articles are of the same kind, and they are thus valued collectively, the rule does not apply. Thus where an indictment for stealing sundry bank notes, or sundry gold

[54] Haskins v. People, 16 N. Y. 344; Com. v. Eastman, 2 Gray (Mass.) 76; People v. Wiley, 3 Hill (N. Y.) 194; State v. Martin, 82 N. C. 672.

[55] Ante, p. 264.

[56] State v. Cameron, 40 Vt. 555; Com. v. Williams, 2 Cush. (Mass.) 583; Com. v. O'Connell, 12 Allen (Mass.) 452; State v. Fenn, 41 Conn. 590; State v. Williams, 10 Humph. (Tenn.) 101; State v. Martin, 82 N. C. 672; Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179; State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253.

[57] Rex v. Gillham, 6 Term R. 265.

[58] Rex v. Burdett, 1 Ld. Raym. 149; Rex v. Gillham, 6 Term R. 267.

[59] Com. v. McKenney, 9 Gray (Mass.) 114; Rex v. Carson, Russ. & R. 303; State v. Harris, 64 N. C. 127.

[60] Rex v. Forsyth, Russ. & R. 274; Duppa v. Mayo, 1 Saund. 286; Pinkney v. Inhabitants of East Hundred, 2 Saund. 379; Hope v. Com., 9 Metc. (Mass.) 134; Collins v. People, 39 Ill. 233; Com. v. Lavery, 101 Mass. 207; Com. v. Falvey, 108 Mass. 304; State v. Longbottoms, 11 Humph. (Tenn.) 39; Sheppard v. State, 42 Ala. 531; ante, p. 266.

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coin, or a certain number of bushels of oats, etc., states an aggregate value, it is sufficient to prove the larceny of less than the quantity or number alleged, if a sufficient value is shown.[61]

Ownership of Property

We have seen that indictments for larceny, embezzlement, false pretenses, malicious mischief, or other offenses in relation to personal property, or for burglary, arson, or other offenses in relation to real property, must state the ownership of the property or the premises.[62] The allegation of ownership is essential to the charge, and must be supported by the proof. Any material variance will be fatal. We have already explained how ownership must be alleged, and in doing so have shown what will constitute a variance, and collected some of the cases on the subject.[63]

Where the ownership of property is not in any way material, it not only need not be stated, but, if stated, it need not be proved, but may be rejected as surplusage.[64] This rule does not apply where the allegation of ownership is a part of the description of the offense. Here, though unnecessarily alleged, it is material, because descriptive of that which is material, and cannot be rejected as surplusage.[65] On a trial for conspiracy to commit robbery, if the indictment alleges possession of the property intended to be stolen in one person and the title in another, both allegations must be proved, though the latter was unnecessary.[66]

[61] Com. v. O'Connell, 12 Allen (Mass.) 451; Com. v. Grimes, 10 Gray (Mass.) 470, 71 Am. Dec. 666; Larned v. Com., 12 Metc. (Mass.) 240; State v. Taunt, 16 Minn. 109 (Gil. 99); ante, p. 266.

[62] Ante, p. 267.

[63] Ante, p. 267, and cases there cited.

[64] Pye's Case, 2 East, P. C. 785; Reg. v. Newboult, L. R. 1 Crown Cas. 344; U. S. v. Howard, 3 Sumn. 12, Fed. Cas. No. 15,403; Stevens v. Com., 4 Leigh (Va.) 683; Rivers v. State, 10 Tex. App. 177. In the case last cited the defendant was indicted under a statute making it an offense to wound a hog. The indictment laid the ownership of the hog in one S. It was held that the ownership of the hog was immaterial, and might be rejected as surplusage.

[65] Com. v. Wade, 17 Pick. (Mass.) 399.

[66] Ward v. State (Tex. Cr. App.) 21 S. W. 250.

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Names and Description of Third Persons

When it is necessary to name or describe third persons in the indictment,[67] they must be named or described accurately. A material error in the names of third persons is much more serious than a mistake in the name of the accused. A mistake in the name of the accused, as we have seen, can only be objected to by a plea in abatement, the effect of which is only to delay the trial.[68] A material variance in the name of a third person, however, is a variance in the description of the offense, and will be sufficient ground for arresting judgment, when the objection appears on the face of the indictment, or if it appears from the evidence it will cause an acquittal.[69] As we have seen, if the names of third

[67] Ante, p. 272. [68] Ante, p. 176.

[69] 2 Hawk. P. C. c. 25, § 72; 1 East, P. C. 514; 1 Chit. Cr. Law, 213, 216; Graham v. State, 40 Ala. 659; Lewis v. State, 90 Ga. 95, 15 S. E. 697; Osborne v. State, 14 Tex. App. 225; Owens v. State (Tex. Cr. App.) 20 S. W. 558; State v. Sherrill, 81 N. C. 550; State v. English, 67 Mo. 136; State v. Reynolds, 106 Mo. 146, 17 S. W. 322; Humbard v. State, 21 Tex. App. 200, 17 S. W. 126; Cronin v. State, 30 Tex. App. 278, 17 S. W. 410; Rex v. Berriman, 5 Car. & P. 601; U. S. v. Howard, 3 Sumn. 12, Fed. Cas. No. 15,403; Reg. v. Wilson, 1 Denison, Crown Cas. 284; Timms v. State, 4 Cold. (Tenn.) 138; Rex v. Norton, Russ. & R. 509; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; State v. Bell, 65 N. C. 313; State v. Scurry, 3 Rich. (S. C.) 68; State v. Trapp, 14 Rich. (S. C.) 203; State v. Owens, 10 Rich. (S. C.) 169. Name of the owner of the premises on indictment for arson or burglary, or larceny from the house. Com. v. Wade, 17 Pick. (Mass.) 398; Rex v. White, 1 Leach, Crown Cas. 252; State v. Rushing, 2 Nott & McC. (S. C.) 560; State v. Ellison, 58 N. H. 325; Graham v. State, 40 Ala. 659. But see Com. v. Price, 8 Leigh (Va.) 757. Name of purchaser on indictment for unlawful sale of intoxicating liquors. Com. v. Shearman, 11 Cush. (Mass.) 546; Com. v. Brown, 2 Gray (Mass.) 358. Name of the owner or builder of a railroad on indictment for obstructing an engine passing thereon. Com. v. Pope, 12 Cush. (Mass.) 272. Name of woman on indictment for rape, incest, etc. Taylor v. Com., 20 Grat. (Va.) 825; Owens v. State (Tex. Cr. App.) 20 S. W. 558. Name of person to whom rooms were rented for gaming. Cronin v. State, 30 Tex. App. 278, 17 S. W. 410. Name of person libeled or slandered. Humbard v. State, 21 Tex. App. 200, 17 S. W. 126. Name of person intended to be defrauded. State v. Reynolds, 106 Mo. 146, 17 S. W. 322; note 16, supra; ante, pp. 218, 223. Name of deceased, or person assaulted, on indictment for murder or assault. Hardin v. State, 26 Tex. 113; Lewis v. State,

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persons are unknown, they may be described as persons to the grand jurors unknown;[70] but if a person is so described, and it appears that his name was in fact known, the variance will be fatal.[71] Some jurisdictions hold that where a person is described as unknown, and it appears that his name could have been ascertained by the exercise of reasonable diligence, this will constitute a variance.[72]

But the better rule is to the contrary. "These cases [cases holding that there is a variance under such conditions]

90 Ga. 95, 15 S. E. 697; Osborne v. State, 14 Tex. App. 225; U. S. v. Howard, 3 Sumn. 12, Fed. Cas. No. 15,403; Timms v. State, 4 Cold. (Tenn.) 138. A good illustration of the more liberal views entertained by the courts is seen in Bennett v. U. S., 194 Fed. 630, 114 C. C. A. 402. In this case the indictment charged defendant with transporting, for an immoral purpose, one Opal Clark. The proof was that the woman transported was known to defendant as Jeanette Clark and that her real name was wholly different from either. The court held that, as the record as a whole clearly indicated the identity of the woman named in the indictment with the woman whom defendant must have known to be the one intended to be named and with the woman who was actually transported, there was no fatal variance. Statutes in some states provide that an erroneous allegation as to the person intended to be injured is not material. Code Cr. Proc. N. Y. § 281. Under this section it was held that defendant could be convicted of assault with intent to kill B., though the indictment charged an assault with intent to kill X. People v. Castaldo, 146 App. Div. 767, 131 N. Y. Supp. 545.

[70] Ante, p. 274.

[71] 2 Hawk. P. C. c. 25, § 71; 2 East, P. C. 561; Rex v. Walker, 3 Camp. 264; Rex v. Bush, Russ. & R. 372; White v. People, 32 N. Y. 465; Barkman v. State, 13 Ark. 703; State v. Wilson, 30 Conn. 500; Jones v. State, 63 Ala. 27; Com. v. Tompson, 2 Cush. (Mass.) 551; Moore v. State, 65 Ind. 213; State v. McIntire, 59 Iowa, 264, 13 N. W. 286; Jorasco v. State, 6 Tex. App. 238. But if the name was in fact unknown at the time the indictment was found, its subsequent discovery will not constitute a variance, or render the indictment defective. White v. People, 32 N. Y. 465; Com. v. Hill, 11 Cush. (Mass.) 137; Cheek v. State, 38 Ala. 227; Com. v. Gallagher, 126 Mass. 54; State v. Bryant, 14 Mo. 340; Zellers v. State, 7 Ind. 659; Reed v. State, 16 Ark. 499.

[72] 2 East, P. C. c. 16, § 163; Rex v. Walker, 3 Camp. 264; Rex v. Deakin, 2 Leach, Crown Cas. 863; Reg. v. Campbell, 1 Car. & K. 82; Reg. v. Stroud, 2 Moody, Crown Cas. 270 (but see the report of this case in 1 Car. & K. 187); Presley v. State, 24 Tex. App. 494, 6 S. W. 540; Blodget v. State, 3 Ind. 403.

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would seem to be properly placed upon lack of diligence or carelessness in making the accusation, and not upon variance between the allegation and proof. The better rule would seem to be that to create a variance the fact of knowledge, not ability to acquire knowledge, must affirmatively appear from the evidence. * * * The fact that the county solicitor could easily have ascertained a better description of the property may be evidence that he knew the same; but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation that he did not know." [73]

A third person, like the accused, may be described by the name by which he is usually known, and if he is well known by more than one name he may be described by either.[74] Where the name of a person is misspelled, this will not render the indictment bad if the name as given and the correct name are idem sonans.[75] But where a person has two

[73] Enson v. State, 58 Fla. 37, 50 South. 948, 138 Am. St. Rep. 92, 18 Ann. Cas. 940. Accord. Com. v. Sherman, 13 Allen (Mass.) 248; Com. v. Glover, 111 Mass. 401; Wells v. State, 88 Ala. 239, 7 South. 272; Jackson v. State, 102 Ala. 167, 15 South. 344. In Rex v. Bush, Russ. & Ry. 372, it was held that an indictment against an accessory of a principal therein alleged to be unknown was good, although the same grand jury had returned another indictment against the principal by name.

[74] Rex v. Sulls, 2 Leach, Crown Cas. 861; Rex v. Norton, Russ. & R. 510; Rex v. Berriman, 5 Car. & P. 601; Rex v. ———, 6 Car. & P. 408; Jones v. State, 65 Ga. 147; Taylor v. Com., 20 Grat. (Va.) 825; Com. v. Trainor, 123 Mass. 414; State v. Peterson, 70 Me. 216; State v. Bundy, 64 Me. 507; State v. Johnson, 67 N. C. 58; Rogers v. State, 90 Ga. 463, 16 S. E. 205; State v. France, 1 Overt. (Tenn.) 434; Com. v. Gould, 158 Mass. 499, 33 N. E. 656; Slaughter v. State (Tex. Cr. App.) 21 S. W. 247; State v. Davis, 109 N. C. 780, 14 S. E. 55; ante, pp. 272, 275, and cases there cited. It is generally held, if a third person is so described that it is impossible to mistake him for any other, that a mistake in the name will be disregarded. Ante, pp. 272, 275. Thus, where an indictment against Charles "Herron" alleged that he killed Lula "Herring," but expressly described the woman as the defendant's wife, the variance in her name was disregarded on motion in arrest. Herron v. State, 93 Ga. 554, 19 S. E. 243. See Mason v. State, 55 Ark. 529, 18 S. W. 827.

[75] Rex v. Foster, Russ. & R. 412; Ahitbol v. Beniditto, 2 Taunt. 401; Williams v. Ogle, 2 Strange, 889. In the following cases the

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Christian names, a transposition of them, as James Richard ——— for Richard James ———, or Jules Henry ——— for Henry Jules ———, is fatal,[76] except in those jurisdictions where only one Christian name is recognized, and the other, if alleged, need not be proved.[77]

names were held idem sonans: "Gigger" (pronounced "Jigger") for "Jiger," Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249. "Willie Fanes" for "Willis Fain," State v. Hare, 95 N. C. 682; "Chambles" for "Chambless," Ward v. State, 28 Ala. 60; "Herriman" for "Harriman," State v. Bean, 19 Vt. 530; "Lossene" for "Lawson," State v. Pullens, 81 Mo. 387; "Banhart," "Benhart," "Bernhardt," for "Bernhart," State v. Witt, 34 Kan. 488, 8 Pac. 769; "Gidines" for "Gidings" or "Giddings," State v. Lincoln, 17 Wis. 579; "Donnelly" for "Donly," Donnelly v. State, 78 Ala. 453; "Anthron" for "Antrum," State v. Scurry, 3 Rich. (S. C.) 68; "Whyneard" for "Winyard" (the latter being pronounced "Winnyard"), Rex v. Foster, Russ. & R. 412; "Segrave" for "Seagrave," Willams v. Ogle, 2 Strange, 889; "Usrey" for "Usury," Gresham v. Walker, 10 Ala. 370; "Benedetto" for "Beniditto," Ahitbol v. Beniditto, 2 Taunt. 401; "McLaughlin" for "McGloflin," McLaughlin v. State, 52 Ind. 476; "Petris" for "Petrie," Petrie v. Woodworth, 3 Caines (N. Y.) 219; "Hutson" for "Hudson," State v. Hutson, 15 Mo. 512; "Georg" for "George," Hall v. State, 32 Tex. Cr. R. 594, 25 S. W. 292; "Blankenship" for "Blackenship," State v. Blankenship, 21 Mo. 504; "Preyer" for "Prior," Page v. State, 61 Ala. 16; "Michal" for "Michaels," State v. Houser, 44 N. C. 410; "Fourai" for "Forrest," State v. Timmens, 4 Minn. 331 (Gil. 241); "Danner" for "Dannaher," Gahan v. People, 58 Ill. 160.

The following have been held not to be idem sonans: "M'Cann" for "M'Carn," Rex v. Tannet, Russ. & R. 351; "Shutliff" for "Shirtliff," 1 Chit. Cr. Law, 216; "Lynes" for "Lyons," Lynes v. State, 5 Port. (Ala.) 236, 30 Am. Dec. 557; "Woods" for "Wood," Neiderluck v. State, 21 Tex. App. 320, 17 S. W. 467; "Sedbetter" for "Ledbetter," Zellers v. State, 7 Ind. 659; "McInnis" for "McGinnis," Barnes v. People, 18 Ill. 52, 65 Am. Dec. 699; "Tarbart" for "Tabart," Bingham v. Dickie, 5 Taunt. 814; "Shakepear" for "Shakepeare," Rex v. Shakespeare, 10 East, 83; "Comyns" for "Cummins," Cruikshank v. Comyns, 24 Ill. 602; "Donnel" for "Donald," Donnel v. U. S., Morris (Iowa) 141, 39 Am. Dec. 457; "Franks" for "Frank," Parchman v. State, 2 Tex. App. 228, 28 Am. Rep. 435; "Amann" for "Ammon," Amann v. People, 76 Ill. 188; "Burral" for "Burrill," Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; "Melville" for "Melvin," State v. Curran, 18 Mo. 320; "Della" for "Dellia," Vance v. State, 65 Ind. 460.

[76] Jones v. Macquillin, 5 Term R. 195; Reg. v. James, 2 Cox, Cr. Cas. 227.

[77] Ante, p. 275.

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If the name is stated with an alias dictus, as may be done,[78] it is sufficient to prove either name.[79]

Following the rule above stated, that a person may be described either by his true name or by the name by which he is usually known, and that proof of either is sufficient, it would seem that a corporation could be described likewise either by its corporate name or by the name by which it is commonly called. There are cases to this effect.[80]

If the name is immaterial—that is, if it is not necessary to a statement of the offense—it may be rejected as surplusage, and a variance therein will have no effect.[81]

Where it is claimed that the true name and the name given in the indictment are idem sonans, and that, therefore, there is no variance,[82] the question, when it arises in evidence on the general issue, should be submitted to the jury as a question of fact, for it is not a question of spelling, but of pronunciation, depending less upon rule than upon usage.[83] If, however, the accused does not ask that the jury be allowed to pass on the question, it has been held that he

[78] Ante, p. 173.

[79] State v. Peterson, 70 Me. 216; Haley v. State, 63 Ala. 89; Kennedy v. People, 39 N. Y. 245; Hunter v. State, 8 Tex. App. 75.

[80] Rogers v. State, 90 Ga. 463, 16 S. E. 205 ("Central Railroad & Banking Company," for "Central Railroad & Banking Company of Georgia"); Putnam v. U. S., 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118 ("National Granite State Bank," for "National Granite State Bank of Exeter"); Com. v. Jacobs, 152 Mass. 276, 25 N. E. 463 ("Warren Club," for "Warren Social Club"). Contra, Com. v. Pope, 12 Cush. (Mass.) 272 ("Boston & Worcester Railroad Company," for "Boston & Worcester Railroad Corporation"); McGary v. People, 45 N. Y. 153 ("Phœnix Mills Company" for "the Phœnix Mills of Senaca Falls").

[81] Savory v. Price, 1 Ryan & M. 1; 2 East, P. C. 593; Rex v. Morris, 1 Leach, Crown Cas. 109; Com. v. Hunt, 4 Pick. (Mass.) 252; U. S. v. Howard, 3 Sumn. 12, Fed. Cas. No. 15,403; Farrow v. State, 48 Ga. 30.

[82] Note 75, p. 392, supra.

[83] Com. v. Donovan, 13 Allen (Mass.) 571; Reg. v. Davis, 2 Denison, Crown Cas. 231, 5 Cox, Cr. Cas. 237; Girous v. State, 29 Ind. 93; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249; State v. Thompson, 10 Mont. 549, 27 Pac. 349; Lawrence v. State, 59 Ala. 61. In Com. v. Gill, 14 Gray (Mass.) 400, the Supreme Court declined to pass on the question on exceptions after a conviction, on the ground

cannot, on appeal, object because the court decided it as a matter of law.[84] On demurrer to a plea in abatement, the question is for the court.[85]

Ordinarily, it is not necessary to describe third persons further than by their name.[86] If an addition, however, is stated, it must be proved, because it is descriptive of the identity of the person. Thus, in an indictment for bigamy, if the woman whom it is alleged that the defendant bigamously married is described as a widow, and the evidence shows that she was a spinster, the variance will be fatal.[87] So where the defendant was charged with procuring Laura A. Fairbanks, "of Worcester, in said county of Worcester," in Massachusetts, to commit perjury, and the evidence showed that the Laura A. Fairbanks who testified on the occasion alleged was at the time and continued a resident of another state, the variance was held fatal, though the woman need not have been described further than by name.[88] "Whenever a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved; for they are essential to its identity."[89]

As to Time

As we have seen, it is necessary in nearly all cases to allege that the offense was committed at a specified time, in order that the indictment may be certain.[90] It is not neces-

that as the question depended on pronunciation, and could only be determined by hearing the name spoken, they had no means of determining it.

[84] Com. v. Gill, supra. But see Mindex v. State (Tex. Cr. App.) 38 S. W. 995.

[85] State v. Havely, 21 Mo. 498. And see Rex v. Shakespeare, 10 East, 83.

[86] Ante, p. 277.

[87] Rex v. Deeley, 1 Moody, Crown Cas. 303.

[88] Com. v. Stone, 152 Mass. 498, 25 N. E. 967.

[89] Com. v. Wellington, 7 Allen (Mass.) 299; Com. v. Stone, supra. And see Wallace v. State, 10 Tex. App. 255. It was held, however, that, where an indictment for adultery alleged that the woman with whom the defendant committed the act was over 18 years old, the allegation might be rejected as surplusage. State v. Ean, 90 Iowa, 534, 58 N. W. 898.

[90] Ante, p. 278.

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sary, however, except where time enters into the nature of the offense, to prove the exact time alleged. Any other time may be shown on the trial, if it is prior to the finding of the indictment, and within the period prescribed by the statute of limitations.[91]

The rule applies to cases in which it is necessary[92] to allege the time of the day at which the offense was committed. Thus, though an indictment for burglary at common law must state at or about what hour it was committed, so that it may appear that it was committed in the nighttime, the evidence need not correspond with the allegation further than to show that the offense was committed at some time of the night, and not in the daytime. Neither the day nor the precise hour need be proved as laid.[93]

An indictment for acts committed on Sunday in violation of the Sunday laws, or for acts committed on any other particular day of the week on which alone they are prohibited,[94] must, of course, state that the acts were done on that particular day of the week, in order to describe the offense, and must give a day of the month and year; but the charge will be supported by proof of acts done on any such day of the week before the finding of the indictment, and during the

[91] 1 Chit. Cr. Law, 224, and authorities there cited; 3 Inst. 230; Vane's Case, Kel. 14; People v. Van Santvoord, 9 Cow. (N. Y.) 655; State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724; State v. Munger, 15 Vt. 291; Willams v. State, 12 Tex. App. 226; State v. Haney, 8 N. C. 460; State v. Swaim, 97 N. C. 462, 2 S. E. 68; Jacobs v. Com., 5 Serg. & R. (Pa.) 316; Turner v. People, 33 Mich. 363; Com. v. Harrington, 3 Pick. (Mass.) 26; Com. v. Kelly, 10 Cush. (Mass.) 69; Com. v. Sego, 125 Mass. 210; Com. v. Dillane, 1 Gray (Mass.) 483; State v. Ferrell, 22 W. Va. 759; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Jackson v. State, 88 Ga. 787, 15 S. E. 905; Clarke v. State, 90 Ga. 448, 16 S. E. 96; McDade v. State, 20 Ala. 81; Palin v. State, 38 Neb. 862, 57 N. W. 743; State v. Davis, 6 Baxt. (Tenn.) 605; Com. v. Davis, 94 Ky. 612, 23 S. W. 218; Medlock v. State, 18 Ark. 363; State v. Bell, 49 Iowa, 440; State v. Branham, 13 S. C. 389; State v. Magrath, 19 Mo. 678.

[92] Ante, p. 281.

[93] 2 Hale, P. C. 179; 2 East, P. C. 513; State v. Bancroft, 10 N. H. 105; People v. Burgess, 35 Cal. 115.

[94] Ante, p. 280.

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period of limitation, though not on the day of the month named.[95]

In some states it has been held that the rule does not apply to continuing offenses,[96] such as being a common seller of intoxicating liquors. "We take the rule to be well settled in criminal cases that when a continuing offense is alleged to have been on a certain day, and on divers days and times between that and another day specified, the proof must be confined to acts done within that time." [97] The same is true where the indictment alleges that the continuing offense was committed on a single day. The state cannot prove acts on any other day than that specified.[98]

The better rule, followed in other jurisdictions, allows a continuing offense to be proved, as any other offense, by proving a commission on any day previous to the indictment and within the statute of limitations.[99]

In prosecutions for homicide the death must not only be alleged, but must be proved to have occurred within a year and a day of the blow, or the crime is not proved,[1] but it need not be shown to have occurred at the exact time after the blow alleged in the indictment.[2]

It has been said that, in an indictment for perjury, the day on which the perjury was committed must be truly laid, and that a variance will be fatal.[3] This rule is correct when the perjury is predicated on a false oath to a certain document, and the time alleged in the indictment is the date of the document. In such case the date is a part of the descrip-

[95] Com. v. Harrison, 11 Gray (Mass.) 308; State v. Bryson, 90 N. C. 747; Megowan v. Com., 2 Metc. (Ky.) 3; Hoover v. State, 56 Md. 584; State v. Brunker, 46 Conn. 327. As to use of "Sabbath" for "Sunday," see State v. Drake, 64 N. C. 589.

[96] Ante, p. 283.

[97] Com. v. Briggs, 11 Metc. (Mass.) 573.

[98] Com. v. Elwell, 1 Gray (Mass.) 463; Com. v. Traverse, 11 Allen (Mass.) 260.

[99] Howard v. People, 27 Colo. 396, 61 Pac. 595; Carter v. U. S., 1 Ind. T. 342, 37 S. W. 204.

[1] 2 Hawk. P. C. c. 23, § 90; ante, p. 281; Clark, Cr. Law, 130.

[2] See Cudd v. State, 28 Tex. App. 124, 12 S. W. 1010.

[3] Whart. Cr. Ev. § 103. And see State v. Ah Lee, 18 Or. 540, 23 Pac. 424.

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tion of the written instrument, and, as we have seen, where written instruments are set out in the indictment, the date of the instrument as given must be proved. A variance will be fatal.[4]

But, where the perjury is not based on a document, there seems to be no good reason why, if the offense is otherwise proved as laid, a variance should be fatal; and it has been held that a person charged with perjury in a proceeding alleged to have been had on a certain day may be convicted, though it is shown that the proceeding was had on a different day.[5]

While the state is not limited to proof of an offense on the day named in the indictment, it is limited to a trial for one offense. "When there are several offenses, for either one of which the accused may be convicted under the indictment, the prosecution should elect the offense which it will pursue, and the testimony should be confined to that offense, unless the case is within some of the exceptions which render the proof of other distinct offenses admissible. After one offense is proved, the prosecution should not have the liberty of the wind, to blow where it listeth. The authorities are not harmonious as to when the prosecution will be required to make election in such case, or as to how long a prosecuting officer will be permitted 'to fish with his witnesses for evidence,' before electing the offense for which he will ask conviction; but it is believed that justice is best promoted by allowing the testimony for the prosecution to go far enough to identify and show one distinct offense, and when this is done to restrict the evidence to that offense." [6]

As to Place

It is not only necessary to allege in the indictment that the offense was committed within the jurisdiction of the

[4] Note 27, p. 382, supra.

[5] Com. v. Davis, 94 Ky. 612, 23 S. W. 218; Matthews v. U. S., 161 U. S. 500, 16 Sup. Ct. 640, 40 L. Ed. 786. And see Richey v. Com., 81 Ky. 524.

[6] King v. State, 66 Miss. 502, 6 South. 188. And see State v. Crimmins, 31 Kan. 376, 2 Pac. 574; State v. Lund, 49 Kan. 209, 30 Pac. 518; Golden v. State, 72 Tex. Cr. R. 19, 160 S. W. 957.

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court, as that it was committed in the county, or in that particular part of the county, over which the court has jurisdiction, in order that the jurisdiction may appear on the face of the indictment;[7] but it is also absolutely essential to prove that the offense was committed within the jurisdiction of the court. Proof that it was committed out of the jurisdiction of the court, or an omission to prove any venue at all, will entitle the defendant to an acquittal, and the defect cannot be aided by verdict.[8]

If it is shown that the offense was committed within the jurisdiction of the court, it is not always necessary to further prove that it was committed at the particular place within the jurisdiction alleged in the indictment.

Some offenses, as we have seen, are local in their nature, while others are transitory. In prosecutions for the former the particular place within the county must be stated, not as venue, but by way of local description, and the place must be proved as laid; but in prosecutions for the latter, place is not material, and if a particular place in the county

[7] Ante, p. 288; People v. Barrett, 1 Johns. (N. Y.) 72.

[8] Moore v. People, 150 Ill. 405, 37 N. E. 909; State v. Hobbs, 37 W. Va. 812, 17 S. E. 380; Justice v. State, 99 Ala. 180, 13 South. 658; Stazey v. State, 58 Ind. 514; McCombs v. State, 66 Ga. 581; Jones v. State, 58 Ark. 390, 24 S. W. 1073; State v. Hartnett, 75 Mo. 251; State v. Burgess, 75 Mo. 541; Randolph v. State, 100 Ala. 139, 14 South. 792; Tidwell v. State, 70 Ala. 33; Williamson v. State, 13 Tex. App. 514; Henderson v. State, 14 Tex. 503; Berry v. State, 92 Ga. 47, 17 S. E. 1006; Harlan v. State, 134 Ind. 339, 33 N. E. 1102; Williams v. State, 21 Tex. App. 256, 17 S. W. 624; Frazier v. State, 56 Ark. 242, 19 S. W. 838. The proof of venue need not be direct, but may be inferential, as where, on a prosecution for homicide, it is shown that the body of the deceased was found in the county in such a condition, and under such circumstances, as to raise the inference that some one put it there. Com. v. Costley, 118 Mass. 2. And see Sullivan v. People, 114 Ill. 24, 28 N. E. 381; Cluck v. State, 40 Ind. 263; Burst v. State, 89 Ind. 133; State v. Farley, 87 Iowa, 22, 53 N. W. 1089; Territory v. Hicks, 6 N. M. 596, 30 Pac. 872; State v. McGinniss, 74 Mo. 245; State v. Daugherty, 106 Mo. 182, 17 S. W. 303; Moore v. State, 22 Tex. App. 117, 2 S. W. 634; Dumas v. State, 62 Ga. 58; State v. Sanders, 106 Mo. 188, 17 S. W. 223; Duncan v. State, 29 Fla. 439, 10 South. 815.

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is stated it need not be proved. Robbery,[9] assaults,[10] by the weight of authority, homicide,[11] simple larceny,[12] disturbance of public assemblages for religious worship, or for other purposes,[13] gaming, etc.,[14] are transitory offenses, and if they are unnecessarily alleged to have been committed at a particular town or other place within the county, they may nevertheless be shown to have been committed at some other place. All that is necessary to sustain the charge is to show that they were committed within the jurisdiction of the court.[15]

On the other hand, burglary and housebreaking,[16] arson,[17] statutory larcenies from the shop, dwelling house, or other particular place,[18] nuisances with respect to highways,[19] failure to repair highways,[20] keeping disorderly house, and

[9] Rex v. Wardle, Russ. & R. 9. Where an indictment for robbery stated that it was committed in a field near the king's highway, and there was no proof that it was committed near any highway, a conviction was nevertheless sustained. Rex v. Wardle, supra.

[10] Com. v. Tolliver, 8 Gray (Mass.) 386, 69 Am. Dec. 252.

[11] State v. Lamon, 10 N. C. 175; Carlisle v. State, 32 Ind. 55. Contra, Com. v. Inhabitants of Springfield, 7 Mass. 9.

[12] Rex v. Bullock, 1 Moody, Crown Cas. 324, note; People v. Honeyman, 3 Denio (N. Y.) 121; Haskins v. People, 16 N. Y. 344; Com. v. Lavery, 101 Mass. 207; State v. Cotton, 24 N. H. 143.

[13] State v. Smith, 5 Har. (Del.) 490.

[14] Covy v. State, 4 Port. (Ala.) 186; Wingard v. State, 13 Ga. 396. Riot. Barnes v. State, 5 Yerg. (Tenn.) 186. Fornication and bastardy. Heikes v. Com., 26 Pa. 513.

[15] Ante, p. 291; 1 Chit. Cr. Law, 200.

[16] Rex v. Bullock, 1 Moody, Crown Cas. 324, note; Reg. v. St. John, 9 Car. & P. 40. But see State v. Meyers, 9 Wash. 8, 36 Pac. 1051.

[17] Rex v. Woodward, 1 Moody, Crown Cas. 323; People v. Slater, 5 Hill (N. Y.) 401. Contra, State v. Meyers, supra. In People v. Slater, supra, the indictment described the building burned as situated in the Sixth ward of the city of New York, and the evidence showed that it was in the Fifth ward, and the variance was held fatal.

[18] Rex v. Napper, 1 Moody, Crown Cas. 44; People v. Honeyman, 3 Denio (N. Y.) 121.

[19] Rex v. White, 1 Burrows, 333.

[20] Com. v. Inhabitants of North Brookfield, 8 Pick. (Mass.) 463; Rex v. Great Canfield, 6 Esp. 136; Rex v. Marchioness Dowager, 4 Adol. & E. 232; Rex. v. Inhabitants of St. Weonard's, 6 Car. & P. 582.

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similar nuisances,[21] according to most of the cases, other nuisances,[22] offenses in relation to cemeteries, etc.,[23] being found armed in a close at night, etc.,[24] are local in their nature. An indictment therefor must not only state the particular place within the county at which they were committed, but must state it accurately. The particular place is stated not as venue, but by way of local description, and if the proof shows that the offense was committed at any other place, though within the county, than the place alleged the variance will be fatal.[25]

If the place is stated unnecessarily, or with unnecessary particularity not as venue, but as matter of local description, the statement is part of the description of the offense, and, like other allegations which are descriptive of that which is essential, must be proved.[26] An indictment for desecrating a public burying ground, for instance, need not describe it by metes and bounds, but if it does so, the metes and bounds must be proved as alleged.[27]

In some cases the crime can only be committed in a particular place. Here, of course, the place must not only be alleged, but it must be proved, in order to show that the offense has been committed.[28]

Indictments on Statutes

The same rules with respect to variance apply to indictments on statutes as to indictments at common law, but

[21] State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135; Com. v. Logan, 12 Gray (Mass.) 136. But see State v. Crogan, 8 Iowa, 523.

[22] Com. v. Heffron, 102 Mass. 148; Wertz v. State, 42 Ind. 161; Dennis v. State, 91 Ind. 291; Droneberger v. State, 112 Ind. 105, 13 N. E. 259; Cornell v. State, 7 Baxt. (Tenn.) 520. But see, contra, State v. Sneed, 16 Lea (Tenn.) 450, 1 S. W. 282; State v. Jacobs, 75 Iowa, 247, 39 N. W. 293.

[23] 1 Chit. Cr. Law, 201; Com. v. Wellington, 7 Allen (Mass.) 300.

[24] Rex v. Ridley, Russ. & R. 515.

[25] 1 Chit. Cr. Law, 200, 201; ante, p. 293.

[26] Moore v. State, 12 Ohio St. 387; Com. v. Wellington, 7 Allen (Mass.) 299; Withers v. State, 21 Tex. App. 210, 17 S. W. 725; State v. Crogan, 8 Iowa, 523; Reg. v. Cranage, 1 Salk. 385; O'Brien v. State, 10 Tex. App. 544.

[27] Com. v. Wellington, supra.

[28] Ante, p. 292; State v. Turnbull, 78 Me. 392, 6 Atl. 1.

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there are a few questions peculiar to them. As we have seen, an indictment on a public statute need not recite the statute.[29] If it does recite a statute, and then counts upon that particular statute, as by concluding "contrary to the form of said statute," a material variance between the statute and the recital will be fatal. If, however, it concludes "contrary to the form of the statute in such case made and provided," thus counting generally on some statute, the recital of a particular statute may be rejected as surplusage, and a variance will be disregarded.[30]

Effect of Modern Statutes

In discussing the question of variance we have merely stated the common-law rules. These rules have to some extent been changed by statute in most jurisdictions, so that it is necessary for the student at this point to consult the statutes of his state.

It is provided in some jurisdictions that, whenever on the trial of an indictment or information, there appears to be any variance between the allegations and the evidence offered in proof thereof (1) in the name of any place mentioned or described therein; or (2) in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which forms the subject of any offense charged therein; or (3) in the name and description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offense; or (4) in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described;

[29] Ante, p. 300.

[30] 2 Hale, P. C. 172; 2 Hawk. P. C. c. 25, § 101; Vander Plunken v. Griffith, Cro. Eliz. 236; Boyce v. Whitaker, 1 Doug. 94; 4 Coke, 48a; Platt v. Hill, 1 Ld. Raym. 382; Rex v. Marsack, 6 Term R. 776; The Nancy v. Fitzpatrick, 3 Caines (N. Y.) 41; Com. v. Washburn, 128 Mass. 421. Even if it counts on a particular statute, an immaterial variance will not be fatal. Reg. v. Westley, Bell, Crown Cas. 193; People v. Walbridge, 6 Cow. (N. Y.) 512; Com. v. Burke, 15 Gray (Mass.) 408. And see ante, p. 301.

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or (5) in the name and description of any matter or thing whatsoever therein named or described; or (6) in the ownership of any property named or described therein—the court before which the trial is had, may, if it considers such variance not material to the merits of the case and that the defendant cannot be prejudiced thereby in his defense on such merits, order such indictment or information to be amended to conform to the proof, on such terms as to postponing the trial, etc., as the court may think reasonable. In some states it is provided that the variance, instead of being cured by amendment, may be disregarded. Such statutes do not exist in all the states.

We have already shown the effect of provisions like this under our constitutional provisions.[31]

CONVICTION OF MINOR OFFENSE

122. If the whole of the offense charged is not proved, but so much of it as to constitute a substantive offense is proved, the defendant may be acquitted of the offense charged, and convicted of the offense proved, provided, at common law, each offense is either a felony or a misdemeanor. In most of our states, either by statute, or independently of any statute, on indictment for felony, there may be a conviction of a misdemeanor included therein. The offense proved must be necessarily included in the charge.

The jury in order to convict the defendant need not necessarily find the whole of the offense, or the highest offense, charged in the indictment, but may convict of any minor offense, included in the charge.[32] "It is a general rule which

[31] Ante, pp. 165, 365, 372.

[32] 1 Chit. Cr. Law, 250; People v. White, 22 Wend. (N. Y.) 167; Wyatt v. State, 1 Blackf. (Ind.) 257; Com. v. Hope, 22 Pick. (Mass.) 1; People v. McGowan, 17 Wend. (N. Y.) 386; Borum v. State, 66 Ala. 468; Clarke v. Com., 25 Grat. (Va.) 908; State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643; State v. Brady, 14 Vt. 353; State v. Eno, 8 Minn. 220 (Gil. 190); State v. Burk, 89 Mo. 635, 2 S. W. 10; State

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runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." [33] "It is a general rule at common law, 'where the accusation in the indictment includes an offense of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious.'" [34] This rule has been expressly declared by statute in many of our states. At common law, as we shall presently see more at length, there could be no conviction of a misdemeanor on indictment for a felony, and this rule is still recognized in a few states; but in most states it is not recognized, or has been changed by statute. To thus allow a conviction for a minor offense included in the charge, does not in any way prejudice the rights of the defendant, or deprive him of the constitutional right to formal notice of the charge against him, for he is not only accused of the highest offense charged in the indictment, but he is also formally accused of every other offense necessarily included in the charge.[35]

Illustrations of the Rule

In accordance with the rule above stated, it is held that the defendant may be convicted of statutory larceny from the dwelling house, or of simple larceny, on an indictment charging burglary with intent to commit larceny, and an actual stealing, for the indictment charges these offenses as well as the offense of burglary. They are necessarily included in the charge.[36] For the same reason, there may be

v. Taylor, 3 Or. 10; Stevens v. State, 19 Neb. 647, 28 N. W. 304; Beckwith v. People, 26 Ill. 500; Carpenter v. People, 4 Scam. (Ill.) 197; Dinkey v. Com., 17 Pa. 126, 55 Am. Dec. 542; Herman v. People, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182; Rogers v. People, 34 Mich. 345; People v. Jackson, 3 Hill (N. Y.) 92; and the numerous cases hereafter referred to.

[33] 1 Chit. Cr. Law, 250; ante, p. 378; Durham v. State, 1 Blackf. (Ind.) 33.

[34] State v. Coy, 2 Aikens (Vt.) 181.

[35] See State v. Burk, 89 Mo. 635, 2 S. W. 10.

[36] 2 Hale, P. C. 302; 2 East, P. C. 513; Rex v. Withal, 1 Leach, Crown Cas. 88; Rex v. Vandercomb, 2 Leach, Crown Cas. 711; Com. v. Tuck, 20 Pick. (Mass.) 360; State v. Cocker, 3 Har. (Del.) 554; State v. Grisham, 2 N. C. 17; Breese v. State, 12 Ohio St. 146, 80

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a conviction of a lower degree of burglary than charged, if all the essential elements of the lower degree are charged;[37] of petit larceny on indictment for grand larceny;[38] of grand larceny in the second degree on indictment for grand larceny in the first degree;[39] by the weight of authority, of simple larceny on indictment for robbery, or for stealing from the person,[40] or for the statutory offense of stealing in a shop or dwelling house, etc.[41]

So, also, there may be a conviction of voluntary manslaughter on indictment for murder;[42] of murder in the sec-

Am. Dec. 340; State v. Colter, 6 R. I. 195; Polite v. State, 78 Ga. 347; Com. v. Lowery, 149 Mass. 67, 20 N. E. 697; People v. Jacks, 76 Mich. 218, 42 N. W. 1134; People v. White, 22 Wend. (N. Y.) 176. But the actual larceny must be sufficiently charged. State v. McClung, 35 W. Va. 280, 13 S. E. 654.

[37] State v. Fleming, 107 N. C. 905, 12 S. E. 131. Contra, State v. Alexander, 56 Mo. 131, where the proof showed that burglary of the first degree had been committed. Of burglary, without being armed with a dangerous weapon, on indictment for burglary, being so armed. State v. Morris, 27 La. Ann. 481; State v. Miller, 45 La. Ann. 1170, 14 South. 136. But on an indictment for burglary, with intent to commit rape, the defendant cannot be convicted of an assault with intent to commit rape. State v. Ryan, 15 Or. 572, 16 Pac. 417.

[38] Bolling v. State, 98 Ala. 80, 12 South. 782; People v. McCallam, 103 N. Y. 587, 9 N. E. 502.

[39] People v. McCallam, supra.

[40] 1 Chit. Cr. Law, 250; 1 Hale, P. C. 534; 2 Hale, P. C. 203; 2 Hawk. P. C. c. 47, § 6; 2 East, P. C. 513, 515, 516, 736, 784; Rex v. Sterne, 1 Leach, Crown Cas. 473; Morris v. State, 97 Ala. 82, 12 South. 276; State v. Keeland, 90 Mo. 337, 2 S. W. 442; State v. Steifel, 106 Mo. 129, 17 S. W. 227; Haley v. State, 49 Ark. 147, 4 S. W. 746; Stevens v. State, 19 Neb. 647, 28 N. W. 304; Brown v. State, 34 Neb. 448, 51 N. W. 1028; Sullivan v. Com. (Ky.) 5 S. W. 365; People v. White, 22 Wend. (N. Y.) 176. Some of the courts hold that this could not be allowed at common law. Rex v. Francis, 2 Strange, 1014; Haley v. State, supra.

[41] Rex v. Etherington, 2 Leach, Crown Cas. 671; Brown v. State, 90 Ga. 454, 16 S. E. 204.

[42] 1 Hale, P. C. 449; 2 Hale, P. C. 302; Co. Litt. 282a; 2 Hawk. P. C. c. 47, § 4; State v. Parish, 3 N. C. 73; Brown v. State, 31 Fla. 207, 12 South. 640; U. S. v. Leonard (C. C.) 2 Fed. 669; Boulden v. State, 102 Ala. 78, 15 South. 341; White v. Washington Territory, 3 Wash. T. 397, 19 Pac. 37. It is generally held that, on an indictment for murder, the defendant may be convicted of involuntary

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ond degree on indictment for murder in the first degree;[43] of assault with intent to kill, or a less aggravated assault, or assault and battery, or simple assault, on indictment for murder, at least where, as is generally the case, there may be conviction for misdemeanor on indictment for felony, and provided, of course, all the essentials of the less offense appear in the charge;[44] or of assault and battery on indictment for manslaughter.[45] Subject to the same limitations, there may be conviction of assault with intent to rape, or a less aggravated assault, or assault and battery, or simple assault, or indecent assault, on an indictment for rape or carnal knowledge of a female under the age of consent;[46] of fornication on indictment for rape,[47] adultery,[48] or seduction;[49] or of incest where the defendant is charged with rape of his own daughter.[50]

And generally where an aggravated assault is charged—as assault with intent to murder, to kill, to rape, or to rob, or any less aggravated assault—the defendant may be convicted of any minor aggravated assault, all the essential elements of which appear in the charge, or, in other words,

manslaughter. Isham v. State, 38 Ala. 213; People v. Pearne, 118 Cal. 154, 50 Pac. 376; Powers v. State, 87 Ind. 144. Contra, Walters v. Com., 44 Pa. 135.

[43] State v. Talmage, 107 Mo. 543, 17 S. W. 990; State v. Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776.

[44] Ex parte Curnow, 21 Nev. 33, 24 Pac. 430; Lang v. State, 16 Lea (Tenn.) 433, 1 S. W. 318; Bean v. State, 25 Tex. App. 346, 8 S. W. 278.

[45] State v. Scott, 24 Vt. 127.

[46] State v. Bagan, 41 Minn. 285, 43 N. W. 5; State v. Mueller, 85 Wis. 203, 55 N. W. 165; Polson v. State, 137 Ind. 519, 35 N. E. 907; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; Pratt v. State, 51 Ark. 167, 10 S. W. 233; State v. May, 42 La. Ann. 82, 7 South. 60; State v. Kyne, 86 Iowa, 616, 53 N. W. 420; Reg. v. Williams, 5 Reports, 186, [1893] 1 Q. B. 320; Jones v. State, 118 Ind. 39, 20 N. E. 634; State v. White, 52 Mo. App. 285.

[47] Com. v. Parker, 146 Pa. 343, 23 Atl. 323. But the indictment must show that the woman was not the defendant's wife. Com. v. Murphy, 2 Allen (Mass.) 163.

[48] Respublica v. Roberts, 1 Yeates (Pa.) 6; State v. Cowell, 26 N. C. 231. But see Maull v. State, 37 Ala. 160.

[49] Dinkey v. Com., 17 Pa. 126, 55 Am. Dec. 542.

[50] Com. v. Goodhue, 2 Metc. (Mass.) 193.

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which is necessarily included in the charge, or of assault and battery, where actual violence is charged, or of simple assault.[51]

[51] State v. Coy, 2 Aikens (Vt.) 181; State v. Evans, 40 La. Ann. 216, 3 South. 838; Foster v. State, 25 Tex. App. 543, 8 S. W. 664; Jenkins v. State, 92 Ga. 470, 17 S. E. 693; Pittman v. State, 25 Fla. 648, 6 South. 437; People v. Ellsworth, 90 Mich. 442, 51 N. W. 531; People v. Prague, 72 Mich. 178, 40 N. W. 243; O'Leary v. People, 4 Parker, Cr. R. (N. Y.) 187; Kennedy v. People, 122 Ill. 649, 13 N. E. 213. But see, for a doubtful case, State v. Allen, 40 La. Ann. 199, 3 South. 537. Of assault with intent to abuse on indictment for assault with intent to carnally know and abuse. 1 Chit. Cr. Law, 251. Of assault on indictment for assault with intent to rape, or of assault and battery on such an indictment, where actual violence is charged. State v. Keen, 10 Wash. 93, 38 Pac. 880; State v. McAvoy, 73 Iowa, 557, 35 N. W. 630. Of simple assault on indictment for assault with intent to kill or to murder, or of assault and battery in such a case, where actual violence is charged. Stewart v. State, 5 Ohio, 241; State v. Coy, 2 Aikens (Vt.) 181; Horn v. State, 98 Ala. 23, 13 South., 329; People v. Chalmers, 5 Utah, 201, 14 Pac. 131; State v. Brent, 100 Mo. 531, 13 S. W. 874; Malone v. State, 77 Ga. 767; State v. Robinson, 31 S. C. 453, 10 S. E. 101; State v. Triplett, 52 Kan. 678, 35 Pac. 815; Chacon v. Territory, 7 N. M. 241, 34 Pac. 448; People v. Ellsworth, 90 Mich. 442, 51 N. W. 531. Of assault with intent to kill on indictment for assault with intent to murder. State v. Waters, 39 Me. 54. Of assault and battery on indictment for assault (and battery) with intent to rob. Barnard v. Com., 94 Ky. 285, 22 S. W. 219. Of unlawfully pointing a pistol at another on indictment for assault with intent to murder by pointing, aiming, and discharging a loaded pistol at him. Jenkins v. State, 92 Ga. 470, 17 S. E. 693. Of assault and battery, armed with a dangerous weapon, "with intent to do bodily harm," on indictment for assault and battery committed with a deadly weapon, "with intent to kill." State v. Johnson, 3 N. D. 150, 54 N. W. 547. And see State v. Collyer, 17 Nev. 275, 30 Pac. 891. Of assault with a deadly weapon on indictment for assault with such a weapon with intent to kill. Pittman v. State, 25 Fla. 648, 6 South. 437; State v. McLennen, 16 Or. 59, 16 Pac. 879, and cases there collected; State v. De Laney, 28 La. Ann. 434; People v. Bentley, 75 Cal. 407, 17 Pac. 436; Territory v. Evans, 4 Ariz. 257, 36 Pac. 209. Of assault on indictment for assault with a deadly weapon with intent to inflict great bodily harm, or of assault and battery, where actual violence is charged. Kennedy v. People, 122 Ill. 649, 13 N. E. 213; People v. Ellsworth, 90 Mich. 442, 51 N. W. 531. Of assault with intent to kill on indictment for assault with intent to kill while lying in wait. State v. Evans, 40 La. Ann. 216, 3 South. 838. And see State v. Price, 45 La.

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So where an indictment charged the burning of a barn adjoining a dwelling house, which offense was made punishable by one section of the statutes, and the proof showed that the house was not a dwelling, it was held that the defendant could be convicted under another section for burning a building not adjoining a dwelling house.[52] This, however, is doubtful.[53]

It has been held that on an indictment for breaking and entering a house in the nighttime, the defendant may be convicted of the minor offense of breaking and entering in the daytime;[54] but there are decisions to the contrary.[55]

Minor Offense Must be Charged

In all cases the minor offense must be necessarily included in the charge. The indictment must on its face show

Ann. 1430, 14 South. 250. Of assault with intent to commit manslaughter on indictment for assault with intent to murder. State v. White, 41 Iowa, 316, 20 Am. Rep. 602; State v. Connor, 59 Iowa, 357, 13 N. W. 327, 44 Am. Rep. 686; Horn v. State, 98 Ala. 23, 13 South. 329. Of assault with intent to inflict great bodily injury, or to do bodily harm, on indictment for assault with intent to murder, or to kill. People v. Davidson, 5 Cal. 133; State v. King, 111 Mo. 576, 20 S. W. 299; Bean v. State, 25 Tex. App. 346, 8 S. W. 278; People v. Prague, 72 Mich. 178, 40 N. W. 243; State v. Schele, 52 Iowa, 608, 3 N. W. 632; Gatliff v. Territory, 2 Okl. 523, 37 Pac. 809. Contra, State v. Yanta, 71 Wis. 669, 38 N. W. 333. Of assault and battery on indictment for assault (and battery) with a deadly weapon with intent to kill, or assault (and battery) with intent to maim. O'Leary v. People, 4 Parker, Cr. R. (N. Y.) 187; State v. Jennings, 104 N. C. 774, 10 S. E. 249.

[52] State v. Thornton, 56 Vt. 35.

[53] Contra, on the ground that the latter offense is not included in the former. Com. v. Hayden, 150 Mass. 332, 23 N. E. 51.

[54] State v. Jordan, 87 Iowa, 86, 54 N. W. 63.

[55] Guynes v. State, 25 Tex. App. 584, 8 S. W. 667; In re McVey, 50 Neb. 481, 70 N. W. 51. In the case last cited the court said: "The crime of burglary as set forth in the Criminal Code differs from that of breaking and entering buildings in the daytime as described in section 53 of the same Code. A man may not be informed against for one crime and convicted of another and different one. * * * The statement of the time as to the crime of burglary is an averment of a material element thereof, and must be specifically proved as laid. The crime of breaking and entering buildings in the daytime is not included in a charge of burglary, and a prisoner cannot be convicted of the former under a charge of the latter."

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every essential element of it, otherwise the defendant would be convicted of an offense, without having been accused of it.[56] "No one can be convicted of an offense which is not charged in the information, where the elements of the offense are not embraced in some greater offense charged." [57] "The lesser offense must be included in the greater by necessary words of description, so that, if the words defining the greater offense are stricken out of the information, there would remain a sufficient description of the lesser offense." [58]

On indictment for assault with intent to do great bodily harm, expressly alleging that the defendant "did beat, bruise, and ill-treat" the person assaulted, there may be a conviction of assault and battery, since a battery is charged; [59] but if the information merely charges the assault with such intent, and does not show that there was actual violence, there may be a conviction of simple assault, but not of assault and battery, for a battery is not necessarily included in the charge.[60]

So, on indictment for assault with intent to rape, though there may be conviction for simple assault, there cannot be conviction for assault and battery, unless actual violence is charged. Assault with intent to commit rape does not nec-

[56] State v. Ackles, 8 Wash. 462, 36 Pac. 597; Com. v. Murphy, 2 Allen (Mass.) 163; Warner v. State, 54 Ark. 660, 17 S. W. 6; State v. Melton, 102 Mo. 683, 15 S. W. 139.

[57] Turner v. Muskegon Circuit Judge, 88 Mich. 359, 50 N. W. 310.

[58] State v. Shear, 51 Wis. 460, 8 N. W. 287; State v. Yanta, 71 Wis. 669, 38 N. W. 333. In the case last cited the rule does not seem to have been correctly applied. It was held that a charge of willfully, maliciously, and feloniously assaulting, cutting, stabbing, and wounding, with intent to murder, did not include the charge of assault with intent to do great bodily harm. It is difficult to suppose it possible to assault, cut, stab, and wound a man with intent to murder him, without intending to inflict rather serious bodily harm. See, contra, cases cited in note 51, p. 407, supra.

[59] People v. Ellsworth, 90 Mich. 442, 51 N. W. 531. And see the cases cited in note 51, p. 407, supra.

[60] Turner v. Muskegon Circuit Judge, 88 Mich. 359, 50 N. W. 310 (explained in People v. Ellsworth, supra).

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essarily imply a battery.[61] It is otherwise, of course, where the consummated crime of rape is charged.[62]

The same is true of assaults with intent to murder, to inflict bodily harm, to rob, assault with a deadly weapon, etc. Conviction of simple assault may always be authorized, but not for assault and battery, unless the indictment shows on its face that there was actual violence.[63]

Under this rule it would seem that the defendant should not be convicted of burning or breaking and entering a building not a dwelling house, on an indictment for burning or breaking and entering a dwelling house, nor for burning or breaking and entering a building in the daytime, on an indictment for doing so in the nighttime, but, as we have seen, there is a conflict in the cases.[64]

On a charge of murder by shooting or stabbing, or other acts of intentional violence, the defendant may well be convicted of assault with intent to kill, or with intent to do great bodily harm.[65] On an indictment for murder which, as allowed by statute, does not set out the manner or means by which the crime was committed, there cannot be a conviction, under a statute, of intentionally pointing a pistol, and accidentally discharging the same, and killing the deceased;[66] nor of cruel and unusual treatment of a slave.[67]

On indictment for rape, as we have seen, there may, in a proper case, be conviction of fornication, but there cannot be such a conviction unless the indictment shows that the woman was not the defendant's wife.[68]

[61] State v. McAvoy, 73 Iowa, 557, 35 N. W. 630; State v. Keen, 10 Wash. 93, 38 Pac. 880.

[62] Note 46, p. 406, supra.

[63] Turner v. Muskegon Circuit Judge, supra; State v. Marcks, 3 N. D. 532, 58 N. W. 25; State v. Melton, 102 Mo. 683, 15 S. W. 139.

[64] Notes 52–55, p. 408, supra.

[65] Notes 42–44, 51, pp. 405, 407, supra.

[66] Lucas v. State, 71 Miss. 471, 14 South. 537.

[67] Wilson v. State, 29 Tex. 245.

[68] Com. v. Murphy, 2 Allen (Mass.) 163. This results from the rule that an indictment for fornication must state that the woman was not the wife of defendant, but that an indictment for rape need not, and the indictment in the case cited did not contain such statement. There is no reason in principle for any distinction between these crimes in the matter of the necessity for alleging that the woman

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So it has been held that on an indictment for rape (charging that the defendant "feloniously, forcibly, and against her will, did carnally know J. J.," saying nothing about her age) the defendant cannot be convicted of the offense of carnally knowing a female child under the age of puberty.[69] Nor can there be conviction of malicious mischief on an indictment for arson;[70] nor of embezzlement on indictment for larceny, or vice versa,[71] unless a statute, as is the case in some states, expressly allows it.[72] Nor of assault with intent to murder on indictment for robbery;[73] or for maiming;[74] nor of wounding, maiming, and disfiguring on an indictment for assault with a slung shot with intent to kill, which does not allege the infliction of an injury;[75] nor of the statutory offense of stabbing another, not designing thereby to effect his death, nor in self-defense, nor in an attempt to preserve the peace, nor in doing any other legal act, whereby death resulted, on indictment for murder.[76]

Felony and Misdemeanor

At common law, in England, because of the fact, as explained on a former page,[77] that the defendant had certain

was not the wife of the accused. The reason given by the court in the case cited why such allegation is necessary in the case of fornication, and not in the case of rape, is, that in the former, unless the fact that the woman was not defendant's wife is averred, everything stated in the indictment might be true and yet defendant not be guilty of any crime, but that in an indictment for rape such averment is not necessary, because a man may be a principal in the second degree in rape even on his own wife. But there is no such distinction, for the same facts that would make a man a principal in the second degree in a rape committed on his wife, would make him a principal in fornication.

[69] Warner v. State, 54 Ark. 660, 17 S. W. 6. And see Whitcher v. State, 2 Wash. 286, 26 Pac. 268.

[70] Crockett v. State, 80 Ga. 104, 4 S. E. 254.

[71] Griffin v. State, 4 Tex. App. 390; Lott v. State, 24 Tex. App. 723, 14 S. W. 277; State v. Harmon, 106 Mo. 635, 18 S. W. 128.

[72] State v. Williams, 40 La. Ann. 732, 5 South. 16; State v. Harmon, 106 Mo. 635, 18 S. W. 128; Reg. v. Gorbutt, 1 Dears. & B. Crown Cas. 166.

[73] Munson v. State, 21 Tex. App. 329, 17 S. W. 251.

[74] Davis v. State, 22 Tex. App. 45, 2 S. W. 630.

[75] State v. Melton, 102 Mo. 683, 15 S. W. 139.

[76] Wood v. Com. (Ky.) 7 S. W. 391.

[77] Ante, p. 340.

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rights on trial for a misdemeanor which he could not claim on trial for a felony, a felony could not upon the trial be modified into a misdemeanor. In other words, on indictment for a felony the defendant could not be convicted of a misdemeanor.[78] And this rule has been recognized in some of our states.[79] The Massachusetts court based the rule on "the broader consideration that the offenses are, in legal contemplation, essentially distinct in their nature and character," [80] but this is not the reason of the rule.

Where the rule is recognized there could not be a conviction of simple assault, assault and battery, or assault with intent to kill (where such aggravated assault is a misdemeanor only), on indictment for murder or manslaughter; [81] nor of simple assault, assault and battery, indecent assault, or assault with intent to rape (when a misdemeanor only), on an indictment for rape.[82] The same would be true of indictments for robbery. So where several persons were indicted for a burglary, in breaking and entering a dwelling house in the nighttime with intent to maim and disfigure the owner by cutting off one of his ears, which was charged as a burglarious breaking and entry with a felonious intent, the court, on demurrer, being of opinion that the offense charged did not amount to a felony, the question was raised whether it would warrant a judgment for the misdemeanor of aggravated assault; but it was decided that at common law this could not be done, and the defendants were bound

[78] 1 Chit. Cr. Law, 251; 2 Hawk. P. C. c. 47, § 8; Rex v. Westbeer, 1 Leach, Crown Cas. 14, 2 Strange, 1133; Rex v. Monteth, 2 Leach, Crown Cas. 702; 2 East, P. C. 737, 738.

[79] Com. v. Roby, 12 Pick. (Mass.) 496 (overruling Com. v. Cooper, 15 Mass. 187); Com. v. Newell, 7 Mass. 249; Com. v. Gable, 7 Serg. & R. (Pa.) 423; State v. Valentine, 6 Yerg. (Tenn.) 533; State v. Flint, 33 La. Ann. 1288; Black v. State, 2 Md. 376; Barber v. State, 50 Md. 161; McWhirt v. Com., 3 Grat. (Va.) 594, 46 Am. Dec. 196. In most of these states, however, the rule has been changed by statute.

[80] Com. v. Roby, 12 Pick. (Mass.) 496.

[81] Com. v. Roby, 12 Pick. (Mass.) 496; Com. v. Cooper, 15 Mass. 187.

[82] Id.

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over to answer for the misdemeanor upon another indictment.[83]

Many, perhaps most, of our courts have refused to recognize the rule that there cannot be a conviction of misdemeanor on indictment for felony, on the ground that the reasons which made the rule proper in England do not exist in this country, there being no privilege to which the defendant is entitled on trial for a misdemeanor that he could not claim on trial for a felony; and so the maxim, "Cessante ratione legis, cessat et ipsa lex," applies.[84] In many states the rule has been expressly abrogated by statute.[85]

In some states it is expressly provided by statute that where a person is charged with the actual commission of a crime, and the evidence shows that he was guilty only of an attempt to commit it, he may be convicted of the attempt.[86]

Conviction of Minor, on Proof of Higher, Offense

In most states it is held, where there is no statute to the contrary, that where a person is convicted of a minor offense necessarily included in the charge, he cannot complain that the evidence showed him to be guilty of the higher offense charged.[87] But in some states, where the offense

[83] Com. v. Newell, 7 Mass. 249.

[84] Herman v. People, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182; People v. Jackson, 3 Hill (N. Y.) 92; People v. White, 22 Wend. (N. Y.) 175; Rogers v. People, 34 Mich. 345; State v. Scott, 24 Vt. 127; Prindeville v. People, 42 Ill. 217; State v. Kennedy, 7 Blackf. (Ind.) 233; Hunter v. Com., 79 Pa. 503, 21 Am. Rep. 83; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Stewart v. State, 5 Ohio, 241; State v. Stedman, 7 Port. (Ala.) 495; State v. Johnson, 30 N. J. Law, 185; State v. Wimberly, 3 McCord (S. C.) 190; State v. Shepard, 7 Conn. 54; State v. Watts, 82 N. C. 656; Cameron v. State, 13 Ark. 712; People v. Chalmers, 5 Utah, 201, 14 Pac. 131.

[85] See Com. v. Drum, 19 Pick. (Mass.) 479; State v. Crummey, 17 Minn. 72 (Gil. 50); Hill v. State, 53 Ga. 125; State v. Purdie, 67 N. C. 26, 326; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360.

[86] In re Lloyd, 51 Kan. 501, 33 Pac. 307; State v. Frank, 103 Mo. 120, 15 S. W. 330.

[87] Polson v. State, 137 Ind. 519, 35 N. E. 907; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; State v. Keeland, 90 Mo. 337, 2 S. W. 442; Com. v. Creadon, 162 Mass. 466, 38 N. E. 1119; Hardy v. Com., 17 Grat. (Va.) 592; State v. Archer, 54 N. H. 465; State v. Par-

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charged is a misdemeanor, and the offense proved is a felony, it is held that there can be no conviction of the misdemeanor on the ground that it merges in the felony.[88]

In some jurisdictions, however, statutes have been enacted, providing, in substance, that no person shall be convicted of an assault with intent to commit an offense, or of any other attempt to commit an offense, when it shall appear that the offense intended or attempted was actually perpetrated.[89] Such a statute is valid, and does not conflict with a statute authorizing a conviction for any degree of offense inferior to that charged in the indictment, nor with a statute authorizing a conviction for a less offense where the charge is for an assault with intent to commit a felony, and authorizing the jury to convict "of any offense, the commission of which is necessarily included in that charged." [90]

Indictment Bad as to Higher Offense

It has been held that an indictment which is bad for the higher offense sought to be charged will not support a conviction for a minor offense charged which if the indictment for the higher offense were good, would necessarily be included therein;[91] but the rule seems to be established that, if the offense of which the defendant is convicted is sufficiently charged, it can make no difference that the higher offense which it was intended to charge, and of which the defendant was acquitted, was not sufficiently charged.[92]

melee, 9 Conn. 259; Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340; Reg. v. Neale, 1 Car. & K. 591; Com. v. Burke, 14 Gray (Mass.) 100; Com. v. McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Brown v. State, 31 Fla. 207, 12 South. 640. But see Brown v. State, 34 Neb. 448, 51 N. W. 1028.

[88] Post, p. 460.

[89] State v. Lacey, 111 Mo. 513, 20 S. W. 238; State v. White, 35 Mo. 500; State v. Mitchell, 54 Kan. 516, 38 Pac. 810.

[90] State v. Lacey, supra.

[91] Territory v. Dooley, 4 Mont. 295, 1 Pac. 747.

[92] Crumbley v. State, 61 Ga. 582; State v. Triplett, 52 Kan. 678, 35 Pac. 815.

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CONVICTION OF HIGHER OFFENSE

123. There can be no conviction for a higher offense than is charged in the indictment.

We should not take the space to state so obvious a proposition, except for the fact that an appellate court has actually been called upon to decide that there can be no conviction for grand larceny on an indictment for petit larceny.[93]

[93] McCollough v. State, 132 Ind. 427, 31 N. E. 1116; People v. Ho Sing, 6 Cal. App. 752, 93 Pac. 204.

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CHAPTER XI

MOTION TO QUASH, ARRAIGNMENT, DEMURRER, AND PLEAS OF DEFENDANT

124–126. Motion to Quash.
127–128. The Arraignment and Pleas.
129. Confession—Plea of Guilty—Nolo Contendere.
130. Plea to the Jurisdiction.
131. Plea in Abatement.
132. Demurrer.
133–135. Pleas in Bar.
136–138. Pleas of Autrefois Acquit and Convict, or Former Jeopardy.
139. Plea of Pardon.
140. Agreement to Turn State's Evidence.
141. Plea of Not Guilty—General Issue.

MOTION TO QUASH

124. A motion to quash the indictment will lie, if it is insufficient as a matter of law, because of any defect apparent on the face of it or of the record, or if counts are joined in it which, by law, ought not to be joined; and in the latter case the court may, in its discretion, quash one or more counts. In some states the motion will lie for defects not apparent on the face of the record.

125. The motion may be made at any time before verdict, unless it is otherwise provided by statute.

126. All motions to quash are, at common law, addressed to the discretion of the court; and it may, if it thinks proper, leave the defendant to his remedy by demurrer, motion in arrest of judgment, or writ of error.

The motion to quash is always a proper way of objecting to the indictment for insufficiency on its face, or on the face

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of the record, in point of law, from whatever cause the insufficiency may arise;[1] and it is also a proper way to object that different counts or parties are improperly joined, though this, as we have seen, may not render the indictment bad, as a matter of law. In some states the motion will not lie for defects not apparent on the face of the indictment or record,[2] but in others the rule is different.[3]

There are various ways in which the defendant may raise objection to the sufficiency of the indictment in point of law. He may do so by motion to quash it, by plea, by demurrer, by motion in arrest of judgment, or on writ of error or appeal. He can attack it by demurrer or plea only after he has been arraigned or called upon to answer the charge, and generally before he has pleaded to the merits; by motion in arrest only after a verdict of guilty; by writ of error or appeal only after a judgment of conviction; but he may attack it by motion to quash at any time after the indictment is presented, and before verdict.

It has been said that a motion to quash must be made before the defendant has been arraigned and pleaded; that it comes too late, for instance, after a plea of not guilty.[4] But this is not true. Ordinarily the indictment will not be quashed after plea, but whenever it is clear that no judgment could be rendered on a verdict of guilty,

[1] Reg. v. Wilson, 6 Q. B. 620; Rex v. Combs, Comb. 243; Rex v. Stratton, 1 Doug. 239; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; State v. Albin, 50 Mo. 419; State v. Cole, 17 Wis. 674; Swiney v. State, 119 Ind. 478, 21 N. E. 1102.

[2] State v. Ward, 60 Vt. 142, 14 Atl. 187; State v. Rickey, 9 N. J. Law, 293; Com. v. Fredericks, 119 Mass. 199; Com. v. Donahue, 126 Mass. 51; Bell v. State, 42 Ind. 335.

[3] See Com. v. Bradney, 126 Pa. 199, 17 Atl. 600; Com. v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; State v. Wall, 15 Mo. 208; State v. Bishop, 22 Mo. App. 435; State v. Horton, 63 N. C. 595.

[4] Rex v. Frith, 1 Leach, Crown Cas. 11; Rex v. Semple, Id. 420; Rex v. Wynn, 2 East, 226; State v. Burlingham, 15 Me. 104; People v. Watters, 5 Parker, Cr. R. (N. Y.) 661; People v. Monroe Oyer and Terminer, 20 Wend. (N. Y.) 108; Deitz v. State, 123 Ind. 85, 23 N. E. 1086; People v. Jones, 263 Ill. 564, 105 N. E. 744. In some states, by statute, the time is limited. See State v. Taylor, 43 La. Ann. 1131, 10 South. 203; State v. Schumm, 47 Minn. 373, 50 N. W. 362; People v. Bawden, 90 Cal. 195, 27 Pac. 204.

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because of the insufficiency of the indictment, or lack of jurisdiction of the court a motion to quash may be made and granted, in the discretion of the court, at any time before verdict, for it would be absurd to require the trial to proceed further, when it is clear that a conviction could not be sustained.[5] A motion to quash for misjoinder of counts or parties may also be made at any time before verdict. It cannot, in any case, be made after verdict.[6]

At common law, a motion to quash an indictment is always addressed to the discretion of the court, and, by the weight of authority, its ruling is not reviewable.[7] But the court, in the exercise of its discretion, is guided by certain rules. It is commonly said that where the offense is a serious one, such as a felony, or a misdemeanor which immediately affects the public at large, the motion should not be granted except upon the clearest and plainest ground, but the party should be driven to a demurrer, or motion in arrest of judgment, or writ of error.[8] The motion will be

[5] Reg. v. James, 12 Cox, Cr. Cas. 127; In re Nicholls, 5 N. J. Law, 539; State v. Riffe, 10 W. Va. 794; Parrish v. State, 14 Md. 238; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; Com. v. Chapman, 11 Cush. (Mass.) 422; State v. Collyer, 17 Nev. 275, 30 Pac. 891; State v. Eason, 70 N. C. 90; State v. Benthall, 82 N. C. 664.

[6] State v. Barnes, 29 Me. 561.

[7] 1 Chit. Cr. Law, 300; 2 Hawk. P. C. c. 25, § 146; Rex v. Wheatly, 2 Burrows, 1127; Rex v. Inhabitants of Belton, 1 Salk. 372; Rex v. Johnson, 1 Wils. K. B. 325; Rex v. Wynn, 2 East, 226; People v. Eckford, 7 Cow. (N. Y.) 535; Com. v. Eastman, 1 Cush. (Mass.) 214, 48 Am. Dec. 596; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; Richards v. Com., 81 Va. 110; Strawhern v. State, 37 Miss. 422; State v. Barnes, 29 Me. 561; State v. Hurley, 54 Me. 562; State v. Jones, 5 Ala. 666; State v. Black (N. J.) 20 Atl. 255; Stout v. State, 96 Ind. 407; State v. Conrad, 21 Mo. 271; State v. Keener, 225 Mo. 488, 125 S. W. 747. In some states the rule does not obtain. See Com. v. Bradney, 126 Pa. 199, 17 Atl. 600. In some states it is provided by statute that for certain defects the defendant may have a motion to quash as of right. Pub. St. Mass. 1882, c. 214, § 25. And see Com. v. Alden, 143 Mass. 113, 9 N. E. 15.

[8] 1 Chit. Cr. Law, 300; Rex v. Inhabitants of Belton, 1 Salk. 372; State v. Dayton, supra; People v. Eckford, 7 Cow. (N. Y.) 535; State v. Colbert, 75 N. C. 368; Proctor v. State, 55 N. J. Law, 472, 26 Atl. 804; Com. v. Litton, 6 Grat. (Va.) 691; State v. Flowers, 109 N. C. 841, 13 S. E. 718; State v. Rector, 11 Mo. 28.

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granted when it is clear that the indictment would not support a judgment of conviction, but not otherwise. "Such a motion should not be allowed to prevail in a doubtful case, but only when the insufficiency of an indictment is so palpable as clearly to satisfy the presiding judge that a verdict thereon would not authorize a judgment against the defendant." [9]

Indictments have been quashed because found on the testimony of an interested person, or of a person not under oath; [10] because the time of the offense was not stated, or the offense was laid on a future day, [11] or appeared to be barred by the statute of limitation; [12] because of repugnancy; [13] because the court in which it was found was without jurisdiction; [14] because it failed to state any offense; [15] because it failed to give the addition of the defendant; [16] because of a defect in the caption; [17] because of omission of a material averment; [18] and for misjoinder of parties, [19] or offenses. [20] In some states it is expressly provided by stat-

[9] Com. v. Eastman, 1 Cush. (Mass.) 214, 48 Am. Dec. 596; Com. v. Hawkins, 3 Gray (Mass.) 464.

[10] State v. Fellows, 3 N. C. 340; State v. Cain, 8 N. C. 352; U. S. v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858; ante, p. 132, and cases there cited.

[11] State v. Roach, 3 N. C. 352; State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584; ante, p. 278, and cases there cited.

[12] State v. J. P., 1 Tyler (Vt.) 283; ante, p. 282.

[13] Ante, p. 201; State v. Johnson, 5 Jones (N. C.) 221.

[14] Rex v. Williams, 1 Burrows, 389; Rex v. Bainton, 2 Strange, 1088; Bell v. Com., 8 Grat. (Va.) 600; Justice v. State, 17 Ind. 56.

[15] State v. Mitchell, 1 Bay (S. C.) 269; People v. Eckford, 7 Cow. (N. Y.) 535; State v. Albin, 50 Mo. 419; State v. Rickey, 9 N. J. Law, 293; Smith v. State, 45 Md. 49; Williams v. State, 42 Tex. 392.

[16] Rex v. Thomas, 3 Dowl. & R. 621; State v. Hughes, 2 Har. & McH. (Md.) 479.

[17] Rex v. Brown, 1 Salk. 376; State v. Hickman, 8 N. J. Law, 299; Respublica v. Cleaver, 4 Yeates (Pa.) 69; ante, p. 159, and cases there cited.

[18] Rex v. Trevilian, 2 Strange, 1268; Rex v. Lease, Andrews, 226; Rex v. Burkett, Id. 230; note 15, supra.

[19] Rex v. Weston, 1 Strange, 623; ante, p. 347.

[20] Ante, p. 331. Indictments have been quashed also for irregularities in the organization of the grand jury, In re Nicholls, 5 N. J. Law, 539; disqualification of a grand juror, Couch v. State, 63 Ala.

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ute that no ground for demurrer shall be ground for motion to quash;[21] and in some the grounds for a motion to quash are specified, and the motion will not lie for any other cause.[22] In some states it is provided by statute that the first of two indictments for the same offense shall be quashed, or shall be deemed suspended and quashed.[23] Except where there is such a provision, however, it is no ground for quashing an indictment that another indictment is pending for the same offense, unless, under the particular circumstances, the court may think the defendant may suffer injustice.[24]

It has been said that the court must quash the whole indictment or none; that it cannot strike out one or more counts and leave others;[25] but by the better opinion each count being a separate indictment, one or more of them may be quashed without affecting the rest of them which are good.[26]

"After an indictment against the defendant has been quashed, a new and more regular one may be preferred against him.[27] He can gain therefore in general very little advantage, except delay, by such an application, and therefore usually reserves his objections till after the verdict, when, if the indictment be found to be insufficient, the court is bound, ex debito justitiæ, to arrest the judgment."[28] By

163; presence of unauthorized persons at deliberations of grand jury, U. S. v. Edgerton (D. C.) 80 Fed. 374.

[21] See State v. Edlevitch, 77 Md. 144, 26 Atl. 406.

[22] See People v. Schmidt, 64 Cal. 260, 30 Pac. 814; State v. Security Bank, 2 S. D. 538, 51 N. W. 337.

[23] See State v. Arnold (Mo. Sup.) 2 S. W. 269; State v. Smith, 71 Mo. 45; State v. Vincent, 91 Mo. 662, 4 S. W. 430; Ball v. State, 48 Ark. 94, 2 S. W. 462; State v. Hall, 50 Ark. 28, 6 S. W. 20.

[24] Rowand v. Com., 82 Pa. 405.

[25] Rex v. Pewtress, 2 Strange, 1026, Cas. t. Hardw. 203; Kane v. People, 3 Wend. (N. Y.) 363; Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370.

[26] Scott v. Com., 14 Grat. (Va.) 687; State v. Wishon, 15 Mo. 503; Williams v. State, 42 Tex. 392; Jones v. State, 6 Humph. (Tenn.) 435; Com. v. Lapham, 156 Mass. 480, 31 N. E. 638; Com. v. Stevenson, 127 Mass. 446; ante, p. 344.

[27] See Perkins v. State, 66 Ala. 457.

[28] 1 Chit. Cr. Law, 304; Rex v. Wheatly, 2 Burrows, 1127.

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statute now some objections are required to be raised by demurrer or motion to quash, or they will be deemed to be waived, and no objection can be made after verdict.

THE ARRAIGNMENT AND PLEAS

127. There can be no valid trial until the defendant is arraigned and pleads to the indictment. But in some states a formal arraignment may be expressly or impliedly waived.

128. In the arraignment the defendant must be called to the bar of the court, the indictment must be distinctly read to him, and he must be asked whether he pleads guilty or not guilty. If he stands mute, and obstinately refuses to answer, a plea of not guilty is entered for him by the court.

A trial without a proper arraignment and plea is a nullity, unless the defendant has expressly or impliedly waived a formal arraignment. Not only is the arraignment necessary unless waived,[29] but the plea is equally so, for without a plea there can be no issue to try.[30] And the fact of ar-

[29] 2 Hale, P. C. 218; 2 Hawk. P. C. c. 28, § 6; Parkinson v. People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; State v. Hughes, 1 Ala. 655; State v. Williams, 117 Mo. 379, 22 S. W. 1104; State v. Wilson, 42 Kan. 587, 22 Pac. 622; Stoneham v. Com., 86 Va. 523, 10 S. E. 238; State v. Montgomery, 63 Mo. 296; Miller v. People, 47 Ill. App. 472.

[30] Jefferson v. State, 24 Tex. App. 535, 7 S. W. 244; State v. Hunter, 43 La. Ann. 157, 8 South. 624; Territory v. Brash, 3 Ariz. 141, 32 Pac. 260; Munson v. State (Tex. App.) 11 S. W. 114; State v. Wilson, 42 Kan. 587, 22 Pac. 622; Parkinson v. People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; Miller v. People, 47 Ill. App. 472; Bowen v. State, 98 Ala. 83, 12 South. 808; State v. Barr, 7 Pennewill (Del.) 340, 79 Atl. 730; State v. Walton, 50 Or. 142, 91 Pac. 490, 13 L. R. A. (N. S.) 811; United States v. Aurandt, 15 N. M. 292, 107 Pac. 1064, 27 L. R. A. (N. S.) 1181; People v. Heath, 51 Colo. 182, 117 Pac. 138; State v. Moss, 164 Mo. App. 379, 144 S. W. 1109; Hoskins v. People, 84 Ill. 87, 25 Am. Rep. 433. That the defendant's attorney may plead for him in his presence, and with his acquiescence, see Stewart v. State, 111 Ind. 554, 13 N. E. 59.

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raignment and plea must appear on the record.[81] By the weight of authority, the arraignment and plea must precede the impaneling and swearing of the jury. An omission thereof cannot be cured by an arraignment and plea after the trial has commenced.[82] In some states it is held that an

[81] See the cases cited in the above notes. And see Aylesworth v. People, 65 Ill. 301; State v. Walker, 119 Mo. 467, 24 S. W. 1011; Clark v. State, 32 Tex. Cr. R. 412, 24 S. W. 29; State v. Taylor, 111 Mo. 448, 20 S. W. 193; State v. Fontenette, 45 La. Ann. 902, 12 South. 937; Bowen v. State, 98 Ala. 83, 12 South. 808; State v. Moss, 164 Mo. App. 379, 144 S. W. 1109; People v. Heath, 51 Colo. 182, 117 Pac. 138. In the case last cited the court held that the omission of arraignment and plea was not cured by a statute providing: "No motion in arrest of judgment, or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in such indictment;" nor by a statute providing: "No indictment shall be insufficient, nor shall the trial judgment or other proceedings thereon be affected by any defect which does not tend to prejudice substantial rights of the party." Sufficiency of showing on the record. Stoneham v. Com., 86 Va. 523, 10 S. E. 238. If there has been an arraignment and plea, the record may be made to show the fact by an entry nunc pro tunc. Long v. People, 102 Ill. 331; Parkinson v. People, 135 Ill. 401, 25 N. E. 764. The leading case in the United States holding that there could be no valid trial without arraignment and plea, and that the fact must be shown on the record, is Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. In this case the court said: "It is true that the Constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed." This case is overruled by Garland v. Washington, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. 772, in which the same court said: "Technical objections of this character were undoubtedly given much more weight formerly than they are now. * * * But with improved methods of procedure, and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away."

[82] Parkinson v. People, 135 Ill. 401, 25 N. E. 764; State v. Hughes, 1 Ala. 655; State v. Montgomery, 63 Mo. 296; United States v. Aurandt, 15 N. M. 292, 107 Pac. 1064. Contra, Morris v. State, 30 Tex. App. 95, 16 S. W. 757; State v. Straub, 16 Wash. 111, 47 Pac. 227.

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arraignment and plea is a mere matter of form, and may be expressly or impliedly waived by the defendant.[33]

Where the defendant has been arraigned, tried, and convicted, and obtains a new trial, he need not be again arraigned before the second trial;[34] nor need there be an arraignment in the circuit court on appeal from a conviction in a justice's court;[35] nor, where a change of venue is demanded and granted after arraignment, need there be a second arraignment in the court to which the case is taken.[36] But a second arraignment in these cases is not error.[37]

The arraignment formerly consisted of three parts: (1) Calling the prisoner to the bar by his name, and commanding him to hold up his hand; (2) reading the indictment to him; and (3) demanding of him whether he is guilty or not guilty, and asking him how he will be tried. It is still necessary to call the defendant to the bar,[38] but the practice of

[33] U. S. v. Molloy (C. C.) 31 Fed. 19; People v. McHale, 61 Hun, 618, 15 N. Y. Supp. 496; State v. Glave, 51 Kan. 330, 33 Pac. 8; Ransom v. State, 49 Ark. 176, 4 S. W. 658; Allyn v. State, 21 Neb. 593, 33 N. W. 212; Hack v. State, 141 Wis. 346, 124 N. W. 492, 45 L. R. A. (N. S.) 664. By statute in some states arraignment may be waived. See State v. Thompson, 95 Iowa, 464, 64 N. W. 419; People v. Tower, 63 Hun, 624, 17 N. Y. Supp. 395; State v. Hoffman, 70 Mo. App. 271; State v. Brock, 61 S. C. 141, 39 S. E. 359. The defendant should plead personally, if competent, and not by counsel; but where the plea was made by counsel, and defendant, when asked by the court if it was his plea, assented by nodding his head, it was held sufficient. State ex rel. Conway v. Blake, 5 Wyo. 107, 38 Pac. 354. Statutes in some states provide that arraignment shall not take place until a specified time after receiving the indictment. See McKay v. State, 90 Neb. 63, 132 N. W. 741, 39 L. R. A. (N. S.) 714, Ann. Cas. 1913B, 1034.

[34] State v. Stewart, 26 S. C. 125, 1 S. E. 468; Byrd v. State, 1 How. (Miss.) 247; Hayes v. State, 58 Ga. 35; Curtis v. Com., 87 Va. 589, 13 S. E. 73. There need be no new arraignment after amendment of the indictment. State v. Sovern, 225 Mo. 580, 125 S. W. 769.

[35] State v. Haycroft, 49 Mo. App. 488.

[36] Davis v. State, 39 Md. 355; State v. Stewart, 26 S. C. 125, 1 S. E. 468. There need be no arraignment in the first court if there is an arraignment in the second. State v. Renfrow, 111 Mo. 589, 20 S. W. 299.

[37] Shaw v. State, 32 Tex. Cr. R. 155, 22 S. W. 588.

[38] 2 Hale, P. C. 219.

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compelling him to hold up his hand, which was for the purpose of identifying him, and which was probably never absolutely necessary,[39] is no longer customary. When arraigned, the defendant should be free from any shackles or bonds, unless there is evident danger of an escape.[40] In felonies he must be brought to the bar of the court in person,[41] but in misdemeanors he may waive the right to be present, and appear and plead by attorney.[42]

It is always necessary to read the indictment to the defendant distinctly, in order that he may understand the charge;[43] and this requirement is not dispensed with by the fact that he has had a copy of the indictment, as provided by statute.[44] After the indictment has been read, the clerk asks: "How say you, A. B.? Are you guilty or not guilty?" If the defendant confesses the charge, he is said to plead guilty. The confession is recorded, and judgment is given as on a conviction.[45] The defendant may, in some cases, instead of confessing in such a way as to say expressly that he is guilty, do so impliedly, by a nolo contendere, which has the same effect, for the purposes of the prosecution.[46] If the defendant denies the charge, he answers "Not guilty," to which the prosecuting officer replies that he is guilty. The answer of the defendant, and the replication or similiter, are entered on the record, and the general issue is thus formed. The court then proceeds to impanel and swear the jury and try the issue, unless a continuance or change of venue is asked and allowed.

Formerly, after issue was joined, the clerk asked the defendant how he would be tried; but as the trial by jury is

[39] 2 Hale, P. C. 219; 2 Hawk. P. C. c. 28, § 2; 1 Chit. Cr. Law, 415; 4 Bl. Comm. 323.

[40] 2 Inst. 315; 3 Inst. 34; 2 Hale, P. C. 119; 2 Hawk. P. C. c. 28, § 1; J. Kelyng, 10; State v. Kring, 64 Mo. 591.

[41] Post, p. 492.

[42] Reg. v. St. George, 9 Car. & P. 483, post, p. 492.

[43] 2 Hale, P. C. 219; 4 Bl. Comm. 323. While the indictment should be read in full, yet if the formal concluding part is omitted it will not vitiate a sentence pronounced on a plea of guilty. State v. Crane, 121 La. 1039, 46 South. 1009.

[44] Rex v. Hensey, 1 Burrows, 643.

[45] Post, p. 428.

[46] Post, p. 430.

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now the only mode of trial in criminal cases, except in proceedings before inferior courts, the question is not necessary nor usual.[47]

By general statutory provision, if the defendant stands mute, that is, does not answer at all, or answers irrelevantly, the court will direct a plea of not guilty to be entered, and the effect will be the same as if the defendant had so pleaded.[48]

If the defendant is deaf and dumb, he may nevertheless, if he understand the use of signs, be arraigned, and the meaning of the clerk in addressing him may be conveyed to him, by some proper person, by signs, and his signs in reply may be explained to the court.[49] If he is insane he cannot be arraigned or tried at all until he becomes sane.[50]

If several persons are charged in the same indictment they ought all to be arraigned before any of them are brought to trial.[51] They have the right to plead severally not guilty, but a plea of not guilty by all of them will be deemed a several plea.[52]

The Various Pleas

There are various objections which the defendant may raise before answering to the merits, and which, as a rule, he must raise before then, if he raises them at all. As we

[47] U. S. v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15,204.

[48] Com. v. Lannan, 13 Allen (Mass.) 563; Ellenwood v. Com., 10 Metc. (Mass.) 223; Com. v. Place, 153 Pa. 314, 26 Atl. 620; Com. v. McKenna, 125 Mass. 397; Com. v. Quirk, 155 Mass. 296, 29 N. E. 514. Formerly, if the defendant obstinately, or of malice, as it was expressed, stood mute in cases of felony, a sentence of peine forte et dure followed, and he was slowly pressed to death with heavy weights; while in treason and misdemeanor it was equivalent to a conviction. Later it was equivalent to a conviction in all cases. If he was dumb ex visitatione Dei, the trial proceeded as if he had pleaded not guilty. Now, however, by statute, even where he stands mute of malice, a plea of not guilty will be entered in all cases.

[49] Rex v. Jones, 1 Leach, Crown Cas. 102; Com. v. Hill, 14 Mass. 207; State v. De Wolf, 8 Conn. 93, 20 Am. Dec. 90; Rex v. Pritchard, 7 Car. & P. 303.

[50] Post, p. 497.

[51] 1 Chit. Cr. Law, 418.

[52] State v. Smith, 24 N. C. 402.

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have seen, he may move to quash the indictment, but objection may be made in this way at any time before verdict.[53] If the court has no jurisdiction, he may raise the question by a plea to the jurisdiction, though, as we shall see, he may take advantage of this objection in other ways, and the plea is not necessary.[54] If there is any defect, whether apparent on the face of the indictment or record, or founded upon some matter of fact extrinsic of the record, which renders the particular indictment insufficient, he may take advantage of it by plea in abatement, and, if the plea is sustained, the indictment will be abated or quashed.[55] The most frequent use of this plea is in cases where the defendant is misnamed in the indictment.

If, admitting every fact properly alleged in the indictment to be true, it appears on the face of the indictment and record that, as a matter of law, the defendant cannot be required to answer, because the indictment fails to charge any offense, or is otherwise insufficient or because of want of jurisdiction, the defendant may demur.[56]

If, without entering into the merits of the charge, and independently of any question of guilt or innocence, there is some extrinsic fact which prevents any prosecution at all for the offense charged, and does not go merely to the sufficiency of the indictment, as where the defendant has already been acquitted or convicted of the same offense, or has been pardoned, he must specially plead this matter in bar of the indictment. This plea is called a special plea in bar.[57]

After this comes the plea of not guilty, which is a plea to the merits, and forms the general issue. We will presently take up each of these pleadings in turn.

Number of Pleas—Successive Pleas

At common law it was the rule, both in civil and criminal cases, that the defendant must rely upon one ground of defense, and pleading double was never allowed. By the statute 4 Anne, c. 16, §§ 4, 5, it was provided that in civil ac-

[53] Ante, p. 416.
[54] Post, p. 431.
[55] Post, p. 432.
[56] Post, p. 436.
[57] Post, pp. 439, 471.

tions the defendant might, by leave of court, plead as many matters as he should see fit, but the statute expressly provided that it should not extend to criminal cases, so that the rule remained that no more than one plea could be put in to answer any indictment or information.[58] The rule was general that, in all cases of misdemeanor, if a defendant pleaded in abatement or specially in bar, and an issue of fact thereon was determined against him, or if he demurred, and the demurrer was overruled, he lost any right to a trial on the offense itself, and sentence could be pronounced as on a regular conviction,[59] though the court could, in its discretion, allow him to plead over.[60] In case of felony, however, if the defendant pleaded in abatement or specially in bar, or demurred, he was allowed at the same time, or even afterwards, to plead over to the indictment on the merits, as if he had never relied upon any other ground of defense; because it was thought that, though a man might lose his property by mispleading, he ought not to forfeit his life by any technical nicety or legal error.[61]

As we shall see, the defendant may, at any time before verdict, withdraw his plea of not guilty and confess or plead guilty. A fortiori may he withdraw a demurrer, plea to the jurisdiction, or in abatement, or specially in bar, to do so. We shall also see that at any time before sentence the defendant will generally be allowed to withdraw a plea of guilty and plead not guilty.

[58] 1 Chit. Cr. Law, 434; Com. v. Blake, 12 Allen (Mass.) 188; Reg. v. Charlesworth, 1 Best & S. 460.

[59] 2 Hawk. P. C. c. 31, § 7; 1 Chit. Cr. Law, 435; Rex v. Gibson, 8 East, 110; Kirton v. Williams, Cro. Eliz. 495. Contra, United States v. Rockefeller (D. C.) 226 Fed. 328. See State v. Copeland, 2 Swan (Tenn.) 626; Hill v. State, 2 Yerg. (Tenn.) 248; Wickwire v. State, 19 Conn. 477; State v. Potter, 61 N. C. 338.

[60] Crosby v. Wadsworth, 6 East, 602; Rex v. Gibson, 8 East, 110; Reg. v. Goddard, 2 Ld. Raym. 922.

[61] 1 Chit. Cr. Law, 435; 2 Hale, P. C. 255; 4 Bl. Comm. 338; 2 Hawk. P. C. c. 23, § 128; Id., c. 31, § 6; Reg. v. Goddard, 2 Ld. Raym. 922; Rex v. Gibson, 8 East, 110; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; State v. McGoy, 111 Mo. 517, 20 S. W. 240.

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Time of Pleading

When the defendant has any special matter to plead in abatement or in bar, as a misnomer, or a former acquittal or conviction, he should plead it at the time of his arraignment, before a plea of not guilty. He cannot so plead after a plea of guilty, unless by leave of the court.[62] The same rule applies to a demurrer. The rule does not apply where matter sought to be pleaded in abatement or specially in bar arose after the plea of not guilty. In such a case the matter may be set up by a plea puis darrein continuance.[63]

Duplicity

We have seen that an indictment is bad for duplicity if it charges more than one offense in a single count.[64] In like manner, and for the same reason, a plea is bad if it sets up two distinct defenses, either in abatement or in bar.[65]

CONFESSION—PLEA OF GUILTY—NOLO CONTENDERE

129. If the defendant confesses his guilt, either expressly by a plea of guilty, or impliedly by a plea of nolo contendere, it is equivalent to a conviction; but he may generally retract and plead not guilty at any time before sentence.

A confession of the defendant may be either express or implied. An express confession is where he pleads guilty, and thus directly, and in the face of the court, confesses the accusation.[66] This is called a plea of guilty, and is equivalent to a conviction. The court must, however, pronounce

[62] 2 Hale, P. C. 219; 1 Chit. Cr. Law, 435; Com. v. Lannan, 13 Allen (Mass.) 567; Com. v. Blake, 12 Allen (Mass.) 188.

[63] Reg. v. Charlesworth, 1 Best & S. 460.

[64] Ante, p. 322.

[65] State v. Emery, 59 Vt. 84, 7 Atl. 129; Reg. v. Sheen, 2 Car. & P. 634.

[66] 2 Hawk. P. C. c. 31, § 1; 2 Hale, P. C. 225; 1 Chit. Cr. Law, 428.

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judgment and sentence as upon a verdict of guilty,[67] but it will hear the facts of the case from the prosecuting officer, and any statement that the defendant or his counsel may wish to make. In the absence of a statutory provision to the contrary, the defendant may plead guilty in a capital case as well as in any other, and the court must pronounce the proper judgment and sentence, though it may be death.[68] It cannot compel him to plead not guilty, and submit to a trial, but it may, and generally will, advise him to withdraw his plea, and plead not guilty, and, instead of immediately directing the plea to be entered, will give him a reasonable time to consider and retract it.[69]

Before sentence has been passed the defendant will generally, but not necessarily, be allowed to retract his plea of

[67] 1 Chit. Cr. Law, 429; 4 Bl. Comm. 329; People v. Luby, 99 Mich. 89, 57 N. W. 1092. "A plea of guilty may be supported whenever a verdict of a jury finding a party guilty of a crime would be held valid. A conviction of crime may be had in two ways; either by the verdict of a jury, or by the confession of the offense by the party charged by a plea of guilty, 'which is the highest conviction.' And the effect of a confession is to supply the want of evidence. When, therefore, a party pleads guilty to an indictment, he confesses and convicts himself of all that is duly charged against him in that indictment." In the case from which we have quoted it was therefore held that since, under the Massachusetts statutes, an indictment for murder, in the usual form, is sufficient to charge murder in the first degree, though it also includes the second degree, a plea of guilty is equivalent to a conviction of the first degree, and warrants a sentence of death. Green v. Com., 12 Allen (Mass.) 155, 172.

[68] Green v. Com., 12 Allen (Mass.) 155. In some states, by statute, a plea of guilty is not allowed in a capital case. State v. Genz, 57 N. J. Law, 459, 31 Atl. 1037. But such a statute does not prevent a plea of guilty of a minor offense included in a capital charge. People v. Smith, 78 Hun, 179, 28 N. Y. Supp. 912. In other states, if defendant pleads guilty to an offense which is divided into degrees, it is provided that a hearing shall be had to determine the degree in which the defendant is guilty. Act Pa., March 31, 1860 (P. L. 402) § 74; State v. Almy, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744. At such hearing the defendant is not entitled to a jury. State v. Almy, supra. In those states where the penalty is assessed by the jury, and not by the judge, the hearing must be by the jury. Wartner v. State, 102 Ind. 51, 1 N. E. 65.

[69] 2 Hale, P. C. 225; 2 Hawk. P. C. c. 31, § 2; 4 Bl. Comm. 329; Com. v. Battis, 1 Mass. 95.

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guilty, and plead not guilty, but he cannot do so after sentence.[70] A defendant may also retract a plea of not guilty, even after it is recorded, and plead guilty.[71]

A plea of guilty is a confession of guilt, but it is a formal confession before the court in which the defendant is arraigned. It is altogether different from a confession formally made before a magistrate, or to some other person. The latter is merely evidence of guilt.[72]

An implied confession, or, as it is termed, a plea of nolo contendere, "is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the king's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper.[73] If they grant the request, an entry is made to this effect, that the defendant 'non vult contendere cum domina regina, et posuit se in gratiam curiæ,' without compelling him to a more direct confession."[74] The chief advantage of such a confession is that it will not prevent a plea of not guilty in an action of trespass for the same injury, while a plea of guilty or direct confession will.[75] The plea of nolo contendere has the same

[70] Reg. v. Sell, 9 Car. & P. 346; State v. Shanley, 38 W. Va. 516, 18 S. E. 734; Mastronada v. State, 60 Miss. 86; Pattee v. State, 109 Ind. 545, 10 N. E. 421; State v. Yates, 52 Kan. 566, 35 Pac. 209; Purvis v. State, 71 Miss. 706, 14 South. 268; Monahan v. State, 135 Ind. 216, 34 N. E. 967; State v. Williams, 45 La. Ann. 1356, 14 South. 32. Whether he shall be allowed to do this rests in the discretion of the trial court. For abuse of discretion in refusing permission, see Dobosky v. State, 183 Ind. 488, 109 N. E. 742. People v. Walker, 250 Ill. 427, 95 N. E. 475; Griffin v. State, 12 Ga. App. 615, 77 S. E. 1080.

[71] 2 Hawk. P. C. c. 31, § 1; 4 Harg. St. Tr. 778, 779; State v. Shanley, 38 W. Va. 516, 18 S. E. 734.

[72] Post, p. 621.

[73] Com. v. Horton, 9 Pick. (Mass.) 206.

[74] 1 Chit. Cr. Law, 431; 2 Hawk. P. C. c. 31, § 3; Reg. v. Templeman, 1 Salk. 55; Com. v. Horton, supra.

[75] 2 Hawk. P. C. c. 31, §§ 1, 3; Reg. v. Templeman, 1 Salk. 55; Com. v. Horton, supra. In Chester v. State, 107 Miss. 459, 65 South. 510, it was held that the entry of a plea of nolo contendere in a city court could not be introduced as a confession of guilt on a trial in the state court involving the same facts.

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effect in a criminal case as a plea of guilty, to the extent that a judgment and sentence may be pronounced as if upon a verdict of guilty.[76] It is not necessary that the court shall adjudge that the defendant is guilty for that follows by necessary legal inference from the implied confession. All that the court is required to do is to pass the sentence of the law affixed to the crime.[77]

Generally, after a plea of guilty, and a fortiori after a plea of nolo contendere, the court will allow the defendant to offer evidence in mitigation of the sentence.[78]

A plea of guilty or nolo contendere will not estop the defendant from taking exception in arrest of judgment to fatal defects apparent in the record;[79] but it is a waiver of all merely formal defects to which he could have objected by some other plea.[80]

PLEA TO THE JURISDICTION

130. By a plea to the jurisdiction the defendant objects that the court before which the indictment is preferred has no jurisdiction of the offense, or of the person of the defendant. This plea is seldom used, as the objection may be taken in other ways.

This plea will be proper when the court before which the indictment is preferred has no cognizance of the particular crime, either because of the nature of the crime, or because it was not committed within the territorial jurisdiction of the court, or when the court has no jurisdiction of the de-

[76] 1 Chit. Cr. Law, 428; Com. v. Horton, supra; Com. v. Ingersoll, 145 Mass. 381, 14 N. E. 449.

[77] Com. v. Horton, supra; Com. v. Ingersoll, supra; Com. v. Holstine, 132 Pa. 357, 19 Atl. 273.

[78] Com. v. Horton, supra.

[79] 1 Chit. Cr. Law, 431; 2 Hawk. P. C. c. 31, § 4. As that the indictment charges no offense. State v. Levy, 119 Mo. 434, 24 S. W. 1026; State v. Watson, 41 La. Ann. 599, 7 South. 125; Klawanski v. People, 218 Ill. 481, 75 N. E. 1028.

[80] Com. v. Hinds, 101 Mass. 210.

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fendant's person.[81] Objection to the jurisdiction may generally be taken advantage of under the plea of not guilty, or the general issue, and need not be specially pleaded,[82] or it may be successfully raised by motion in arrest of judgment, or on appeal or writ of error, or by demurrer, when the want of jurisdiction appears on the face of the indictment or in the caption.[83] A plea to the jurisdiction is therefore seldom resorted to.[84]

The plea, being dilatory, the highest degree of certainty is required. It must set forth specifically all the facts necessary to sustain it.[85]

A plea to the jurisdiction will not lie on the ground that the presiding judge was not entitled to the office, since the right of the judge to office, at least if he is a de facto judge, cannot be tried in a collateral way, but only in a direct proceeding in which he is one of the parties.[86]

PLEAS IN ABATEMENT

131. Any defect, whether apparent on the face of the indictment, or founded upon some matter of fact extrinsic of the record, which renders the indictment insufficient, may be taken advantage of by plea in abatement.

Any defect apparent on the face of the indictment, or founded on some matter extrinsic of the record, rendering the indictment insufficient, may be made the ground of a plea in abatement, and, if found for the defendant, will abate the indictment.[87] Thus, if the indictment does not describe the defendant by any addition, where an addition is

[81] 4 Bl. Comm. 333; 2 Hale, P. C. 256.

[82] Parker v. Elding, 1 East, 352; Rex v. Johnson, 6 East, 583.

[83] Rex v. Fearnley, 1 Term R. 316, 1 Leach, 425; Fitch v. Com., 92 Va. 824, 24 S. E. 272.

[84] Whart. Cr. Prac. & Pl. § 422.

[85] Post, p. 178; Taylor v. State, 79 Md. 130, 28 Atl. 815.

[86] State v. Conlan, 60 Conn. 483, 23 Atl. 150, and cases there cited.

[87] 2 Hale, P. C. 236, 238; Donald v. State, 31 Fla. 255, 12 South. 695; Day v. Com., 2 Grat. (Va.) 562; Com. v. Long, 2 Va. Cas. 318.

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necessary, it is defective on its face, and the defendant may plead in abatement.[88] So, also, if the defendant is misnamed or misdescribed, which is an objection founded on an extrinsic fact, a plea in abatement will lie.[89] So, where an indictment for failure to repair a highway does not sufficiently describe the highway, the objection may be raised in this way.[90] If the defect is apparent on the face of the indictment, without reference to any extrinsic fact, it is more usual to move to quash the indictment or to demur. But in most jurisdictions, where extrinsic facts must be shown, the plea is necessary.

As we have seen, all mistakes in the name or addition of the defendant must be taken advantage of in this manner, for the objection cannot be raised on motion in arrest, or on writ of error.[91] When a misnomer is pleaded in abatement, the state may either allow the plea, for the defendant must give his true name therein, and will be concluded thereby,[92] or it may reply, either denying the truth of the plea, or alleging that the defendant is as well known by one name as the other, so that he may be properly indicted by either, thus raising an issue of fact.[93]

It is well settled that the pendency of one indictment is no ground for a plea in abatement or in bar to another indictment for the same cause,[94] though it might be ground

[88] 1 Chit. Cr. Law, 445; ante, p. 174.

[89] 2 Hawk. P. C. c. 25, § 70; Davids v. People, 192 Ill. 176, 61 N. E. 537.

[90] Rex v. Hammersmith, 1 Starkie, 357, 358.

[91] Ante, p. 176; Com. v. Inhabitants of Dedham, 16 Mass. 146; Com. v. Gillespie, 7 Serg. & R. (Pa.) 479, 10 Am. Dec. 475; People v. Collins, 7 Johns. (N. Y.) 549; Turns v. Com., 6 Metc. (Mass.) 225; Scott v. Soans, 3 East, 111; Com. v. Fredericks, 119 Mass. 199; State v. Narcarm, 69 N. H. 237, 45 Atl. 744.

[92] 2 Hale, P. C. 238; 4 Bl. Comm. 335; Com. v. Sayers, 8 Leigh (Va.) 722.

[93] State v. Malia, 79 Me. 540, 11 Atl. 602; Com. v. Gale, 11 Gray (Mass.) 320. Where a plea of misnomer is sufficient in form, the question of idem sonans, being a question of fact, must be raised by replication, and not by demurrer. State v. Malia, supra.

[94] 1 Chit. Cr. Law, 446; 2 Hawk. P. C. c. 34, § 1; Reg. v. Goddard, Ld. Raym. 922; Rex v. Stratton, Doug. 240; Withipole's Case, Cro. Car. 134, 147; Com. v. Drew, 3 Cush. (Mass.) 282; Dutton v. State,

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for the exercise of the court's discretion to quash one or the other of them. No prejudice to the defendant can well arise, for whenever either of them, and it is immaterial which, is tried, and a judgment rendered on it, the judgment may be pleaded in bar to the other.[95]

A plea in abatement is merely a dilatory plea. If successful, the only advantage generally gained is delay, for the defendant may be detained in custody, and a new indictment may be presented, or, in some cases, as we have seen, the indictment may be amended.[96]

The plea must be verified by affidavit.[97] In these dilatory pleas the highest degree of certainty is required.[98]

A plea in abatement, being, as it is, an excuse for a refusal to answer the charge contained in the indictment, must be filed before any plea in bar.[99]

If the plea is insufficient either in point of form or in substance, the prosecuting officer may demur, thereby forming an issue of law on the plea.[1] The court will not, on motion,

5 Ind. 534; Kalloch v. Superior Court of City and County of San Francisco, 56 Cal. 236; State v. Eaton, 75 Mo. 586; State v. Security Bank of Clark, 2 S. D. 538, 51 N. W. 337; White v. State, 86 Ala. 69, 5 South. 675; Eldridge v. State, 27 Fla. 162, 9 South. 448; Vaughn v. State, 32 Tex. Cr. R. 407, 24 S. W. 26; ante, p. 136; post, p. 442. The rule does not apply to qui tam and penal actions. Com. v. Drew, supra; Com. v. Churchill, 5 Mass. 175.

[95] Com. v. Drew, supra; post, p. 439.

[96] Rowland v. State, 126 Ind. 517, 26 N. E. 485; ante, p. 363.

[97] Com. v. Sayers, 8 Leigh (Va.) 722; State v. Allen, 91 Me. 258, 39 Atl. 994.

[98] 4 Bac. Abr. 51; State v. Ward, 60 Vt. 142, 14 Atl. 187; State v. Emery, 59 Vt. 84, 7 Atl. 129; People v. Lauder, 82 Mich. 109, 46 N. W. 956; Dolan v. People, 64 N. Y. 485; State v. Bryant, 10 Yerg. (Tenn.) 527; State v. Brooks, 9 Ala. 9; Hardin v. State, 22 Ind. 347; Reeves v. State, 29 Fla. 527, 10 South. 901; Tilley v. Com., 89 Va. 136, 15 S. E. 526; Dyer v. State, 11 Lea (Tenn.) 509; State v. Duggan, 15 R. I. 412, 6 Atl. 597; Davids v. People, 192 Ill. 176, 61 N. E. 537.

[99] 2 Hale, P. C. 175; 2 Hawk. P. C. c. 34, § 4; Martin v. Com., 1 Mass. 347; State v. Dibble, 59 Conn. 168, 22 Atl. 155; State v. Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871. The prayer of the plea is that the indictment be quashed, or that defendant may not be compelled to answer. Rex v. Shakespeare, 10 East, 83.

[1] 1 Chit. Cr. Law, 449; Rex v. Dean, 1 Leach, Crown Cas. 476.

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quash the plea,[2] nor can it be amended.[3] If the prosecuting officer denies the plea, he replies to that effect, and an issue of fact on the plea is thus formed.[4] If the replication is insufficient in law, the defendant may demur,[5] or he may answer it on the facts, by a rejoinder, and so on until an issue on the plea is reached. Issue must be thus taken on a plea in abatement, either by demurrer or reply, and the issue must be tried and determined. It is error to summarily overrule a plea, without an issue thereon.[6]

When a plea in abatement to an indictment is found in favor of the defendant, he is not discharged, but is detained, as we have seen, until a new indictment can be presented.[7] If a plea on the ground of misnomer by one of several defendants is sustained, the indictment will be quashed as to that one only.[8] If the plea is found against the defendant on the facts, he is allowed to plead over in cases of felony,[9] but in cases of misdemeanor the judgment is final, as upon a conviction.[10] The latter proposition does not apply to judgment against him on demurrer to his plea, or on his demurrer to the replication to his plea; in such case he is entitled to plead over.[11] These are the common-law rules,

[2] Rex v. Cooke, 2 Barn. & C. 618.

[3] Rex v. Cooke, 2 Barn. & C. 871.

[4] Rex v. Dean, 1 Leach, Crown Cas. 476; Baker v. State, 80 Wis. 416, 50 N. W. 518; note 93, supra.

[5] Rex v. Knollys, 2 Salk. 509.

[6] Martin v. State, 79 Wis. 165, 48 N. W. 119; Baker v. State, 80 Wis. 416, 50 N. W. 518. If the plea is bad on its face, the error is not ground for reversal. Baker v. State, supra.

[7] 2 Hale, P. C. 176, 238; 2 Hawk. P. C. c. 34, § 2; Rowland v. State, 126 Ind. 517, 26 N. E. 485; note 96, supra.

[8] 2 Hale, P. C. 177.

[9] 2 Hale, P. C. 239, 255; 2 Hawk. P. C. c. 31, § 6; 4 Bl. Comm. 338; Rex v. Gibson, 8 East, 107; Rex v. Goddard, 2 Ld. Raym. 922.

[10] 2 Hawk. P. C. c. 31, § 7; Rex v. Gibson, 8 East, 107; Eichorn v. Le Maitre, 2 Wils. 367; Rex v. Gibson, 8 East, 107; Guess v. State, 6 Ark. 147; Com. v. Carr, 114 Mass. 280, 19 Am. Rep. 345.

[11] Rex v. Johnson, 6 East, 583; Bowen v. Shopcott, 1 East, 542; Eichorn v. Le Maitre, 2 Wils. 368. "This distinction between the result of a verdict against the defendant on his plea in abatement, and a judgment against him on demurrer thereon, is founded on this principle, that wherever a man pleads a fact which he knows to be false,

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but they may not now obtain under the practice of some of the states, and in some states they have been modified by statute.[12]

DEMURRER

132. By a demurrer the defendant raises the objection that on the face of the indictment and record, admitting the truth of every fact which is well pleaded, he ought not, as a matter of law, be required to answer. A demurrer lies not only by the defendant to the indictment, but by the state to every plea of the defendant, and by the defendant to every plea of the state, if it is insufficient as a matter of law.

A demurrer admits the truth of every fact which is sufficiently alleged, but raises the objection that, as a matter of law, the indictment does not charge an offense, or does not charge such an offense that the defendant can be, as a matter of law, required to answer.[13] If a defendant is indicted for stealing property which is not the subject of larceny, the indictment is bad on demurrer; for admitting the taking, it charges no offense. The demurrer puts the legality of the whole proceedings in issue, and compels the court to examine the whole record, so that, for instance, if it appears from the caption of the indictment that the court has no jurisdiction, a demurrer will be sustained.[14] Facts which are not well pleaded, even though material, are not admit-

and a verdict be against him, the judgment ought to be final, for every man must be presumed to know whether his plea be true or false in matter of fact; but upon demurrer to a plea in abatement, there shall be a respondeat ouster, because every man shall not be presumed to know the matter of law which he leaves to the judgment of the court." Eichorn v. Le Maitre, 2 Wils. 368; 1 Chit. Cr. Law, 451.

[12] See Harding v. State, 22 Ark. 210.

[13] 4 Bl. Comm. 334; State v. Ball, 30 W. Va. 382, 4 S. E. 645; Lazier v. Com., 10 Grat. (Va.) 708; Holmes v. State, 17 Neb. 73, 22 N. W. 232; Com. v. Trimmer, 84 Pa. 65.

[14] 1 Chit. Cr. Law, 440; Rex v. Fearnley, 1 Term R. 316, 1 Leach, Crown Cas. 425; Com. v. Trimmer, 84 Pa. 65.

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ted, nor does the demurrer admit allegations of the legal effect of the facts pleaded.[15]

In civil pleading a demurrer may be general or special. The former assigns no special ground of objection, while the latter does specify the objection. In criminal pleading, at common law, there is no such distinction.[16]

At common law, in cases of misdemeanor, the defendant cannot, as of right, plead over to the indictment, after the overruling of his demurrer, where the demurrer is general, but the decision on the demurrer operates as a conviction, for the demurrer admits the facts;[17] nor, it seems, can he plead over, as a matter of right, in cases of felony.[18] The court, however, may, in the exercise of its discretion, allow him to plead over in cases of misdemeanor,[19] and generally will do so in cases of felony.[20] By statutes, in some jurisdictions, it is provided that in all cases where a demurrer is overruled the judgment shall be respondeat ouster, thus giving the right to plead over, and in some states, even in the absence of a statute, this is the rule.

If the indictment contain two distinct and independent charges for two separate offenses, in separate counts, or in the same count, and the defendant demurs generally, though one of the offenses be not indictable, or be insufficiently alleged, the indictment will be sustained as to the good count or charge, for it may be good in part.[21]

[15] Whart. Cr. Pl. & Prac. § 403; Com. v. Trimmer, 84 Pa. 65.

[16] Reg. v. Brown, 3 Cox, Cr. Cas. 133.

[17] 2 Hawk. P. C. c. 31, § 7; 2 Hale, P. C. 257; Rex v. Gibson, 8 East, 107; State v. Passaic Agr. Soc., 54 N. J. Law, 260, 23 Atl. 680; People v. Taylor, 3 Denio (N. Y.) 98; State v. Abrisch, 42 Minn. 202, 43 N. W. 1115; Wickwire v. State, 19 Conn. 477.

[18] Bennett v. State, 2 Yerg. (Tenn.) 472; Reg. v. Faderman, 3 Car. & K. 353.

[19] 1 Chit. Cr. Law, 439.

[20] 2 Hawk. P. C. c. 31, § 6; Wilson v. Laws, 1 Salk. 59; Hume v. Ogle, Cro. Eliz. 196; Barge v. Com., 3 Pen. & W. (Pa.) 262, 23 Am. Dec. 81; Foster v. Com., 8 Watts & S. (Pa.) 77; Com. v. Goddard, 13 Mass. 456.

[21] Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782; Hendricks v. Com., 75 Va. 934; State v. McClung, 35 W. Va. 280, 13 S. E. 654; Gibson v. State, 79 Ga. 344, 5 S. E. 76; ante, p. 346.

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On demurrer to an information or complaint, defects may be cured by amendment,[22] and the same is true of defects in the caption of an indictment.[23] An indictment itself, however, cannot be amended, unless it is allowed by statute.[24]

A demurrer should regularly be interposed before pleading to the indictment. The defendant cannot, as a matter of right, withdraw his plea and demur. Whether he shall be allowed to do so rests in the discretion of the court.[25]

If the demurrer is on the ground that the facts stated do not constitute a crime, and it is sustained, the defendant must be discharged from custody.[26] But, if the objection is to the form of the indictment, he only obtains a delay, for, though the indictment may be quashed, he may be detained until a new indictment is found,[27] or, by statute, until the indictment is amended.

At common law the defendant could take the chance of a complete acquittal, and, failing in this, he could, on motion in arrest of judgment, obtain almost any advantage that he could have obtained on demurrer,[28] so that there was little to be gained by demurrer, unless the indictment clearly failed to charge any offense. In the latter case it was, and still is, advisable, for, if sustained, the defendant, as we have just seen, must be discharged from custody, and a trial will be avoided. By statutes now, in most states, the remedy by motion in arrest of judgment is not as effectual as formerly, and some defects, such as duplicity, uncertainty, etc., must be raised by motion to quash, or demurrer, if raised at all.

[22] Rex v. Holland, 4 Term R. 458; ante, p. 368.

[23] Ante, p. 161.

[24] Ante, p. 363.

[25] Reg. v. Brown, 3 Cox, Cr. Cas. 127; Reg. v. Purchase, Car. & M. 617; Com. v. Chapman, 11 Cush. (Mass.) 422; People v. Villarino, 66 Cal. 228, 5 Pac. 154.

[26] Rex v. Lyon, 2 Leach, Crown Cas. 600; Rex v. Haddock, Andrews, 137; Rex v. Fearnley, 1 Term R. 316; Rex v. Burder, 4 Term R. 778.

[27] 1 Chit. Cr. Law, 443; Rex v. Haddock, Andrews, 147; ante, p. 420.

[28] 4 Bl. Comm. 324; 1 Chit. Cr. Law, 442.

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In some states it is provided that demurrer shall not lie for certain specified grounds, such as uncertainty; or the grounds of demurrer are specified by statute, and a demurrer will not lie for any other ground.[29]

As we have seen, misjoinder of counts, since it does not render an indictment bad as a matter of law, is not ground for demurrer.[30]

PLEAS IN BAR

133. A plea in bar goes to show that the defendant cannot be punished for the offense charged. It may be:
(a) Special, or
(b) General.

134. A special plea in bar does not go to the merits, and deny the facts alleged in the indictment, but sets up some extrinsic fact, by reason of which the defendant cannot be tried at all for the offense charged. The usual special pleas in bar are:
(a) Autrefois acquit or convict, or former jeopardy.
(b) Pardon.

135. The general plea in bar is the plea of not guilty.

SAME—PLEAS OF AUTREFOIS ACQUIT AND CONVICT, OR FORMER JEOPARDY

136. At common law an acquittal or conviction of an offense in a court having jurisdiction, and on a sufficient accusation, may be pleaded in bar of any subsequent prosecution for the same offense.

137. The Constitution of the United States, and the different state Constitutions, provide, in substance, that no person shall be twice put in jeopardy for the same offense. Most of the courts hold that this is merely a declaration of the common-law rule.

[29] See People v. Schmidt, 64 Cal. 260, 30 Pac. 814; People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700.
[30] Ante, p. 342.

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138. To constitute a former jeopardy—

(a) The court in which the former prosecution took place must have had jurisdiction, and must have been legally constituted.

(b) The indictment or other accusation must have been sufficient to sustain a conviction, and the proceedings must have been valid.

(c) Jeopardy only begins when the jury have been sworn and charged with the trial of the issue.

(d) There is no jeopardy if the prosecution fails through the fault or procurement of the defendant, or, by the weight of opinion, through necessity, as because of the death or sickness of a juror or inability of the jury to agree.

(e) The offenses must be the same in fact and in law. By the weight of authority, they are not the same if the defendant could not have been convicted under the first indictment on proof of the facts charged in the second. A conviction or acquittal under one indictment will bar a prosecution under another for any offense of which the defendant could have been convicted under the first.

It is a universal maxim of the common law that no person is to be twice placed in jeopardy for the same offense.[31] Whenever a man is once acquitted upon any indictment or other accusation, before any court having jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation of the same crime.[32] This is called the plea of autrefois acquit. So if a person has, in like manner, once been tried and convicted, he may plead such conviction in bar of any subsequent accusation for the same offense.[33] This is called a plea of autrefois convict. By the Constitution of the United States, it is declared that "no person shall be * * * subject, for the same offense, to

[31] Staunford, P. C. lib. 2, c. 36, p. 105; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

[32] 4 Bl. Comm. 335; Reg. v. Bird, 2 Denison, Crown Cas. 216.

[33] 4 Bl. Comm. 336.

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be twice put in jeopardy of life and limb." This provision applies only to prosecutions in the federal courts, but there are similar provisions in the state Constitutions. Some of them omit the words "of life or limb," and merely prohibit putting a person twice in jeopardy for the same offense, or twice trying him for the same offense, but the purpose and meaning are the same. They are "equivalent to a declaration of the common-law principle that no person shall be twice tried for the same offense." [84] "The question recurs, what is the meaning of the rule that no person shall be subject for the same offense to be twice put in jeopardy of life or limb? Upon the fullest consideration which I have been able to bestow on the subject, I am satisfied that it means no more than this: that no man shall be twice tried for the same offense. * * * The test by which to decide whether a person has been once tried is perfectly familiar to every lawyer—it can only be by a plea of autrefois acquit, or a plea of autrefois convict." [85] Some of the courts thus construe the constitutional provision as being merely declaratory of the common-law rule. Others have given it a broader construction, and have sustained a plea of former jeopardy, when a common-law plea of autrefois acquit or convict could not have been sustained. It will not be possible for us to go at length into the cases on the question of former jeopardy, and show the points on which they are conflicting. All that we can do is to state and explain the general rules. The student must then consult the decisions of his own state.

Of course, a plea of autrefois convict can only be sustained by showing a verdict of guilty, for without this there

[84] Com. v. Roby, 12 Pick. (Mass.) 501; People v. Goodwin, 18 Johns. (N. Y.) 202, 9 Am. Dec. 203. Some courts hold that the words "life or limb" do not prevent a second prosecution for offenses punished by fine only. Jones v. State, 15 Ark. 261. Other courts hold that the words "life or limb" restrict the prohibition against double jeopardy to capital cases. McCreary v. Com. 29 Pa. 323. In some Constitutions the words "life or liberty" are used. It has been held that the word "liberty" covers the right to vote or hold public office. Jenkins v. State, 14 Ga. App. 276, 80 S. E. 688.

[85] People v. Goodwin, supra.

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can be no conviction. A verdict of not guilty, however, was not necessary to a plea of autrefois acquit. If, after jeopardy really attached, the prosecution was discontinued unnecessarily, and without the defendant's fault or consent, this was equivalent to an acquittal.

What Constitutes Jeopardy

Jeopardy does not begin until the defendant is put upon his trial before a court of competent jurisdiction, upon an accusation which is sufficient to sustain a conviction, and the jury has been sworn and charged with his deliverance. They are always so charged as they are sworn. In the first place, the defendant must be put upon his trial. The discharge of a prisoner by a committing magistrate, or the refusal of a grand jury to indict him, does not prevent a subsequent indictment, for there has been no jeopardy.[36] Nor, for the same reason, does the quashing of an indictment, or the sustaining of a demurrer or plea in abatement, or plea to the jurisdiction, before a plea to the merits and swearing of the jury, prevent a subsequent indictment for the same offense.[37] And a plea of former arraignment,[38] or that another indictment is pending,[39] is bad. Jeopardy only begins when the defendant has been put upon his trial, and this is not until the jury has been fully impaneled and sworn. At any time before this the prosecution may be discontinued without prejudice to the right to institute another prosecu-

[36] 2 Hale, P. C. 243, 246; 2 Hawk. P. C. c. 35, § 6; McCann v. Com., 14 Grat. (Va.) 570; Gaffney v. Circuit Judge Missaukee County, 85 Mich. 138, 48 N. W. 478; Com. v. Hamilton, 129 Mass. 479; Ex parte Crawlin, 92 Ala. 101, 9 South. 334; Com. v. Miller, 2 Ashm. (Pa.) 61; Jambor v. State, 75 Wis. 664, 44 N. W. 963; State v. Whipple, 57 Vt. 637; Ex parte Clarke, 54 Cal. 412; State v. Harris, 91 N. C. 656.

[37] Com. v. Gould, 12 Gray (Mass.) 171; Stuart v. Com., 28 Grat. (Va.) 950; State v. Redman, 17 Iowa, 333.

[38] Fost. Cr. Law, 104, 105.

[39] Reg. v. Goddard, 2 Ld. Raym. 920; Rex v. Stratton, Doug. 240; Withipole's Case, Cro. Car. 147; State v. Benham, 7 Conn. 418; Com. v. Drew, 3 Cush. (Mass.) 279; People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; O'Meara v. State, 17 Ohio St. 515; Stuart v. Com., 28 Grat. (Va.) 950; State v. Dixon, 78 N. C. 558; State v. Webb, 74 Mo. 333; Miazza v. State, 36 Miss. 614; ante, p. 433.

tion.[40] Swearing part of the jurors is not enough to put the defendant in jeopardy.[41]

By the weight of authority, as soon as the jury are entirely sworn, and charged with the deliverance of the defendant, jeopardy attaches;[42] and if, after that, a nolle prosequi is entered,[43] or the jury are unnecessarily discharged, without the defendant's consent,[44] this will amount to an acquittal, and he cannot be again tried either on that indictment or on another indictment for the same offense.[45]

[40] People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; Com. v. Tuck, 20 Pick. (Mass.) 356; Stuart v. Com., 28 Grat. (Va.) 950; State v. Champeau, 52 Vt. 313, 36 Am. Rep. 754; State v. Hastings, 86 N. C. 596; Ferris v. People, 48 Barb. (N. Y.) 17; Gardiner v. People, 6 Parker, Cr. R. (N. Y.) 155; Bryans v. State, 34 Ga. 323; Alexander v. Com., 105 Pa. 1; State v. Main, 31 Conn. 572; State v. Burket, 2 Mill, Const. (S. C.) 155, 12 Am. Dec. 662; State v. M'Kee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Patterson v. State, 70 Ind. 341; Clarke v. State, 23 Miss. 261; State v. Paterno, 43 La. Ann. 514, 9 South. 442.

[41] State v. Burket, supra.

[42] See following notes.

[43] Reynolds v. State, 3 Ga. 53; United States v. Farring, 4 Cranch, C. C. 465, Fed. Cas. No. 15,075. But not if the nolle prosequi was entered before trial, Ex parte Foss, 102 Cal. 347, 36 Pac. 669, 25 L. R. A. 593, 41 Am. St. Rep. 182; or even when entered after trial, if entered because the indictment was insufficient to warrant a conviction, Walton v. State, 3 Sneed (Tenn.) 687; or because of a material variance, Martha v. State, 26 Ala. 72.

[44] People ex rel. Stabile v. Warden of City Prison of City of New York, 202 N. Y. 138, 95 N. E. 729; Hilands v. Com., 111 Pa. 1, 2 Atl. 70, 56 Am. Rep. 235; Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757.

[45] State v. Robinson, 46 La. Ann. 769, 15 South. 146; Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; State v. M'Kee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Morgan v. State, 13 Ind. 215; Com. v. Hart, 149 Mass. 7, 20 N. E. 310; People v. Webb, 38 Cal. 467; People v. Cage, 48 Cal. 323, 17 Am. Rep. 436; Bryans v. State, 34 Ga. 323; Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281; Mount v. State, 14 Ohio, 295, 45 Am. Dec. 542; Teat v. State, 53 Miss. 439, 24 Am. Rep. 708; O'Brian v. Com., 9 Bush (Ky.) 333, 15 Am. Rep. 715; Klock v. People, 2 Parker, Cr. R. (N. Y.) 676; Stewart v. State, 15 Ohio St. 159; Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; Price v. State, 19 Ohio, 423; People v. Barrett, 2 Caines (N. Y.) 304, 2 Am. Dec. 239; Lee v. State, 26 Ark. 260, 7 Am. Rep. 611; Joy v. State, 14 Ind. 139; State v. Walker, 26 Ind. 346; Hines v. State, 24 Ohio St. 134; Gruber v. State, 3 W. Va. 699; Bell v. State, 44 Ala. 393;

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The discharge of the jury does not amount to an acquittal if through the escape, death, sickness,[46] or misconduct of a juror,[47] or the disqualification of a juror not discovered before the jury are sworn,[48] or because of the illness of the prisoner or of the judge,[49] or the expiration of the term of court,[50] or any other case of urgent necessity, the progress of the trial is interrupted. In such a case another jury may be impaneled, and the defendant may be again put upon his trial.[51]

State v. Redman, 17 Iowa, 329; McFadden v. Com., 23 Pa. 12, 62 Am. Dec. 308; People v. Ny Sam Chung, 94 Cal. 304, 29 Pac. 642, 28 Am. St. Rep. 129. Where the jury separates after rendering a verdict which is void because delivered to the judge outside of the courthouse, the accused, having been once in jeopardy is entitled to be discharged. Jackson v. State, 102 Ala. 76, 15 South. 351.

[46] Doles v. State, 97 Ind. 555; De Berry v. State, 99 Tenn. 207, 42 S. W. 31; State v. Emery, 59 Vt. 84, 7 Atl. 129. Insanity of juror. Davis v. State, 51 Neb. 301, 70 N. W. 984. Illness of juror's wife. Hawes v. State, 88 Ala. 37, 7 South. 302. Contra, Upchurch v. State, 36 Tex. Cr. R. 624, 38 S. W. 206, 44 L. R. A. 694. Death of juror's son. State v. Davis, 31 W. Va. 390, 7 S. E. 24. Death of juror's mother. Stocks v. State, 91 Ga. 831, 18 S. E. 847.

[47] In re Ascher, 130 Mich. 540, 90 N. W. 418, 57 L. R. A. 806; McKenzie v. State, 26 Ark. 334.

[48] State v. Allen, 46 Conn. 531; Com. v. McCormick, 130 Mass. 61, 39 Am. Rep. 423.

[49] Nugent v. State, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746. See also State v. Tatman, 59 Iowa, 471, 13 N. W. 632 (illness of judge's wife).

[50] Reg. v. Newton, 3 Cox, C. C. 489; State v. Jeffors, 64 Mo. 376.

[51] Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Rex v. Stevenson, 2 Leach, Crown Cas. 546; Nugent v. State, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746; Rex v. Edwards, 4 Taunt. 309; Stocks v. State, 91 Ga. 831, 18 S. E. 847; State v. Hall, 9 N. J. Law, 256; State v. Allen, 46 Conn. 531; State v. M'Kee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; Com. v. Roby, 12 Pick. (Mass.) 502; Com. v. McCormick, 130 Mass. 61, 39 Am. Rep. 423; Com. v. Fells, 9 Leigh (Va.) 613; Stone v. People, 2 Scam. (Ill.) 326; People v. Cage, 48 Cal. 323, 17 Am. Rep. 436; State v. Moor, Walk. (Miss.) 134, 12 Am. Dec. 541; People v. Ross, 85 Cal. 383, 24 Pac. 789; State v. Honeycutt, 74 N. C. 391; Hector v. State, 2 Mo. 166, 22 Am. Dec. 454; Barrett v. State, 35 Ala. 406; Mixon v. State, 55 Ala. 129, 28 Am. Rep. 695; Lester v. State, 33 Ga. 329; Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 272; Hoffman v. State, 20 Md. 425.

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Nor, by the great weight of authority, does it amount to an acquittal to discharge the jury without the defendant's consent, even in a capital case, where they have been deliberating so long that there is no reasonable expectation that they will be able to agree, and they state in open court that they will not be able to agree.[52] "These decisions cannot be regarded as a violation of the maxim under consideration, because, although in a certain sense it may be said that the prisoner was put in jeopardy by the first trial, yet the event has shown that there was no legal trial, and, therefore, that he was in no such jeopardy or danger of conviction as the maxim regards."[53]

[52] Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; People v. Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; U. S. v. Perez, 9 Wheat. 579, 6 L. Ed. 165; Winsor v. Reg., L. R. 1 Q. B. 289; Com. v. Bowden, 9 Mass. 494; Com. v. Roby, 12 Pick. (Mass.) 502; Ex parte McLaughlin, 41 Cal. 212, 10 Am. Rep. 272; State v. Woodruff, 2 Day (Conn.) 504, 2 Am. Dec. 122; U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; State v. Whitson, 111 N. C. 695, 16 S. E. 332; State v. Champeau, 52 Vt. 313, 36 Am. Rep. 754; People v. Pline, 61 Mich. 247, 28 N. W. 83; Com. v. Olds, 5 Litt. (Ky.) 137; State v. Moor, Walk. (Miss.) 134, 12 Am. Dec. 541; People v. Greene, 100 Cal. 140, 34 Pac. 630. Contra, Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; Com. v. Clue, 3 Rawle (Pa.) 498; Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757; Williams v. Com., 2 Grat. (Va.) 570, 44 Am. Dec. 403. So by statute now in Virginia. Jones v. Com., 86 Va. 740, 10 S. E. 1004. If the court abuses its discretion in discharging the jury for failure to agree, the discharge will operate as an acquittal. Where a jury had been out for four days, the judge sent the sheriff to inquire whether they could agree, and, on his bringing a reply that they could not, discharged the jury, without further inquiry as to their ability to agree. It was held that this amounted to an acquittal. People v. Cage, 48 Cal. 323, 17 Am. Rep. 436. See, also, People ex rel. Stabile v. Warden of City Prison of City of New York, 202 N. Y. 138, 95 N. E. 729. The discharge must not be in the defendant's absence. Rudder v. State, 29 Tex. App. 262, 15 S. W. 717. In Ohio a discharge of the jury through failure to agree will constitute jeopardy, where defendant does not consent to the discharge, and the court makes no finding that there was no probability of the jury being able to agree. State v. Rose, 89 Ohio St. 383, 106 N. E. 50, L. R. A. 1915A, 256.

[53] Com. v. Roby, 12 Pick. (Mass.) 502.

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The discharge of the jury, even unnecessarily, does not amount to an acquittal where the defendant consents, for he may waive his rights in this respect.[54]

Jurisdiction of Former Court

To constitute a former jeopardy, the court in which the former prosecution took place must have been legally constituted, and must have had jurisdiction of the offense and of the person of the defendant; otherwise its judgment must have been null and void.[55] Thus, an acquittal or conviction in a court of the United States, on indictment for an offense of which that court has no jurisdiction, is no bar to an indictment against him for the same offense in a state court.[56] And a trial and acquittal or conviction which is void because one of the presiding judges was related to the defendant cannot support a plea of former jeopardy.[57]

[54] Reg. v. Deane, 5 Cox, Cr. Cas. 501; Com. v. Sholes, 13 Allen (Mass.) 554; People v. Kerm, 8 Utah, 268, 30 Pac. 988; People v. Gardner, 62 Mich. 307, 29 N. W. 19; State v. M'Kee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Stewart v. State, 15 Ohio St. 155; People v. Nash, 15 Cal. App. 320, 114 Pac. 784, where defendant consented to a discharge of the jury that he might withdraw a plea of not guilty, and demur. In State v. Van Ness, 82 N. J. Law, 181, 83 Atl. 195, it was held that even where the jury was discharged without authority of law—as where it was discharged by the deputy clerk in the absence of the judge—that such discharge did not prevent defendant from being retried.

[55] People v. Connor, 65 Hun, 392, 20 N. Y. Supp. 209; Id., 142 N. Y. 130, 36 N. E. 807; Reg. v. Bowman, 6 Car. & P. 337; Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54; McLain v. State, 31 Tex. Cr. R. 558, 21 S. W. 365; Com. v. Peters, 12 Metc. (Mass.) 387; Com. v. Dascom, 111 Mass. 404; State v. Odell, 4 Blackf. (Ind.) 156; Weaver v. State, 83 Ind. 289; State v. Green, 16 Iowa, 239; State v. Parker, 66 Iowa, 586, 24 N. W. 225; State v. Little, 1 N. H. 257; State v. Hodgkins, 42 N. H. 474; Phillips v. People, 88 Ill. 160; Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621; State ex rel. Barbee v. Weatherspoon, 88 N. C. 19; Com. v. Myers, 1 Va. Cas. 188; Com. v. Jackson, 2 Va. Cas. 501; State v. Epps, 4 Sneed (Tenn.) 552; Foust v. State, 85 Tenn. 342, 3 S. W. 657; State v. Payne, 4 Mo. 376; State v. Phillips, 104 N. C. 786, 10 S. E. 463; Alford v. State, 25 Fla. 852, 6 South. 857. But see Rex v. Simpson, 136 L. T. J. 10.

[56] Com. v. Peters, 12 Metc. (Mass.) 387; Blyew v. Com., 91 Ky. 200, 15 S. W. 356.

[57] People v. Connor, 65 Hun, 392, 20 N. Y. Supp. 209; Id., 142 N. Y. 130, 36 N. E. 807.

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Character of the Court

If the court in which the defendant was formerly prosecuted was legally constituted, and had jurisdiction, it makes no difference what court it was. The former jeopardy will bar a subsequent prosecution by the same sovereign in any tribunal whatever.[58]

Where two separate courts of the same sovereign have concurrent jurisdiction of the offense, the one which first rightfully assumes jurisdiction acquires control to the exclusion of the other.[59]

Errors and Irregularities on Former Prosecution

Though the court may have had jurisdiction of the former prosecution, yet if the proceedings were so illegally or irregularly conducted that a conviction could not have been sustained, as where there was no arraignment or no plea, or waiver thereof, when such waiver is allowed, the acquittal therein will not constitute a bar.[60] But errors or irregularities which do not render the proceedings a nullity will not defeat a plea of autrefois acquit.[61]

The same is true to a certain extent of the plea of autrefois convict. If the proceedings were so irregular that the conviction is an absolute nullity, and the sentence has not been performed, the conviction is no bar.[62] But irregulari-

[58] 2 Hawk. P. C. c. 35, § 10; 1 Chit. Cr. Law, 458; Wemyss v. Hopkins, L. R. 10 Q. B. 378; Com. v. Goddard, 13 Mass. 459; Com. v. Cunningham, 13 Mass. 247; Com. v. Miller, 5 Dana (Ky.) 320; Wortham v. Com., 5 Rand. (Va.) 669; Bailey's Case, 1 Va. Cas. 258. But see note 93, infra.

[59] Whart. Cr. Pl. & Prac. § 441; Burdett v. State, 9 Tex. 43.

[60] State v. Mead, 4 Blackf. (Ind.) 309, 30 Am. Dec. 661; Finley v. State, 61 Ala. 201; Com. v. Bosworth, 113 Mass. 200, 18 Am. Rep. 467. Where the omission of arraignment and plea are regarded as mere formal defects, the rule is contra. State v. Kinghorn, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. (N. S.) 136.

[61] 2 Hawk. P. C. c. 35, § 8; 2 Hale, P. C. 274; Com. v. Goddard, 13 Mass. 458; Stevens v. Fassett, 27 Me. 266; Hines v. State, 24 Ohio St. 134; O'Brian v. Com., 9 Bush. (Ky.) 333, 15 Am. Rep. 715; State v. Brown, 16 Conn. 54.

[62] People v. Connor, 65 Hun, 392, 20 N. Y. Supp. 209; Id., 142 N. Y. 130, 36 N. E. 807; Com. v. Alderman, 4 Mass. 477; Warriner v. State, 3 Tex. App. 104, 30 Am. Rep. 124. In Com. v. Endrukat, 231 Pa. 529, 80 Atl. 1049, 35 L. R. A. (N. S.) 470, the defendant, who

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ties which do not render the proceeding an absolute nullity, but merely render it reversible on error, will not defeat the plea of former conviction, where the judgment has not been reversed.[63] If the prosecution was carried on without fraud on the defendant's part, and he has not only been convicted, but has performed the judgment, he will be protected against a subsequent prosecution, notwithstanding irregularities in the proceedings, though they may have been such as to render the judgment void.[64]

Insufficiency of Former Indictment—Variance

It is generally held that there must have been a sufficient accusation on the former prosecution; otherwise the proceedings were null and void, and the defendant never in jeopardy. If, therefore, the indictment was insufficient because of fatal defects in the organization or constitution of the grand jury, or because it was so defective in form or substance that a conviction upon it could not have been sustained, an acquittal upon it cannot be pleaded.[65] If, for in-

was on trial for murder, set up the defense of insanity. The jury's verdict was: Guilty of murder, but insane at the time of the trial. The jury was discharged, and the court of its own motion set aside the verdict. The defendant was later put on trial for the same offense. Held, that the verdict of guilty was a nullity, as defendant could not be tried if, as found by the jury, he was insane, and that he could be tried again.

[63] Com. v. Loud, 3 Metc. (Mass.) 328, 37 Am. Dec. 139.

[64] Com. v. Loud, 3 Metc. (Mass.) 328, 37 Am. Dec. 139; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872. In the latter case it was held that the provisions of the common law and of the federal Constitution that no man shall be twice placed in jeopardy of life or limb, are mainly designed to prevent a second punishment for the same offense, and hence, when the court has imposed fine and imprisonment where the statute only conferred power to impose fine or imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment only. As to the effect of fraud, see post, p. 454.

[65] 2 Hale, P. C. 245; 2 East, P. C. 519; Rex v. Vandercomb, 2 Leach, Crown Cas. 708; Rex v. Emden, 9 East, 441; Reg. v. Vaux, 4 Coke, 44a; Weston v. State, 63 Ala. 155; People v. Barrett, 1 Johns. (N. Y.) 66; Munford v. State, 39 Miss. 558; Kohlheimer v. State, 39 Miss. 548, 77 Am. Dec. 689; Hite v. State, 9 Yerg. (Tenn.) 357; People v. Clark, 67 Cal. 99, 7 Pac. 178; Pritchett v. State, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468; Com. v. Somerville, 1 Va. Cas.

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stance, a person who has been indicted and tried in one county is afterwards indicted in another, he cannot plead former jeopardy in bar of the latter indictment, because one indictment must be bad, since the offense will be proved to have been beyond the jurisdiction of the grand jury in one case or the other.[66] And if an indictment for larceny lay the property in the goods in the wrong person, or erroneously describe the property, and the defendant is acquitted, he may be tried on another indictment correctly stating the ownership or describing the property, for the former indictment was fatally defective, and there was no jeopardy;[67] and the same is true of prosecutions for arson or any other offense, where the first indictment was bad for mistake in naming the owner of the premises.[68] And the rule applies to other cases in which there has been an acquittal on the ground of variance.[69]

But it has lately been held by the Supreme Court of the United States that, though an indictment is fatally defective, yet if the court has jurisdiction of the cause and of the defendant, and the defendant pleads not guilty and is tried on the merits, and acquitted, he cannot again be prosecuted for the same offense.[70]

164, 5 Am. Dec. 514; Gerard v. People, 3 Scam. (Ill.) 363; State v. Ray, Rice (S. C.) 1, 33 Am. Dec. 90; State v. Smith, 88 Iowa, 178, 55 N. W. 198; State v. Meekins, 41 La. Ann. 543, 6 South. 822; McKay v. State, 90 Neb. 63, 132 N. W. 741, 39 L. R. A. (N. S.) 714, Ann. Cas. 1913B, 1034; McCaskey v. State, 76 Tex. Cr. R. 255, 174 S. W. 338.

[66] 2 Hale, P. C. 245.

[67] Rex v. Forsgate, 1 Leach, Crown Cas. 464; Com. v. Clair, 7 Allen (Mass.) 525; Parchman v. State, 2 Tex. App. 228, 28 Am. Rep. 435; Thompson v. Com. (Ky.) 25 S. W. 1059; State v. Williams, 45 La. Ann. 936, 12 South. 932. But see Knox v. State, 89 Ga. 259, 15 S. E. 308.

[68] Com. v. Mortimer, 2 Va. Cas. 325; Com. v. Wade, 17 Pick. (Mass.) 400; State v. Brown, 33 S. C. 151, 11 S. E. 641.

[69] See Com. v. Chesley, 107 Mass. 223; Guedel v. People, 43 Ill. 226.

[70] U. S. v. Ball, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300. The rule of this case has been adopted by statute in some jurisdictions. See Croft v. People, 15 Hun (N. Y.) 484. It does not apply where the acquittal was not on the merits. State v. Littschke, 27 Or. 189, 40 Pac. 167.

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Nor will a conviction on an insufficient indictment bar a subsequent indictment, if the conviction has been set aside, or the judgment arrested.[71] Not even will an unreversed judgment constitute a bar in such a case where the sentence has not been executed.[72] If the sentence has been executed, it is otherwise.[73]

If a verdict is erroneously set aside, or the judgment erroneously arrested, on a good indictment, not on defendant's application, he cannot be again tried.[74]

Mistrial Through Defendant's Fault or by Consent

If there is a mistrial, through the defendant's fault, he cannot set up the prosecution in bar of a subsequent trial. He is precluded from claiming an acquittal, for instance, if he absents himself when the verdict is rendered, so that there is a mistrial,[75] or if he fails, before the jury are discharged, to raise objections to a verdict that is so defective that a judgment cannot be rendered on it. He cannot acquiesce in the verdict until it is too late to remedy the defect, and then claim the benefit of the defect.[76] So if he withdraws a plea of guilty by leave of the court, and consents to a nolle prosequi he may be again tried.[77] And, as we have seen, if he consents to a discharge of the jury, he cannot claim an acquittal.[78]

[71] People v. Casborus, 13 Johns. (N. Y.) 351; Com. v. Hatton, 3 Grat. (Va.) 623; Guedel v. People, 43 Ill. 226; State v. Elder, 65 Ind. 282, 32 Am. Rep. 69; Robinson v. State, 52 Ala. 587; Com. v. Chesley, 107 Mass. 223.

[72] U. S. v. Jones (C. C.) 31 Fed. 725; State v. Gill, 33 Ark. 129; Kohlheimer v. State, 39 Miss. 548, 77 Am. Dec. 689.

[73] Com. v. Loud, 3 Metc. (Mass.) 328, 37 Am. Dec. 139.

[74] State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; note 45, p. 443, supra.

[75] State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; People v. Higgins, 59 Cal. 357.

[76] Wright v. State, 5 Ind. 527; Wilson v. State, 20 Ohio, 26; State v. Sutton, 4 Gill. (Md.) 494; Gibson v. Com., 2 Va. Cas. 111; Com. v. Smith, 2 Va. Cas. 327; Com. v. Gibson, 2 Va. Cas. 70; State v. Valentine, 6 Yerg. (Tenn.) 533; State v. Spurgin, 1 McCord (S. C.) 252; Com. v. Hatton, 3 Grat. (Va.) 623; State v. Redman, 17 Iowa, 329; Murphy v. State, 7 Cold. (Tenn.) 516; Cobia v. State, 16 Ala. 781.

[77] Ledgerwood v. State, 134 Ind. 81, 33 N. E. 631.

[78] Note 54, p. 446, supra.

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Verdict Set Aside—Judgment Arrested or Reversed—New Trial

We have just seen that where the defendant does not object to a verdict, which is so defective that no judgment can be entered on it, until after the jury have been discharged, he cannot claim an acquittal. Many of the courts seem to go further than this, and hold without qualification that, where the jury return a verdict upon which no lawful judgment can be entered, their discharge without the defendant's consent does not operate as an acquittal.[79] But it is not believed that if objection is made to the form of the verdict before the jury are discharged, and the defect may be remedied by sending them back to correct it, the court may discharge the jury without doing so. Such a discharge would, no doubt, operate as an acquittal.

Whenever, on the defendant's application, a verdict or judgment of conviction is set aside, arrested, or reversed, as on motion for a new trial, motion in arrest of judgment, writ of error or appeal, he may be again tried.[80]

If a person is found guilty on one only of several counts, and obtains a new trial on motion, or reversal of the judgment on appeal or error, he cannot be again tried on the

[79] Ex parte Brown, 102 Ala. 179, 15 South. 602, and cases there collected.

[80] Reg. v. Drury, 3 Car. & K. 193; Com. v. Roby, 12 Pick. (Mass.) 502; Sutcliffe v. State, 18 Ohio, 469, 51 Am. Dec. 459; Com. v. Green, 17 Mass. 515; Clark v. State, 4 Humph. (Tenn.) 254; Gibson v. Com., 2 Va. Cas. 111; People v. Casborus, 13 Johns. (N. Y.) 351; People v. McKay, 18 Johns. (N. Y.) 212; Com. v. Gould, 12 Gray (Mass.) 173; Lane v. People, 5 Gilman (Ill.) 305; State v. Lee, 114 N. C. 844, 19 S. E. 375; Johnson v. State, 82 Ala. 29, 2 South. 466; Joy v. State, 14 Ind. 139; State v. Benjamin (La.) 14 South. 71; State v. Knouse, 33 Iowa, 365; State v. Redman, 17 Iowa, 329; Robinson v. State, 23 Tex. App. 315, 4 S. W. 904; People v. Barric, 49 Cal. 342; Lovett v. State, 33 Fla. 389, 14 South. 837; Gannon v. People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; People v. Schmidt, 64 Cal. 260, 30 Pac. 814; People v. Hardisson, 61 Cal. 378; State v. Rhodes, 112 N. C. 857, 17 S. E. 164; Veatch v. State, 60 Ind. 291. Contra, Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281. The rule does not apply where a verdict is erroneously set aside, or the judgment erroneously arrested, and not on the defendant's application. State v. Elden, 41 Me. 165; State v. Parish, 43 Wis. 395; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458.

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other counts, for a verdict of guilty on the one count is an acquittal on the others.[81] And, by the weight of authority, if a person is convicted, not of the highest offense charged, but of a minor offense included in the charge, as of manslaughter on an indictment for murder, or simple assault on an indictment for an aggravated assault, this is an acquittal of every higher offense of which he could have been convicted, and, on obtaining a new trial, he cannot be again tried for the higher offense.[82]

[81] Campbell v. State, 9 Yerg. (Tenn.) 333, 30 Am. Dec. 417; Brennan v. People, 15 Ill. 511; Morris v. State, 8 Smedes & M. (Miss.) 762; Hurt v. State, 25 Miss. 378, 59 Am. Dec. 225; State v. Kattlemann, 35 Mo. 105. So, if defendant is acquitted on one of several counts and the verdict is silent as to the other counts, this is an acquittal on all, and he cannot be tried again on the counts on which there was no finding. Roland v. People, 23 Colo. 283, 47 Pac. 269. This rule applies, even though the trial proceeded only on the count on which he was acquitted, the prosecuting attorney having, after the jury was impaneled and sworn, elected to proceed on this count only. Murphy v. State, 25 Neb. 807, 41 N. W. 792.

[82] Brennan v. People, 15 Ill. 511; Johnson v. State, 29 Ark. 31, 21 Am. Rep. 154; People v. Gordon, 99 Cal. 227, 33 Pac. 901; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Belden, 33 Wis. 121, 14 Am. Rep. 748; Huff v. State (Tex. Cr. App.) 24 S. W. 903; Robinson v. State, 21 Tex. App. 160, 17 S. W. 632; Johnson v. State, 27 Fla. 245, 9 South. 208; Slaughter v. State, 6 Humph. (Tenn.) 410; People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245; post, p. 462. But see, contra, State v. Behimer, 20 Ohio St. 572; Com. v. Arnold, 83 Ky. 1, 4 Am. St. Rep. 114; State v. McCord, 8 Kan. 232, 12 Am. Rep. 469; Trono v. U. S., 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773; Reg. v. Tancock, 13 Cox, C. C. 217; Waller v. State, 104 Ga. 505, 30 S. E. 835; State v. Bradley, 67 Vt. 465, 32 Atl. 238; U. S. v. Gonzales (D. C.) 206 Fed. 239. This doctrine does not apply to the penalty imposed on the second conviction. Therefore, where the defendant, after having been convicted of murder, was sentenced to life imprisonment, was granted a new trial, at which he was again convicted of murder, it was held that his former sentence was no bar to a sentence of death on the second conviction. People v. Grill, 151 Cal. 592, 91 Pac. 515. In People v. Farrell, 146 Mich. 264, 109 N. W. 440, where defendant was found guilty of murder and sentenced for that crime after an appeal from a conviction of manslaughter, the appellate court remanded the case to the trial court with directions to sentence the defendant for manslaughter.

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Writ of Error or Appeal by the State—New Trial After Acquittal

At common law, the state cannot appeal or sue out a writ of error to review a judgment in favor of the defendant in a criminal case, even on demurrer, much less on a verdict of acquittal. Whether an appeal or writ of error will lie at the instance of the state under the constitutional provision as to double jeopardy would seem to depend on the construction given to the provision by the courts. As we have seen, the constitutional provisions differ in different states. Some provide that no one shall be twice put in jeopardy for the same offense; others that no one shall be twice put in jeopardy of life or limb. We have also seen that most courts hold these phrases to be synonymous, and to prohibit a second trial for any offense. In jurisdictions so holding it would seem clear that it is not within the power of the Legislature to allow a writ of error by the state and a new trial after the defendant has been acquitted by the jury on the facts, notwithstanding errors of law may have been committed at the trial, and it is generally so held.[83] A few courts, however, hold that the phrase "life or limb, or liberty," restricts the prohibition to felonies.[84] It would seem that in these jurisdictions the state may appeal on the acquittal of one tried for a misdemeanor, and the defendant could be again put on trial. One court at least, has consistently so held.[85] Other courts, however, hold that the

[83] Com. v. Cummings, 3 Cush. (Mass.) 212, 50 Am. Dec. 732; People v. Corning, 2 N. Y. 9, 49 Am. Dec. 364; U. S. v. More, 3 Cranch, 159, 2 L. Ed. 397; State v. Reynolds, 4 Hayw. (Tenn.) 110; State v. Kemp, 17 Wis. 669; U. S. v. Sanges, 144 U. S. 312, 12 Sup. Ct. 609, 36 L. Ed. 445; People v. Dill, 1 Scam. (Ill.) 257; Martin v. People, 13 Ill. 341; Com. v. Steimling, 156 Pa. 400, 27 Atl. 297; Com. v. Harrison, 2 Va. Cas. 202; State v. Lee, 49 Kan. 570, 31 Pac. 147; State v. Solomons, 6 Yerg. (Tenn.) 360, 27 Am. Dec. 469; State v. Simmons, 49 Ohio St. 305, 31 N. E. 34; Com. v. Cain, 14 Bush (Ky.) 525; Com. v. Sanford, 5 Litt. (Ky.) 289; State v. Powell, 86 N. C. 640; State v. Phillips, 66 N. C. 647; State v. Copeland, 65 Mo. 497; Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F, 1093.

[84] Jones v. State, 15 Ark. 261; State v. Smith, 53 Ark. 24, 13 S. W. 391; McCreary v. Com., 29 Pa. 323.

[85] Jones v. State, 15 Ark. 261. See, also, Com. v. Prall, 146 Ky. 109, 142 S. W. 202, Ann. Cas. 1913C, 768.

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defendant cannot, after a verdict of acquittal, be again put on trial on appeal by the state.[86]

By statute, in many of the states, a writ of error or appeal is allowed the state from an adverse judgment on motion to quash or demurrer, or motion in arrest of judgment, or where a statute has been held unconstitutional;[87] and it is also allowed by statute in case of an acquittal by the jury on the facts for the purpose of determining and settling questions of law, but not for the purpose of obtaining a new trial.[88]

Recently, however, the Connecticut court has held that it is not putting a person twice in jeopardy for the same offense to grant a new trial on appeal by the state, under statutory authority, from an acquittal, because of error in the exclusion of evidence offered by the state.[89]

Effect of Fraud in Former Prosecution

A prosecution instituted and carried on by or in the interest of an offender, in order to escape punishment, can never be relied upon to sustain a plea either of former acquittal or conviction. It may be treated as void by the state and ignored because of the fraud, or on the ground that the state was not in any sense a party to it.[90] Thus, where an

[86] Com. v. Steimling, 156 Pa. 400, 27 Atl. 297.

[87] State v. Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846; Com. v. Wallace, 114 Pa. 405, 6 Atl. 685, 60 Am. Rep. 353; State v. Huffman, 51 Kan. 541, 33 Pac. 377.

[88] State v. Ward, 75 Iowa, 637, 36 N. W. 765. Some courts allow it without a statute. Com. v. Steimling, 156 Pa. 400, 27 Atl. 297.

[89] State v. Lee, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202. And see State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; State v. Stoll, 143 Cal. 689, 77 Pac. 818.

[90] Shideler v. State, 129 Ind. 523, 28 N. E. 537, and 29 N. E. 36, 16 L. R. A. 225, 28 Am. St. Rep. 206; Com. v. Alderman, 4 Mass. 477; State v. Lowry, 1 Swan (Tenn.) 34; State v. Colvin, 11 Humph. (Tenn.) 599, 54 Am. Dec. 58; State v. Yarbrough, 8 N. C. 78; Com. v. Dascom, 111 Mass. 404; State v. Little, 1 N. H. 257; State v. Wakefield, 60 Vt. 618, 15 Atl. 181; In re State ex rel. Battle, 7 Ala. 259; Com. v. Jackson, 2 Va. Cas. 501; State v. Epps, 4 Sneed (Tenn.) 552; State v. Green, 16 Iowa, 239; State v. Brown, 16 Conn. 54; State v. Simpson, 28 Minn. 66, 9 N. W. 78, 41 Am. Rep. 269; McFarland v. State, 68 Wis. 400, 32 N. W. 226, 60 Am. Rep. 867; State v. Cole, 48 Mo. 70.

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offender fraudulently institutes a prosecution against himself in a justice's court, and pays or performs the judgment against him, for the purpose of preventing an indictment against him, which purpose may well be implied from the circumstances, he cannot set up his conviction to defeat an indictment subsequently presented.[91]

This, it has been held, does not apply where the state is in fact a party to the prosecution. Where a prosecution in behalf of the state is regularly commenced by the prosecuting attorney, and carried on to final judgment, the state is a party to the prosecution, and it has been held that the judgment will bar a subsequent prosecution for the same offense, notwithstanding the fact that the prosecutor was corrupted during the pendency of the prosecution.[92]

Several Sovereignties

Where the same act constitutes an offense against each of several sovereigns, a prosecution by one does not bar a prosecution by the other.[93] Thus, an act which constitutes an offense both against a state and against the United States may be punished by both.[94]

On this principle, it has even been held that a prosecution under a municipal ordinance for a violation thereof is no bar to a prosecution by the state for the same act as an of-

[91] Com. v. Alderman, 4 Mass. 477; De Haven v. State, 2 Ind. App. 376, 28 N. E. 562; People v. Cuatt, 70 Misc. Rep. 453, 126 N. Y. Supp. 1114. And see Warriner v. State, 3 Tex. App. 104, 30 Am. Rep. 124.

[92] Shideler v. State, 129 Ind. 523, 28 N. E. 537, and 29 N. E. 36, 16 L. R. A. 225, 28 Am. St. Rep. 206.

[93] U. S. v. Barnhart (C. C.) 10 Sawy. 491, 22 Fed. 285; Bloomer v. State, 48 Md. 521; Com. v. Green, 17 Mass. 515; U. S. v. Amy, 14 Md. 149, note. Of course, one sovereign may, in his discretion, refrain from punishing a man who has already been punished for the same act by another sovereign, or the fact of such punishment may be considered by the court in mitigation of the punishment. See U. S. v. Furlong, 5 Wheat. 184, 5 L. Ed. 64.

[94] Whart. Cr. Pl. & Prac. § 442; U. S. v. Barnhart, supra; Hendrick v. Com., 5 Leigh (Va.) 707; Phillips v. People, 55 Ill. 430; Moore v. Illinois, 14 How. 13, 14 L. Ed. 306; State v. Norman, 16 Utah, 457, 52 Pac. 986.

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fense against the state,[95] and that a prosecution by the state will not bar a prosecution under the ordinance.[96]

So it has been held that a prosecution before a federal court-martial will not bar a prosecution by the state, or vice versa.[97]

Necessity for Former Judgment

It has been held that not only a plea of former acquittal, but a plea of former conviction as well, may be sustained, though no judgment was ever rendered in the former prosecution.[98] This is true, of course, of the plea of former acquittal; but there are many cases which hold the contrary in case of a plea of former conviction, since a verdict of guilty may be set aside in some cases, or the judgment may be arrested on defendant's application, without prejudice to the right to institute another prosecution.[99]

It has been held that a plea of guilty, if outstanding, will support a plea of former conviction, though no judgment

[95] State v. Clifford, 45 La. Ann. 980, 13 South. 281; Greenwood v. State, 6 Baxt. (Tenn.) 567, 32 Am. Rep. 539; McRae v. Mayor, etc., of City of Americus, 59 Ga. 168, 27 Am. Rep. 390; Wragg v. Penn Tp., 94 Ill. 11, 34 Am. Rep. 199; Robbins v. People, 95 Ill. 175; People v. Stevens, 13 Wend. (N. Y.) 341; State v. Oleson, 26 Minn. 507, 5 N. W. 959; State v. Lee, 29 Minn. 445, 13 N. W. 913; Levy v. State, 6 Ind. 281; Ambrose v. State, 6 Ind. 351; Town of Van Buren v. Wells, 53 Ark. 368, 14 S. W. 38; State v. Muir, 164 Mo. 610, 65 S. W. 285. But see Preston v. People, 45 Mich. 486, 8 N. W. 96; and contra, by statute, Gustin v. State, 10 Ala. App. 171, 65 South. 302.

[96] See the cases above cited.

[97] State v. Rankin, 4 Cold. (Tenn.) 145; 3 Op. Atty. Gen. 750; Steiner's Case, 6 Op. Atty. Gen. 413; People v. Wendel, 59 Misc. Rep. 354, 112 N. Y. Supp. 301; In re Stubbs (C. C.) 133 Fed. 1012; Whart. Cr. Pl. & Prac. § 439.

[98] State v. Parish, 43 Wis. 395; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; Mount v. State, 14 Ohio, 295, 45 Am. Dec. 542; State v. Benham, 7 Conn. 414; Hurt v. State, 25 Miss. 378, 59 Am. Dec. 225; State v. Elden, 41 Me. 165; Kepner v. U. S. 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655.

[99] Com. v. Lany, 8 Gray (Mass.) 461; Com. v. Lockwood, 109 Mass. 329, 12 Am. Rep. 699; Com. v. Fraher, 126 Mass. 265; U. S. v. Olsen (D. C.) 57 Fed. 579; Coleman v. Tennessee, 97 U. S. 530, 24 L. Ed. 1118; People v. Casborus, 13 Johns. (N. Y.) 351; Brennan v. People, 15 Ill. 511.

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has been entered on it.[1] This would seem doubtful, however, since, as we have seen, a plea of guilty may be withdrawn by leave of the court, to allow a plea of not guilty.

Identity of Offenses

To sustain a plea of autrefois acquit or convict, the offense of which the party was acquitted or convicted must be the same offense as that for which he is subsequently put on trial. Neither an acquittal nor a conviction of one offense will bar a prosecution for another.[2] It is often very difficult to determine when the offenses are the same, and there is much conflict in the cases. All we can do in the limited space which we can devote to the subject is to state the general rules, and give such illustrations of them as may be necessary to make them clear.

(1) It is the general rule that if the crimes are so distinct, either in fact or in law, that proof of the facts charged in the second indictment would not have supported a conviction under the first, the offenses are not the same, and the second indictment is not barred.[3]

An indictment for uttering a forged instrument is not barred by an acquittal on an indictment for forging the

[1] People v. Goldstein, 32 Cal. 432.

[2] 2 Hawk. P. C. c. 25, §§ 1, 3; Id. c. 36, § 10; 2 Hale, P. C. 253; 1 Chit. Cr. Law, 452, 462. The burden of proving that the offenses are the same is on the defendant. Jacobs v. State, 100 Ark. 591, 141 S. W. 489. It has been held that, though the offenses are not the same, yet, if they grew out of the same transaction and the only litigated question in the first trial was found in the defendant's favor, and a conviction on the second indictment would necessarily involve a contrary finding, the defendant cannot be again tried. People v. Grzesczak, 77 Misc. Rep. 202, 137 N. Y. Supp. 538.

[3] 2 Hawk. P. C. c. 35, §§ 11, 12; 2 East, P. C. 522; 2 Hale, P. C. 244; Rex v. Vandercomb, 2 Leach, Crown Cas. 717; Rex v. Emden, 9 East, 437; Com. v. Roby, 12 Pick. (Mass.) 502; Rex v. Plant, 7 Car. & P. 575; Reg. v. Salvi, 10 Cox, Cr. Cas. 481, note; Com. v. Clair, 7 Allen (Mass.) 525; People v. Handley, 93 Mich. 46, 52 N. W. 1032; People v. Kerm, 8 Utah, 268, 30 Pac. 988; Winn v. State, 82 Wis. 571, 52 N. W. 775. This rule is not generally followed in cases where the first indictment was for an offense which forms an integral and necessary part of the offense charged in the second indictment. See post, p. 462, and illustrations there cited.

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same instrument,[4] unless by statute, as is the case in some jurisdictions, a person may be convicted of forgery on proof of uttering. Nor, it has been held, is an indictment for a burglarious entry with intent to steal barred by acquittal on an indictment charging the same burglarious entry and an actual stealing, since, though the burglary is the same, the defendant could not have been convicted on the first indictment on proof of a mere intention to steal.[5] And it has been laid down as a general rule that an acquittal or conviction of burglary is no bar to an indictment for larceny, committed after entry, or vice versa.[6]

For the same reason, an acquittal or conviction on an indictment under a statute for a nuisance in keeping a tenement for the unlawful sale of intoxicating liquors is no bar to an indictment for being a common seller of intoxicating liquors at the same time and place, and the reverse of the proposition is also true.[7] "The gist of one offense is the keeping a tenement for an illegal purpose, which makes it a nuisance; of the other, the doing certain acts which constitute an offense, to the commission of which it is not necessary that the defendant should have been the keeper of any building or tenement whatever. On the trial of the first indictment the jury would have been properly instructed to acquit the defendant if he did not keep the tenement described, however great a number of sales of intoxicating liquors he might have made within it. The rule has been often stated 'that, unless the first indictment was such as

[4] Hooper v. State, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926; Reddick v. State, 31 Tex. Cr. R. 587, 21 S. W. 684.

[5] 2 Hawk. P. C. c. 35, § 5; 1 Chit. Cr. Law, 456; Rex v. Vandercomb, 2 Leach, Crown Cas. 716; Com. v. Roby, 12 Pick. (Mass.) 503.

[6] 2 Hale, P. C. 245, 246; 2 Hawk. P. C. c. 35, § 5; State v. Warner, 14 Ind. 572; Wilson v. State, 24 Conn. 57; State v. Hackett, 47 Minn. 425, 50 N. W. 472, 28 Am. St. Rep. 380; Bell v. State, 48 Ala. 684, 17 Am. Rep. 40; People v. Garnett, 29 Cal. 622; Smith v. State, 22 Tex. App. 350, 3 S. W. 238; Rust v. State, 31 Tex. Cr. R. 75, 19 S. W. 763; Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153.

[7] Com. v. Bubser, 14 Gray (Mass.) 83; Com. v. Cutler, 9 Allen (Mass.) 486; Com. v. Hogan, 97 Mass. 122. And see Com. v. Brelsford, 161 Mass. 61, 36 N. E. 677.

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the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.'"[8] In like manner, an acquittal of keeping a shop open on Sunday will not bar an indictment for a nuisance in keeping the same shop at the same time for the illegal sale of intoxicating liquors.[9]

If, at common law, a person is indicted as an accessory after the fact, and acquitted, he may be indicted as a principal, for on proof of the second charge he could not have been convicted on the first indictment.[10] The same is true where a person is acquitted on an indictment as accessory before the fact, and is afterwards indicted as principal, or vice versa.[11] The rule is otherwise where by statute a person indicted as principal may be convicted as an accessory.[12]

We have seen that, if an acquittal results from a variance between the indictment and the proof, the defendant has not been in jeopardy for the offense proven, because the indictment is insufficient to support a conviction;[13] that, for instance, an acquittal on an indictment for stealing the property or burning the building of one person, because the ownership is proven to have been in another person, is no bar to an indictment laying the ownership in the proper

[8] Com. v. Bubser, supra.

[9] Com. v. Shea, 14 Gray (Mass.) 386. And see Com. v. Trickey, 13 Allen (Mass.) 559. So the offense of behaving in an indecent manner in a public place, and of insulting a public officer by deed or word in his presence, are not so identical that a conviction of the first will bar a prosecution for the second, though the words and acts set forth in both charges were the same. Gavieres v. U. S., 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489.

[10] 1 Hale, P. C. 625, 626; 2 Hale, P. C. 244; 1 Chit. Cr. Law, 457; 2 Hawk. P. C. c. 35, § 11.

[11] 2 Hale, P. C. 244; 1 Chit. Cr. Law, 457; 2 Hawk. P. C. c. 35, § 11; Rex v. Birchenough, 1 Moody, Crown Cas. 477; Rex v. Plant, 7 Car. & P. 575; Reynolds v. People, 83 Ill. 479, 25 Am. Rep. 410; State v. Larkin, 49 N. H. 36, 6 Am. Rep. 456; Morrow v. State, 14 Lea (Tenn.) 475.

[12] Davis v. People, 22 Colo. 1, 43 Pac. 122.

[13] Ante, p. 448.

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person.[14] Another reason why this is true is because the offenses are not the same. Proof of the second indictment would not have sustained the first.[15]

As we shall presently see, an acquittal or conviction on one indictment will bar a subsequent indictment for a minor offense so included in the first charge that the defendant could have been convicted of it on the first trial.[16] This rule cannot apply, however, where the first indictment was for a felony, and the second is for a misdemeanor, and the defendant was acquitted because in the particular jurisdiction there could be no conviction of misdemeanor on indictment for felony.[17]

In some states, where a felony merges a misdemeanor arising out of the same act, there can be no conviction on indictment for a misdemeanor on proof of a felony. In these states, where an aggravated assault, such as an assault with intent to rape, to murder, or to rob, is a felony, there can be no conviction on indictment for a simple assault or assault and battery on proof of an aggravated assault; and it is held that acquittal or conviction on indictment for simple assault or assault and battery will not bar a prosecution for aggravated assault; and on the same reasoning, where an aggravated assault is a misdemeanor, it is held that an acquittal or conviction on an indictment for assault with intent to rape, murder, or rob will not bar a prosecution for rape, murder, or robbery.[18]

[14] Rex v. Forsgate, 1 Leach, Crown Cas. 464; Com. v. Mortimer, 2 Va. Cas. 325; Parchman v. State, 2 Tex. App. 228, 28 Am. Rep. 435; Com. v. Wade, 17 Pick. (Mass.) 400.

[15] Com. v. Wade, supra; Com. v. Clair, 7 Allen (Mass.) 525; State v. Williams, 45 La. Ann. 936, 12 South. 932.

[16] Post, p. 461.

[17] 1 Chit. Cr. Law, 456; 2 Hawk. P. C. c. 35, § 5; Rex v. Webster, 1 Leach, Crown Cas. 12; Crosby v. Leng, 12 East, 415; Com. v. Roby, 12 Pick. (Mass.) 504.

[18] See Com. v. Roby, 12 Pick. (Mass.) 502; State v. Hattabough, 66 Ind. 223; Severin v. People, 37 Ill. 414; People v. Saunders, 4 Parker, Cr. R. (N. Y.) 196; Murphy v. Com., 23 Grat. (Va.) 960; Reg. v. Morris, 10 Cox, Cr. Cas. 480. But see People v. Purcell (Gen. Sess.) 16 N. Y. Supp. 199; State v. Smith, 43 Vt. 324. But see post, pp. 461, 463.

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(2) If the charges are in fact for the same offense, though the indictments differ, the defendant may plead his former acquittal or conviction, with proper averments to show the identity of the charges.

"It would be absurd to suppose that, by varying the day, parish, or any other allegation the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial." [19] Thus, if a person is indicted for homicide on a certain day or by certain means, and acquitted, and is afterwards indicted for killing the same person on a different day or by different means, the difference between the indictments does not make the offenses different.[20] And the same is true of other offenses, for, though it is possible for several acts of the same kind to be committed at different times by the same person, it lies in averment, and the party indicted may always show by parol evidence, the burden of proof being on him,[21] that the same charge is intended.[22]

(3) If the defendant could have been convicted under the first indictment of the offense charged in the second, an acquittal under the former indictment is a bar to the second.[23]

[19] 1 Chit. Cr. Law, 452; Rex v. Coogan, 1 Leach, Crown Cas. 448; Rex v. Emden, 9 East, 437; 2 Hawk. P. C. c. 35, § 3; Com. v. Roby, 12 Pick. (Mass.) 504; Com. v. Cunningham, 13 Mass. 245; People v. McGowan, 17 Wend. (N. Y.) 386; State v. Brown, 16 Conn. 54; State v. Wiseback, 139 Mo. 214, 40 S. W. 946.

[20] 2 Hale, P. C. 179, 244; 2 Hawk. P. C. c. 35, § 3; Rex v. Clark, 1 Brod. & B. 473.

[21] Com. v. Fredericks, 155 Mass. 455, 29 N. E. 622. Some courts hold that the production by the defendant of a record of a former conviction or acquittal on an indictment alleging such facts that the defendant might have been convicted on proof of the facts charged in the second indictment, raises a prima facie presumption that the two offenses are the same. Bainbridge v. State, 30 Ohio St. 264; State v. Smith, 22 Vt. 74. Contra, Com. v. Fredericks, 155 Mass. 455, 29 N. E. 622.

[22] 2 Hale, P. C. 179, 244; Duncan v. Com., 6 Dana (Ky.) 295; People v. McGowan, supra. So where the two indictments describe the person killed, differently, but sufficiently, it may be shown that the same person is intended. 2 Hale, P. C. 244. In such case the plea must show that the party was known by both names, so as to show that the first proceedings were valid. Id.; 2 Hawk. P. C. c. 35, § 3.

[23] This rule does not apply, where there are admittedly two differ-

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As we have shown in another connection,[24] on an indictment for murder the defendant may be convicted of manslaughter, or, in most jurisdictions, of assault with intent to kill, and, in some jurisdictions, of assault and battery or simple assault. So, on indictment for rape or robbery, there may be, in most jurisdictions, a conviction of assault with intent to rape or rob, or simple assault. The same is true of other offenses. The defendant may be acquitted of the highest offense charged, and convicted of a minor offense included in the charge. Wherever, therefore, the defendant is acquitted entirely on an indictment, this is not only an acquittal of the highest offense charged, but is an acquittal of every minor offense of which he could have been convicted under that indictment, and the acquittal may be pleaded in bar of a subsequent indictment for the minor offense.[25]

So where the defendant, instead of being altogether acquitted on the indictment, is convicted of a minor offense included in the charge, this is an acquittal of the higher offenses charged, and bars any subsequent indictment, or a further prosecution on the same indictment, for a higher offense of which he might have been convicted.[26]

ent transactions, at different times, each constituting a distinct offense. For example, if A. were acquitted or convicted on an indictment charging him with larceny of goods belonging to a person unknown on January 1st, and subsequently were indicted for larceny on January 2d of goods of a person unknown, the offenses would not necessarily be identical, and the first acquittal or conviction necessarily be a bar to the second indictment, though the defendant might have been convicted under the first indictment of the offense charged in the second, since, as we have seen, the state is not restricted to the date alleged in the indictment.

[24] Ante, p. 403.

[25] 2 Hale, P. C. 246; Wrote v. Wigges, 4 Coke, 45b; Com. v. Roby, 12 Pick. (Mass.) 504; Reg. v. Gould, 9 Car. & P. 364; Dinkey v. Com., 17 Pa. 126, 55 Am. Dec. 542; People v. McGowan, 17 Wend. (N. Y.) 386; State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22.

[26] 2 Hale, P. C. 246; Rex v. Dawson, 3 Starkie, 62; State v. Dearborn, 54 Me. 442; Com. v. Herty, 109 Mass. 348; People v. Knapp, 26 Mich. 112; Rolls v. State, 52 Miss. 391; State v. Belden, 33 Wis. 121. 14 Am. Rep. 748; State v. Lessing, 16 Minn. 75 (Gil. 64); State v.

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As we have seen, in those jurisdictions in which there can be no conviction of a misdemeanor on indictment for a felony, an acquittal on indictment for a felony will not bar a subsequent prosecution for a misdemeanor included in the charge.[27]

(4) If the defendant could have been convicted of the offense charged in the first indictment on proof of the facts charged in the second, though he could not have been convicted of the whole offense charged in the second, then the second indictment is barred by an acquittal on the first, for the former acquittal has negatived the existence of the facts charged in the second.

If a person can be convicted of an offense charged on proof of a higher offense, his acquittal of the offense charged necessarily negatives his guilt of the higher offense, and he cannot afterwards be prosecuted therefor.

An acquittal on an indictment for voluntary manslaughter will bar a future prosecution for the same act as murder, for the defendant could have been convicted of manslaughter on proof of murder. The acquittal negatives the facts charged in the second indictment.[28]

Reed, 40 Vt. 603; Clem v. State, 42 Ind. 420, 13 Am. Rep. 369; Slaughter v. State, 6 Humph. (Tenn.) 410; Morris v. State, 8 Smedes & M. (Miss.) 762; State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643; State v. Shepard, 7 Conn. 54; Golding v. State, 31 Fla. 262, 12 South. 525; People v. Jones, 53 Cal. 58; Brennan v. People, 15 Ill. 511; State v. Wooten, 136 La. 560, 67 South. 366; ante, p. 452, and cases there cited. The trial court cannot, by refusing to receive the verdict, prevent the jeopardy from attaching. Hall v. State, 12 Ala. App. 42, 67 South. 739. In People v. Ho-Sing, 6 Cal. App. 752, 93 Pac. 204, the accused was indicted for robbery. The indictment was insufficient to charge robbery, but did sufficiently charge larceny. He was convicted of robbery. It was held, reversing the conviction for robbery, that accused could not again be tried for the larceny; he having been in jeopardy for that offense under the first indictment.

[27] Ante, p. 460.

[28] 1 Chit. Cr. Law, 455; 2 Hale, P. C. 246; Wrote v. Wigges, 4 Coke, 45b, 46; Com. v. Roby, 12 Pick. (Mass.) 504. And see Jackson v. State, 11 Okl. Cr. 523, 148 Pac. 1058. But the discharge of the defendant under an indictment for manslaughter on the ground that the jury failed to agree is no bar to a subsequent indictment for murder on the same facts. People ex rel. Bullock v. Hayes, 166 App. Div. 507, 151 N. Y. Supp. 1075.

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For the same reason, an acquittal on an indictment for assault or assault and battery will bar a prosecution for the same act as an aggravated assault, such as an assault with intent to murder, to rape, or to rob, provided (and this qualification is important) that, in the particular jurisdiction, there could have been a conviction of the simple assault or assault and battery on proof of the aggravated assault; and, subject to the same qualification, an acquittal on an indictment for an assault with intent to rape, to rob, or to murder will bar a subsequent prosecution for the consummated crime of rape, robbery, or murder.[29]

In some states, as we have seen, where the aggravated assault is a felony, it is held that it merges the misdemeanor of assault or assault and battery, so that there could be no conviction of the latter on proof of the former, and, therefore, that acquittal of the misdemeanor cannot be a bar to an indictment for the felony. And in other states, where the aggravated assault is a misdemeanor, it is held, on the same principle, that an acquittal thereof cannot bar a prosecution for the consummated offense which is a felony.[30]

(5) In reason, and by the weight of authority, if the prosecuting officer elects to prosecute for an act as constituting a certain offense, and the defendant is convicted of that

[29] People v. Purcell (Gen. Sess.) 16 N. Y. Supp. 199; State v. Smith, 43 Vt. 324; Com. v. Arner, 149 Pa. 35, 24 Atl. 83; Franklin v. State, 85 Ga. 570, 11 S. E. 876; dissenting opinion of Biddle, J., in State v. Hattabough, 66 Ind. 223. In People v. Purcell, supra, it was held that an acquittal on a charge of assault and battery is a bar to an indictment for rape. In State v. Smith, supra, it was held that an acquittal or conviction of assault with intent to rape will bar a prosecution for rape. In Com. v. Arner, supra, it was held that a person who has been convicted of fornication and bastardy cannot thereafter be tried for rape for the same act. In Franklin v. State, supra, it was held that an acquittal on an indictment for simple assault will bar a prosecution for aggravated assault. Of course, in all these cases the transaction on which both indictments were based was the same.

[30] Com. v. Roby, 12 Pick. (Mass.) 502; State v. Hattabough, 66 Ind. 223; Severin v. People, 37 Ill. 414; People v. Saunders, 4 Parker, Cr. R. (N. Y.) 196; State v. Littlefield, 70 Me. 452, 35 Am. Rep. 335; Murphy v. Com., 23 Grat. (Va.) 960; Reg. v. Morris, 10 Cox, Cr. Cas. 480.

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offense, he cannot afterwards be prosecuted for the same act under aggravating circumstances which change its legal character. But, if the aggravating circumstances do not intervene until after the first conviction, it is otherwise. Some of the cases, as we shall see, are in conflict with this rule.

A conviction of larceny, for instance, under an indictment for burglary and larceny, was held a bar to an indictment charging the same felonious taking as a robbery. To hold otherwise, it was said, would be to subject the defendant to a second prosecution for the same felonious taking.[81] So, where a person has been convicted of assault with intent to commit rape, he cannot afterwards be prosecuted for rape.[82] And, where a person has been convicted of fornication and bastardy, he cannot afterwards be prosecuted for the same act as rape.[83] So, where a man is indicted and convicted of an assault and battery, he cannot be afterwards indicted for the same transaction as a riot. "The state," it was said in such a case, "cannot divide an offense consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for the offense compounded of them all; as, for instance, to indict for an assault, then for a battery, then for imprisonment, then for a riot, then for a mayhem, etc. But, upon an indictment for any of these offenses, the court will inquire into the concomitant facts, and receive

[81] State v. Lewis, 9 N. C. 98, 11 Am. Dec. 741; Floyd v. State, 80 Ark. 94, 96 S. W. 125.

[82] State v. Smith, 43 Vt. 324.

[83] Com. v. Arner, 149 Pa. 35, 24 Atl. 83. A conviction of fornication bars a subsequent trial for bastardy based on the same transaction. Com. v. Evans, 45 Pa. Super. Ct. 174. A conviction for battery bars an indictment for assault with intent to commit murder. People v. McDaniels, 137 Cal. 192, 69 Pac. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81. A conviction of petit larceny bars a prosecution for grand larceny. Storrs v. State, 129 Ala. 101, 29 South. 778. A conviction of assault and battery bars a prosecution for assault with intent to ravish. State v. Blevins, 134 Ala. 213, 32 South. 637. But in State v. Rose, 89 Ohio St. 383, 106 N. E. 50, L. R. A. 1915A, 256, it was held that an indictment for "contributing to the moral delinquency of a female by sexual intercourse with her" was no bar to an indictment for rape on the same female.

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information thereof, by way of aggravating the fine and punishment, and will proportion the same to the nature of the offense, as enhanced by all these circumstances, and no indictment will afterwards lie for any of these separate facts done at the same time." [84]

As has been said, this rule does not apply where the aggravating circumstances did not intervene until after the former conviction. Thus, where a man is convicted and punished for an assault and battery, or assault with intent to kill, and the person subsequently dies, he may be prosecuted for the murder or manslaughter.[85]

Where a person assaults and wounds, or kills or otherwise injures, two persons at the same time by the same act, there is a conflict of authority as to whether a prosecution for the offense against one will bar a prosecution for the offense against the other. Some courts hold that in such a case but one crime is committed, and therefore there can be but one prosecution.[86] Others hold the two woundings, killings, etc., constitute two distinct crimes, and that a prosecution for one does not bar a prosecution for the other.[87]

[84] State v. Ingles, 3 N. C. 4.

[85] Reg. v. Morris, 10 Cox, Cr. Cas. 480; People v. Purcell (Gen. Sess.) 16 N. Y. Supp. 199; Diaz v. U. S., 223 U. S. 442, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

[86] State v. Damon, 2 Tyler (Vt.) 387. But see Keeton v. Com., 92 Ky. 522, 18 S. W. 359; Gunter v. State, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17; Sadberry v. State, 39 Tex. Cr. R. 466, 46 S. W. 639. "If one by a single volition should discharge into a congregation of people a firearm loaded with peas for shot, and each of 50 different persons should be hit by a pea, it would be startling to affirm that he could be punished for assault and battery 50 times, and once for disturbing the meeting." 1 Bish. New Cr. Law, § 1061.

[87] People v. Fox, 269 Ill. 300, 110 N. E. 26; Com. v. Browning, 146 Ky. 770, 143 S. W. 407; People v. Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295. "Manifestly, appellee, if first tried for the shooting and wounding of Caywood, could not be convicted on proof that he shot Stewart, though both Caywood and Stewart were wounded by one and the same shot. As well might it be argued that, in the killing of several of the same family by putting poison in the food eaten by them, conviction of the poisoner for the death of one of them would bar a prosecution for the killing of the others. If one should throw a bomb into a crowd, and kill several persons, it could not be maintained that his conviction for the death of one of them would

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(6) Where the same act, or different acts in the same transaction, constitute separate and distinct offenses, neither an acquittal nor a conviction of one of such offenses will bar a subsequent prosecution for another; but, since a felony merges a misdemeanor arising out of the same act, a conviction of the felony will bar a subsequent prosecution for the misdemeanor.

To sustain a plea of former conviction, the offenses must be the same.[38] If a man should rob and then murder another, his conviction of the robbery would not bar a prosecution and punishment for the murder, for the offenses are distinct, and one felony does not merge in another.[39]

The same is true of misdemeanors. Where the same act or acts constitute separate and distinct misdemeanors, the defendant may be separately prosecuted and punished for each. Under the Massachusetts statutes, keeping a tenement for the illegal sale of intoxicating liquors is one offense, while keeping liquors with intent to sell them is another offense. A conviction for keeping a tenement may therefore be had, though the only evidence is as to liquors for the keeping of which with intent to sell the defendant has already been convicted and punished.[40]

bar a prosecution against him for the killing of any of the others. It seems to us that the mere statement of appellee's contention constitutes its refutation." Com. v. Browning, supra.

[38] 1 Chit. Cr. Law, 452, 462; 2 Hawk. P. C. c. 25, §§ 1, 3; Id. c. 36, § 10; 2 Hale, P. C. 253. Where accused, after shooting deceased in his dwelling, set fire to the dwelling, his conviction of murder on an indictment charging a killing with a pistol is no bar to an indictment for the arson. State v. Rodgers, 100 S. C. 77, 84 S. E. 304.

[39] Clark, Cr. Law, 35.

[40] Com. v. McShane, 110 Mass. 502. See, also, as to punishment for separate offenses arising out of the same act, State v. Inness, 53 Me. 536; Smith v. Com., 7 Grat. (Va.) 593; Keeton v. Com., 92 Ky. 522, 18 S. W. 359; State v. Wheeler, 62 Vt. 439, 20 Atl. 601; Arrington v. Com., 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242; post, p. 468. In Ball v. State, 67 Miss. 358, 7 South. 353, it was held that a conviction for intoxication and profanity did not bar a prosecution for disturbing religious worship growing out of the same transaction; and in State v. Ross, 4 Lea (Tenn.) 442, that a conviction for disturbing a religious assembly by discharging a firearm was not a bar to a

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And generally, if several acts of trespass, though growing out of the same transaction, are separate and distinct, each may be prosecuted as a separate offense.[41] Thus, where a person assaults A. with intent to kill him, and, when B. comes to A.'s assistance, assaults B. with a like intent, the two offenses are distinct, and a prosecution for the assault on A. will not bar a prosecution for the assault on B.[42] And it has been held that where a man presents a pistol at two persons at the same time, and demands their property, compelling a surrender thereof by both at the same time, he commits two separate and distinct offenses—an assault and robbery of each—and may be prosecuted for both.[43]

prosecution for an attempt to commit murder by the same act. In Ruble v. State, 51 Ark. 170, 10 S. W. 262, a conviction for selling liquor without a license was held not to bar a prosecution for selling liquor to a minor, though both prosecutions were predicated on the same act of selling.

[41] Ashton v. State, 31 Tex. Cr. R. 482, 21 S. W. 48; Samuels v. State, 25 Tex. App. 538, 8 S. W. 656; Womack v. State, 7 Cold. (Tenn.) 508; State v. Parish, 8 Rich. (S. C.) 323; State v. Nash, 86 N. C. 650, 41 Am. Rep. 472; Smith v. Com., 7 Grat. (Va.) 593; Vaughan v. Com., 2 Va. Cas. 273; Greenwood v. State, 64 Ind. 250.

[42] Ashton v. State, supra.

[43] Keeton v. Com., 92 Ky. 522, 18 S. W. 359. Some of the courts, however, would hold this only a single offense. See ante, p. 466. State v. Damon, 2 Tyler (Vt.) 387. In State v. Rosenbaum, 23 Ind. App. 236, 55 N. E. 110, 77 Am. St. Rep. 432, a statute made it a misdemeanor for a shopkeeper to permit persons other than himself to be in the shop during certain prohibited hours. A. was indicted for permitting X. to be in the shop during the prohibited hours, and was acquitted. He was subsequently indicted for allowing Y. to be in the shop during such hours. A. pleaded in abatement that Y. was in the shop in company with X. at the time alleged in the former indictment, and at no other time. The court held that the former acquittal was a bar. In Black v. State, 13 Ga. App. 541, 79 S. E. 173, defendant was indicted for perjury in swearing that he was not married, and acquitted. He was later indicted for other false testimony in the same case. The court held the second prosecution was barred, saying: "The identity of the proceeding and of the oath administered the witness exclude the possibility that the witness is guilty of more than one perjury in the particular investigation. There is but one violation of the oath." See, also, State v. Barnes, 26 S. D. 268, 128 N. W. 170.

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At common law, where the same act constitutes both a felony and a misdemeanor, the latter is merged in the former. A conviction of rape or murder or robbery, for instance, would bar a subsequent prosecution for assault with intent to rape, murder, or rob.[44]

Pleading—Issue and Judgment on Plea

The special plea of autrefois acquit or convict is necessary, for a former acquittal or conviction is not admissible under the general issue of not guilty, nor is it admissible on demurrer, motion in arrest of judgment, or writ of error.[45] The plea consists partly of matter of record and partly of matter of fact. The matter of record is the former indictment and acquittal or conviction, and the matter of fact is the averment of the identity of the offense and of the person. The plea must set forth the record of the former acquittal or conviction,[46] and it must state that the charge and person are the same as in the first prosecution.[47] In case of felony, it was formerly necessary in such a plea to plead

[44] Clark, Cr. Law, (3 Ed.) 45.

[45] State v. Barnes, 32 Me. 534; Com. v. Merrill, 8 Allen (Mass.) 547; Com. v. Chesley, 107 Mass. 223; Com. v. O'Neil (Mass.) 29 N. E. 1146; Zachary v. State, 7 Baxt. (Tenn.) 1; Justice v. Com., 81 Va. 209; Rickles v. State, 68 Ala. 538; U. S. v. Moller, 16 Blatchf. 65, Fed. Cas. No. 15,794; People v. Cuatt, 70 Misc. Rep. 453, 126 N. Y. Supp. 1114; State v. White, 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132. By statute in some states this defense may be made under the plea of not guilty. Hankins v. People, 106 Ill. 628; Clem v. State, 42 Ind. 420, 13 Am. Rep. 369. In People v. Harding, 53 Mich. 481, 19 N. W. 155, it was held that while ordinarily former jeopardy must be pleaded on arraignment, yet if, on the second trial, it be claimed that the accused was put in jeopardy by a former proceeding, and the record itself discloses all the facts, they need not be pleaded anew. See, also, State v. White, 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132.

[46] 2 Hale, P. C. 241, 243, 255; 1 Chit. Cr. Law, 459; 2 Hawk. P. C. c. 35, § 2; Vaux's Case, 4 Coke, 44a; Rex v. Wildey, 1 Maule & S. 188; Rex v. Emden, 9 East, 438; Rex v. Vandercomb, 2 Leach, Crown Cas. 712; Grisham v. State, 19 Tex. App. 504.

[47] 1 Hale, P. C. 255, 392; 2 Hale, P. C. 241; 1 Chit. Cr. Law, 460; 2 Hawk. P. C. c. 35, § 3; Smith v. State, 52 Ala. 407.

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over not guilty of the offense charged,[48] but this does not now seem to be required.[49]

The prosecuting officer may either reply, taking issue upon the averments of identity, or nul tiel record (no such record) if he intends to dispute the fact of an acquittal or conviction,[50] or he may demur if he relies on its insufficiency as a matter of law.[51] The plea concludes with a prayer for defendant's discharge, and must be verified.[52] As we have seen, a plea setting up two distinct defenses is bad for duplicity.[53] If, therefore, in a plea of autrefois acquit, the defendant were to set up two distinct records of acquittal, the plea would be bad.[54] In case of felony, if the plea is held bad, the judgment is respondeat ouster, unless the defendant has pleaded over in the plea in which case the jury are merely charged again to inquire of the second issue.[55] In England in cases of misdemeanor, the defendant cannot plead over, and the judgment against him on the plea is final and as upon a conviction.[56] Generally, however, in this country, no such distinction between felonies and misdemeanors is recognized, but the defendant is allowed to

[48] 2 Hale, P. C. 255; 1 Chit. Cr. Law, 460.

[49] Com. v. Goddard, 13 Mass. 455; Barge v. Com., 3 Pen. & W. (Pa.) 262, 23 Am. Dec. 81.

[50] 2 Hale, P. C. 255; 1 Chit. Cr. Law, 460; Rex v. Wildey, 1 Maule & S. 184; Rex v. Bowman, 6 Car. & P. 101, 337; Hite v. State, 9 Yerg. (Tenn.) 357.

[51] Rex v. Vandercomb, 2 Leach, Crown Cas. 715, 716; State v. Locklin, 59 Vt. 654, 10 Atl. 464.

[52] 2 Hale, P. C. 392; Rex v. Vandercomb, 2 Leach, Crown Cas. 715.

[53] Ante, p. 428.

[54] Rex v. Sheen, 2 Car. & P. 634.

[55] Rex v. Roche, 1 Leach, Crown Cas. 134; Rex v. Wildey, 1 Maule & S. 184; Rex v. Coogan, 1 Leach, Crown Cas. 448; Rex v. Vandercomb, 2 Leach, Crown Cas. 721; Com. v. Roby, 12 Pick. (Mass.) 510; Com. v. Wade, 17 Pick. (Mass.) 402. Where there is a plea over in the plea of autrefois acquit or convict, the jury cannot be charged at the same time with both issues, but they must first determine the plea of former acquittal or conviction. Rex v. Roche, 1 Leach, Crown Cas. 135; Com. v. Merrill, 8 Allen (Mass.) 545.

[56] 1 Chit. Cr. Law, 461; Rex v. Taylor, 3 Barn. & C. 502; Rex v. Goddard, 2 Ld. Raym. 922; Rex v. Gibson, 8 East, 107; Reg. v. Bird, 5 Cox, Cr. Cas. 11.

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plead over in all cases.[57] In all cases when the plea is sustained the defendant is discharged.[58]

These pleas must always be pleaded after the acquittal or conviction. They cannot be taken advantage of as a plea in abatement that another indictment for the same offense is pending.[59]

As we have already seen, autrefois acquit and convict are favored pleas, being pleas in bar, and admit of a lower degree of certainty than an indictment, and a still lower degree of certainty than pleas in abatement or other dilatory pleas.[60]

SAME—PLEA OF PARDON

139. If the defendant has been pardoned, he must specially plead that fact in bar, in order to take advantage of it, unless the pardon is by a public statute, of which the court must take judicial notice.

If an offender has been pardoned, he cannot be tried for the offense. If the pardon is by a public statute, the court must take judicial notice of it; but if it is a special pardon, of which the court cannot thus take notice, it must be specially pleaded.[61] A pardon, if pleaded at all before verdict,

[57] Com. v. Golding, 14 Gray (Mass.) 49; Com. v. Goddard, 13 Mass. 455; Fulkner v. State, 3 Helsk. (Tenn.) 33; McFarland v. State, 68 Wis. 400, 32 N. W. 226, 60 Am. Rep. 867. Contra, by statute, People v. Briggs, 1 Dak. 302 (289), 46 N. W. 451.

[58] 2 Hale, P. C. 391.

[59] 1 Chit. Cr. Law, 463; Reg. v. Goddard, 2 Ld. Raym. 920; Rex v. Stratton, Doug. 240; Withipole's Case, Cro. Car. 147; State v. Benham, 7 Conn. 418; ante, pp. 433, 442.

[60] Ante, p. 178; Harp v. State, 59 Ark. 113, 26 S. W. 714.

[61] 3 Inst. 234; 2 Hawk. P. C. c. 37, § 61; U. S. v. Wilson, 7 Pet. 150, 8 L. Ed. 640; Id., Baldw. 91, Fed. Cas. No. 16,730; State v. Keith, 63 N. C. 140. Contra, Territory v. Richardson, 9 Okl. 579, 60 Pac. 244, 49 L. R. A. 440, holding that a pardon may be set up on a motion to dismiss the indictment. The court said: "All that is requisite is that the attention of the court shall be called to the fact that a full and absolute pardon has been granted, and the court before whom the matter is pending will itself determine whether the evidence is sufficient."

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must be pleaded before the general issue, unless the date is subsequent to the pleadings, for the defendant is estopped by his plea of not guilty and issue thereon.[62] Failure to plead a pardon will prevent the defendant from taking advantage of it in bar of the trial and conviction; but it does not necessarily subject him to punishment. It may be taken advantage of at any time, even after conviction and judgment.[63] At common law, production of a pardon after judgment of conviction would cause reversal of the judgment, but would not remove the attainder consequent upon the judgment.[64]

SAME—AGREEMENT TO TURN STATE'S EVIDENCE

140. In Texas, and perhaps in other states, the defendant may plead in bar an agreement with the state's attorney to turn state's evidence against his accomplice.

This question was considered at some length by the Texas court in a recent case, and it was held that the trial court erred in sustaining a demurrer to such a plea on the ground that it was unauthorized by law. It was held that the state's attorney had a right to make such an agreement, and that the defendant might set it up, and claim a discharge at the hands of the court.[65] The plea is addressed solely to the court, and the sufficiency of the evidence to support it is not a question for the jury.[66]

[62] Fost. Cr. Law, 43; 2 Hawk. P. C. c. 37, § 57; U. S. v. Wilson, 7 Pet. 150, 8 L. Ed. 640; Com. v. Lockwood, 109 Mass. 339, 12 Am. Rep. 699. Contra, Territory v. Richardson, 9 Okl. 579, 60 Pac. 244, 49 L. R. A. 440, holding that a pardon can be pleaded at any stage of the proceedings before the execution of the sentence.

[63] 4 Bl. Comm. 337; 1 Chit. Cr. Law, 466; 2 Hawk. P. C. c. 37, § 59; 6 Coke, 14; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699.

[64] 4 Bl. Comm. 337.

[65] Camron v. State, 32 Tex. Cr. R. 180, 22 S. W. 682, 40 Am. St. Rep. 763, and authorities there cited.

[66] Camron v. State, 32 Tex. Cr. R. 180, 22 S. W. 682, 40 Am. St. Rep. 763; Cameron v. Same (Tex. Cr. App.) 25 S. W. 288.

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SAME—PLEA OF NOT GUILTY—GENERAL ISSUE

141. If the defendant pleads not guilty, he thereby denies every fact and circumstance necessary to make him guilty of the crime charged. When the issue is joined, this forms what is called the "general issue."

The plea of not guilty puts in issue the whole of the charge, not merely whether the defendant actually did the acts charged, but also the criminal intention with which he is alleged to have done them, and the legal quality of the guilt to be deduced from the whole.[67] In civil cases, if the facts are admitted, and the defense is that they were rendered legal by circumstances, a special justification must be pleaded; but in criminal cases all matters of justification or excuse may be shown under the general issue.[68] In an indictment for murder, for instance, the defendant cannot plead that he killed the deceased while in a passion caused by provocation, so that the offense was manslaughter only; or that he killed him to prevent his escape from arrest for felony, and was therefore justified; or that he killed him in self-defense, and was therefore excusable; or that he was of tender years, or insane; but he must simply plead "not guilty," and he may show these circumstances under that plea.[69]

In civil actions the statute of limitations must generally be specially pleaded, but in criminal cases it is generally

[67] 1 Chit. Cr. Law, 470; 4 Bl. Comm. 338.

[68] 2 Hale, P. C. 258; 4 Bl. Comm. 338; Martin v. Com., 1 Mass. 347; Savage v. State, 18 Fla. 909; Adams v. State, 28 Fla. 511, 10 South. 106; Hodge v. State, 29 Fla. 500, 10 South. 556; State v. Farr, 12 Rich. (S. C.) 24; Richards v. State, 82 Wis. 172, 51 N. W. 652; Mills v. State, 76 Md. 274, 25 Atl. 229; Cooper v. State, 64 Md. 44, 20 Atl. 986.

[69] 2 Hale, P. C. 258, 304; 4 Bl. Comm. 338.

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held that it may be shown under the plea of not guilty that the prosecution is barred.[70]

A plea of not guilty, as we have seen, may always be withdrawn, to admit of a confession or plea of guilty;[71] but a plea of not guilty cannot be withdrawn so as to allow the defendant to demur or plead in abatement or specially in bar, unless by leave of the court.[72]

Other questions in relation to the plea of not guilty have been already considered.[73]

[70] U. S. v. Brown, 2 Lowell, 267, Fed. Cas. No. 14,665; State v. Carpenter, 74 N. C. 230; Com. v. Ruffner, 28 Pa. 259.

[71] Ante, p. 429.

[72] Ante, pp. 428, 434, 438.

[73] Ante, p. 421.

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CHAPTER XII

TRIAL AND VERDICT

142–143. Time of Trial—Continuance.
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TIME OF TRIAL—CONTINUANCE

142. The defendant is entitled to a speedy trial, and, if it is denied him, he must be discharged. But this does not prevent a reasonable continuance on application of the prosecution, in order that it may properly prepare for trial.

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143. The defendant may be arraigned and tried immediately upon presentation of the indictment, unless he can show ground for a continuance. If, without fault on his part, he is unprepared for trial, or if it appears that a fair and impartial trial cannot then be had, a continuance should be granted him.

Defendant's Right to Speedy Trial

Every person held on a criminal charge has the legal right to demand a speedy trial, and, if it is denied him, he is entitled to be discharged on habeas corpus. The right was guaranteed to the English people by the Magna Charta, and confirmed by subsequent bills of right, which are a part of our common law. Independently of this, the same right is guaranteed to us by the Constitutions of the United States and the different states. "The speedy trial to which a person charged with crime is entitled under the Constitution is a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for a trial; and, if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial." [1] Reasonable and necessary delay is not a denial of the right. "It is very clear that one arrested and accused of crime has not the right to demand a trial immediately upon the accusation or arrest being made. He must wait until a regular term of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for the trial. Nor does a speedy trial mean a trial immediately upon the presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for prepara-

[1] U. S. v. Fox, 3 Mont. 512, quoted in Black, Const. Law, 503.

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tion. The law does not exact impossibilities, extraordinary efforts, diligence or exertion from the courts or the representatives of the state; nor does it contemplate that the right to a speedy trial shall operate to deprive the state of a reasonable opportunity of fairly prosecuting criminals." [2] Whenever, therefore, without fault on the part of the prosecution, delay is necessary in order that it may procure the attendance of material witnesses, or otherwise prepare properly for trial, or because the prosecuting officer is sick, or unable to attend, a reasonable continuance should be granted.[3] But the court has no power to grant a continuance on application of the state without good cause therefor being shown. Mere want of preparation on the part of the state is not sufficient cause if, by the exercise of reasonable diligence, it could have been prepared.[4]

By statute, in some jurisdictions, it is expressly declared that the defendant must be brought to trial within a certain time, or be discharged, and acquitted of the offense,[5] unless good excuse is shown for the delay. In other jurisdictions he is not discharged from the offense, but only discharged from confinement.[6]

[2] Ex parte Stanley, 4 Nev. 116. And see Stewart v. State, 13 Ark. 720; Nixon v. State, 2 Smedes & M. (Miss.) 497, 41 Am. Dec. 601; City of Creston v. Nye, 74 Iowa, 369, 37 N. W. 777; Arrowsmith v. State, 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915E, 363.

[3] Com. v. Carter, 11 Pick. (Mass.) 278; People v. Shufelt, 61 Mich. 237, 28 N. W. 79; People v. Weeks, 99 Mich. 86, 57 N. W. 1091; Sample v. State, 138 Ala. 259, 36 South. 367.

[4] U. S. v. Fox, 3 Mont. 513; Klock v. People, 2 Parker, Cr. R. (N. Y.) 676; Benton v. Com., 90 Va. 328, 18 S. E. 282. As where the state failed to provide a public prosecutor. State v. Sims, 1 Overt. (Tenn.) 253.

[5] See Durham v. State, 9 Ga. 306; McGuire v. Wallace, 109 Ind. 284, 10 N. E. 111; State v. Wear, 145 Mo. 162, 46 S. W. 1099.

[6] State v. Garthwaite, 23 N. J. Law, 143; In re Begerow, 136 Cal. 293, 68 Pac. 773, 56 L. R. A. 528. Since the state has the right to prosecute and try a person while such person is serving a sentence of imprisonment for another crime, the right of an accused to be tried within the period fixed by statute is not abridged by the fact that during all of such period he was in prison. Arrowsmith v. State, 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915E, 363; State v. Keefe, 17 Wyo. 227, 98 Pac. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161; Flagg v.

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The statutes vary in other provisions, and the student should consult the statutes of his own state. Some provide that the accused is not entitled to the benefit of the statute if the delay happen on his application, or with his assent; some except from the operation of the statute persons charged with certain crimes.

An application for trial must generally be shown and a denial of or resistance to the application, to entitle the accused to a discharge.[7] If the delay is caused by the accused he is not entitled to the benefit of the statute.[8]

Defendant's Right to Delay—Continuance

There is nothing at all, in the absence of statutory provisions in particular jurisdictions, to prevent the state from arraigning the defendant, and putting him upon his trial, at the same term at which the indictment is presented, or even on the same day, provided the defendant cannot show sufficient ground for a continuance.[9]

Same—Want of Preparation

Every person charged with crime should be allowed a reasonable time for preparing his defense. If he and his counsel have used due diligence, and have been unable to properly prepare for trial, a motion for a continuance should be granted.[10] For this reason the defendant should not

State, 11 Ga. App. 37, 74 S. E. 562; Dudley v. State, 55 W. Va. 472, 47 S. E. 285; In re Garvey, 7 Colo. 502, 4 Pac. 758. Contra, Gillespie v. State, 176 Ill. 238, 52 N. E. 250.

[7] Moreland v. State, 51 Ga. 192; Hunley v. State, 105 La. 636, 31 S. E. 543; State v. Enke, 85 Iowa, 35, 51 N. W. 1146. The demand must be made in due time. If the accused fails to appear when his case is called, he has no legal right to demand a trial subsequently. Moreland v. State, supra.

[8] Moreland v. State, 51 Ga. 192. In Com. v. Jailer of Allegheny County, 7 Watts (Pa.) 366, the accused was convalescing from smallpox when he demanded trial. In Respublica v. Arnold, 3 Yeates (Pa.) 263, he had kept the state's witnesses away from the trial. In Com. v. Hale, 13 Phila. (Pa.) 452, he was a fugitive from justice. In all of these cases it was held the accused was not entitled to be discharged.

[9] 1 Chit. Cr. Law, 483; 2 Hale, P. C. 28, 29; 2 Inst. 568; 4 Inst. 164; 4 Bl. Comm. 351.

[10] North v. People, 139 Ill. 81, 28 N. E. 966; State v. Deschamps, 41

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ordinarily be forced to a trial immediately after the indictment is presented, but should be given until the following term to engage counsel, procure attendance of witnesses, and otherwise prepare for his defense. There may be cases in which he should be prepared for an immediate trial, as where he has been in custody, charged with the crime, for some time before the presentation of the indictment, and has had the advice and assistance of counsel, or an opportunity to procure such assistance; and, if this is the case, he has no right to a continuance. A continuance should never be granted merely for delay, or for the mere convenience of the defendant or his counsel.[11] If the defendant has been negligent in not preparing for trial, want of preparation is no ground for a continuance, and negligence of his counsel must ordinarily be imputed to him.[12] If his counsel has acted treacherously or in bad faith, a continuance should be granted.[13]

Same—Absence or Sickness of Defendant or His Counsel

As we shall presently see, there can be no trial for a felony, in the absence of the defendant. In misdemeanor cases, where the defendant is too ill to attend the trial, or is otherwise unable to attend, without fault on his part, a continuance should be granted.[14] If the counsel for defendant is too ill to attend, and the defendant has had no time, or was unable, to procure other counsel, he is entitled to a

La. Ann. 1051, 7 South. 133; Blackman v. State, 76 Ga. 288; State v. Brooks, 39 La. Ann. 239, 1 South. 421.

[11] Vance v. Com., 2 Va. Cas. 162; People v. Jackson, 111 N. Y. 362, 19 N. E. 54; State v. Duncan, 28 N. C. 98.

[12] Rex v. D'Eon, 1 W. Bl. 510, 3 Burrows, 1513; Smith v. State, 132 Ind. 145, 31 N. E. 807; People v. McGonegal, 62 Hun, 622, 17 N. Y. Supp. 147; People v. Collins, 75 Cal. 411, 17 Pac. 430; Price v. People, 131 Ill. 223, 23 N. E. 639; Com. v. Buccieri, 153 Pa. 535, 26 Atl. 228; May v. State, 38 Neb. 211, 56 N. W. 804; Maloney v. Traverse, 87 Iowa, 306, 54 N. W. 155; Ballard v. State, 31 Fla. 266, 12 South. 865; Dobson v. State (Ark.) 17 S. W. 3. See North v. People, 139 Ill. 81, 28 N. E. 966.

[13] State v. Lewis, 74 Mo. 222.

[14] Hays v. Hamilton, 68 Ga. 833. But not where his inability to be present is due to his voluntary intoxication. State v. Ellvin, 51 Kan. 784, 33 Pac. 547.

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continuance.[15] But the mere absence of counsel because engaged in other business, or even because of sickness, where the defendant is represented by other counsel, or could have procured other counsel, is ordinarily no ground for a continuance.[16] If the defendant's counsel has suddenly withdrawn from the case without leaving time or opportunity to employ other counsel, a continuance should be granted.[17]

Same—Absence of Witness

A continuance should be granted because of the absence of a material witness for the defendant, if due diligence has been used to procure his attendance, and there is a reasonable prospect of his being present at the time to which the continuance is asked.[18] The expected testimony must be

[15] Hayley v. Grant, Sayer, 63; People v. Logan, 4 Cal. 188; Daughtery v. State, 33 Tex. Cr. R. 173, 26 S. W. 60; Loyd v. State, 45 Ga. 57.

[16] State v. Koontz, 31 W. Va. 127, 5 S. E. 328; State v. Stegner, 72 Iowa, 13, 33 N. W. 340; State v. Rainsberger, 74 Iowa, 196, 37 N. W. 153; Harvey v. State, 67 Ga. 639; Burnett v. State, 87 Ga. 622, 13 S. E. 552; Robinson v. State, 82 Ga. 535, 9 S. E. 528; Mixon v. State, 85 Ga. 455, 11 S. E. 874; Long v. People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; Stockholm v. State, 24 Tex. App. 598, 7 S. W. 338; Roberts v. People, 9 Colo. 458, 13 Pac. 630; State v. Bailey, 94 Mo. 311, 7 S. W. 425; Stephens v. Com. (Ky.) 6 S. W. 456; Bates v. Com. (Ky.) 16 S. W. 528; Newberry v. State, 26 Fla. 334, 8 South. 445; State v. Sullivan, 43 Kan. 563, 23 Pac. 645; State v. Murdy, 81 Iowa, 603, 47 N. W. 867.

[17] Jackson v. State, 88 Ga. 784, 15 S. E. 677; Wray v. People, 78 Ill. 212.

[18] Rex v. D'Eon, 1 W. Bl. 510, 3 Burrows, 1513; Hewitt's Case, 17 Grat. (Va.) 629; Hunt v. Com. (Ky.) 24 S. W. 623; Phillips v. Com., 90 Va. 401, 18 S. E. 841; Dawson v. State, 32 Tex. Cr. R. 535, 25 S. W. 21, 40 Am. St. Rep. 791; Walton's Case, 32 Grat. (Va.) 863; People v. Vermilyea, 7 Cow. (N. Y.) 383; State v. Maddox, 117 Mo 667, 23 S. W. 771; Pettit v. State, 135 Ind. 393, 34 N. E. 1118; Bowlin v. Com., 94 Ky. 391, 22 S. W. 543; Walker v. State, 32 Tex. Cr. R. 175, 22 S. W. 685; North v. People, 139 Ill. 81, 28 N. E. 966; Sutton v. People, 119 Ill. 250, 10 N. E. 376. Refusal to grant a continuance in a proper case for this cause is not cured by the trial court adjourning to the home of the witness and there tendering the witness to defendant. Carter v. State, 100 Miss. 342, 56 South. 454, Ann. Cas. 1914A, 369.

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material,[19] and it is not material if it is altogether irrelevant;[20] nor if it is merely cumulative, or if the facts could be proved by other witnesses present;[21] nor if it is merely impeaching;[22] nor if it is as to character;[23] nor in some states by statute, if it is probably false.[24] The defendant must not have been guilty of laches, but must have used due diligence to procure the attendance of the witness, or to procure his deposition.[25] It must also appear that there is a reasonable prospect that the attendance of the witness will be procured at the time to which the continuance is

[19] Rex v. D'Eon, 1 W. Bl. 510, 3 Burrows, 1513; People v. Anderson, 53 Mich. 60, 18 N. W. 561; Hurd v. Com., 5 Leigh (Va.) 715; State v. Spillman, 43 La. Ann. 1001, 10 South. 198; Dow v. State, 31 Tex. Cr. R. 278, 20 S. W. 583; Steele v. People, 45 Ill. 152; Earp v. Com., 9 Dana (Ky.) 302.

[20] State v. Turlington, 102 Mo. 642, 15 S. W. 141; Abrigo v. State, 29 Tex. App. 143, 15 S. W. 408.

[21] Henderson v. Com. (Ky.) 15 S. W. 782; State v. Hillstock, 45 La. Ann. 298, 12 South. 352; Scott v. State (Tex. Cr. App.) 25 S. W. 783; Attaway v. State, 31 Tex. Cr. R. 475, 20 S. W. 925; Higginbotham v. State (Tex. Cr. App.) 20 S. W. 360; Nelson v. Com. (Ky.) 23 S. W. 350; Sneed v. State, 47 Ark. 180, 1 S. W. 68. But see People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[22] Earp v. Com., 9 Dana (Ky.) 302; State v. Howell, 117 Mo. 307, 23 S. W. 263.

[23] Rex v. Jones, 8 East, 34; McNealy v. State, 17 Fla. 198; People v. Wilson, 3 Parker, Cr. R. (N. Y.) 199; Rhea v. State, 10 Yerg. (Tenn.) 258; State v. Klinger, 43 Mo. 127. Except, perhaps, under peculiar circumstances. State v. Nash, 7 Iowa, 347.

[24] Maul v. State, 33 Tex. Cr. R. 228, 26 S. W. 199; Loakman v. State, 32 Tex. Cr. R. 563, 25 S. W. 22; Cockerell v. State, 32 Tex. Cr. R. 585, 25 S. W. 421.

[25] Rex v. D'Eon, 1 W. Bl. 510, 3 Burrows, 1513; Jamison v. People, 145 Ill. 357, 34 N. E. 486; People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; Price v. State, 57 Ark. 165, 20 S. W. 1091; Com. v. Buccieri, 153 Pa. 535, 26 Atl. 228; Dingman v. State, 48 Wis. 485, 4 N. W. 668; Stultz v. State (Tex. Cr. App.) 24 S. W. 649; Scott v. State (Tex. Cr. App.) 25 S. W. 783; Gibson v. State, 59 Miss. 341; Lewis v. State, 89 Ga. 803, 15 S. E. 772; State v. Farrington, 90 Iowa, 673, 57 N. W. 606; State v. Banks, 118 Mo. 117, 23 S. W. 1079; Marler v. Com. (Ky.) 24 S. W. 608; State v. McCoy, 111 Mo. 517, 20 S. W. 240; Glover v. State, 89 Ga. 391, 15 S. E. 496; Wormeley v. Com., 10 Grat. (Va.) 658; Early v. Com., 86 Va. 921, 11 S. E. 795; Holt v. Com., 2 Va. Cas. 156; Roussell v. Com., 28 Grat. (Va.) 930; Unsel v. Com., 87 Ky. 368, 8 S. W. 144.

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asked, and therefore a continuance will not ordinarily be granted where the witness is beyond the jurisdiction of the court, so that he cannot be compelled to attend.[26]

If the state admits that the absent witness will testify as stated by the defendant, and the statement is admitted as evidence, a continuance will generally be denied.[27]

Error in refusing to grant a continuance on this ground is cured if the witness appears in court before the trial is ended, and the defendant examines him, or is given an opportunity to examine him.[28]

Same—Local Prejudice and Excitement—Tampering with Jury

As the accused is entitled to a fair trial, in some cases local prejudice against the defendant may be ground for a continuance. The defendant should not be forced to a trial at a time when the public excitement is so great that it may probably intimidate or otherwise influence the jury, and

[26] Rex v. D'Eon, 1 W. Bl. 510, 3 Burrows, 1513; Com. v. Millard, 1 Mass. 6; Mull's Case, 8 Grat. (Va.) 695; Woolfolk v. State, 85 Ga. 69, 11 S. E. 814; State v. Files, 1 Tread. Const. (S. C.) 234; Skates v. State, 64 Miss. 644, 1 South. 843, 60 Am. Rep. 70; State v. Duffy, 39 La. Ann. 419, 2 South. 184; People v. Lewis, 64 Cal. 401, 1 Pac. 490. But a continuance may, in the discretion of the court, be granted to take the deposition of a witness abroad, where depositions may be used, or to procure his attendance where he will probably voluntarily attend. Rex v. Morphew, 2 Maule & S. 602; White v. Com., 80 Ky. 480; McDermott v. State, 89 Ind. 187; State v. Klinger, 43 Mo. 127.

[27] Com. v. Knapp, 9 Pick. (Mass.) 515, 20 Am. Dec. 491; People v. Wilson, 3 Parker, Cr. R. (N. Y.) 199; Johnson v. Com., 94 Ky. 578, 23 S. W. 507; Baker v. State, 58 Ark. 513, 25 S. W. 603; Hickam v. People, 137 Ill. 75, 27 N. E. 88; Van Meter v. People, 60 Ill. 168; State v. Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284; Wise v. State, 34 Ga. 348; Hood v. State, 93 Ga. 168, 18 S. E. 553; Browning v. State, 33 Miss. 48; Hall v. Com., 94 Ky. 322, 22 S. W. 333; Roberts v. Com., 94 Ky. 499, 22 S. W. 845; Pace v. Com., 89 Ky. 204, 12 S. W. 271. But see State v. Hickman, 75 Mo. 416. Some, but not all, courts require the state to admit the truth of the expected testimony. See the cases cited supra; and see People v. Vermilyea, 7 Cow. (N. Y.) 369; Olds v. Com., 3 A. K. Marsh. (Ky.) 467.

[28] Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493; State v. Banks, 118 Mo. 117, 23 S. W. 1079; Vaughn v. Com. (Ky.) 23 S. W. 371.

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prevent a fair and impartial trial.[29] There must be something more than mere public excitement; it must be such as will probably thus unduly influence the jury, and this probability must be shown.[30] Where means have been used to unduly influence the jury, a continuance should be granted.[31]

Practice

In all cases a motion for a continuance must be supported by an affidavit or affidavits setting forth the grounds upon which it is asked.[32] Care should be exercised, in preparing the affidavit, to state sufficient facts to entitle the applicant to a continuance, for if the affidavit is insufficient, the application will be denied. It is not sufficient in applying for a continuance because of the absence of a material witness, to state in the affidavit that the witness is a material one, and is absent, except perhaps where there is no cause to suspect that the application is made merely for delay.[33] The affidavit must state definitely what the defendant expects the absent witness to testify, so that the court may see that the testimony is material, and, further than this, it must show that due diligence has been used to procure the attendance of the witness, and that his attendance will probably be procured.[34] The affidavit on application by the de-

[29] Com. v. Dunham, Thatcher, Cr. Cas. (Mass.) 516; Reg. v. Bolam, 2 Moody & R. 192; Bishop v. State, 9 Ga. 121.

[30] Ballard v. State, 31 Fla. 266, 12 South. 865; Baw v. State, 33 Tex. Cr. R. 24, 24 S. W. 293; Miller v. State, 32 Tex. Cr. 319, 20 S. W. 1103; Woolfolk v. State, 85 Ga. 69, 11 S. E. 814. See King v. State, 91 Tenn. 617, 20 S. W. 169.

[31] Rex v. Joliffe, 4 Term R. 285; Rex v. Gray, 1 Burrows, 510.

[32] 1 Chit. Cr. Law, 492; State v. Underwood, 44 La. Ann. 1114, 11 South. 823; Mitchell v. State, 92 Tenn. 668, 23 S. W. 68.

[33] Rex v. D'Eon, 1 W. Bl. 510, 3 Burrows, 1513; Rex v. Jones, 8 East, 37; Palmer v. State, 165 Ala. 129, 51 South. 358.

[34] Rex v. D'Eon, 1 W. Bl. 514, 3 Burrows, 1513; Rex v. Jones, 8 East, 31, 37; Hurd v. Com., 5 Leigh (Va.) 715; State v. Underwood, supra; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; Green v. Com. (Ky.) 24 S. W. 623; Boyd v. State, 33 Fla. 316, 14 South. 836; Martin v. State, 32 Tex. Cr. R. 441, 24 S. W. 512; Rollins v. State, 32 Tex. Cr. R. 566, 25 S. W. 125; State v. Whitton, 68 Mo. 91; State v. Alred, 115 Mo. 471, 22 S. W. 363; State v. Fox, 79

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fendant may be made by himself, and should be so made where he knows the facts, and is competent to swear to them. It need not necessarily be made by him. It should in all cases be made by the person or persons who are able to swear to the facts stated. If the defendant knows the facts, and can swear to them, he should make the affidavit; otherwise it may be made by his counsel or by third persons.[85] Some courts allow counter affidavits to be filed in opposition to the motion,[86] but others hold that it is unauthorized.[87]

Joint Defendants

Where there are several defendants, who may be tried separately, the case may be continued as to some and denied as to others.[88]

Discretion of Court

A motion for a continuance is addressed to the discretion of the court, and its ruling thereon will not be reviewed except in a clear case of abuse of discretion.[89] The court, however, cannot act arbitrarily, but must be guided by rules of law. An abuse of discretion will in most states be ground

Mo. 109; State v. Dusenberry, 112 Mo. 277, 20 S. W. 461; Smith v. State, 132 Ind. 145, 31 N. E. 807; Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905; Moody v. People, 20 Ill. 315; Sutton v. People, 145 Ill. 279, 34 N. E. 420; North v. People, 139 Ill. 81, 28 N. E. 966; Long v. People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; Davis v. State, 85 Tenn. 522, 3 S. W. 348; Carthaus v. State, 78 Wis. 560, 47 N. W. 629; White v. State, 86 Ala. 69, 5 South. 674; Warner v. State, 114 Ind. 137, 16 N. E. 189; Beavers v. State, 58 Ind. 530.

[85] Moody v. People, 20 Ill. 315; Reg. v. Langhurst, 10 Cox, Cr. Cas. 353.

[86] State v. Murdy, 81 Iowa, 603, 47 N. W. 867; State v. Bailey, 94 Mo. 311, 7 S. W. 425; State v. Simien, 30 La. Ann. 296.

[87] Price v. People, 131 Ill. 223, 23 N. E. 639; Miller v. State, 29 Neb. 437, 45 N. W. 451. It has been held that error in allowing a counter affidavit is harmless. Price v. People, supra.

[88] White v. State, 31 Ind. 262.

[89] People v. Collins, 75 Cal. 411, 17 Pac. 430; State v. Bradley, 90 Mo. 160, 2 S. W. 284; State v. Primeaux, 39 La. Ann. 673, 2 South. 423; Brown v. State, 85 Tenn. 439, 2 S. W. 895; Hicks v. State, 25 Fla. 535, 6 South. 441; Isaacs v. U. S., 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Com. v. Buccieri, 153 Pa. 535, 26 Atl. 228; State v. Severn, 225 Mo. 580, 125 S. W. 769.

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for reversing a conviction.[40] In a few states the ruling of the court on a motion for a continuance because of absence of a witness, and perhaps on other grounds, will not be reviewed at all.[41]

PLACE OF TRIAL—CHANGE OF VENUE

144. Ordinarily the trial must take place in the county in which the offense was committed and the indictment presented; but either at common law or by statute, if the defendant cannot have a fair and impartial trial in that county, the case may be taken to an adjoining county. This is called a change of venue.

We have already shown that a criminal prosecution must generally be instituted, and the trial had, in the county in which the offense was committed; and we have also shown the exceptional cases in which a prosecution may be instituted and carried on in one county for an offense committed in another.[42]

At common law, if a fair and impartial trial could not be had in the county in which the offense was committed, the defendant could apply for and obtain a change of the place of trial to an adjoining county.[43] This is what is meant by change of venue. There is doubt as to the extent to which the common law in this respect is in force in this country. The question was fully considered by the New Hampshire court in a late case, and it held that the common law was there in force, so as to authorize a change of venue on the defendant's application.[44] In Vermont, on the other hand,

[40] See the cases heretofore cited.

[41] Walker v. State, 91 Ala. 76, 9 South. 87; State v. Wyse, 33 S. C. 582, 12 S. E. 556; State v. Pankey, 104 N. C. 840, 10 S. E. 315.

[42] Ante, p. 10. The application for a change must be seasonably made, if no time is fixed by the statute. State ex rel. Lefebvre v. Clifford, 65 Wash. 313, 118 Pac. 40.

[43] 1 Chit. Cr. Law, 494; Rex v. Cowle, 2 Burrows, 834; State v. Albee, 61 N. H. 423, 60 Am. Rep. 325.

[44] State v. Albee, 61 N. H. 423, 60 Am. Rep. 325. See People v.

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where a statute provided generally that the trial should be had in the county in which the offense was committed, which, as we have seen, is merely a declaration of the common law, it was said (not held) that there could be no change of venue unless authorized by a statute.[45] It is now expressly provided by statute, perhaps in all the states, that the defendant shall be entitled to a change of venue on showing one of the grounds therefor specified in the statute.

A statute allowing a change of venue on the defendant's application, or with his consent, is not in violation of the constitutional provision that the trial shall be had in the county where the offense was committed or the indictment was presented, for the defendant may waive his privilege to be there tried.[46] At the common law and in some states a change can be made on application of the prosecuting attorney, or by the court ex mero motu, without the defendant's consent.[47] But in those states whose Constitutions secure to the accused the right to be tried in the county where the crime was committed a change of venue can be made only on the request of the accused.[48]

All of the statutes are designed to give the defendant a change of venue when he cannot have a fair and impartial trial in the county in which the offense was committed. The grounds upon which the change may be demanded are

Vermilyea, 7 Cow. (N. Y.) 108; People v. Mather, 3 Wend. (N. Y.) 434.

[45] State v. Howard, 31 Vt. 414.

[46] State v. Albee, 61 N. H. 423, 60 Am. Rep. 325; Dula v. State, 8 Yerg. (Tenn.) 511; Perteet v. People, 70 Ill. 171.

[47] Rex v. Harris, 3 Burr. 1330; People v. Webb, 1 Hill (N. Y.) 179; People v. Baker, 3 Parker, Cr. R. (N. Y.) 181; Adams v. State (Tex. Cr. App.) 23 S. W. 691; People v. Peterson, 93 Mich. 27, 52 N. W. 1039; Com. v. Davidson, 91 Ky. 162, 15 S. W. 53; McMillan v. State, 68 Md. 307, 12 Atl. 8; People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865; State v. Winchester, 18 N. D. 534, 122 N. W. 1111, 21 Ann. Cas. 1196 (by statute).

[48] State v. Denton, 6 Cold. (Tenn.) 539; Wheeler v. State, 24 Wis. 52; Dougan v. State, 30 Ark. 41; Cochrane v. State, 6 Md. 400; Bramlett v. State, 31 Ala. 376; State v. Gut, 13 Minn. 341 (Gil. 315); Gut v. Minnesota, 9 Wall. 35, 19 L. Ed. 573; State v. Knapp, 40 Kan. 148, 19 Pac. 728; Ex parte Rivers, 40 Ala. 712.

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prejudice or disqualification of the judge,[49] prejudice in the minds of the people of the county in which the offense was committed,[50] in some states difficulty in obtaining a jury on a second trial.[51] Convenience of witnesses is not sufficient cause.[52]

Affidavits must be filed or testimony produced by the defendant in support of the motion,[53] and the affidavits and witnesses must state the facts showing that an impartial trial cannot be had. It is not sufficient merely to state that a fair and impartial trial cannot be had.[54] The state may in like manner file counter affidavits in opposition to the motion.[55] But in some states an affidavit of prejudice of the judge cannot be resisted by counter affidavits.[56]

The motion, when made on the ground of local prejudice, is addressed to the discretion of the presiding judge, and, if he is satisfied that the prejudice is not sufficient to prevent a fair and impartial trial, he may deny the motion; and, unless there is a clear abuse of discretion in denying the mo-

[49] Ex parte Curtis, 3 Minn. 274 (Gil. 188); Vanderkarr v. State, 51 Ind. 91; State v. Henning, 3 S. D. 492, 54 N. W. 536. Contra, Johnson v. State, 31 Tex. Cr. R. 456, 20 S. W. 985.

[50] People v. Lee, 5 Cal. 353; People v. Graham, 21 Cal. 261; State v. Crafton, 89 Iowa, 109, 56 N. W. 257; Jamison v. People, 145 Ill. 357, 34 N. E. 486; State v. Olds, 19 Or. 397, 24 Pac. 394; Garcia v. State, 34 Fla. 311, 16 South. 223; Bowman v. Com., 96 Ky. 8, 27 S. W. 870.

[51] Com. v. Cleary, 148 Pa. 26, 23 Atl. 1110.

[52] People v. Harris, 4 Denio (N. Y.) 150.

[53] The requirement of affidavits is satisfied if witnesses in support of the motion are produced in open court, sworn by the judge, and their statements taken down by the official stenographer. State v. Sullivan, 39 S. C. 400, 17 S. E. 865. In some states affidavits of others than the defendant are necessary. See State v. Turlington, 102 Mo. 642, 15 S. W. 141.

[54] People v. Bodine, 7 Hill (N. Y.) 147; Wormeley v. Com., 10 Grat. (Va.) 658; Peters v. U. S., 2 Okl. 116, 33 Pac. 1031. Salm v. State, 89 Ala. 56, 8 South. 66. As to examination of affiants to test their credibility, see Jackson v. State, 54 Ark. 243, 15 S. W. 607.

[55] State v. Belvel, 89 Iowa, 405, 56 N. W. 545, 27 L. R. A. 846; Baw v. State, 33 Tex. Cr. R. 24, 24 S. W. 293; Pierson v. State, 21 Tex. App. 14, 17 S. W. 468; Perrin v. State, 81 Wis. 135, 50 N. W. 516.

[56] Cantwell v. People, 138 Ill. 602, 28 N. E. 964.

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tion, his ruling will not be reviewed.[57] In case of abuse of discretion, denial of the motion will be ground for setting a conviction aside.[58] In most states it is held that the court has no discretion where the application is based on the prejudice of the judge, and that the change must be granted as a matter of course.[59]

In some states the defendant is limited to one application for change of venue, and, after having obtained a change, he cannot apply for another change on the ground that there is prejudice in the county to which the case was sent, or of the judge of such county.[60]

There may be a change of venue as to one only of several defendants.[61]

As we have seen, if there was an arraignment in the first court, the defendant need not be again arraigned. And if there has been no arraignment he may be arraigned for the first time in the court to which the case is taken.[62]

[57] Jamison v. People, 145 Ill. 357, 34 N. E. 486; Gitchell v. People, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147; Hickam v. People, 137 Ill. 75, 27 N. E. 88; State v. Foster, 91 Iowa, 164, 59 N. W. 8; Howard v. Com. (Ky.) 26 S. W. 1; State v. Belvel, 89 Iowa, 405, 56 N. W. 545, 27 L. R. A. 846; State v. Conable, 81 Iowa, 60, 46 N. W. 759; King v. State, 91 Tenn. 617, 20 S. W. 169; State v. Russell, 13 Mont. 164, 32 Pac. 854; People v. Vincent, 95 Cal. 425, 30 Pac. 581; Horn v. State, 98 Ala. 23, 13 South. 329; Adams v. State, 28 Fla. 511, 10 South. 106; Martin v. State, 21 Tex. App. 1, 17 S. W. 430; Power v. People, 17 Colo. 178, 28 Pac. 1121; Perrin v. State, 81 Wis. 135, 50 N. W. 516; Muscoe v. Com., 87 Va. 460, 12 S. E. 790; Edwards v. State, 2 Wash. 291, 26 Pac. 258; Quinn v. State, 123 Ind. 59, 23 N. E. 977; State v. Heacock, 106 Iowa, 191, 76 N. W. 654; State v. Winchester, 18 N. D. 534, 122 N. W. 1111, 21 Ann. Cas. 1196; Com. v. March, 248 Pa. 434, 94 Atl. 142.

[58] Garcia v. State, 34 Fla. 311, 16 South. 223; State v. Crafton, 89 Iowa, 109, 56 N. W. 257; Higgins v. Com., 94 Ky. 54, 21 S. W. 231; Bowman v. Com., 96 Ky. 8, 27 S. W. 870.

[59] Manly v. State, 52 Ind. 215; Cantwell v. People, 138 Ill. 602, 28 N. E. 964; State v. Henning, 3 S. D. 492, 54 N. W. 536. But see City of Emporia v. Volmer, 12 Kan. 622.

[60] See Perrin v. State, 81 Wis. 135, 50 N. W. 516; Baker v. State, 88 Wis. 140, 59 N. W. 570; State ex rel. Vickery v. Wofford, 119 Mo. 375, 24 S. W. 764. But see Yater v. State ex rel. Board of Com'rs of Ripley County, 58 Ind. 299; State v. Minski, 7 Iowa, 336.

[61] State v. Martin, 24 N. C. 101.

[62] Ante, p. 423.

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The jurisdiction of the court in which the prosecution is pending is not affected by its erroneous denial of a motion for a change of venue.[63]

RIGHT TO PUBLIC TRIAL

145. Under the Constitution of the United States, and of most, if not all, the states, the accused has a right to a public trial; but this does not prevent the court from excluding, in a proper case, for the protection of the public morals, young persons or persons attending merely from idle curiosity.

"It is required that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge, and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." [64]

[63] Turner v. Conkey, 132 Ind. 248, 31 N. E. 777, 17 L. R. A. 509, 32 Am. St. Rep. 251.

[64] Cooley, Const. Lim. (5th Ed.) 312; People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849.

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The court, however, cannot make an order excluding all persons from the courtroom. It has been held, for instance, that even on a trial which involves an inquiry into a question of sexual immorality, an order excluding all persons from the courtroom, except the defendant and the officers of the court, violates the defendant's right to a public trial.[65]

Where the trial judge stationed an officer at the door of the courtroom, with orders to "see that the room was not crowded, but that all respectable citizens be admitted when they apply," and the officer refused admittance to a number of persons, though the room was not crowded, it was held that the defendant was entitled to a new trial.[66]

On the other hand, where, on account of scandalous evidence, all persons were excluded except jurors, officers of the court, litigants and their attorneys, witnesses and other persons whom the parties to the prosecution desired should remain, it was held that the defendant's right was not violated.[67] The same was held where, on a trial for rape, the courtroom was cleared of all spectators except persons connected with the court, members of the bar, and all persons connected with the case as witnesses, etc.,[68] and where, on a trial for obtaining money by threats to accuse of sodomy, the court excluded all persons who had no business before the court, or any connection with the case except persons whom the defendant especially requested should be admitted.[69]

[65] People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108. Accord: State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734, 9 Ann. Cas. 108, where on a trial for rape the court admitted no one but the jury, counsel, members of the bar, newspaper men, and one other person, a witness for the defense.

[66] People v. Murray, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294.

[67] State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487.

[68] Reagan v. U. S., 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. S.) 583.

[69] People v. Hall, 51 App. Div. 57, 64 N. Y. Supp. 433. In State v. Callahan, 100 Minn. 63, 110 N. W. 342, it was held that in a proper case the court might temporarily clear the courtroom of all persons except court officers, counsel, witnesses, and the defendant, and that,

This right to a public trial is for the prisoner's benefit, and therefore may be waived by him.[70]

CUSTODY AND RESTRAINT OF DEFENDANT

146. In prosecutions for felony, and in some jurisdictions in prosecutions for misdemeanors involving corporal punishment, the defendant should be taken into custody during the trial so as to insure his presence. In misdemeanors involving punishment by a mere fine, and, in most jurisdictions, in all other cases of misdemeanor, he may remain at large on bail.

147. The defendant must not be subjected to unnecessary restraint during the trial. Necessary restraint is not illegal.

Unless the defendant has been admitted to bail, he is always in custody during the trial. And in cases of felony, and in some jurisdictions in cases of misdemeanor where corporal punishment may be inflicted, he must be taken into custody, even though he has been admitted to bail,[71] for, as we shall see, in most jurisdictions he must be present at the trial, whether he wishes it or not; and a trial in his absence, even with his consent, would be illegal. In cases of misdemeanor, where the punishment is a mere fine, and, by the weight of authority, even where the penalty may be corporal punishment, he may remain at large.[72]

The defendant should not be kept tied or in shackles during the trial, unless he is unruly, or there is danger of an

although the record did not show a withdrawal of the order, it would be inferred that it was made for a temporary purpose only, and that it was not enforced after the reason calling for its existence ceased to exist.

[70] People v. Tarbox, 115 Cal. 57, 46 Pac. 896.

[71] Reg. v. Simpson, 10 Mod. 248; People v. Beauchamp, 49 Cal. 41; post, p. 492.

[72] Rex v. Carlile, 6 Car. & P. 636; Whart. Cr. Pl. & Prac. § 540a; post, p. 497.

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escape. If he is unnecessarily bound, or otherwise subjected to unnecessary restraint, the trial will be illegal, for it is not considered that he is as well able to make his defense when bound.[73] Necessary restraint will not render a conviction bad. Thus it has been held that it is perfectly proper to permit a dangerous and desperate man, charged with murder, to be attended by an armed guard.[74]

PRESENCE OF THE DEFENDANT

148. In all criminal prosecutions, the defendant must be personally present during the entire proceeding from arraignment to sentence. He cannot, according to the weight of authority, waive the privilege in cases of felony, nor, according to some, but not all, of the authorities, in cases of misdemeanor involving corporal punishment. By the weight of authority, however, he may waive the privilege in all cases of misdemeanor. The record must show that he was present when his presence was necessary.

It is well settled that even at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. He must be personally present, not only when he is arraigned and pleads to the charge, but at every subsequent stage of the prosecution, up to and including the time when sentence is pronounced. If he is absent, or if the record does not show his presence, when the jury is called and sworn, or when evidence is introduced, or the jury is charged, or arguments of counsel are made, or the verdict is rendered, or sentence is pronounced, a conviction will be set aside.[75] The legislature

[73] State v. Kring, 1 Mo. App. 438; Id., 64 Mo. 591; Faire v. State, 58 Ala. 74; Lee v. State, 51 Miss. 566.

[74] State v. Duncan, 116 Mo. 288, 22 S. W. 699.

[75] Dunn v. Com., 6 Pa. 385; Hamilton v. Com., 16 Pa. 129, 55 Am. Dec. 485; Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; Harris v. People, 130 Ill. 457, 22 N. E. 826; Brooks v. People, 88 Ill. 327; Sperry v. Com., 9 Leigh (Va.) 623, 33 Am. Dec. 261; Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281; Coleman v. Com., 90 Va. 635, 19

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cannot change this rule of the common law, where his absence is not voluntary, for to try him in his absence would be to try him without due process of law, and would therefore be unconstitutional; or if testimony were received in the defendant's absence, it would violate his constitutional

S. E. 161; State v. Cross, 27 Mo. 332; Palmquist v. State, 30 Fla. 73, 11 South. 521; French v. State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855; Shelton v. Com., 89 Va. 450, 16 S. E. 355; Scaggs v. State, 8 Smedes & M. (Miss.) 722; Stubbs v. State, 49 Miss. 716; Rolls v. State, 52 Miss. 391; Warfield v. State, 96 Miss. 170, 50 South. 561; Humphrey v. State, 3 Okl. Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972. See, for cases in which convictions have been set aside because the defendant was not present, or the record did not show his presence, at the arraignment, State v. Jones, 61 Mo. 232; Hall v. State, 40 Ala. 698; Jacobs v. Com., 5 Serg. & R. (Pa.) 315; at the calling and swearing of the jury, Dougherty v. Com., 69 Pa. 286; State v. Crocket (State v. Smith), 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4; Rolls v. State, 52 Miss. 391; Warfield v. State, 96 Miss. 170, 50 South. 561; at discharge of jury, for sickness of juror, State v. Smith, 44 Kan. 75, 24 Pac. 84, 8 L. R. A. 774, 21 Am. St. Rep. 266; at the reception of evidence, Dougherty v. Com., supra; People v. Perkins, 1 Wend. (N. Y.) 91; State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; Jackson v. Com., 19 Grat. (Va.) 656; State v. Moran, 46 Kan. 318, 26 Pac. 754; Andrews v. State, 2 Sneed (Tenn.) 550; State v. Cross, 27 Mo. 332; while codefendant was testifying, Richards v. State, 91 Tenn. 723, 20 S. W. 533, 30 Am. St. Rep. 907; Garman v. State, 66 Miss. 196, 5 South. 385; when the case was continued, Com. v. Coleman, 90 Va. 635, 19 S. E. 161; Shelton v. Com., 89 Va. 450, 16 S. E. 355; contra, State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; at a view by the jury, People v. Jones (Cal.) 11 Pac. 501; State v. Sanders, 68 Mo. 202, 30 Am. Rep. 782; Foster v. State, 70 Miss. 755, 12 South. 822; Benton v. State, 30 Ark. 328; State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; contra, State v. Reed, 3 Idaho, 754, 35 Pac. 706; State v. Lee Doon, 7 Wash. 308, 34 Pac. 1103; while the court was charging or recharging the jury, or finally submitting the case to them, Allen v. Com., 86 Ky. 642, 6 S. W. 645; Brewer v. Com. (Ky.) 8 S. W. 339; Richie v. Com. (Ky.) 8 S. W. 913; Jackson v. Com., 19 Grat. (Va.) 656; Witt v. State, 5 Cold. (Tenn.) 11; Wilson v. State, 87 Ga. 583, 13 S. E. 566; State v. Myrick, 38 Kan. 238, 16 Pac. 330; Wade v. State, 12 Ga. 25; Maurer v. People, 43 N. Y. 1; Linbeck v. State, 1 Wash. 336, 25 Pac. 452; contra, People v. Robinson, 86 Mich. 415, 49 N. W. 260; Roberts v. State, 111 Ind. 340, 12 N. E. 500; when the verdict was received from the jury, Prine v. Com., 18 Pa. 103;

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right to be confronted by the witnesses against him.[76] Some of the courts hold that the defendant, on trial for any felony, cannot waive this privilege even by consenting to a trial, or part of the trial, in his absence;[77] but other courts hold that the privilege, being for his benefit, may be waived

Dougherty v. Com., 69 Pa. 286; Com. v. Tobin, 125 Mass. 203, 28 Am. Rep. 220; State v. Epps, 76 N. C. 55; Andrews v. State, 2 Sneed (Tenn.) 550; Stubbs v. State, 49 Miss. 716; Finch v. State, 53 Miss. 363; Jackson v. Com., 19 Grat. (Va.) 656; Harris v. State, 153 Ala. 19, 49 South. 458 (if he is not present, the irregularity is not cured by calling the jury together after their dispersal, and reading the verdict to them in defendant's presence, and having them assent to the verdict, Harris v. State, supra); at the time of sentence, Dougherty v. Com., 69 Pa. 286; State v. Hurlbut, 1 Root (Conn.) 90; Peters v. State, 39 Ala. 681; Stubbs v. State, 49 Miss. 716; Rolls v. State, 52 Miss. 391. But it seems that absence at the time of sentence merely entitles him to be remanded for a new sentence, and does not entitle him to a new trial. See Cole v. State, 10 Ark. 318; Kelly v. State, 3 Smedes & M. (Miss.) 518. That it is sufficient if the record shows defendant's presence by necessary or reasonable implication, see Brown v. State, 29 Fla. 543, 10 South. 736; State v. Nickleson, 45 La. Ann. 1172, 14 South. 134; Snodgrass v. Com., 89 Va. 679, 17 S. E. 238. That continuance of presence may be presumed, see State v. Miller, 100 Mo. 606, 13 S. W. 832; Burney v. State, 32 Fla. 253, 13 South. 406. But see, contra, the cases above cited, and Day v. Territory, 2 Okl. 409, 37 Pac. 806; Shelton v. Com., 89 Va. 450, 16 S. E. 355. Absence of defendant's counsel, defendant himself being present, when the verdict was received and sentence given, is not ground for reversal, at least in the absence of prejudice. Whitehurst v. State, 3 Ala. App. 88, 57 South. 1026.

[76] Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; Harris v. People, 130 Ill. 457, 22 N. E. 826. The accused is not deprived of his right to confront the witnesses against him by the admission of depositions taken before a magistrate at the house of a witness who was ill, when accused and his counsel were present and examined the witness. People v. Droste, 160 Mich. 66, 125 N. W. 87. See, also, Wilson v. State, 175 Ind. 458, 93 N. E. 609. Where the Constitution provides that accused may appear in person or by counsel, an appearance by one who is not authorized by accused to represent him is void. Ex parte Super, 76 Tex. Cr. R. 415, 175 S. W. 697.

[77] Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; State v. Smith, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4; People v. Beauchamp, 49 Cal. 41; Humphrey v. State, 3 Okl. Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972.

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by him in felonies not capital.[78] It is generally agreed that he cannot waive it in capital cases.[79]

In cases where the defendant may waive his right to be present, if his conduct is such that it is necessary to remove him temporarily from the courtroom, such temporary absence will not affect the validity of the trial.[80] Some courts have gone further, and held that short inadvertent absences, even in capital cases, would not render the trial void, if no prejudice has been suffered.[81] It has also been held that temporary absences from the courtroom are no ground for setting aside a conviction, if there was no request to suspend the trial, and no prejudice is shown.[82]

By the weight of authority, presence of the defendant is not necessary when certain motions are made and heard, such as motions in arrest of judgment, or for a new trial,[83]

[78] Hill v. State, 17 Wis. 675, 86 Am. Dec. 736; State v. Cherry, 154 N. C. 624, 70 S. E. 294; Sahlinger v. People, 102 Ill. 241; Com. v. McCarthy, 163 Mass. 458, 40 N. E. 766; Price v. State, 36 Miss. 531, 72 Am. Dec. 195; Lynch v. Com., 88 Pa. 189, 32 Am. Rep. 445; Diaz v. U. S., 223 U. S. 442, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138; State v. Peacock, 50 N. J. Law, 34, 11 Atl. 270 (felonies not capital). Even if the defendant may waive his right to be present, a waiver because of well-founded fear of mob violence will not render a conviction in his absence valid. Massey v. State, 31 Tex. Cr. R. 371, 20 S. W. 758. See, for voluntary use of opiate during trial as affecting presence, State v. Trull, 169 N. C. 363, 85 S. E. 133.

[79] Sherrod v. State, 93 Miss. 774, 47 South. 554, 20 L. R. A. (N. S.) 509, and see cases cited in preceding notes. Contra, at reception of verdict, Cawthon v. State, 119 Ga. 395, 46 S. E. 897; Frank v. State, 142 Ga. 741, 83 S. E. 645, L. R. A. 1915D, 817. In the case last cited defendant's presence was waived by counsel, but, the court held, later ratified by defendant.

[80] U. S. v. Davis, 6 Blatchf. 464, Fed. Cas. No. 14,923.

[81] Lee v. State, 56 Ark. 4, 19 S. W. 16; State v. Grate, 68 Mo. 22.

[82] Hite v. Com. (Ky.) 20 S. W. 217; Howard v. Com., 118 Ky. 1, 80 S. W. 211, 25 Ky. Law Rep. 2213. On appeal to the Supreme Court of the United States it was held that the ruling of the Kentucky court was not a denial of due process of law. Howard v. Kentucky, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421.

[83] Com. v. Costello, 121 Mass. 371, 23 Am. Rep. 277; State v. West, 45 La. Ann. 928, 13 South. 173. But see Hooker v. Com., 13 Grat. (Va.) 763. The court may insist upon the personal presence of de-

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to quash the indictment,[84] to require election,[85] for a change of venue,[86] for a continuance,[87] etc., or when anything else is done that forms no part of the trial.[88] And his presence is not necessary in an appellate court to which he has taken the case by appeal or writ of error, for he is not there on trial.[89]

It has been said that the right of the defendant thus to be personally present during the trial extends also to misdemeanors where the punishment may be corporal, and that, in these cases, as in cases of felony, he cannot waive the right;[90] but, in so far as the waiver of the privilege is con-

fendant on the argument of such motion. Fleming v. State, 62 Fla. 48, 56 South. 298.

[84] Epps v. State, 102 Ind. 539, 1 N. E. 491. Contra, State v. Clifton, 57 Kan. 448, 46 Pac. 715.

[85] State v. Kendall, 56 Kan. 238, 42 Pac. 711.

[86] State v. Elkins, 63 Mo. 159. Contra, Ex parte Bryan, 44 Ala. 402.

[87] State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

[88] State v. Dominique, 39 La. Ann. 323, 1 South. 665; State v. Woolsey, 19 Utah, 491, 57 Pac. 426. Absence of the defendant when the court asks the jury if they desire further instructions is not error, where no instructions are given in his absence. State v. Coley, 114 N. C. 879, 19 S. E. 705. And see State v. Jones, 29 S. C. 201, 7 S. E. 296. Nor is it error for the clerk, in the defendant's absence, to set the case for trial, Smith v. State, 98 Ala. 55, 13 South. 508; or for the court to appoint an attorney to assist in the prosecution, Hall v. State, 132 Ind. 317, 31 N. E. 536; or to amend the information before trial, State v. Beatty, 45 Kan. 492, 25 Pac. 899. Some of the courts hold that a view by jury or a continuance is no part of the trial, but this is doubtful. See note 75, p. 492, supra, where the cases on these points are cited. But it is not error for the court to insist on defendant's presence at the argument on such motions, even though defendant is represented by counsel, if such presence is practical. Fleming v. State, 62 Fla. 48, 56 South. 298.

[89] Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218; Donnelly v. State, 26 N. J. Law, 464; People v. Clark, 1 Parker, Cr. R. (N. Y.) 360; Tooke v. State, 23 Tex. App. 10, 3 S. W. 782; State v. Buhs, 18 Mo. 319; Vowell v. State, 132 Tenn. 349, 178 S. W. 768; Com. v. Cody, 165 Mass. 133, 42 N. E. 575.

[90] Lawn v. People, 11 Colo. 343, 18 Pac. 281; Ex parte Tracy, 25 Vt. 93; Nomaque v. People, Breese (Ill.) 145, 12 Am. Dec. 157; People v. Ebner, 23 Cal. 158; Com. v. Crump, 1 Va. Cas. 172; Warren v. State, 19 Ark. 214, 68 Am. Dec. 214.

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cerned; the weight of authority is clearly to the contrary.[91] In cases of misdemeanor, where the punishment is a mere fine, and, by the weight of authority, in all cases of misdemeanor, the defendant may waive this privilege, and he may do so impliedly by voluntarily absenting himself.[92] If there is no express or implied waiver of the right to be present in cases of misdemeanor, absence will generally be fatal to a conviction, though there is not the same strictness in these cases as in cases of felony.[93]

INSANITY OF DEFENDANT

149. The defendant cannot be arraigned or tried or sentenced while he is insane, though he may have been sane when the offense was committed.

Insanity of the defendant at the time for the trial must be distinguished from insanity at the time the offense was committed. In the latter case he cannot be punished at all, however sane he may be at the time for trial, for he is not guilty.[94] His insanity in such case does not prevent his be-

[91] Shiflett v. Com., 90 Va. 386, 18 S. E. 838; State v. Epps, 76 N. C. 55; U. S. v. Santos, 5 Blatchf. 104, Fed. Cas. No. 16,222; Douglass v. State, 3 Wis. 820; State v. Reckards, 21 Minn. 47; Stephens v. People, 19 N. Y. 549; Cook v. State, 26 Ga. 593; State v. White, 19 Kan. 445, 27 Am. Rep. 137; State v. Lucker, 40 S. C. 549, 18 S. E. 797; People v. Corbett, 28 Cal. 330; Dixon v. State, 13 Fla. 631, 636; Hill v. State, 17 Wis. 675, 86 Am. Dec. 736; State v. Guinness, 16 R. I. 401, 16 Atl. 910; State v. Vaughan, 29 Iowa, 286; Holmes v. Com., 25 Pa. 221.

[92] State v. Guinness, 16 R. I. 401, 16 Atl. 910; Shiflett v. Com., 90 Va. 386, 18 S. E. 838; Ex parte Tracy, 25 Vt. 93; People v. Ebner, 23 Cal. 158; State v. Hale, 91 Iowa, 367, 59 N. W. 281; City of Bloomington v. Heiland, 67 Ill. 278. Unavoidable absence, because of sickness, necessitating removal from the court room, is not a waiver. Rex v. Streek, 2 Car. & P. 413.

[93] Duke's Case, 1 Salk. 400; People v. Winchell, 7 Cow. (N. Y.) 525; Stubbs v. State, 49 Miss. 716; Tabler v. State, 34 Ohio St. 127; State v. Cross, 27 Mo. 332; Clark v. State, 4 Humph. (Tenn.) 254; State v. Ford, 30 La. Ann. 311. But see Stephens v. People, 19 N. Y. 549; Holmes v. Com., 25 Pa. 221; Grimm v. People, 14 Mich. 300.

[94] Clark, Cr. Law, 64. It has been held allowable to submit to

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ing tried if he has since become sane, but is a matter of defense to be brought out at the trial under his plea of not guilty. If he is insane when brought into court to be arraigned, though there is no question as to his sanity when the offense was committed, he cannot be arraigned; and if he becomes insane at any time before judgment and sentence the prosecution must end.[95] The reason is that an insane person cannot properly make his defense. This rule does not exempt him from liability to punishment, but merely suspends the right to try him during his insanity. When at the time of the arraignment, therefore, or at any stage of the trial, there appears to be doubt as to the defendant's sanity, a jury must be sworn to ascertain the state of his mind, and if they find him insane he must be committed as an insane person. If the defendant does not seem able to distinguish between a plea of guilty and a plea of not guilty, or if he has not sufficient intellect to comprehend the nature or course of proceedings, so as to make a proper defense, and challenge jurors, and the like, this is enough to warrant a finding that he is of unsound mind.[96] This question must not be confounded with the question of insanity at the time the offense was committed.

FURNISHING COPY OF INDICTMENT AND LIST OF JURORS AND WITNESSES

150. In some states by statute a copy of the indictment and a list of the jurors and witnesses must be furnished the defendant a certain time before trial. But these are privileges which he may waive, and he does so by not objecting before trial to a failure to furnish them.

Formerly the defendant had no right, in cases of felony, to have a copy of the indictment furnished him, but such

the trial jury the double issue of defendant's insanity at the time of trial and his guilt. State v. Sandlin, 156 N. C. 624, 72 S. E. 203.

[95] 4 Bl. Comm. 24; State v. Peacock, 50 N. J. Law, 34, 11 Atl. 270; State v. Pritchett, 106 N. C. 667, 11 S. E. 357.

[96] Rex v. Pritchard, 7 Car. & P. 303; Reg. v. Berry, 1 Q. B. Div. 447.

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right is now given him by statute in England and in many of our states.[97] It is also provided by statute in some states that he shall be furnished a list of the witnesses, or that the names of the witnesses shall be indorsed on the indictment,[98] and in some states that he shall be furnished in advance of the day set for the trial a copy of the venire, or list of the jurors summoned.[99] The defendant waives his rights under these statutes by going to trial without objection.[1] The prosecuting officer is not precluded from calling witnesses, particularly in case of surprise, whose names are not on the list furnished or indorsed on the indictment.[2]

BILL OF PARTICULARS

151. Where the charge is general, the court may require the prosecuting officer to furnish the defendant with a bill of particulars showing the particular acts relied upon.

Generally an indictment must be sufficiently certain to give the defendant notice of the particular charge against him, so that ordinarily a bill of particulars will be unnecessary. But there are some cases, as we have seen, in which, from the nature of the crime, the charge may be general. Thus a person may be charged generally with being a com-

[97] See Robertson v. State, 43 Ala. 325; Hubbard v. State, 72 Ala. 164; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Fouts v. State, 8 Ohio St. 98; State v. Fuller, 39 Vt. 74.

[98] See Hill v. People, 26 Mich. 496; Scott v. People, 63 Ill. 508.

[99] Kellum v. State, 33 Tex. Cr. R. 82, 24 S. W. 897; State v. Pollet, 45 La. Ann. 1168, 14 South. 179; Coates v. State, 1 Ala. App. 35, 56 South. 6.

[1] Reg. v. Frost, 9 Car. & P. 162; State v. Norton, 45 Vt. 258; State v. Howard, 118 Mo. 127, 24 S. W. 41; Fouts v. State, 8 Ohio St. 98; State v. Beeder, 44 La. Ann. 1007, 11 South. 816; Lord v. State, 18 N. H. 173; People v. Harris, 95 Mich. 87, 54 N. W. 648.

[2] Hill v. People, 26 Mich. 496; Bulliner v. People, 95 Ill. 394; State v. Townsend, 7 Wash. 462, 35 Pac. 367; State v. Loehr, 93 Mo. 103, 5 S. W. 696; Simons v. People, 150 Ill. 66, 36 N. E. 1019; Gifford v. People, 148 Ill. 173, 35 N. E. 754; People v. Machen, 101 Mich. 400, 59 N. W. 664; State v. Boughner, 5 S. D. 461, 59 N. W. 736.

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mon barretor, or common scold, or common seller of intoxicating liquors, or the keeper of a common bawdy or gaming house, or a common night walker or prostitute, without setting out the particular acts relied upon.[3] In these cases it is held that the defendant may ask the court to require the prosecuting officer to furnish him with a bill of particulars showing the acts relied upon, so that he may know what evidence he will be called upon to meet, and may properly prepare his defense.[4] And the court may compel the prosecuting officer to furnish a bill of particulars in other cases where the charge is too general to show what particular acts are to be shown in support of it, as on indictment for adultery or embezzlement.[5]

The granting of a bill of particulars, being entirely discretionary with the court,[6] such bill cannot supply defects in the indictment, which without such bill would render the indictment invalid; but by giving to defendant an absolute right to a bill of particulars, a defendant may be put on trial on an indictment otherwise defective for lack of particularity, for the constitutional provision that the accused shall have a right to be informed of the nature and cause of the accusation against him does not specify that such information must be contained in the indictment proper, and he is informed of it, unless he waives the information—if he has a right to a bill of particulars containing the information.[7]

[3] Ante, p. 190.

[4] 2 Hawk. P. C. c. 25, § 59; Rex v. Mason, 2 Term R. 586; Com. v. Pray, 13 Pick. (Mass.) 359; Com. v. Davis, 11 Pick. (Mass.) 434; State v. Chitty, 1 Bailey (S. C.) 379; State v. Russell, 14 R. I. 506; Goersen v. Com., 99 Pa. 388; Williams v. Com., 91 Pa. 493.

[5] People v. Davis, 52 Mich. 569, 18 N. W. 362. And see U. S. v. Brooks (D. C.) 44 Fed. 749 (embezzlement). But see, contra, State v. Quinn, 40 Mo. App. 627.

[6] Rosen v. U. S., 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606. In State v. Baltimore & O. R. Co., 68 W. Va. 193, 69 S. E. 703, it is held that the granting of a bill of particulars was not in the arbitrary discretion of the trial court; that its refusal was a basis of error. See, also, State v. Lewis, 69 W. Va. 472, 72 S. E. 475, Ann. Cas. 1913A, 1203.

[7] See Com. v. Kelley, 184 Mass. 320, 68 N. E. 346; Com. v. Snell, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019; Com. v. Sinclair, 195 Mass. 100, 80 N. E. 799, 11 Ann. Cas. 217.

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LOSS OF INDICTMENT OR INFORMATION

152. If the indictment or information is lost or destroyed before or during or after the trial, a copy may be substituted if conclusively proved to be exact.

When an information has been lost from the files or destroyed, its place may, on motion of the state's attorney, be supplied by a copy.[8] And by the great weight of authority the rule also applies in case of a lost or destroyed indictment.[9] It is immaterial at what time the indictment is lost, whether before, during, or after trial.[10] In either case the substituted copy must be exact, and must be conclusively proved.[11] The fact that an indictment or information is mutilated does not destroy it, or prevent its use.[12]

[8] Long v. People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48.

[9] Long v. People, supra; 1 Bish. New Cr. Proc. § 1400; State v. Gardner, 13 Lea (Tenn.) 134, 49 Am. Rep. 660; State v. Harrison, 10 Yerg. (Tenn.) 542; Mount v. State, 14 Ohio, 295, 45 Am. Dec. 542; Buckner v. State, 56 Ind. 208; State v. Simpson, 67 Mo. 647; State v. Circuit Court in and for Beadle County, 20 S. D. 122, 104 N. W. 1048; McGuire v. State, 76 Miss. 504, 25 South. 495; State v. Strayer, 58 W. Va. 676, 52 S. E. 862; State v. Shank, 79 Iowa, 47, 44 N. W. 241; State v. McCarver, 194 Mo. 717, 92 S. W. 684. Contra, Bradshaw v. Com., 16 Grat. (Va.) 507, 86 Am. Dec. 722.

[10] See cases cited in preceding note, and State v. Ireland, 109 Me. 158, 83 Atl. 453, 41 L. R. A. (N. S.) 1079, Ann. Cas. 1913E, 604. In the case last cited the indictment was lost after defendant had been arraigned and pleaded, but before the case was submitted to the jury. Defendant was convicted and sentenced. No copy was ever substituted. The judgment was affirmed. The court said: "The issue had already been made up. The jury knew the nature of the offense charged and the parties involved. The presence or absence of the indictment itself could not aid or hinder them in reaching their verdict. It did not in this case. Such meritless technicalities should not be permitted to thwart the administration of criminal justice. * * * A copy duly certified by the county attorney as such can by order of court at the next term be placed on file in lieu of the original, and the rights of the respondents [not to be tried again for the same offense] be thereby safely guarded."

[11] Authorities above cited.

[12] Com. v. Roland, 97 Mass. 598.

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PRESENCE OF JUDGE

153. The judge must be present during the whole trial. If he absents himself, and the trial proceeds in his absence, a conviction will be set aside.

The presence of the judge at every stage of the trial is essential to the validity of the proceedings. If he absents himself, and any part of the trial is conducted in his absence, even with the consent of the defendant, a conviction cannot be sustained, and it is immaterial whether his absence is during the reception of evidence or merely during the argument of counsel. He must be present at every stage of the trial. Any substantial proceeding carried on in his absence is coram non judice.[13]

Some of the cases hold that any absence of the judge, however short, entitles the defendant to a new trial, on the ground that, the judge being a component part of the court, there is no court during his absence.[14] In other cases it is held that a temporary absence under such circumstances that the defendant could not have been prejudiced does not render the trial nugatory.[15]

[13] Meredeth v. People, 84 Ill. 479; Thompson v. People, 144 Ill. 378, 32 N. E. 968; O'Brien v. People, 17 Colo. 561, 31 Pac. 230; Palin v. State, 38 Neb. 862, 57 N. W. 743; Martin v. State, 10 Ga. App. 455, 73 S. E. 686. In the case last cited the judge left the county of the trial while the jury were deliberating, and went to an adjoining county to grant a charter. It was held that a verdict thereafter returned was void, though it was not shown that defendant was prejudiced.

[14] People v. Tupper, 122 Cal. 424, 55 Pac. 125, 68 Am. St. Rep. 44; People v. Blackman, 127 Cal. 248, 59 Pac. 573. In the case last cited the judge went into the retiring room for 10 minutes during the argument of the prosecuting attorney.

[15] Rowe v. People, 26 Colo. 542, 59 Pac. 57; Schintz v. People, 178 Ill. 320, 52 N. E. 903; Turbeville v. State, 56 Miss. 793; Pritchett v. State, 92 Ga. 65, 18 S. E. 536, criticized in Martin v. State, 10 Ga. App. 455, 73 S. E. 686. In State v. Keehn, 85 Kan. 765, 118 Pac. 851, it was held that defendant might waive the presence of the judge at the reception of the verdict.

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SEPARATE TRIAL OF JOINT DEFENDANTS

154. It is within the discretion of the court whether persons jointly indicted shall be tried separately or together.

Where several persons are jointly indicted, as for murder, they are not entitled, as a matter of right, to separate trials; but it is a matter resting in the discretion of the court, to be determined under all the circumstances of the case, and unless the court abuses its discretion in refusing an application for severance such refusal is not ground for reversal.[16] It is held that the state may claim a severance as a matter of right.[17]

If it appears that the defendants, or either of them, may be prejudiced by a joint trial, as where the defenses are antagonistic, or one of them has made a confession, a severance should be granted;[18] but, if no prejudice can result to either by a joint trial, they should be tried together.[19] The defendants must ask for a severance before the trial is begun.[20]

[16] Doyle v. People, 147 Ill. 394, 35 N. E. 372; State v. Lee, 46 La. Ann. 623, 15 South. 159; Com. v. Bingham, 158 Mass. 169, 33 N. E. 341; Com. v. Robinson, 1 Gray (Mass.) 555; Com. v. Jenks, 138 Mass. 484; U. S. v. White, 4 Mason, 158, Fed. Cas. No. 16,682; Mitchell v. State, 92 Tenn. 668, 23 S. W. 68; Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475; Curran's Case, 7 Grat. (Va.) 619; Redman v. State, 1 Blackf. (Ind.) 431; Com. v. Lewis, 25 Grat. (Va.) 938; Com. v. Place, 153 Pa. 314, 26 Atl. 620; Ballard v. State, 31 Fla. 266, 12 South. 865; State v. Oxendine, 107 N. C. 783, 12 S. E. 573; People v. Covitz, 262 Ill. 514, 104 N. E. 887; Com. v. Borasky, 214 Mass. 313, 101 N. E. 377; Emery v. State, 101 Wis. 627, 78 N. W. 145; State v. Brauneis, 84 Conn. 222, 79 Atl. 70; State v. Nixon, 86 N. J. Law, 371, 90 Atl. 1102.

[17] State v. Prater, 52 W. Va. 132, 43 S. E. 230.

[18] Com. v. James, 99 Mass. 438; Com. v. Bingham, 158 Mass. 169, 33 N. E. 341; U. S. v. Kelly, 4 Wash. C. C. 528, Fed. Cas. No. 15,516; State v. Soper, 16 Me. 293, 33 Am. Dec. 665; State v. Taylor, 45 La. Ann. 605, 12 South. 927; Maton v. People, 15 Ill. 536.

[19] Note 16, p. 503, supra; State v. Conley, 39 Me. 78; State v. O'Brien, 7 R. I. 336.

[20] McJunkins v. State, 10 Ind. 140.

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When a severance is granted it is within the discretion of the prosecuting officer which defendant he will try first.[21]

Though the practice may work inconvenience, and even difficulty, the court may, in its discretion, grant separate trials in cases of riot and conspiracy, as well as in other cases.[22]

CONSOLIDATION OF INDICTMENTS

155. In most states, if separate indictments are pending against the same defendant for offenses which could be joined in separate counts in the same indictment, and tried together, the defendant may be tried on both at the same time.

It would seem clear that if the offenses in two or more separate indictments pending against the same defendant are such that the defendant could not object to being tried for all at the same time, if they were joined in different counts of the same indictment, he should not be allowed to object to the indictments being consolidated and tried at the same time; and there are numerous cases allowing such a practice.[23] If the offenses are such that they could not be joined in different counts of the same indictment, and tried together, the indictments must be tried separately.[24]

[21] Patterson v. People, 46 Barb. (N. Y.) 625; People v. McIntyre, 1 Parker, Cr. R. (N. Y.) 371. Contra, by statute, Davis v. State, 33 Tex. Cr. R. 344, 26 S. W. 410.

[22] Casper v. State, 47 Wis. 535, 2 N. W. 1117.

[23] Withers v. Com., 5 Serg. & R. (Pa.) 59; Cummins v. People, 4 Colo. App. 71, 34 Pac. 734; State v. Lee, 114 N. C. 844, 19 S. E. 375.

[24] State v. Devlin, 25 Mo. 175; Cummins v. People, supra.

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COUNSEL

156. The state is represented at the trial by the regular prosecuting attorney, but he may call in other counsel to assist him, or, if he permits, private counsel may be employed by the prosecutor or other private persons to assist.

157. The defendant may either employ counsel, or, if he is unable to do so, the court will appoint counsel, to defend him. In the latter case the defendant cannot insist on the appointment of counsel selected by him, and, if he refuses to accept the services of counsel, he may be tried without.

In ordinary cases the regular prosecuting attorney or his assistant will act alone in conducting the prosecution, but, with leave of the court, he may have assistance from other counsel, and frequently does so in difficult cases, or cases which involve a great amount of labor.[25] Private persons may also employ and pay counsel to assist in the prosecution, with leave of the court,[26] if the regular prosecuting attorney chooses to accept such assistance.[27] If the regular

[25] State v. Mack, 45 La. Ann. 1155, 14 South. 141; State v. Orrick, 106 Mo. 111, 17 S. W. 176; Richards v. State, 82 Wis. 172, 51 N. W. 652; State v. Johnson, 24 S. D. 590, 124 N. W. 847; Blair v. State, 72 Neb. 501, 101 N. W. 17.

[26] Granting such leave is in the discretion of the court; it should "never be abused by permitting counsel for the defendant to be overwhelmed, on account of their inexperience, by the number and ability of counsel assisting the state's attorney." People v. Blevins, 251 Ill. 381, 96 N. W. 214, Ann. Cas. 1912C, 451. In State v. Johnson, 24 S. D. 590, 124 N. W. 847, it was held that the power of the court was wholly discretionary and its exercise was not reviewable.

[27] State v. Bartlett, 55 Me. 200; Benningfield v. Com. (Ky.) 17 S. W. 271; State v. Tighe, 27 Mont. 327, 71 Pac. 3; Hayner v. People, 213 Ill. 142, 72 N. E. 792; State v. Crafton, 89 Iowa, 109, 56 N. W. 257; People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; Keyes v. State, 122 Ind. 527, 23 N. E. 1097. The employment of private counsel is regulated by statute in some states. See McKay v. State, 90 Neb. 63, 132 N. W. 741, 39 L. R. A. (N. S.) 714, Ann. Cas. 1913B, 1034. In the case last cited it was held that the statute called for

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prosecuting attorney is sick, or otherwise unable to appear, the court may appoint an attorney to conduct the prosecution.[28]

If the defendant is able to do so, he employs his own counsel.[29] If he cannot do so, the court must appoint counsel for him.[30] In some states provision is made for compensating the counsel so appointed, but in others they are expected to act without compensation, and must do so unless the court will excuse them. The defendant cannot compel the judge to appoint an attorney whom he has selected, instead of one whom the judge has appointed.[31] If the defendant refuses to accept the services of counsel, he may be tried without counsel. Where the court has offered and insisted on assigning counsel to the defendant, and he has refused to allow it to be done, or to accept the counsel's services, the court cannot force counsel upon him, but must proceed to try him without.[32]

affirmative action by the court and by the prosecuting officer; that it was not sufficient, to legalize the appearance of private counsel as assistant to the prosecuting attorney, to show that such counsel was "permitted" by the court and prosecuting attorney to take part in the case. In some states counsel employed and paid by outside parties is not allowed. Biemel v. State, 71 Wis. 444, 37 N. W. 244; Bird v. State, 77 Wis. 276, 45 N. W. 1126. And see McKay v. State, 90 Neb. 63, 132 N. W. 741, 37 L. R. A. (N. S.) 714, Ann. Cas. 1913B, 1034.

[28] Keithler v. State, 10 Smedes & M. (Miss.) 192; State v. Johnson, 12 Tex. 231; Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370; White v. Polk County, 17 Iowa, 413.

[29] Cross v. State, 132 Ind. 65, 31 N. E. 473.

[30] Hendryx v. State, 130 Ind. 265, 29 N. E. 1131. Formerly, though the defendant had at common law the right to the advice and assistance of counsel, he could not be represented by counsel at his trial. 1 Chit. Cr. Law, 407; Y. B. 30 & 31 Edw. I. 529; 2 Hawk. P. C. c. 39, §§ 1, 4. In Com. v. Polichinus, 229 Pa. 311, 78 Atl. 382, the trial court instructed the jury that they were not to consider the evidence in the light of the arguments of counsel. A conviction was reversed, the court holding that the instruction was a denial of the constitutional right of defendant to be heard by counsel. If the record merely shows that defendant did not have counsel, it is not cause for a new trial, unless it further appears that the right to have counsel was denied him. Gatlin v. State, 17 Ga. App. 406, 87 S. E. 151.

[31] Baker v. State, 86 Wis. 474, 56 N. W. 1088.

[32] State v. Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542.

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THE PETIT JURY—RIGHT TO JURY TRIAL, AND WAIVER

158. In all criminal prosecutions the defendant is entitled to a trial by jury. In some states he cannot waive this right in any case where the trial was by jury at common law. In other states he may waive the right in prosecutions for a misdemeanor, and in others he may also waive it in cases of felony.

Right to Trial by Jury

The right of every person charged with crime to a trial by jury has from a very early period existed at common law.[33] With us it is guaranteed by our federal and state Constitutions.[34] The language of the different provisions varies to some extent, but in general their object and effect is the same, namely, to secure to every person charged with a crime the same right to a jury trial, and only the same right, as had always existed at common law. No new right is conferred, but the common-law right is guaranteed so that the Legislature cannot take it away nor impair it. The Legislature may regulate the mode of trial by jury, provided it does not deprive the accused of his substantial common-law rights, but it cannot take away one of these rights.[35]

[33] 1 Chit. Cr. Law, 500.

[34] The Constitution of the United States declares that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. The same provision appears in some of the state Constitutions. In others it is merely declared that the right of trial by jury shall remain inviolate; in still others, that the right shall be "as heretofore enjoyed."

[35] 1 Bish. Cr. Proc. §§ 890–894; Black, Const. Law, 493–497; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; Ross v. Irving, 14 Ill. 171; Work v. State, 2 Ohio St. 296, 59 Am. Dec. 671, and cases hereafter referred to. In State v. Strasburg, 60 Wash. 106, 110 Pac. 1020, 32 L. R. A. (N. S.) 1216, Ann. Cas. 1912B, 917, it was held that a statute providing that insanity is no defense to a charge of crime was in contravention to the constitutional provision that the right of trial by jury shall remain inviolate, since it took away from the jury the question of criminal intent.

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At common law a person accused of petit offenses, such as vagrancy, disorderly conduct, violation of a municipal ordinance, and trivial breaches of the peace, of which justices of the peace and police magistrates had jurisdiction, had no right to demand a trial by jury, and by the weight of authority he has no such right under the constitutional guaranty, for, as we have seen, it was only intended to guarantee the same right as had always existed at common law.[36]

The constitutional guaranty of a jury trial only applies to criminal prosecutions. It does not apply, for instance, to a proceeding to punish for contempt of court.[37]

By the weight of authority a statute authorizing a trial without a jury is valid if the defendant is at the same time given an unqualified and unfettered right of appeal and a trial by jury in the appellate court.[38]

[36] People v. Justices of Court of Special Sessions, 74 N. Y. 406; People ex rel. St. Clair v. Davis, 143 App. Div. 579, 127 N. Y. Supp. 1072; Wong v. City of Astoria, 13 Or. 538, 11 Pac. 295; Byers v. Com., 42 Pa. 89, 94; State v. Glenn, 54 Md. 573; Com. v. Horton, 1 Va. Cas. 335; Inwood v. State, 42 Ohio St. 186; State v. Conlin, 27 Vt. 318; McGear v. Woodruff, 33 N. J. Law, 213; Frost v. Com., 9 B. Mon. (Ky.) 362; Williams v. City Council of Augusta, 4 Ga. 509; State v. McCory, 2 Blackf. (Ind.) 5; State v. Ledford, 3 Mo. 102. See, also, Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953. A jury trial is sometimes allowed by statute in these inferior courts.

[37] Black, Const. Law, 496; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405. Nor to proceedings to commit a child to the industrial school. Ex parte Ah Peen, 51 Cal. 280. Nor to proceedings by a court-martial. Rawson v. Brown, 18 Me. 216.

[38] Jones v. Robbins, 8 Gray (Mass.) 329; Emerick v. Harris, 1 Bin. (Pa.) 416; Murphy v. People, 2 Cow. (N. Y.) 815; Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186; Black, Const. Law, 497; City of Emporia v. Volmer, 12 Kan. 622; Wong v. Astoria, 13 Or. 538, 11 Pac. 295. Contra, Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223. A statute requiring a recognizance on appeal to be conditioned for the payment of such fine and costs as shall be imposed is an unreasonable restriction on the right of appeal. In re Jahn, 55 Kan. 694, 41 Pac. 956.

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Waiver of Jury Trial

Whether or not the right to a jury trial is a right which the defendant can waive is a question upon which the authorities are conflicting. Some of the courts have held that a jury may be waived in all cases, provided there is a statute authorizing the court to try the case without a jury;[39] that the constitutional right to a trial by jury is not infringed when the accused may have it or not at his election.[40] Many of the cases so holding were cases of felony, but most of them were cases of misdemeanor, and it is probable that the court in some of the latter cases did not intend to lay down any such rule for cases of felony.[41] Many of the cases hold that trial by jury cannot be waived in prosecutions for felony.[42] It is difficult to understand how there can be any distinction in this respect between a prosecution for a felony, and a prosecution for such a misdemeanor as at common law entitled the defendant to a jury trial. It would seem in reason that if a jury cannot be waived in one it cannot be waived in the other, and that if it can be waived in one it can be waived in the other. The grade of the crime should be immaterial, provided it is such a crime as entitled the defendant to a jury trial at common law, for, as we have seen, the constitutions guarantee the same right as

[39] Dillingham v. State, 5 Ohio St. 283.

[40] In re Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285; State v. Worden, 46 Conn. 349, 33 Am. Rep. 27; Dailey v. State, 4 Ohio St. 58; Dillingham v. State, 5 Ohio St. 283; People v. Goodwin, 5 Wend. (N. Y.) 251; Ward v. People, 30 Mich. 116; Darst v. People, 51 Ill. 286, 2 Am. Rep. 301; State v. Moody, 24 Mo. 560; Murphy v. State, 97 Ind. 579.

[41] See Dailey v. State, supra; Dillingham v. State, supra; and then compare Williams v. State, 12 Ohio St. 622.

[42] Williams v. State, 12 Ohio St. 622; Hill v. People, 16 Mich. 351; Ward v. People, 30 Mich. 116; Allen v. State, 54 Ind. 461; State v. Maine, 27 Conn. 281; State v. Mansfield, 41 Mo. 470; State v. Davis, 66 Mo. 684, 27 Am. Rep. 387; Neales v. State, 10 Mo. 498; State v. Lockwood, 43 Wis. 403; Arnold v. State, 38 Neb. 752, 57 N. W. 378; Harris v. People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153; (contra, misdemeanor, Brewster v. People, 183 Ill. 143, 55 N. E. 640); Com. v. Shaw, 1 Pittsb. R. (Pa.) 492 (collecting the authorities). See, also, Dickinson v. U. S., 159 Fed. 801, 86 C. C. A. 625; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585.

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existed at common law. If, therefore, a jury trial cannot be waived in one case in which it was necessary at common law, it cannot, in reason, be waived in another.[43] Where the Constitution or a statute expressly requires a jury trial, and does not merely give the accused the right to such a trial, a jury can in no case be waived, for it is intended to protect the state as well as the defendant.[44]

Where the right to a jury trial is given by statute in cases which could be tried without a jury at common law, as in prosecutions for petit misdemeanors before inferior tribunals, the right may, of course, be waived.[45]

In all cases the right to a jury may be waived by pleading guilty, for in such a case no trial at all is necessary.[46]

Where a jury trial may be waived, it is not necessary that there shall be an express waiver; it is sufficient if a jury is not demanded, or if the case is tried and submitted to the court.[47] It has also been held that it is not necessary that the court shall inform the accused of his right to demand a trial by jury.[48]

In all cases the waiver must be by the defendant personally, and not by his attorney for him, unless in his presence, and with his acquiescence.[49]

[43] "A plea of not guilty to an information or indictment for crime, whether felony or misdemeanor, puts the accused upon the country, and can be tried by a jury only. The rule is universal as to felonies; not quite so as to misdemeanors. But the current of authority appears to apply it to both classes of crime; and this court holds that to be safer and better alike in principle and practice. The right of trial by jury, upon indictment or information for crime, is secured by the Constitution upon a principle of public policy, and cannot be waived." State v. Lockwood, 43 Wis. 405. And see Com. v. Shaw, 1 Pittsb. R. (Pa.) 492. But see In re Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285.

[44] Arnold v. State, 38 Neb. 752, 57 N. W. 378; In re McQuown, 19 Okl. 347, 91 Pac. 689, 11 L. R. A. (N. S.) 1136.

[45] People v. Weeks, 99 Mich. 86, 57 N. W. 1091; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585.

[46] State v. Almy, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744.

[47] Dailey v. State, 4 Ohio St. 58; People v. Goodwin, 5 Wend. (N. Y.) 251.

[48] People v. Goodwin, supra; State v. Larger, 45 Mo. 510. But see Brown v. State, 16 Ind. 496.

[49] Brown v. State, supra.

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SAME—NUMBER OF JURORS

159. In most, but not all, states, the jury must consist of not less nor more than twelve men, as at common law. But, where the defendant may waive his right to a jury, he may consent to be tried by a jury of less or more than twelve.

The constitutional guaranty of a trial by jury implies there shall be, as at common law, a jury of not more nor less than twelve men.[50] A statute providing for a greater or less number would be unconstitutional,[51] unless, as in some states, the Constitution authorizes the Legislature to provide for trial by a jury of less than twelve.[52] In some jurisdictions it has been held that in trials for a misdemeanor, if the defendant consents to being tried by a jury of less than twelve, he cannot complain of the irregularity;[53] but it would seem, at least in those jurisdictions where it is held that a jury trial cannot be waived, that the right to a full jury of twelve men is a right which cannot be waived, and so it has been held.[54]

[50] 2 Hale, P. C. 161; 1 Chit. Cr. Law, 505; Black, Const. Law, 494; Work v. State, 2 Ohio St. 296, 59 Am. Dec. 671; People v. Kennedy, 2 Parker, Cr. R. (N. Y.) 312; Cancemi v. People, 18 N. Y. 128; Brown v. State, 8 Blackf. (Ind.) 561; People v. O'Neil, 48 Cal. 257; Bowles v. State, 5 Sneed (Tenn.) 360; Doebler v. Com., 3 Serg. & R. (Pa.) 237; People v. Luby, 56 Mich. 551, 23 N. W. 218.

[51] See the cases above cited. This does not apply to summary proceedings before a justice of the peace or other inferior tribunal for petit offenses, in which a jury trial cannot be demanded as of right. Ante, p. 508; Work v. State, supra.

[52] Baurose v. State, 1 Iowa, 378. And see People v. Toledo, 150 App. Div. 403, 135 N. Y. Supp. 49.

[53] Com. v. Dailey, 12 Cush. (Mass.) 80; Murphy v. Com., 1 Metc. (Ky.) 365; Tyra v. Com., 2 Metc. (Ky.) 1; Schulman v. State, 76 Tex. Cr. R. 229, 173 S. W. 1195.

[54] Cancemi v. People, 18 N. Y. 128; Dickinson v. U. S., 159 Fed. 801, 86 C. C. A. 625; Territory v. Ortiz, 8 N. M. 154, 42 Pac. 87.

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SAME—SELECTING AND SUMMONING JURORS

160. The jurors must be selected and summoned as required by law.

The mode of selecting and summoning jurors is regulated by statute in the different states. These statutes vary in many respects, and it would be impracticable to undertake to refer to them specifically. The student must be left to consult the statutes and decisions of his state.

SAME—QUALIFICATION AND EXEMPTION OF JURORS—CHALLENGES

161. The jurors must not only be properly selected and summoned, but they must be individually qualified to serve. If they are disqualified they may be challenged by either side, and must be excluded. Challenges are either,

(a) To the array, that is, to the jury as a whole; or

(b) To the polls, that is, to individual jurors.

162. A challenge to the array is an objection to all the jurors collectively because of some defect of the panel as a whole, and is either,

(a) Principal challenge—where the defect renders the jury prima facie incompetent, as where the officer selecting or summoning them was related to the prosecutor or defendant, or they were not selected or summoned in the manner required by law, etc.

(b) Challenge for favor—where the defect does not amount to ground for principal challenge, but there is a probability of partiality.

163. Challenges to the polls are challenges to individual jurors, and are

(a) Principal challenges—

(1) Propter defectum—where the juror is incompetent to serve on any jury, as where he is an

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alien, infant, nonresident of the county, etc., or has not particular qualifications prescribed by statute.

(2) Propter affectum—where there is some circumstance rendering him prima facie partial or biased in the particular case, as where he is related to one of the parties, or has formed an opinion, etc.

(3) Propter delictum—where the particular juror, by some act, has ceased, in the eye of the law, to be probus et legalis homo, as where he has been convicted of an infamous crime.

(b) Challenge to the favor—where the circumstances show a probability of bias and impartiality, but are not sufficient to render the juror prima facie disqualified, so as to be ground for principal challenge propter affectum.

164. Peremptory challenges are such as the court is bound to allow without any cause being assigned or shown. A certain number of these challenges are allowed to the defendant, and, in most states, to the prosecution.

165. Ordinarily objections to jurors must be made before the jury is sworn, or the swearing is begun; but this rule does not apply where the disqualification is not discovered until afterwards, and due diligence has been used to discover it.

166. The fact that a juror is exempt from jury service does not disqualify him, if he consents to serve.

Challenges

The right to a jury trial implies that the jury shall be impartial, and that it shall consist of men who are legally competent to act as jurors, and that they shall be legally selected, summoned, and impaneled. The Constitutions guarantee the right to such a jury as the accused was entitled to demand at common law. In determining the qualifications of jurors, we must therefore look to the common law. The Legislatures may and often do require qualifications which were not required by the common law, and pro-

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vide other modes of selecting, summoning, and impaneling jurors, and they sometimes do away with requirements of the common law; but they cannot constitutionally declare any common-law requirement unnecessary, if by doing so they deprive the accused of any substantial right which he had at common law.[55] To secure the right to an impartial jury, the accused must have the right to challenge or object to any juror who is disqualified for any cause. The Legislature may prescribe the time and manner of objecting to jurors, and the manner of determining objections, but it cannot take away the right to object.[56]

Challenges are either to the array or to the polls, and are either principal challenges or challenges to the favor.

Challenges to the Array

A challenge to the array is an objection, not to individual jurors, but to all the jurors, collectively, and is based, not upon any supposed disqualification of individual jurors, but upon some defect of the panel as a whole.[57] It is ground for principal challenge to the array, that the officer who summoned the jurors is related within the ninth degree, either by affinity or by consanguinity, to the prosecutor or to the defendant;[58] that one or more of the jurors was selected and summoned at the instance of one of the parties;[59] that there are relations existing between the officer and one of the parties prima facie implying favor or ill will on the part of the officer;[60] that the jurors were not selected or summoned in the manner required by law.[61]

[55] Ex parte Vermilyea, 6 Cow. (N. Y.) 562.

[56] Black, Const. Law, 494; Palmore v. State, 29 Ark. 248. Laws limiting the number of peremptory challenges to be allowed to the defendant, or granting peremptory challenges to the state, are not unconstitutional. Black, Const. Law, 494; post, p. 524. Nor is a law unconstitutional which allows the court to admit a juror as competent, although he has formed and expressed an opinion as to the guilt of the accused, if the court is satisfied that he will render an impartial verdict. Id.; post, p. 518.

[57] Co. Litt. 156, 158; 3 Bl. Comm. 359; Gardner v. Turner, 9 Johns. (N. Y.) 261.

[58] Vanauken v. Beemer, 4 N. J. Law, 364.

[59] Co. Litt. 156.

[60] Baylis v. Lucas, Cowp. 112.

[61] Gardner v. Turner, 9 Johns. (N. Y.) 260; State v. Clark, 42 Vt.

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The array may be challenged for favor whenever there are circumstances which, while not sufficient ground for principal challenge, are such as show a probability that the officer who selected or summoned the jury was biased.[62] It has been said that a challenge may be made to the array on account of any bias on the part of the officer who summoned them which would be ground for challenge to a juror.[63] If the challenge is allowed and sustained, the panel is discharged and a new jury summoned.[64]

Challenges to the Polls

Challenges to the polls are objections to individual jurors. Like challenges to the array, they are either principal challenges, or challenges to the favor.

Principal Challenges to the Polls

Principal challenges to the polls have been classified as challenges propter honoris respectum, propter defectum, propter affectum, and propter delictum.[65] The first is not recognized in this country, because it depends upon a title of nobility. The other three are recognized.

Same—Propter Defectum

A challenge propter defectum is on the ground that the juror is not qualified at all to serve on any jury. It will lie where the juror is an alien;[66] or not a resident of the coun-

629; Gladden v. State, 13 Fla. 623; Lamb v. State, 36 Wis. 424; Morgan v. State, 31 Ind. 193; State v. McAfee, 64 N. C. 339; Reid v. State, 50 Ga. 556; Clarke v. State, 3 Ala. App. 5, 57 South. 1024. Where the law is directory, merely, a literal compliance with its terms is not essential. Com. v. Nye, 240 Pa. 359, 87 Atl. 585.

[62] Co. Litt. 156.

[63] People v. Coyodo, 40 Cal. 586.

[64] See Humphries v. State, 100 Ga. 260, 28 S. E. 25.

[65] Co. Litt. 156; Archb. Cr. Pl. & Prac. 165, note.

[66] Borst v. Beecker, 6 Johns. (N. Y.) 332; Rex v. Sutton, 8 Barn. & C. 417; Richards v. Moore, 60 Vt. 449, 15 Atl. 119; Hollingsworth v. Duane, 4 Dall. 353, Fed. Cas. No. 6,618; Seal v. State, 13 Smedes & M. (Miss.) 286; Schumaker v. State, 5 Wis. 324; State v. Quarrel, 2 Bay (S. C.) 150, 1 Am. Dec. 637; People v. Chung Lit, 17 Cal. 320. By statute in many states, a person who has declared his intention to become a citizen, for the purpose of naturalization, is a competent juror. Babcock v. People, 13 Colo. 515, 22 Pac. 817. There is an exception to this rule where the defendant is an alien. By an early

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ty;[67] or, in some states by statute, and possibly at common law, not a freeholder;[68] or, by statute in many jurisdictions, because he has not paid his taxes;[69] or because he is an infant;[70] or is over the age limited by statute;[71] or is an idiot or lunatic or drunken;[72] or a woman;[73] or does

English statute (28 Edw. III. c. 13, § 2), it was provided, in substance, that where the defendant in a criminal case (or either party in a civil case) was an alien, part of the jurors should be aliens. This statute has been recognized as a part of the common law in some of our states, but rejected in others, and in some states similar statutes have been enacted. Such a panel of jurors is called a "panel de medietate linguae." See 1 Bish. Cr. Proc. §§ 927-930; Respublica v. Mesca, 1 Dall. (Pa.) 73, 1 L. Ed. 42; Richards v. Com., 11 Leigh (Va.) 690; Brown v. Com., 11 Leigh (Va.) 711; People v. McLean, 2 Johns. (N. Y.) 381; State v. Antonio, 11 N. C. 200.

[67] Co. Litt. 156b. The jurors must be summoned from the vicinage. This has always been essential at common law, and is still so. Swart v. Kimball, 43 Mich. 443, 5 N. W. 635. Under our constitutional provisions, as we have seen, or under most of them, this is a requirement which the Legislature cannot dispense with. Swart v. Kimball, supra. Jurors were at one time in England required to be summoned from the very ville or other place in the county where the offense was committed, but by statute they are now summoned from the body of the county, and not from any particular place in it. Such is also the rule with us. A juror may be a resident of the county without being an elector or voter. State v. Fairlamb, 121 Mo. 137, 25 S. W. 895.

[68] Co. Litt. 156; Byrd v. State, 1 How. (Miss.) 163; Bradford v. State, 15 Ind. 347; Shoemaker v. State, 12 Ohio, 43; Nelson v. State, 10 Humph. (Tenn.) 518; Dowdy v. Com., 9 Grat. (Va.) 727, 60 Am. Dec. 314; Aaron v. State, 37 Ala. 106. There is some doubt as to whether this qualification is necessary at common law with us. The matter is generally set at rest by statutes, some of which declare it necessary, while others declare it unnecessary.

[69] State v. Davis, 109 N. C. 780, 14 S. E. 55; State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; Collins v. State, 31 Fla. 574, 12 South. 906.

[70] Co. Litt. 157.

[71] Co. Litt. 157; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330. If the statute merely exempts persons over a certain age, the exemption is a personal privilege, which they may waive. It does not disqualify them. Post, p. 523.

[72] State v. Scott, 8 N. C. 24; Thomas v. State, 27 Ga. 287.

[73] 3 Bl. Comm. 362. See Harland v. Territory, 3 Wash. T. 131, 13 Pac. 453.

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not understand the English language;[74] or, by statute in some states, is unable to read or write;[75] or, by statute, has within a certain time served on a prior jury;[76] or is deaf, or otherwise in such a bad condition physically as to be unable to act as a juror.[77]

Same—Propter Affectum

A principal challenge propter affectum is based on some circumstance that raises the presumption of bias or partiality in the particular case. Any partiality or bias, whether it be in favor of the defendant or against him, will disqualify a juror.

Such a challenge will always lie where a juror is related to the prosecutor or to the defendant within the ninth degree,[78] either by affinity, that is, by marriage,[79] or by consanguinity.[80]

[74] State v. Push, 23 La. Ann. 14; People v. Davis, 4 Cal. Unrep. 524, 36 Pac. 96; Long v. State, 86 Ala. 36, 5 South. 443. But see In re Allison, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224. As to sufficiency of knowledge of language, see State v. Dent, 41 La. Ann. 1082, 7 South. 694; State v. Ford, 42 La. Ann. 255, 7 South. 696.

[75] Mabry v. State, 71 Miss. 716, 14 South. 267; Johnson v. State, 21 Tex. App. 368, 17 S. W. 252; San Antonio & A. P. Ry. Co. v. Gray (Tex. Civ. App.) 66 S. W. 229.

[76] First Nat. Bank of Plattsburg v. Post, 66 Vt. 237, 28 Atl. 989.

[77] Jesse v. State, 20 Ga. 156; Hogshead v. State, 6 Humph. (Tenn.) 59; Rhodes v. State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

[78] In some jurisdictions the relationship must be within the fourth degree, Kahn v. Reedy, 8 Ohio Cir. Ct. R. 345; in others, the third degree, Page v. State, 22 Tex. App. 551, 3 S. W. 745.

[79] 1 Chit. Cr. Law, 541; 3 Bl. Comm. 363; Co. Litt. 157a; State v. Potts, 100 N. C. 457, 6 S. E. 657; Powers v. State, 27 Tex. App. 700, 11 S. W. 646. But see Moses v. State, 11 Humph. (Tenn.) 232. Affinity ceases on the dissolution, by death or divorce, of the marriage by which it was created. State v. Shaw, 25 N. C. 532. Marriage will relate each party by affinity, to the other's blood relations, but it will not relate the blood relations of one of them to the blood relations of the other. A juror, therefore, is not incompetent because his stepdaughter married the brother of one of the parties. Central Railroad & Banking Co. of Georgia v. Roberts, 91 Ga. 513, 18 S. E. 315. See, also, Burns v. State, 89 Ga. 527, 15 S. E. 748; McDuffie v. State, 90 Ga. 786, 17 S. E. 105; Kirby v. State, 89 Ala. 63, 8 South. 110.

[80] 1 Chit. Cr. Law, 541; 3 Bl. Comm. 363; Co. Litt. 157a; People

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Such a challenge will also lie where a juror is under the power of either party,[81] or in his employment,[82] or if he is to receive part of the fine,[83] or if since he was summoned he has eaten or drank at the expense of either party,[84] or if there are actions pending between a juror and either party which imply hostility,[85] or if one of the parties has given a juror money to influence his verdict.[86]

A principal challenge propter affectum will also lie where a juror has expressed his wishes as to the result of the trial;[87] or if he has formed and expressed, or merely formed, a decided, and not a conditional or hypothetical, opinion as to the guilt or innocence of the defendant.[88] There are

v. Clark, 62 Hun, 84, 16 N. Y. Supp. 473, 695; Mahaney v. St. Louis & H. R. Co., 108 Mo. 191, 18 S. W. 895; State v. Merriman, 34 S. C. 16, 12 S. E. 619; State v. Williams, 9 Houst. (Del.) 508, 18 Atl. 949; Page v. State, 22 Tex. App. 551, 3 S. W. 745. Relationship to prosecuting attorney does not disqualify. People v. Waller, 70 Mich. 237, 38 N. W. 261.

[81] 1 Chit. Cr. Law, 541.

[82] 1 Chit. Cr. Law, 542; Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 South. 360; Block v. State, 100 Ind. 357. See State v. Coella, 3 Wash. St. 99, 28 Pac. 28; Crawford v. U. S., 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392. In the case last cited it was held that an employé of the United States was not a competent juror where defendant was on trial for conspiracy to defraud the United States. So of a partner of defendant. Stumm v. Hummel, 39 Iowa, 478.

[83] 1 Chit. Cr. Law, 542. That an inhabitant of a town to which a fine will go is disqualified, see State v. Williams, 30 Me. 484. Contra, Treasurer of Middletown v. Ames, 7 Vt. 166. A person having a bet on the result of the trial is incompetent. Cluverius v. Com., 81 Va. 787.

[84] 1 Chit. Cr. Law, 542; Co. Litt. 157; Com. v. Mosier, 135 Pa. 221, 19 Atl. 943. That one of the parties has been entertained at the juror's house is only a ground of challenge to the favor. Anon., 3 Salk. 81; post, p. 523. A person who is bail for defendant's appearance is not a competent juror. Brazleton v. State, 66 Ala. 96.

[85] 1 Chit. Cr. Law, 542; Co. Litt. 157.

[86] Co. Litt. 157.

[87] 1 Chit. Cr. Law, 542. A member of an association having for its object the suppression of the crime for which the defendant is indicted is not thereby rendered incompetent as a juror. Com. v. Burroughs, 145 Mass. 242, 13 N. E. 884. Compare Com. v. Moore, 143 Mass. 136, 9 N. E. 25, 58 Am. Rep. 128.

[88] 1 Chit. Cr. Law, 542; 2 Hawk. P. C. c. 43, § 28; People v. Rath-

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some cases to the effect that a juror who has served in one case, and returned a verdict of guilty, is not disqualified to

bun, 21 Wend. (N. Y.) 509; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Willis v. State, 12 Ga. 444; Sprouce v. Com., 2 Va. Cas. 375; Osiander v. Com., 3 Leigh (Va.) 780, 24 Am. Dec. 693; Armistead v. Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633; Ned v. State, 7 Port. (Ala.) 187; Noble v. People, Breese (Ill.) 54. There is much conflict and confusion in the cases on this point, and some very fine distinctions have been drawn. We cannot go into the question at any length, but must content ourselves with referring to some of the cases, and leave the student to follow up the subject by reading them. It has been held that if the opinion expressed is merely conditional or hypothetical, and not unqualified, it does not disqualify. People v. Mather, 4 Wend. (N. Y.) 243, 21 Am. Dec. 122; Durell v. Mosher, 8 Johns. (N. Y.) 445; State v. Potter, 18 Conn. 166; Smith v. Com., 7 Grat. (Va.) 593; State v. Foster, 91 Iowa, 164, 59 N. W. 8. The courts are virtually agreed that an opinion formed on being an eyewitness of the transaction, or on hearing or reading the statements or testimony of eyewitnesses either out of court or in a prior judicial proceeding, will disqualify. Ex parte Vermilyea, 6 Cow. (N. Y.) 555; Mabry v. State, 71 Miss. 716, 14 South. 267. By the weight of authority, the opinion need not have been formed from any favor or ill will. Ex parte Vermilyea, 6 Cow. (N. Y.) 555; and cases hereafter cited. But see Rex v. Edmonds, 4 Barn. & Ald. 471; State v. Spencer, 21 N. J. Law, 196. It has been said, and is so provided by statute in some states, that, if the opinion formed by a juror is not strong enough to influence him in his trial of the case, it does not disqualify him. Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; People v. Honeyman, 3 Denio (N. Y.) 121; People v. Fuller, 2 Parker, Cr. R. (N. Y.) 16; State v. Ellington, 26 N. C. 61; Shannon v. State (Tex. Cr. App.) 26 S. W. 410; Lewis v. State, 137 Ind. 344, 36 N. E. 1110; State v. Le Duff, 46 La. Ann. 546, 15 South. 397; King v. State, 5 How. (Miss.) 730; Hendrick v. Com., 5 Leigh (Va.) 707; Pollard v. Com., 5 Rand. (Va.) 659. It has even been held under such a statute that an opinion does not disqualify, though some evidence may be necessary to remove it. State v. Field, 89 Iowa, 34, 56 N. W. 276; Shannon v. State (Tex. Cr. App.) 26 S. W. 410. Many, probably most, of the courts, have held that an opinion formed or expressed, on common report or rumor, or on newspaper reports, will not disqualify, if the juror believes and states on oath that such opinion will not influence him or prevent him from rendering a true verdict on the evidence, and the court is satisfied that such is the case, and in many states it is so provided by statute. Com. v. Berger, 3 Brewst. (Pa.) 247; Moses v. State, 10 Humph. (Tenn.) 456; State v. Williams, 3 Stew. (Ala.) 454; Quesenberry v. State, 3 Stew. & P. (Ala.) 368; McGregg v. State, 4 Blackf. (Ind.)

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serve in another case against a joint defendant who has taken a separate trial, involving the same state of facts, but

101; Baldwin v. State, 12 Mo. 223; Moran v. Com., 9 Leigh (Va.) 651; Smith v. Com., 6 Grat. (Va.) 696; Payne v. State, 3 Humph. (Tenn.) 375; State v. Morea, 2 Ala. 275; State v. Ellington, 29 N. C. 61; State v. Dove, 32 N. C. 469; Nelms v. State, 13 Smedes & M. (Miss.) 500, 53 Am. Dec. 94; Lee v. State, 45 Miss. 114; Baker v. State, 88 Wis. 140, 59 N. W. 570; State v. Duffy, 124 Mo. 1, 27 S. W. 358; State v. De Graff, 113 N. C. 688, 18 S. E. 507; State v. Frier, 45 La. Ann. 1434, 14 South. 296; State v. Gile, 8 Wash. 12, 35 Pac. 417. Other courts, in the absence of such a statute, have held that the ground upon which the opinion has been formed is immaterial; that there is no distinction between an opinion founded on being an eyewitness, or on hearing the testimony of those who were present at the transaction, and an opinion based on rumors, reports, and newspaper publications; that in either case the opinion disqualifies. People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Neely v. People, 13 Ill. 687; State v. Webster, 13 N. H. 491; Leach v. People, 53 Ill. 311; Clem v. State, 33 Ind. 418; Lithgow v. Com., 2 Va. Cas. 297; Reynolds v. State, 1 Ga. 222; and see Boon v. State, 1 Ga. 631; Wilson v. State, 87 Neb. 638, 128 N. W. 38; and that a juror who has formed an opinion on the merits does not become qualified because he declares that, if the circumstances on which his opinion is based are not supported by the proof, his opinion of the defendant's guilt will be removed. "Too much stress ought not to be laid on the juror's declaration that, if the circumstances on which his opinion was founded should not be supported by the evidence, his opinion of the defendant's guilt would be removed. The disqualifying bias which the law regards is one which in a measure operates unconsciously on the juryman, and leads him to indulge his own feelings when he thinks he is influenced entirely by the weight of evidence." People v. Mather, 4 Wend. (N. Y.) 244, 21 Am. Dec. 122. And see Coleman v. Hagerman, cited 4 Wend. (N. Y.) 243, 21 Am. Dec. 122; Baxter v. People, 3 Gilman (Ill.) 368; Cancemi v. People, 16 N. Y. 501; Payne v. State, 3 Humph. (Tenn.) 375; People v. Keefer, 97 Mich. 15, 56 N. W. 105; U. S. v. Hanway, 2 Wall. Jr., 150, Fed. Cas. No. 15,299; Trimble v. State, 2 G. Greene (Iowa) 404; Sam v. State, 13 Smedes & M. (Miss.) 189. In some states it is provided by statute that an opinion or impression as to the guilt of the accused shall not be ground for challenge for cause if the juror states on oath that he can render an impartial verdict notwithstanding such opinion, and if the court is satisfied that the opinion will not influence his verdict. Such a statute has been held constitutional, as it does not take away the right to trial by an impartial jury. Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; Palmer v. State, 42 Ohio St. 596. There is authority for saying that an opinion must not only be formed, but must

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the better opinion is to the contrary.[89] And generally a person who has served in a prior case against another, or against the same defendant, involving the same questions of fact, is disqualified.[90] So if a person has served on the grand jury which indicted the defendant, he is incompetent to serve on the petit jury.[91]

By the overwhelming weight of authority, conscientious scruples against the infliction of capital punishment will disqualify a juror in a case where the punishment may be death.[92] This has been said to be ground for challenge to

be expressed, before it will disqualify. Noble v. People, Breese (Ill.) 54; Boardman v. Wood, 3 Vt. 570. But in reason, and by the weight of authority, formation of opinion is alone enough. McGowan v. State, 9 Yerg. (Tenn.) 184; People v. Rathbun, 21 Wend. (N. Y.) 509; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122. And see cases cited above.

[89] 2 Hawk. P. C. c. 43, § 29; State v. Sheeley, 15 Iowa, 404; People v. Troy, 96 Mich. 530, 56 N. W. 102; Stephens v. State, 53 N. J. Law, 245, 21 Atl. 1038.

[90] People v. Troy, supra; Edmondson v. Wallace, 20 Ga. 660; State v. James, 34 S. C. 49, 12 S. E. 657; Garthwaite v. Tatum, 21 Ark. 336, 76 Am. Dec. 402. For limitations of the rule, see Com. v. Hill, 4 Allen (Mass.) 591. See State v. Maloney, 118 Mo. 112, 23 S. W. 1084.

[91] Rex v. Percival, Sid. 243; State v. Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; Rice v. State, 16 Ind. 298; Stewart v. State, 15 Ohio St. 155. He must have actually served on the grand jury. Rafe v. State, 20 Ga. 60; Rouse v. State, 4 Ga. 136. That one who served as coroner at an inquest is competent to serve as a juror on an indictment for the murder, see O'Connor v. State, 9 Fla. 215.

[92] Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; People v. Damon, 13 Wend. (N. Y.) 351; People v. Carolin, 115 N. Y. 658, 21 N. E. 1059; Gates v. People, 14 Ill. 433; State v. McIntosh, 39 S. C. 97, 17 S. E. 446; Com. v. Lesher, 17 Serg. & R. (Pa.) 155; State v. Stewart, 45 La. Ann. 1164, 14 South. 143; Davidson v. State, 135 Ind. 254, 34 N. E. 972; Martin v. State, 16 Ohio, 364; State v. Town, Wright (Ohio) 75; Jones v. State, 2 Blackf. (Ind.) 475; Clore's Case, 8 Grat. (Va.) 606; Stalls v. State, 28 Ala. 25; Lewis v. State, 9 Smedes & M. (Miss.) 115; Burrell v. State, 18 Tex. 713; People v. Tanner, 2 Cal. 257; Williams v. State, 3 Ga. 453; Gonzales v. State, 31 Tex. Cr. R. 508, 21 S. W. 253; Pierce v. State, 13 N. H. 536; State v. Jewell, 33 Me. 583; State v. Ward, 39 Vt. 225; Bell v. State, 91 Ga. 15, 16 S. E. 207; Untreiner v. State, 146 Ala. 26, 41 South. 285; State v. Vick, 132 N. C. 995, 43 S. E. 626; People v. Cebulla, 137 Cal. 314, 70 Pac. 181; State v. Wooley, 215 Mo. 620, 115

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favor only.[93] Scruples against convicting on circumstantial evidence is ground for challenge.[94] But the fact that a juror is in favor of the law alleged to have been violated, and voted for it, does not disqualify him.[95] Nor is he disqualified because of his prejudice against the crime, if not prejudiced against the defendant.[96] If, however, a juror is so prejudiced against the law which is alleged to have been violated, because he believes it unconstitutional, or because he thinks it should not be enforced, that he would be biased against its enforcement, he may be challenged by the state.[97] A bad opinion of the defendant's character does not disqualify.[98]

A prejudice against the defense of insanity does not disqualify a juror, if it appears that the prejudice is only against feigned defenses of this character, and that he can and will render a verdict in accordance with the law and the evidence.[99]

S. W. 417. It has been held in some states that mere opposition to capital punishment does not disqualify a juror who states that he can nevertheless render a verdict according to the evidence. Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; People v. Stewart, 7 Cal. 140; Atkins v. State, 16 Ark. 568.

[93] State v. Mercer, 67 N. C. 266.

[94] Griffin v. State, 90 Ala. 596, 8 South. 670; Calhoun v. State, 143 Ala. 11, 39 South. 378; Gates v. People, 14 Ill. 433; Com. v. Heist, 14 Pa. Co. Ct. R. 239; State v. Barker, 46 La. Ann. 798, 15 South. 98; State v. Young, 119 Mo. 495, 24 S. W. 1038; State v. Frier, 45 La. Ann. 1434, 14 South. 296; People v. Fanshawe, 65 Hun, 77, 19 N. Y. Supp. 865; Id., 137 N. Y. 68, 32 N. E. 1102; Johnson v. State, 34 Neb. 257, 51 N. W. 835; State v. Leabo, 89 Mo. 247, 1 S. W. 288; State v. Miller, 156 Mo. 76, 56 S. W. 907; State v. Bauerle, 145 Mo. 1, 46 S. W. 609; People v. Amaya, 134 Cal. 531, 66 Pac. 794. So where there is a prejudice against an informer's testimony. People v. Mahoney, 73 Hun, 601, 26 N. Y. Supp. 257.

[95] People v. Keefer, 97 Mich. 15, 56 N. W. 105.

[96] Williams v. State, 3 Ga. 453; People v. McGonegal, 136 N. Y. 62, 32 N. E. 616; People v. Reynolds, 16 Cal. 128; Com. v. Poisson, 157 Mass. 510, 32 N. E. 906. But see People v. Wheeler, 96 Mich. 1, 55 N. W. 371.

[97] Com. v. Austin, 7 Gray (Mass.) 51; Com. v. Buzzell, 16 Pick. (Mass.) 153.

[98] Helm v. State, 67 Miss. 562, 7 South. 487.

[99] People v. Sowell, 145 Cal. 292, 78 Pac. 717; Butler v. State, 97

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Same—Propter Delictum

A challenge propter delictum is based on the ground that the juror objected to has for some act ceased to be, in the eye of the law, probus et legalis homo, as because he has been convicted of an infamous crime.[1]

Challenges to the Polls for Favor

The challenge to the polls for favor is of the same nature with the principal challenge propter affectum, but of an inferior degree. The general rule of law is that the juror shall be indifferent; and, if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favor, according to the degree of probability of his being biased. The cause of principal challenge to the polls, as we have seen, is such matter as carries with it, prima facie, evident marks of suspicion, either of malice or of favor. But when from any circumstance whatever it appears probable that a juror may be biased in favor of or against either party, and such circumstances do not amount to matter for a principal challenge, it may be made the ground of challenge to the favor.[2] The effect of the two species of challenge is the same.[3] A juror may be challenged to the favor after a challenge for principal cause has been overruled.[4]

Exemption from Jury Service

If the statute merely exempts a person from jury service, as because he is over the statutory age, or is an officer of the United States, or a doctor, dentist, lawyer, fireman, po-

Ind. 378; People v. Carpenter, 102 N. Y. 238, 6 N. E. 584; State v. Croney, 31 Wash. 122, 71 Pac. 783.

[1] Co. Litt. 158; Arch. Cr. Pl. & Prac. 165, note; 2 Hawk. P. C. c. 43, § 25.

[2] A challenge to the favor has been sustained, for instance, because the juror was attending court in the expectation of being called as a witness for the opposite party, though he expected to testify as to the defendant's character. State v. Barber, 113 N. C. 711, 18 S. E. 515. Such a challenge was overruled where it was based on the ground that the juror had said the defendant was a tough citizen, the examination on his voir dire showing that there was no prejudice. State v. Anderson, 14 Mont. 541, 37 Pac. 1.

[3] Arch. Cr. Pl. & Prac. 165, note.

[4] Carnal v. People, 1 Parker, Cr. R. (N. Y.) 272.

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liceman, etc., or has already served on a jury within a certain time, etc., and does not declare him incompetent to serve, it does not disqualify him. He can claim his exemption, but if he consents to serve, and is otherwise qualified, he cannot be challenged.[5]

Peremptory Challenges

A peremptory challenge is a challenge which may be interposed or not at the pleasure of the party challenging, and without assigning or showing any cause. It is the right to have a juror excluded without cause, and the court is bound to allow it.[6] At common law the defendant had the right to thirty-five peremptory challenges in cases of felony,[7] while the king had in all cases the right to challenge any number, without any limit whatever.[8] The common law has been changed in England by statutes taking away the right of the king to such challenges, and reducing the number to be allowed the defendant, and some of these statutes became a part of our common law. It is not necessary to do more than refer to these statutes, for the matter is now regulated by statute in all of our states.[9] The number of peremptory challenges allowed will be found to vary in the different states, and in the same state it will vary, according as the offense is a capital or a less felony, or merely a misdemeanor. In some states no peremptory challenges are allowed in cases of misdemeanor. And in some states the state is not allowed the right at all.

Statutes reducing the number of peremptory challenges

[5] 2 Hawk. P. C. c. 43, § 26; State v. Forshner, 43 N. H. 89, 80 Am. Dec. 132; Davis v. People, 19 Ill. 74; State v. Quimby, 51 Me. 395; State v. Day, 79 Me. 120, 8 Atl. 544; State v. Toland, 36 S. C. 515, 15 S. E. 599; Thomas v. State, 27 Ga. 287; People v. Lange, 90 Mich. 454, 51 N. W. 534; People v. Rawn, 90 Mich. 377, 51 N. W. 522; State v. Jackson, 42 La. Ann. 1170, 8 South. 297. Therefore, the fact that the court erroneously refused a juror's claim of exemption is no ground of complaint by the defendant. State v. Jackson, supra.

[6] 1 Bish. Cr. Proc. § 935; 1 Chit. Cr. Law, 534.

[7] 1 Chit. Cr. Law, 534; 1 Bish. Cr. Proc. §§ 941, 942.

[8] 2 Hawk. P. C. c. 43, § 2.

[9] The history of the law on this subject will be found in 1 Bish. Cr. Proc. §§ 935–945.

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to be allowed the defendant, or taking them away altogether, or allowing peremptory challenges to the state, are not unconstitutional.[10]

Passing Jurors at Request of the State

The common-law right of the king to challenge peremptorily was taken away by an early English statute,[11] in substance requiring the king to show cause for his challenges. Under this statute it was held that the king need not show any cause for his challenge, until the whole panel was gone through, and it appeared that there would not be a full jury without a person challenged by him. And the defendant was required to show all his causes of challenge as the jurors were called, and before the king could be required to show any.[12] The English practice, after this statute, is thus stated by Mr. Bishop: "The course of things is for the court, on the application of the counsel for the prosecution, when the list of jurors returned is being called over, and the prisoner is being required to accept or challenge each juror as he appears at the call of his name, to direct such jurors to stand aside as are objected to on behalf of the prosecution. The panel is thus gone through with; and, if a full jury is obtained, without calling upon those who are required to stand aside, the proceeding is tantamount to a peremptory challenge on the part of the government. But, if a full jury is not thus obtained, and some of the jurors who were called did not, as it sometimes happens, answer to their names, then the panel is called over a second time, omitting those whose cases have been finally disposed of, yet including both those who did not answer, and those who were set aside at the instance of the prosecution; and on this second call the government can challenge only for cause. And, if the state challenges for cause in the first instance, the panel may still be gone through with before the

[10] Dowling v. State, 5 Smedes & M. (Miss.) 664; Walter v. People, 32 N. Y. 147; Hartzell v. Com., 40 Pa. 462; Jones v. State, 1 Ga. 610; Walston v. Com., 16 B. Mon. (Ky.) 15; Cregier v. Bunton, 2 Strob. (S. C.) 487.

[11] 33 Edw. I, St. 4.

[12] 2 Hawk. P. C. c. 43, § 8.

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question is tried; so that, if the jury becomes full before the panel is exhausted, all necessity of inquiry into the causes of challenge is avoided." [13]

In some of our states, either under the English statute and decisions as a part of the common law, or by their own statutes, the same practice obtains.[14] In other states it is not recognized, or has been abolished.[15]

Time and Mode of Challenge—Practice

With regard to the time for interposing a challenge, the mode of challenging, the mode of trying and determining the objection, etc., there is considerable difference in the practice of the different states, and there is some conflict of opinion on various questions. In some states the whole matter is regulated by statute.

As we have already stated, where the Constitution of a state guarantees the right to a trial by jury, it guarantees the right to an impartial jury. The Legislature may, within proper limits, regulate the mode of objecting to jurors, but it cannot take away or impair the right. Any statute which undertakes to do so is void.

The accused has a right to insist that no prejudiced or otherwise incompetent person shall serve as a juror, but this is a right which he may waive, and he may waive his objection impliedly by failing to object at the proper time. A challenge to the array must be made, if at all, not only before the jury is sworn,[16] but before a challenge to the polls.[17] If the defendant knows or could know that a juror is disqualified for cause, and fails to object to him while

[13] 1 Bish. Cr. Proc. § 938.

[14] See State v. Bone, 52 N. C. 121; Warren v. Com., 37 Pa. 45; Com. v. Addis, 1 Browne (Pa.) 285; Jewell v. Com., 22 Pa. 94; U. S. v. Douglass, 2 Blatchf. 207, Fed. Cas. No. 14,989; State v. Craton, 28 N. C. 164; State v. Arthur, 13 N. C. 217; State v. Barrontine, 2 Nott & McC. (S. C.) 553; State v. Stalmaker, 2 Brev. (S. C.) 1.

[15] See Sealy v. State, 1 Ga. 213, 44 Am. Dec. 641; Reynolds v. State, 1 Ga. 222; People v. Henries, 1 Parker, Cr. R. (N. Y.) 579.

[16] 1 Chit. Cr. Law, 544; People v. Oliveria, 127 Cal. 376, 59 Pac. 772; Dunn v. State, 143 Ala. 67, 39 South. 147; State v. Banner, 149 N. C. 519, 63 S. E. 84.

[17] 1 Chit. Cr. Law, 545; Co. Litt. 158a; People v. McKay, 18 Johns. (N. Y.) 212.

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the jury is being impaneled, and before they are sworn, or the swearing is begun,[18] he waives his objection, and cannot afterwards raise it.[19] Even where the incompetency of a juror is not in fact known before he is sworn, the accused will waive his right to object if he does not use due diligence to discover it; and he does thus waive his objection if he fails to interrogate him, when by doing so he might bring out his incompetency.[20] If the juror is interrogated, and testifies falsely, due diligence is shown, and the objection may be raised when the facts are discovered, even after verdict.[21] There are some cases in conflict with the rule stated, but the great weight of authority is in its favor. It would seem that any other rule, whether laid down by the court or by a statute, must be unconstitutional, as depriving the defendant, without any fault on his part, of an impartial and competent jury.

[18] Reg. v. Frost, 9 Car. & P. 129, and cases cited in the following note. The swearing is not begun where the juror takes the book without authority. Reg. v. Frost, supra.

[19] Co. Litt. 158a; 2 Hawk. P. C. c. 43, § 1; 1 Chit. Cr. Law, 545; Reg. v. Frost, 9 Car. & P. 129; Com. v. Knapp, 10 Pick. (Mass.) 477, 480, 20 Am. Dec. 534; State v. O'Driscoll, 2 Bay (S. C.) 153; Croy v. State, 32 Ind. 384; King v. State, 5 How. (Miss.) 730; Van Blaricum v. People, 16 Ill. 364, 63 Am. Dec. 316; Schnell v. State, 92 Ga. 459, 17 S. E. 966; Ward v. State, 1 Humph. (Tenn.) 253; McClure v. State, 1 Yerg. (Tenn.) 206; Gillespie v. State, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137; Lisle v. State, 6 Mo. 426; Com. v. Jones, 1 Leigh (Va.) 598; Dilworth v. Com., 12 Grat. (Va.) 689, 65 Am. Dec. 264; Beck v. State, 20 Ohio St. 228; McFadden v. Com., 23 Pa. 12, 62 Am. Dec. 308; State v. Morea, 2 Ala. 275; People v. Thayer, 61 Misc. Rep. 573, 115 N. Y. Supp. 855; People v. Toledo, 150 App. Div. 403, 135 N. Y. Supp. 49.

[20] Brown v. People, 20 Colo. 161, 36 Pac. 1040; State v. Nash, 45 La. Ann. 1137, 13 South. 732, 734; Beck v. State, 20 Ohio St. 228. But see Jones v. State, 97 Miss. 269, 52 South. 791.

[21] Brown v. People, supra; State v. Nash, supra. Contra, McClure v. State, 1 Yerg. (Tenn.) 206. If, however, the incompetency of the juror becomes known after his examination, but before verdict, and defendant has an opportunity to have him excused and the trial begun anew, but defendant refrains from making any objection at that time, it is a waiver, and he cannot complain after the verdict is rendered. Queenan v. Oklahoma, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175.

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In some cases it has been held that the court may, in the exercise of a sound discretion, discharge a juror for incompetency, after he has been sworn, and before any evidence has been introduced, though the cause existed before the juror was sworn, and could have been discovered;[22] but there is authority to the contrary.[23]

In some states it is held that the right to challenge peremptorily must be exercised, if at all, before the jurors are interrogated as to their bias, or challenged for cause.[24] In others it is held that the right to challenge a juror peremptorily remains open until he is sworn, and this seems to be the better doctrine, for a challenge for cause may create a prejudice in the juror's mind.[25]

Challenges to the array must be in writing, but challenges to the polls are made orally.[26] In all cases of challenge for cause, either principal or to the favor, the cause must be specified, or the court may disregard the challenge.[27]

The practice is to examine the juror himself on oath, such an examination being called an examination on his voir dire; but it is also competent to introduce other witnesses

[22] In New York, in a capital case, a juror was so discharged because he had scruples against capital punishment. People v. Damon, 13 Wend. (N. Y.) 351; Ochs v. People, 25 Ill. App. 379. And see Tooel v. Com., 11 Leigh (Va.) 714; McGuire v. State, 37 Miss. 369.

[23] Ward v. State, 1 Humph. (Tenn.) 253; ante, p. 443.

[24] Com. v. Webster, 5 Cush. (Mass.) 297, 52 Am. Dec. 711; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458.

[25] 1 Chit. Cr. Law, 545; Beauchamp v. State, 6 Blackf. (Ind.) 307; Munly v. State, 7 Blackf. (Ind.) 593; Morris v. State, 7 Blackf. (Ind.) 607; Hooker v. State, 4 Ohio, 348; Hendrick v. Com., 5 Leigh (Va.) 707. In some cases it is held that the court in its discretion may allow a peremptory challenge even after the juror has been sworn, but before the panel is complete. People v. Durrant, 116 Cal. 179, 48 Pac. 75. Where a juror well known to defendant's counsel, and whom he had peremptorily challenged, by mistake sat on the jury, but was not noticed until the verdict was rendered, it was held that it was too late for defendant to take advantage of the error as ground for a new trial; the juror having qualified himself on his voir dire. Cooper v. State, 65 Tex. Cr. R. 423, 144 S. W. 937.

[26] 1 Chit. Cr. Law, 546.

[27] Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Mann v. Glover, 14 N. J. Law, 195. But see Carnal v. People, 1 Parker, Cr. R. (N. Y.) 272.

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to prove disqualification. In examining a juror on his voir dire, he occupies the position of a witness, and he cannot be compelled to answer questions tending to criminate him or disgrace him or render him infamous.[28] The court as well as the parties may examine a juror on his voir dire.[29] In misdemeanor cases, it has been held that there is no right to examine a juror upon his voir dire without first challenging him.[30]

The mode of trying a challenge varies in the different states. Probably in all of them a principal challenge propter defectum or affectum is submitted to the court. In many states this is also the practice in case of challenges to the favor, all challenges being determined by the court. In other states the practice in the latter cases, and in others, is to submit the challenge to triers appointed by the court for the purpose. In most states the matter is now generally regulated by statute.[31]

In challenges to the favor, where triers pass on the question of the competency of a juror, their decision is not reviewable;[32] but in those jurisdictions where the judge determines challenges to the favor there is a difference of opinion on this question. In some states it is held, and this seems to be the better rule, that it is not;[33] in others the contrary is held.[34] Where such determination is reviewable, nothing short of palpable error is ground for reversal.[35]

[28] Hudson v. State, 1 Blackf. (Ind.) 317. For this reason it has been held that a juror cannot be asked whether he has expressed an opinion adverse to the accused; but by the overwhelming weight of authority, and generally by statute, such questions are proper, at least in this country. 1 Bish. Cr. Proc. § 934.

[29] Montague v. Com., 10 Grat. (Va.) 767.

[30] Schnell v. State, 92 Ga. 459, 17 S. E. 966.

[31] If the accused consents that the challenge shall be determined by the court, he cannot afterwards complain that it was not submitted to triers. People v. Mather, supra. Nor can such consent be revoked and a demand be made for submission of the question to triers. People v. Rathbun, 21 Wend. (N. Y.) 509.

[32] People v. Allen, 43 N. Y. 28.

[33] State v. Haines, 36 S. C. 504, 15 S. E. 555; People v. McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

[34] Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

[35] Com. v. March, 248 Pa. 434, 94 Atl. 142.

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Discharging and Excusing Jurors

It is not always necessary that a juror shall be challenged in order that the court may discharge him as incompetent. The court may of its own motion interrogate jurors, and if it finds them disqualified for any reason, whether for principal cause or for favor, discharge them, though no challenge has been interposed.[36]

The court has the discretionary power, even where a juror is not disqualified, to excuse him because of sickness, or for any other reasonable cause, at any time before the panel is completed.[37] And it has been held, and seems to be well established, that the court may, in the exercise of a sound discretion, excuse a juror at his own request, as a favor to him, before he is accepted as one of the panel.[38]

Effect of Error in Overruling Challenge

By the weight of authority, the defendant cannot complain of the erroneous overruling of his challenge for cause, if he afterwards challenged the juror peremptorily without exhausting his peremptory challenges, so that the juror did not serve;[39] or, according to some of the cases, if he could have so peremptorily challenged him.[40] But if, by such a challenge, he exhausted his peremptory challenges before

[36] Marsh v. State, 30 Miss. 627; Lewis v. State, 9 Smedes & M. (Miss.) 115; State v. Marshall, 8 Ala. 302; People v. Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

[37] Patterson v. State, 48 N. J. Law, 381, 4 Atl. 449; State v. Hobgood, 46 La. Ann. 855, 15 South. 406; Aaronson v. State, 56 N. J. Law, 9, 27 Atl. 937. So by statute in some states. Pierson v. State, 99 Ala. 148, 13 South. 550; Webb v. State, 100 Ala. 47, 14 South. 865.

[38] State v. Barber, 113 N. C. 711, 18 S. E. 515.

[39] Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; People v. Larubia, 140 N. Y. 87, 35 N. E. 412; State v. Moody, 7 Wash. 395, 35 Pac. 132; People v. Schafer, 161 Cal. 573, 119 Pac. 920. But see Dowdy v. Com., 9 Grat. (Va.) 727, 60 Am. Dec. 314; Carroll v. State, 3 Humph. (Tenn.) 315.

[40] Preswood v. State, 3 Heisk. (Tenn.) 468; State v. Le Duff, 46 La. Ann. 546, 15 South. 397; Prewitt v. Lambert, 19 Colo. 7, 34 Pac. 684; Jenkins v. Mitchell, 40 Neb. 664, 59 N. W. 90; Blenkiron v. State, 40 Neb. 11, 58 N. W. 587; Richards v. U. S., 175 Fed. 911, 99 C. C. A. 401; People v. Durrant, 116 Cal. 179, 48 Pac. 75. But see, contra, People v. Larubia, supra; Freeman v. People, supra; People v. Bodine, 1 Denio (N. Y.) 281.

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the jury was completed, he is prejudiced, for his peremptory challenges have been thereby diminished, and the error will be ground for a new trial.[41]

SAME—SWEARING THE JURY

167. In all cases the jury must be sworn, and the fact that they were sworn must appear on the record.

In no criminal prosecution can there be a valid trial unless every one of the jurors is sworn, and the fact of swearing must appear on the record.[42] The usual form of oath is: "You shall well and truly try, and true deliverance make, between the state of ——— and the prisoner at the bar, whom you shall have in charge, and a true verdict give, according to the evidence, so help you God."[43] Ordinarily

[41] See cases above cited; and see People v. Casey, 96 N. Y. 115; People v. Weil, 40 Cal. 268. But see Moore v. Com., 7 Bush (Ky.) 191. Neither the state nor the defendant can object to the erroneous allowance by the court of a challenge. "We can hardly see how the court could commit substantial error in discharging any person from the jury when 12 other good, lawful, and competent men could easily be had to serve on the jury." State v. Sorter, 52 Kan. 531, 34 Pac. 1036.

[42] Rex v. Morris, 2 Strange, 901; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; Carnett v. State (Ark.) 6 S. W. 513; Johnson v. State, 47 Ala. 62; Baldwin v. Kansas, 129 U. S. 52, 9 Sup. Ct. 193, 32 L. Ed. 640; Smith v. State, 25 Fla. 517, 6 South. 482; Judah v. McNamee, 3 Blackf. (Ind.) 272; Pruitt v. State (Ark.) 11 S. W. 822; Stephens v. State, 33 Tex. Cr. R. 101, 25 S. W. 286; Lancaster v. State, 91 Tenn. 267, 18 S. W. 777; Brown v. Com., 86 Va. 466, 10 S. E. 745. Where the record merely stated, that "The jury being by the clerk sworn, and after selection the following * * * are chosen as jurors to try this cause," the verdict and judgment was set aside. State v. Duff, 253 Mo. 415, 161 S. W. 683. But the form of oath need not, and should not, appear on the record. Lawrence v. Com., 30 Grat. (Va.) 845; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; State v. Ice, 34 W. Va. 244, 12 S. E. 695. In some states, by statute, the jury must be sworn in a body, and a failure to so swear them will be fatal to a conviction. Stephens v. State, supra.

[43] It is sufficient if the jury are sworn "well and truly to try the issues joined," the omission of the words "and true deliverance make" being immaterial. Lancaster v. State, 91 Tenn. 267, 18 S. W. 777.

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the oath is taken on the Bible, and the book is kissed, but this is not necessary where the juror has conscientious scruples against kissing the book.[44] In some jurisdictions the practice of kissing the book has been abolished. And it is generally provided that jurors who are conscientiously opposed to taking an oath may be affirmed.

OPENING OF THE CASE BY COUNSEL

168. After the jury have been sworn, the prosecuting attorney opens the case for the state, by stating the circumstances of the offense, and then introduces his evidence. The defendant's counsel then opens the defense in like manner, and introduces his evidence.

It is not only the right but the duty of the prosecuting attorney to open the case by a statement to the jury.[45] The object is to show the jury the issue before them, and prepare them for the evidence. The attorney should state shortly what facts are necessary, and are relied upon as constituting the offense, and what proof he expects to offer. He has a right, it seems, to go fully both into the law and the facts. "The evidence and the law," says Mr. Bishop, "should be set side by side in such a way as to enable the jury to appreciate each piece of testimony as it is presented to them. They should, in other words, be made acquainted in advance with what it is necessary to prove, and how the necessary matter is to be established in the particular case. Then, when a witness gives in his evidence, every word, if the evidence is well directed, tells; and it will not be in the power of opposing counsel to remove the impression by argument. But if the jury approach the case with minds clouded—if they do not know what needs to be proved, or what proof it is proposed to present before them—they cannot distinguish, when a witness is testifying, between the

[44] See Walker's Case, 1 Leach, Crown Cas. 498.

[45] Rex v. Gascoine, 7 Car. & P. 772. Even an admission of the facts by the defendant cannot deprive the state of the right to open the case. French v. State, 93 Wis. 325, 67 N. W. 706.

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unimportant and the important, or know what weight to give to anything. And the mass of half-remembered evidence may, when they come to consider their verdict, produce its proper effect, or it may not." [46]

It seems that at one time the defendant himself made his opening address or statement to the jury, but under the modern practice the statement is made by his counsel.[47]

VIEW BY JURY

169. When it is necessary in order that the jury may more clearly understand the evidence, the court may, in its discretion, allow the jury to view the scene of the crime.

This is common practice, not only in prosecutions for homicide, but in any other case in which a view of the premises by the jury may aid them in reaching a proper verdict.[48] The matter rests, however, in the sound discretion of the court.[49] There is a conflict of authority as to whether a view is part of the trial demanding the presence of the accused.[50] But, even where it is held to be a part of the trial, it is generally held that defendant may waive his privilege.[51] The jury must be under the charge of a sworn officer of the court, and must not be allowed to separate, or hold

[46] 1 Bish. Cr. Proc. § 971.

[47] Reg. v. Rider, 8 Car. & P. 539.

[48] Reg. v. Martin, 12 Cox, Cr. Cas. 204; Reg. v. Whalley, 2 Cox, Cr. Cas. 231; Chute v. State, 19 Minn. 271 (Gil. 230); Sasse v. State, 68 Wis. 530, 32 N. W. 849.

[49] Com. v. Miller, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170; State v. Coella, 8 Wash. 512, 36 Pac. 474.

[50] See People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368. Where the jury, while taking a walk in the custody of an officer, viewed, in the absence of defendant and his counsel, a place mentioned by defendant in his testimony; it was held not ground for a new trial; no prejudice being shown to have resulted. Com. v. Filer, 249 Pa. 171, 94 Atl. 822.

[51] People v. Thorn, supra; State v. Buzzell, 58 N. H. 257, 42 Am. Rep. 586; Shular v. State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211.

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any communication with outsiders.[52] An unauthorized view by the jury or a part of the jury, on their own motion, and unaccompanied by an officer, will generally be ground for setting a conviction aside.[53] The judge, in some states, must accompany the jury.[54] Where the premises have been fully described in the testimony, and there is no material controversy as to the situation, it is no abuse of discretion for the court to refuse to allow a view by the jury.[55]

MISCONDUCT OF PROSECUTING ATTORNEY

170. Misconduct of the prosecuting attorney prejudicial to the defendant will be ground for setting a conviction aside.

It is impossible to lay down any hard and fast rule as to what words or actions of counsel amount to such misconduct as to demand a new trial. Obviously it must depend on the circumstances of the individual case. Conduct that may prejudice the jury in one case may be innocuous in another.[56] A conviction for fraudulently obtaining money has been reversed because the district attorney made the statement in closing his argument that if the train had not been late he would have had another witness, who would also have testified that he had been defrauded.[57]

A new trial has been granted where the district attorney

[52] Reg. v. McNamara, 14 Cox, Cr. Cas. 229; Fleming v. State, 11 Ind. 234; People v. Green, 53 Cal. 60. And see People v. Bush, 68 Cal. 623, 10 Pac. 169.

[53] Ruloff v. People, 18 N. Y. 179; Eastwood v. People, 3 Parker, Cr. R. (N. Y.) 25. But see Com. v. Brown, 90 Va. 671, 19 S. E. 447.

[54] People v. White, 5 Cal. App. 329, 90 Pac. 471.

[55] State v. Coella, 8 Wash. 512, 36 Pac. 474.

[56] "Whether unwarranted remarks by the county attorney are prejudicial, when viewed in the light of the circumstances attending their use, must be left to some extent to the judicial discernment of the trial judge." State v. Brand, 124 Minn. 408, 145 N. W. 39.

[57] Latham v. U. S., 226 Fed. 420, 141 C. C. A. 250, L. R. A. 1916D, 1118.

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deliberately, by questions put to defendant containing no element of misconduct by defendant, and by parading witnesses as a challenge to defendant, created the false impression that the latter has been guilty of misdeeds, when the evidence really does not sustain such conclusion.[58]

A conviction of seduction has been set aside because the state's attorney, merely to prejudice the defendant before the jury, caused the prosecuting witness to take her baby with her on the stand.[59] On a prosecution for murder, where the defense depended almost entirely on the defendant's testimony, the prosecuting attorney, while cross-examining the defendant as to his previous residence and manner of life, asked him whether he had not committed a crime, and been confined in the penitentiary; and held in his hand, in view of the jury, what appeared to be a letter, which he referred to while asking the questions. The defendant's attorney called this an artful effort to make the jury believe that the questions were based on facts, whereupon the prosecuting attorney stated that he had not referred to the paper for mere "buncombe," but that he had reliable information on which he asked the questions. The conviction was set aside because of this misconduct, though it was reprimanded by the court, and the jury were instructed that only the evidence in the case and the law as given them by the court were to be considered in arriving at a verdict.[60] So misconduct in asking a witness improper questions for the evident purpose of prejudicing the defendant may be ground for a new trial.[61] In a murder case in Wisconsin it appeared

[58] People v. Freeman, 203 N. Y. 267, 96 N. E. 413. See, also, People v. Pettanza, 207 N. Y. 560, 101 N. E. 428.

[59] State v. Carter, 8 Wash. 272, 36 Pac. 29.

[60] Holder v. State, 58 Ark. 473, 25 S. W. 279. See, also, Flint v. Com. (Ky.) 23 S. W. 346. As to improper argument, see post, p. 538. It has been held to be improper conduct for the prosecuting attorney, when defendant objected to certain testimony, to remark: "Oh, yes; I knew you would object, for it cooks your goose." Oldham v. Com. (Ky.) 58 S. W. 418.

[61] People v. Wells, 100 Cal. 459, 34 Pac. 1078; People v. Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223; Cargill v. Com. (Ky.) 13 S. W. 916. "Where an improper question is asked of a witness by a district attorney, the test whether it is misconduct is found in an-

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that, soon after the defendant had been placed in jail, the district attorney sent a person to her to represent himself as sent by her attorney, to obtain the facts of her defense, to convey to an attorney to be employed for her in another city. The district attorney also, through the telephone, assured her he was her attorney, and counseled her to make disclosures to the person sent by him, which she did. It was very properly held that this misconduct disqualified the district attorney for prosecuting the case, and the defendant was given a new trial.[62] Such gross misconduct as this ought to disqualify an attorney for practicing at all.

Ordinarily misconduct on the part of the prosecuting attorney may be cured by the court's rebuking him in the presence of the jury, and cautioning the jury not to let it influence them;[63] but it must appear that the defendant could not well have been prejudiced under all the circumstances.[64]

MISCONDUCT OF JUDGE

171. Improper conduct or remarks by the court during the trial, if prejudicial to the defendant, will be ground for setting a conviction aside.

Thus a conviction has been set aside because the court, on a prosecution for murder, in which the defense was that

swer to the question: What was the purpose of counsel in asking the question? If it was to take unfair advantage of the defendant by intimating to the jury something that was either not true or not capable of being proven in the manner attempted, it is error. And if the district attorney knows, when he asks the question, that an objection to the question should or will be sustained, the error is not corrected because the objection is sustained." People v. Grider, 13 Cal. App. 703, 110 Pac. 586.

[62] State v. Russell, 83 Wis. 330, 53 N. W. 441.

[63] State v. Howard, 118 Mo. 127, 24 S. W. 41; Wheeless v. State, 92 Ga. 19, 18 S. E. 303; State v. Ean, 90 Iowa, 534, 58 N. W. 898; People v. Pyckett, 99 Mich. 613, 58 N. W. 621; State v. Reid, 39 Minn. 277, 39 N. W. 796; People v. Smith, 180 N. Y. 125, 72 N. E. 931; People v. Mathews, 139 Cal. 527, 73 Pac. 416; Sawyer v. U. S., 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269.

[64] Holder v. State, supra; Latham v. U. S., 226 Fed. 420, 141 C. C. A. 250, L. R. A. 1916D, 1118.

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the defendant's wife committed the crime, said to the jury that he sometimes thought that the disposition of our first male ancestor to charge the fault upon the woman given to him did not die out with Adam, but was inherited by his descendants.[65] So where, when a witness for the state, who was absent when wanted, was brought in by an officer, the court, in the presence of the jury, held a colloquy with the witness, which tended to discredit the defendant and his counsel, and lead the jury to believe that, if they were not guilty of procuring the absence of the witness, they were, in the opinion of the court, capable of committing it, a conviction was set aside.[66]

The judge should be careful not to do or say anything during the trial to reflect on a witness, or to express or intimate in any way any opinion on his credibility. A conviction has been reversed because the judge, after asking a witness if she knew how long three minutes were, took out his watch, asked her to tell three minutes, and then announced that what she called three minutes was only forty-five seconds.[67]

So if the judge, either during the examination of the witnesses or at any time during the trial, makes improper comments on the evidence, it may cause a reversal.[68]

[65] State v. Hawley, 63 Conn. 47, 27 Atl. 417. And see People v. Moyer, 77 Mich. 571, 43 N. W. 928.

[66] People v. Abbott, 4 Cal. Unrep. 276, 34 Pac. 500. See, also, Allen v. U. S., 115 Fed. 3, 52 C. C. A. 597; Peeples v. State, 103 Ga. 629, 29 S. E. 691.

[67] Burke v. People, 148 Ill. 70, 35 N. E. 376. And see Jefferson v. State, 80 Ga. 16, 5 S. E. 293.

[68] Kelly v. State, 33 Tex. Cr. R. 31, 24 S. W. 295; People v. Kindleberger, 100 Cal. 367, 34 Pac. 852; State v. Clements, 15 Or. 237, 14 Pac. 410; Sharp v. State, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27. As where the judge, in admitting evidence, states that he is inclined to think that in doing so he is overruling the Supreme Court. State v. Hawley, 63 Conn. 47, 27 Atl. 417. The appellate court is reluctant to interfere with the exercise of the discretion of the trial judge in participating in the examination of witnesses, but it will do so when the judge's examination has been conducted in a manner so hostile to the defendant and his witnesses as to probably produce in the minds of the jury the impression that the judge has a fixed opinion that the defendant is guilty and should be convicted. Adler

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If the particular conduct or remark of the court is called for by the remarks or conduct of the defendant or his counsel, or is warranted by the circumstances, the fact that the defendant must have been prejudiced thereby gives him no right to complain. It is not error, for instance, for the court, in the exercise of its discretion, to commit to jail, in the presence of the jury, one of the defendant's witnesses, because of the character of his testimony,[69] or to rebuke defendant's counsel when the rebuke is warranted,[70] or to fine him for contempt where he is guilty of a contempt.[71]

SUMMING UP AND ARGUMENT OF COUNSEL

172. In arguing the case to the jury, counsel must not go beyond the evidence, nor make improper remarks. Generally improper remarks by the prosecuting attorney prejudicial to the defendant will be ground for setting aside a conviction, if properly objected to by the defendant, and not cured by the action of the court; but, as a rule, if the defendant raises no objection, or if, on objection being made, the court rebukes the attorney, and instructs the jury not to regard the remark, a conviction will not be set aside.

173. The time for argument is within the sound discretion of the court. But for an abuse of discretion a conviction may be set aside.

After all the evidence has been introduced, and each side has rested his case, the respective counsel address the jury,

v. U. S., 182 Fed. 464, 104 C. C. A. 608. See, also, Drake v. State, 65 Tex. Cr. R. 282, 143 S. W. 1157; Davis v. State, 65 Tex. Cr. R. 271, 143 S. W. 1161; People v. Bernstein, 250 Ill. 63, 95 N. E. 50.

[69] People v. Hayes, 70 Hun, 111, 24 N. Y. Supp. 194; Id., 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572.

[70] Pease v. State, 91 Ga. 18, 16 S. E. 113.

[71] Goldstein v. State (Tex. Cr. App.) 23 S. W. 686; Miller v. State, 32 Tex. Cr. R. 266, 22 S. W. 880. But, even though the conduct of the judge is improper, the judgment should not be reversed, if it was

summing up the evidence, and arguing the question of its effect and sufficiency. The summing up and argument is first made by the prosecuting attorney, and then by the counsel for the defense, and in many states the prosecuting attorney is entitled to reply.[72] In the latter case the reply closes the argument; the counsel for the defense has no right to reply. Where there are more than one counsel for the state, one of them may make the first argument, and the other the reply. Several counsel for the defendant may be allowed to argue the case.

The time at which the argument of counsel must be made rests within the discretion of the court. Ordinarily it is made as soon as the case is closed, and each counsel makes his argument as soon as the other has finished, but the court may allow an adjournment before the argument of either or of one of them.[73]

It is also within the discretion of the court to limit the time to be allowed for argument,[74] but a prejudicial abuse of discretion will be ground for setting aside a conviction.[75]

In their argument to the jury, counsel must keep within the facts of the case, and must be careful not to misstate the evidence, or make improper remarks. If they do so, the court may rebuke them, and require them to proceed properly. Persistence in an illegitimate line of argument in violation of the court's caution would be a contempt of court.

Improper remarks by the prosecuting attorney is often the ground for setting a conviction aside and granting a new trial.[76] A conviction has been set aside, for instance,

not prejudicial to the defendant. It is not prejudicial if the evidence clearly shows defendant's guilt. Lepper v. U. S., 233 Fed. 227, 147 C. C. A. 233.

[72] Doss v. Com., 1 Grat. (Va.) 557; State v. Millican, 15 La. Ann. 557. But see State v. Brisbane, 2 Bay (S. C.) 451; Loeffner v. State, 10 Ohio St. 598.

[73] State v. Lewis, 118 Mo. 79, 23 S. W. 1082.

[74] Mansfield v. State (Tex. Cr. App.) 24 S. W. 901; Yeldell v. State, 100 Ala. 26, 14 South. 570, 46 Am. St. Rep. 20; Vaughan v. State, 58 Ark. 353, 24 S. W. 885.

[75] People v. Green, 99 Cal. 564, 34 Pac. 231; McLean v. State, 32 Tex. Cr. R. 521, 24 S. W. 898.

[76] Davis v. State, 138 Ind. 11, 37 N. E. 397; Hall v. U. S., 150 U.

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where, in a prosecution for rape, the prosecuting attorney said to the jury that, as the friends of the prosecutrix had not hanged or burnt the defendant, his life should pay the penalty,[77] and where he asked the jury to act "as detectives" in regard to the facts of the case.[78] It is always improper for the prosecuting attorney to throw the weight of his personal influence into a case by announcing his individual opinion as to the guilt of the defendant.[79] So, if the prosecuting attorney makes improper comments on the testimony of the defendant,[80] or, in some states, by statute, if he comments at all on the defendant's failure to testify in his own behalf,[81] or explains to the jury that the state has no right

S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003; Butler v. State (Tex. Cr. App.) 27 S. W. 128; Jones v. State, 14 Ga. App. 568, 81 S. E. 801. The fact that the improper remarks of the prosecuting attorney were called forth by improper remarks of defendant's counsel is immaterial. Jones v. State, supra. But see Dollar v. State, 99 Ala. 236, 13 South. 575, where it was held that on a prosecution for selling intoxicating liquors, where the defendant's counsel refers to the amount of the prosecuting attorney's fees in such cases, error cannot be predicated on the latter's statement to the jury that he would give up all his fees if he could put down the accursed traffic.

[77] Thompson v. State, 33 Tex. Cr. R. 472, 26 S. W. 987.

[78] People v. O'Brien, 96 Mich. 630, 56 N. W. 72.

[79] State v. Mack, 45 La. Ann. 1155, 14 South. 141; People v. McGuire, 89 Mich. 64, 50 N. W. 786. But see State v. Beasley, 84 Iowa, 83, 50 N. W. 570.

[80] State v. Fairlamb, 121 Mo. 137, 25 S. W. 895; Lewis v. State, 137 Ind. 344, 36 N. E. 1110.

[81] Brazell v. State, 33 Tex. Cr. R. 333, 26 S. W. 723; Dawson v. State (Tex. Cr. App.) 24 S. W. 414; Frazier v. State, 135 Ind. 38, 34 N. E. 817; Gurley v. State, 101 Miss. 190, 57 South. 565; People v. Annis, 261 Ill. 157, 103 N. E. 568. A statement by the prosecuting attorney that, though accused had offered no testimony, the attorney did not intend to refer to his failure to testify, is such a reference. Wilcock v. State, 64 Tex. Cr. R. 1, 141 S. W. 88. It is not error for the court to instruct the jury that the fact that defendant had not testified should raise no presumption against him. State v. Carlisle, 28 S. D. 169, 132 N. W. 686, Ann. Cas. 1914B, 395. If the reference is ambiguous, it will not be reversible error if the prosecuting attorney disclaims any intent to comment on defendant's failure to testify. State v. Nieburg, 86 Vt. 392, 85 Atl. 769. The impropriety of such reference is not cured by an instruction by the court that defendant's failure to testify was not to be construed against him, and by a statement by the prosecuting attorney that the instruction was

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to appeal from an erroneous acquittal, while the defendant may appeal from an erroneous conviction,[82] or comments on matters not in evidence, it may avoid a conviction.[83]

It would seem that in those jurisdictions where the jury are the judges of the law as well as the facts counsel should have the right to argue the law to them, and so it has been held;[84] but there is authority to the contrary.[85] It has even been held, rather inconsistently, that counsel have this right where the jury must take the law from the court; but in reason and by the weight of authority in the latter case there is no such right.[86] In those jurisdictions where the jury are the judges both of the law and the facts, it is proper, in arguing a criminal case, to read from reported decisions both the statement of facts and the decisions thereon.[87] But the court may and should refuse to allow this to be done in those jurisdictions where the jury are bound to receive and apply the law as it is given to them by the court.[88]

Ordinarily, in order that the defendant may, after a conviction, complain of improper remarks by the prosecuting attorney, he must object to them at the time they are made,

the law. State v. Marceaux, 50 La. Ann. 1137, 24 South. 611. But when, on such improper reference, the court offered to discharge the jury, but defendant objected, a new trial will not be granted. State v. Varnado, 126 La. 732, 52 South. 1006. Nor should counsel comment on the failure to examine a witness who was accessible to both parties. Barnett v. State, 165 Ala. 59, 51 South. 299.

[82] Brazell v. State, supra; Crow v. State, 33 Tex. Cr. R. 264, 26 S. W. 209; Boone v. People, 148 Ill. 440, 36 N. E. 99; Vaughan v. State, 58 Ark. 353, 24 S. W. 885.

[83] Dollar v. State, 99 Ala. 236, 13 South. 575; Pollard v. State, 33 Tex. Cr. R. 197, 26 S. W. 70; State v. Woolard, 111 Mo. 248, 20 S. W. 27; Johnson v. State, 125 Tenn. 420, 143 S. W. 1134, Ann. Cas. 1913C, 261. So if the prosecuting counsel state his own knowledge of the facts, unless he has testified as a witness. Com. v. Shoemaker, 240 Pa. 255, 87 Atl. 684.

[84] Lynch v. State, 9 Ind. 541; Com. v. Porter, 10 Metc. (Mass.) 263.

[85] Franklin v. State, 12 Md. 236.

[86] Com. v. Porter, 10 Metc. (Mass.) 263; Com. v. Austin, 7 Gray (Mass.) 51.

[87] Wohlford v. State, 148 Ill. 296, 36 N. E. 107.

[88] State v. Boughner, 5 S. D. 461, 59 N. W. 736.

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so as to give the court an opportunity to rebuke the attorney, and caution the jury against being influenced by them. He cannot allow the remarks to be made without objection, and, after taking his chances on an acquittal, object to them for the first time on motion for a new trial or on writ of error or appeal.[89]

Generally, if the court rebukes counsel for making improper remarks, and instructs the jury to disregard them, a conviction will not be set aside,[90] but there may be cases in which the remarks cannot be thus cured. If they were such that the defendant must have been prejudiced by them notwithstanding the effort of the court to counteract their effect, they will be ground for setting the conviction aside.[91]

INSTRUCTIONS OR CHARGE OF THE COURT TO THE JURY

174. The court should fully and correctly instruct the jury as to the law by which they are to be governed in arriving at a verdict, and an erroneous and prejudicial instruction will be ground for setting aside a conviction, if it was properly excepted to. But ordinarily an omission to charge on any particular point is no ground for objection after verdict, unless an instruction on the point was requested, or the court's attention was called to the omission.

[89] Boone v. People, 148 Ill. 440, 36 N. E. 99; Garner v. State (Tex. Cr. App.) 24 S. W. 420; State v. Mack, 45 La. Ann. 1155, 14 South. 141; People v. Lane, 101 Cal. 513, 36 Pac. 16; State v. Howard, 118 Mo. 127, 24 S. W. 41; Cartwright v. State, 71 Miss. 82, 14 South. 526; State v. Sortor, 52 Kan. 531, 34 Pac. 1036; Wheeless v. State, 92 Ga. 19, 18 S. E. 303.

[90] State v. Butler, 85 Me. 225, 27 Atl. 142; Vaughan v. State, 58 Ark. 353, 24 S. W. 885; State v. Hill, 114 N. C. 780, 18 S. E. 971; Handly v. Com. (Ky.) 24 S. W. 609; State v. Hack, 118 Mo. 92, 23 S. W. 1089; State v. Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362; State v. Varnado, 126 La. 732, 52 South. 1006.

[91] Cartwright v. State, supra. And see note 81, p. 540.

175. In a few states the jury are the judges of the law as well as the facts; but in most states the court is the exclusive judge of the law, and the jury must follow his instructions, though there is no remedy if they fail to do so and acquit the defendant.

176. In all states the jury are the exclusive judges of the facts, and in most states the court cannot charge thereon, or express any opinion on the credibility of the witnesses, or the weight and effect of the evidence.

After the evidence is all in, and the counsel have finished their argument it becomes the duty of the court to charge or instruct the jury as to the law by which they are to be governed in determining the case. In some states instructions are given before argument, but the court may give additional instructions, or modify those already given, during or after the argument.[92]

Province of Court and Jury—Jurors as Judges of the Law

Some of the cases hold that it has always been the rule at common law that in criminal cases, though not in civil, the jury are the judges both of the law and the facts.[93] This rule is recognized as a part of the common law in some of our states, while in others it is expressly declared in the Constitution, or by statute.[94] It would be absurd to sup-

[92] Wood v. State, 64 Miss. 761, 2 South. 247. The court, in trying the case, has a right to reserve its decision in regard to what instructions it will give till the evidence is all in, and cannot be compelled to charge the jury at stages in the evidence upon propositions which may or may not be applicable to the case. People v. McCallam, 103 N. Y. 587, 9 N. E. 502.

[93] Co. Litt. 228; 4 Bl. Comm. 361; dissenting opinion in Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 296, 39 L. Ed. 343; Rex v. Woodfall, 5 Burrows, 2661; State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90 (since overruled, State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775).

[94] State v. Croteau, supra; State v. McDonnell, 32 Vt. 491; State v. Meyer, 58 Vt. 457, 3 Atl. 195; Doss v. Com., 1 Grat. (Va.) 557; State v. Snow, 18 Me. 346; State v. Allen, 1 McCord (S. C.) 525, 10 Am. Dec. 687; Armstrong v. State, 4 Blackf. (Ind.) 247; U. S. v. Taylor (C. C.) 11 Fed. 470; Franklin v. State, 12 Md. 236; Swann v.

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pose from this that, even in these jurisdictions, the jury are to ascertain and determine the law for themselves, and that the judge must not instruct them as to the law.[95] Nothing like this is meant. All that is meant is that, contrary to the rule in civil cases, the jury in a criminal case may, if it sees fit, disregard the law as laid down by the court, and acquit the defendant, though, if they regarded the instructions they would, under the facts, be bound to convict. It gives the jury the right to judge of the law over the head of the court in all criminal cases, but it does not prevent the court from telling them what the law is, and of the importance of regarding it; nor does it make it proper for the jury to disregard it; it merely allows them to do so. The responsibility is cast upon the jury. For this reason it has been held not error for the court to say to the jury that this rule is not intended for ordinary criminal cases; that it is a matter of favor to the defendant, and should not be acted upon by the jury, except after the most thorough conviction of its necessity and propriety; that any departure by the jury from the law laid down by the court must be taken solely on their own responsibility; and that the safer and better and fairer way, in ordinary criminal cases, is to take the law from the court, and that they are always justified in doing so.[96]

State, 64 Md. 423, 1 Atl. 872 (under the constitution); Holder v. State, 5 Ga. 441 (by statute); Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 (by statute); Patterson v. State, 7 Ark. 59, 44 Am. Dec. 530 (by statute).

[95] Murphy v. State, 6 Ind. 490; Grady v. State, 11 Ga. 253.

[96] See State v. McDonnell, 32 Vt. 532; U. S. v. Taylor (C. C.) 11 Fed. 470; Hunt v. State, 81 Ga. 140, 7 S. E. 142; Spies v. People, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898, 3 Am. St. Rep. 320; U. S. v. Keller (C. C.) 19 Fed. 633; Franklin v. State, 12 Md. 236; Schnier v. People, 23 Ill. 17; Fisher v. People, 23 Ill. 283; Lynch v. State, 9 Ind. 541; Williams v. State, 10 Ind. 503. In Schuster v. State, 178 Ind. 320, 99 N. E. 422, the court instructed the jury that they were the judges of the law as well as of the facts, and, if they could each say on their oaths that they knew the law better than the court, then they had the right to do so, but before assuming such responsibility they should be assured that they were not acting from caprice or prejudice, and were controlled by a deep conviction that the court was wrong, and that, before saying that it was their duty to reflect whether they were better qualified to judge the law than the court,

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On the other hand, in most jurisdictions, the doctrine that the jury are the judges of the law as well as the facts is not recognized at all; but it is held that the court is the sole judge of the law, and that the jury must follow the instructions in this respect.[97] Since a verdict of acquittal cannot be set aside, there is no remedy if the jury sees fit to decide contrary to the law of the case as laid down by the court; but in those states where it is held that the court is the sole judge of the law, the court may charge the jury that they are bound to be governed by the instructions. The court could not set aside a verdict of acquittal because of a disregard of its instruction, but either the trial court or an appellate court could and should set aside a conviction on this ground if the conviction is contrary to law.[98]

The judge in all the states may and always should instruct the jury fully as to the law; though, as we shall see, he cannot charge on the facts. The admissibility or competency of evidence is a question of law, and the court may

and if under those circumstances they were prepared to say that the court was wrong, the Constitution gave them that right. It was held that the instruction was reversible error, as imposing a restriction upon the jurors not imposed by the Constitution.

[97] Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343 (Mr. Justice Gray and Mr. Justice Shiras dissenting); U. S. v. Battiste, 2 Sumn. 240, Fed. Cas. No. 14,545; State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775; dissenting opinion of Bennett, J., in State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90; Duffy v. People, 26 N. Y. 588; Com. v. Porter, 10 Metc. (Mass.) 263; Com. v. Anthes, 5 Gray (Mass.) 185; Williams v. State, 32 Miss. 389, 66 Am. Dec. 615; Hamilton v. People, 29 Mich. 173; Hardy v. State, 7 Mo. 607; State v. Schoenwald, 31 Mo. 147; Montgomery v. State, 11 Ohio, 427; Parrish v. State, 14 Neb. 60, 15 N. W. 357; Jackson v. State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Pierce v. State, 13 N. H. 536; State v. Smith, 6 R. I. 33; State v. Rheams, 34 Minn. 18, 24 N. W. 302; State v. McLain, 104 N. C. 894, 10 S. E. 518; Pierson v. State, 12 Ala. 153; Montee v. Com., 3 J. J. Marsh. (Ky.) 149; People v. Anderson, 44 Cal. 65; McGowan v. State, 9 Yerg. (Tenn.) 184; Dale v. State, 10 Yerg. (Tenn.) 551; Com. v. McManus, 143 Pa. 64, 21 Atl. 1018, and 22 Atl. 761, 14 L. R. A. 89; Brown v. Com., 87 Va. 215, 12 S. E. 472; State v. Wilson, 157 Iowa, 698, 141 N. W. 337. In Sparf v. U. S., and Com. v. McManus, supra, the question is considered at great length, and numerous cases are reviewed.

[98] Dailey v. State, 10 Ind. 536; State v. Sims, Dud. (Ga.) 213.

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charge as to what evidence the jury may and what they may not consider.[99] And it may charge them on the law by which they should determine the credibility of the witnesses,[1] or the sufficiency of the evidence,[2] but it must be careful in most jurisdictions not to comment or express an opinion on the credibility of a witness or the effect and weight of the evidence.[3] So, if the indictment does not charge an offense,[4] or, in most states, if the evidence, assuming it to be true, is insufficient, as a matter of law, to support the charge,[5] the court may so charge, and direct an acquittal, for this is a matter of law. In like manner it is not error to instruct the jury that the defendant cannot properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the minor offenses that might, under some circumstances, be included in the offense charged, where there is no evidence whatever upon which any verdict could be properly returned except one of guilty, or one of not guilty, of the particular offense charged.[6]

Same—Jury as Judges of the Fact

On the other hand, the jury are the exclusive judges of all questions of fact. They are the sole judges of the weight and sufficiency of the evidence, including the credibility of the witnesses, and in most states, if the court in its charge expresses an opinion or comments on the weight and effect

[99] State v. McDonnell, 32 Vt. 491.

[1] Adam v. State (Tex. Cr. App.) 20 S. W. 548; Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905; People v. Rohl, 138 N. Y. 616, 33 N. E. 933.

[2] People v. Rohl, supra; Welsh v. State, 96 Ala. 92, 11 South. 450.

[3] Horn v. State, 98 Ala. 23, 13 South. 329; Gibbs v. State (Tex. Cr. App.) 20 S. W. 919; Gilyard v. State, 98 Ala. 59, 13 South. 391; post, p. 547.

[4] People v. Cook, 10 Mich. 164.

[5] Post, p. 547; Com. v. Packard, 5 Gray (Mass.) 101.

[6] Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343; Stiener v. State, 33 Tex. Cr. R. 291, 26 S. W. 214; State v. Jordan, 87 Iowa, 86, 54 N. W. 63; People v. Barry, 90 Cal. 41, 27 Pac. 62; People v. McNutt, 93 Cal. 658, 29 Pac. 243; McCoy v. State, 27 Tex. App. 415, 11 S. W. 454; State v. McKinney, 111 N. C. 683, 16 S. E. 235; Jones v. State, 52 Ark. 346, 12 S. W. 704; O'Brien v. Com., 89 Ky. 354, 12 S. W. 471; Robinson v. State, 84 Ga. 674, 11 S. E. 544.

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of the evidence,[7] or the credibility of any witness,[8] the error, if against the defendant, will be ground for setting aside a conviction. This rule does not prevent the court from summing up the evidence that has been introduced, and bringing out its relation to the issues involved,[9] but care must be used not to comment on its weight.

It is therefore error for the court in its charge to assume the existence of facts in issue;[10] but not if the fact is conceded, or the evidence of it is uncontradicted.[11]

Same—Directing Verdict

When the evidence is so defective or so weak that a verdict of guilty could not be sustained, the jury, in most states, should be instructed to return a verdict of not guilty,

[7] Woodin v. People, 1 Parker, Cr. R. (N. Y.) 464; Lefler v. State, 122 Ind. 206, 23 N. E. 154; Bill v. People, 14 Ill. 432; Muely v. State, 31 Tex. Cr. App. 155, 18 S. W. 411, and 19 S. W. 915; Burtles v. State, 4 Md. 273; Newcomb v. State, 37 Miss. 383; Jim v. State, 4 Humph. (Tenn.) 289; McGuffie v. State, 17 Ga. 497; Noland v. State, 19 Ohio, 131; State v. Papa, 32 R. I. 453, 80 Atl. 12. In some of the states the court may express an opinion on the weight and effect of the evidence, if the jury are told that they are not bound by the opinion. White v. Territory, 1 Wash. St. 279, 24 Pac. 447; State v. Smith, 12 Rich. (S. C.) 430; McClain v. Com., 110 Pa. 263, 1 Atl. 45; People v. Rathbun, 21 Wend. (N. Y.) 509; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; State v. Duffy, 57 Conn. 525, 18 Atl. 791; U. S. v. Foster (D. C.) 183 Fed. 626. But in most states the rule is as stated in the text; and in some states it is expressly so declared by statute.

[8] State v. Presley, 35 N. C. 494; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; Com. v. Bosworth, 6 Gray (Mass.) 479; Hronek v. People, 134 Ill. 139, 24 N. E. 861, 8 L. R. A. 837, 23 Am. St. Rep. 652; Lowe v. State, 88 Ala. 8, 7 South. 97; People v. O'Brien, 96 Cal. 171, 31 Pac. 45. But an instruction that the jury may consider the interest of a witness, etc., is proper where no opinion as to his credibility is expressed. Johnson v. State, 34 Neb. 257, 51 N. W. 835; State v. Turner, 110 Mo. 196, 19 S. W. 645; ante, p. 546.

[9] State v. Dawkins, 32 S. C. 17, 10 S. E. 772.

[10] Com. v. McMahon, 145 Pa. 413, 22 Atl. 971; Newton v. State (Miss.) 12 South. 560; Fowler v. State, 100 Ala. 96, 14 South. 860; Milligan v. State (Tex. Cr. App.) 22 S. W. 414; State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; Scott v. People, 141 Ill. 195, 30 N. E. 329.

[11] Hawkins v. State, 136 Ind. 630, 36 N. E. 419; People v. Phillips, 70 Cal. 61, 11 Pac. 493.

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but where there is no variance between the allegations and the proof, and the evidence, though weak or defective, will support a verdict of guilty, such an instruction is properly refused.[12] The court can never direct a verdict of guilty when the facts are disputed, but some courts hold that, if all the facts showing guilt are admitted, there is nothing for the jury to pass upon, and the direction of a verdict of guilty is proper.[13]

Character of the Charge—Whether Erroneous

We have shown when an instruction is erroneous as invading the province of the jury; but there are other questions as to the character of the charge which must be briefly considered. Of course, an instruction which incorrectly states the law is erroneous, and, unless it is clear that no prejudice could have resulted, will cause a conviction to be set aside. An instruction, though correct in so far as its separate statements of law are concerned, may be erroneous for other reasons. It is erroneous, for instance, if it is confused and misleading;[14] or if it consists of abstract propositions of law, though the fact that an instruction is abstract will not necessarily cause a reversal on conviction,[15] or if it is not supported by the pleadings and by the evidence,[16] or

[12] State v. Cady, 82 Me. 426, 19 Atl. 908; State v. Jones, 18 Or. 256, 22 Pac. 840; Pellum v. State, 89 Ala. 28, 8 South. 83. Contra, where the jury are the judges of the law as well as the facts. Goldman v. State, 75 Md. 621, 23 Atl. 1097.

[13] People v. Richmond, 59 Mich. 570, 26 N. W. 770; People v. Ackerman, 80 Mich. 588, 45 N. W. 367; People v. Neumann, 85 Mich. 98, 48 N. W. 290. Contra, State v. Winchester, 113 N. C. 641, 18 S. E. 657; State v. Jackson, 42 Kan. 384, 22 Pac. 427.

[14] Dryman v. State, 102 Ala. 130, 15 South. 433; Fountain v. State, 98 Ala. 40, 13 South. 492; State v. Pettit, 119 Mo. 410, 24 S. W. 1014; State v. Hawley, 63 Conn. 47, 27 Atl. 417; State v. Gile, 8 Wash. 12, 35 Pac. 417; Conrad v. State, 132 Ind. 254, 31 N. E. 805; People v. Harper, 83 Mich. 273, 47 N. W. 221.

[15] State v. Hall, 39 Me. 107; State v. Clair, 84 Me. 248, 24 Atl. 843; Long v. State, 12 Ga. 295; Bonner v. State, 97 Ala. 47, 12 South. 408; Brister v. State, 26 Ala. 107; State v. Houser, 28 Mo. 233; State v. King, 111 Mo. 576, 20 S. W. 299; Browning v. State, 30 Miss. 656. It is error to read abstract propositions of law from text-books or reports. State v. McDonnell, 32 Vt. 491.

[16] Coughlin v. People, 18 Ill. 266, 68 Am. Dec. 541; Doyle v. Peo-

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is argumentative,[17] or ignores some of the evidence, or singles out and gives undue prominence to particular parts of the evidence,[18] or refers to the details of other cases given in the books.[19]

Instructions which would ordinarily be improper may be justified by improper argument of counsel. Thus where, on indictment for murder, the defendant's counsel alluded in argument to a higher law which he claimed the Bible sustained, it was held not error for the court in his charge to justify the laws of the state on the subject of murder and manslaughter.[20]

Inadvertent mistakes which do not render an instruction misleading, or otherwise prejudice the defendant, will be disregarded.[21]

It is well settled that the charge of the court is to be considered and construed as a whole in determining whether a particular part of it, or a particular instruction, was erroneous.[22] An erroneous instruction may be cured by giving a

ple, 147 Ill. 394, 35 N. E. 372; People v. Hawes, 98 Cal. 648, 33 Pac. 791; Ratigan v. State, 33 Tex. Cr. R. 301, 26 S. W. 407; State v. Robinson, 39 Me. 150; State v. Collins, 30 N. C. 407; McCoy v. State, 15 Ga. 205; Jackson v. State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Corbett v. State, 31 Ala. 329; Daniels v. State, 24 Tex. 389; State v. Ross, 29 Mo. 32.

[17] Horn v. State, 102 Ala. 144, 15 South. 278; Miles v. State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140; State v. O'Grady, 65 Vt. 66, 25 Atl. 905; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Brassell v. State, 91 Ala. 45, 8 South. 679; State v. Almos, 122 Minn. 479, 142 N. W. 801.

[18] Cox v. State, 99 Ala. 162, 13 South. 556; Com. v. Hourigan, 89 Ky. 305, 12 S. W. 550; Scott v. People, 141 Ill. 195, 30 N. E. 329; State v. Cantlin, 118 Mo. 100, 23 S. W. 1091; People v. Hawes, 98 Cal. 648, 33 Pac. 791; State v. Almos, 122 Minn. 479, 142 N. W. 801.

[19] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

[20] State v. Workman, 39 S. C. 151, 17 S. E. 694.

[21] Daley v. State (Tex. Cr. App.) 24 S. W. 643; State v. Wilson, 9 Wash. 16, 36 Pac. 967; People v. Derringer, 142 N. Y. 629, 37 N. E. 565; People v. Hunt, 26 Cal. App. 514, 147 Pac. 476.

[22] Com. v. Zappe, 153 Pa. 498, 26 Atl. 16; People v. Jassino, 100 Mich. 536, 59 N. W. 230; State v. Reed, 117 Mo. 604, 23 S. W. 886; People v. Hawes, 98 Cal. 648, 33 Pac. 791; Champ v. State, 32 Tex. Cr. R. 87, 22 S. W. 678; State v. Miller, 111 Mo. 542, 20 S. W. 243; People v. Hunt, 26 Cal. App. 514, 147 Pac. 476.

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correct one, if it is clear that the jury could not have been misled;[23] but generally, if the erroneous instruction is not withdrawn, and both remain for the consideration of the jury, the error will not be cured.[24]

On What Points Necessary—Necessity of a Request

It is the duty of the court to charge the jury fully on the law of the case; but ordinarily, if he omits to instruct them on a particular point, counsel must call his attention to the omission, and request an instruction covering the point. If he remains silent, and fails to make the request, the defendant cannot afterwards complain of the omission.[25]

Granting or Refusing Requests

Any instruction requested by counsel should be given if it is proper, but it should be refused if it is bad within any of the rules above stated; as, for instance, where it is abstract, or argumentative, or confused and misleading, or not supported by the evidence.[26] It is improper to refuse any

[23] State v. Reed, supra; Thompson v. Com. (Ky.) 26 S. W. 1100; People v. Derringer, 142 N. Y. 629, 37 N. E. 565; Padfield v. People, 146 Ill. 660, 35 N. E. 469; Spies v. People, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898, 3 Am. St. Rep. 320; People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50.

[24] Plummer v. State, 135 Ind. 308, 34 N. E. 968; State v. Brumley, 53 Mo. App. 126; Mills v. U. S., 164 U. S. 644, 17 Sup. Ct. 210, 41 L. Ed. 584.

[25] People v. Raher, 92 Mich. 165, 52 N. W. 625, 31 Am. St. Rep. 575; Winn v. State, 82 Wis. 571, 52 N. W. 775; Dave v. State, 22 Ala. 23; Mead v. State, 53 N. J. Law, 601, 23 Atl. 264; State v. Marqueze, 45 La. Ann. 41, 12 South. 128; State v. O'Neal, 29 N. C. 251; State v. Jackson, 112 N. C. 851, 17 S. E. 149; People v. Fice, 97 Cal. 459, 32 Pac. 531; Burns v. Com., 3 Metc. (Ky.) 13; McMeen v. Com., 114 Pa. 300, 9 Atl. 878; People v. Marks, 72 Cal. 46, 13 Pac. 149; State v. Anderson, 26 S. C. 599, 2 S. E. 699; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330; State v. Hessenius, 165 Iowa, 415, 146 N. W. 58, L. R. A. 1915A, 1078. Where the court is required by statute to give certain instructions—e. g., that no inference of guilt should be drawn from the failure of defendant to testify—it has been held error to fail to give the instruction even though it was not requested. State v. Myers, 8 Wash. 177, 35 Pac. 580, 756. Contra, State v. Stevens, 67 Iowa, 557, 25 N. W. 777; People v. Flynn, 73 Cal. 511, 15 Pac. 102.

[26] Hill v. Com., 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744; Bostic v. State, 94 Ala. 45, 10 South. 602; Com. v. Cosseboom, 155 Mass.

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instruction which correctly states the law, and is applicable to the issues, and supported by the evidence.[27] If, for instance, an accomplice of the defendant has testified, the court should, on request of defendant, charge as to the effect of an accomplice's testimony, and the necessity for corroboration.[28] So, in a proper case, it is error to refuse an instruction as to the effect of circumstantial evidence;[29] though, if there is any direct evidence, such as the testimony of an eyewitness, or a confession of the accused, such an instruction is properly refused.[30]

If the requested instruction is proper it ought to be given as asked, without modification or change in the language,[31] but in the absence of statute the defendant cannot demand as a matter of right that the language of the request be followed, and a change in the language which does not prejudice him will not cause a reversal.[32] If the instruction is

298, 29 N. E. 463; McCoy v. State, 15 Ga. 205; Floyd v. State, 82 Ala. 16, 2 South. 683.

[27] Jones v. State, 30 Tex. App. 345, 17 S. W. 544; State v. Wilson, 2 Scam. (Ill.) 225; Davis v. State, 10 Ga. 101; Sparks v. State, 23 Tex. App. 447, 5 S. W. 135; People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50.

[28] Brown v. State (Tex. Cr. App.) 20 S. W. 924.

[29] Hyden v. State, 31 Tex. Cr. R. 401, 20 S. W. 764.

[30] Wilson v. State (Tex. Cr. App.) 21 S. W. 361; Jones v. State, 31 Tex. Cr. R. 177, 20 S. W. 354; Vaughan v. State, 57 Ark. 1, 20 S. W. 588.

[31] State v. Evans, 33 W. Va. 417, 10 S. E. 792; Cotton v. State, 31 Miss. 504; Stanton v. State, 13 Ark. 317. In Horn v. U. S., 182 Fed. 721, 105 C. C. A. 163, it was held that defendant was not entitled to rely for reversal on a plain mistake in the statement of facts in an instruction which arose from a misstatement of facts in the defendant's request to charge.

[32] Com. v. Mullen, 150 Mass. 394, 23 N. E. 51; Long v. State, 12 Ga. 293; Gardner v. State, 55 N. J. Law, 17, 26 Atl. 30; People v. Lemperle, 94 Cal. 45, 29 Pac. 709; Shultz v. State, 13 Tex. 401; Com. v. McManus, 143 Pa. 64, 21 Atl. 1018, and 22 Atl. 761, 14 L. R. A. 89; Boles v. State, 9 Smedes & M. (Miss.) 284; State v. Durr, 39 La. Ann. 751, 2 South. 546. It is provided by statute in some states that charges must be given in writing, and must be given or refused in the terms in which they are requested. Code Ala. 1907, § 5364. Under such statute it has been held that, while the court may explain to the jury the written charge, it cannot qualify or modify it, Callaway & Truit v. Gay, 143 Ala. 524, 39 South. 277; and that even

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misleading or otherwise erroneous the court may correct it, and then give it as modified.[33]

Most courts hold that, if the instruction requested is partly erroneous and partly good, the court need not correct it, or give that part which is good, but may refuse the whole.[34] Some courts, however, hold that the good part, or a similar instruction, should be given.[35]

If the instruction has already been substantially given, either in the general charge or in other special instructions, it may be refused, for the court is not bound to repeat.[36]

Ordinarily requests for instructions come too late if not made before the jury have retired to consider their verdict, and they may on this ground be refused;[37] though the court has the discretion to recall the jury for further instructions.[38]

Objections and Exceptions

When an erroneous instruction is given an objection should be made, and an exception saved, in order to have the error reviewed, for in some cases, in the absence of an

when the charge asked asserts a proposition which is legally incorrect, and which therefore the court should have refused to give, any qualification of it is error, Elland v. State, 52 Ala. 322. So, where the court gave the charge as requested, but added, "This is a fool charge, but I will give it to you, gentlemen of the jury, as the Supreme Court has said it was good law, but in my opinion it is misleading," it was held that the modification or criticism of the charge was reversible error. Barker v. State, 2 Ala. App. 92, 57 South. 88.

[33] Keithler v. State, 10 Smedes & M. (Miss.) 192; Baxter v. People, 3 Gilm. (Ill.) 368; Lambeth v. State, 23 Miss. 322; State v. Wilson, 2 Scam. (Ill.) 225; State v. Wilson, 8 Iowa, 407.

[34] People v. Hunt, 26 Cal. App. 514, 147 Pac. 476.

[35] Stanton v. State, 13 Ark. 317; Swallow v. State, 22 Ala. 20.

[36] Painter v. People, 147 Ill. 444, 35 N. E. 64; People v. Harris, 136 N. Y. 423, 33 N. E. 65; Hatcher v. State, 18 Ga. 460; Alexander v. Com. (Ky.) 20 S. W. 254; State v. Knight, 43 Me. 11; Trogdon v. State, 133 Ind. 1, 32 N. E. 725; Taylor v. Com., 90 Va. 109, 17 S. E. 812; State v. Howell, 26 Mont. 3, 66 Pac. 291; People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50.

[37] State v. Catlin, 3 Vt. 530, 23 Am. Dec. 230; Engeman v. State, 54 N. J. Law, 247, 23 Atl. 676.

[38] Post, pp. 556, 566.

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exception, the error will not be reviewed on appeal.[39] And ordinarily the specific objection should be pointed out. In many cases a general exception will be insufficient.[40]

DEMURRER TO EVIDENCE

177. In some states the defendant may demur to the evidence if, assuming it to be true, and admitting every legitimate inference that can be drawn from it, it is insufficient to authorize a conviction.

A demurrer to the evidence not only admits the truth of the evidence—that is, the existence of every fact of which there is any evidence at all—but it admits the existence of every fact which it legitimately tends to prove, and leaves it to the court to say whether, as a matter of law, a conviction is authorized. Such a course may be taken in some states if the prosecuting officer chooses to join in the demurrer,[41] but it is seldom taken. In most states the court may direct an acquittal if the evidence is clearly insufficient, and the better and safer course is to move for such a direction,[42] for if the demurrer to the evidence is overruled the case goes to the jury on the evidence of the state alone.[43] The court may, in the exercise of its discretion, refuse to entertain a demurrer to the evidence.[44]

[39] Fitzgerald v. State (Tex. Cr. App.) 23 S. W. 1107; Wheeless v. State, 92 Ga. 19, 18 S. E. 303; State v. Richards, 85 Me. 252, 27 Atl. 122; Noblin v. State, 100 Ala. 13, 14 South. 767; State v. Kennade, 121 Mo. 405, 26 S. W. 347; Wood v. State, 31 Fla. 221, 12 South. 539.

[40] Gardner v. State, 55 N. J. Law, 17, 26 Atl. 30; Thompson v. State, 32 Tex. Cr. R. 265, 22 S. W. 979; People v. Hart, 10 Utah, 204, 37 Pac. 330.

[41] Duncan v. State, 29 Fla. 439, 10 South. 815; Hutchison v. Com., 82 Pa. 472; Doss v. Com., 1 Grat. (Va.) 557; Com. v. Parr, 5 Watts & S. (Pa.) 345; Brister v. State, 26 Ala. 108; Bryan v. State, 26 Ala. 65; Young v. State (Tex. Cr. App.) 24 S. W. 287.

[42] Ante, p. 547.

[43] Hutchison v. Com., supra.

[44] Duncan v. State, supra. In some states it is held that a demurrer to evidence is not a proper proceeding. State v. Alderton, 50 W. Va. 101, 40 S. E. 350.

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CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY

178. In all criminal cases care must be taken to keep the jury free from improper influences. In cases of felony, particularly where the punishment may be death, the fact that there was an opportunity for improper influence will generally render a conviction bad, unless the absence of such influence affirmatively and clearly appears; therefore in these cases the jury must be kept together, and in charge of a sworn officer, until they have rendered their verdict, and must not be allowed to hold any communication with outsiders, unless the nature of the communication is known to the court or the officer.

179. Any misconduct on the part of the jury which may have been prejudicial to the defendant will be ground for setting a conviction aside.

180. The jury should be left free in their deliberations. Any coercion of the jury as a whole, or of an individual juror, will be ground for setting a conviction aside.

It is almost a universal rule that, in cases where the punishment may be death, the jury must, during an adjournment, and at other times when not in the actual presence of the court, and until they have rendered, or at least found, a verdict, be kept in the charge of a sworn officer of the court, and not be allowed to separate, except in cases of necessity, and then only when the separating juror is accompanied by an officer.[45] In many states the rule applies also to prosecutions for felonies not capital.[46] In cases of misdemeanor the

[45] Jumpertz v. People, 21 Ill. 375; Com. v. McCaul, 1 Va. Cas. 271; McLean v. State, 8 Mo. 153; Quinn v. State, 14 Ind. 589; State v. Godfrey, Brayton (Vt.) 170; post, p. 558.

[46] McLean v. State, 8 Mo. 153; Wiley v. State, 1 Swan (Tenn.) 256; Berry v. State, 10 Ga. 511; post, p. 559. Contra, McCreary v. Com., 29 Pa. 323; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559; Sutton v. People, 145 Ill. 279, 34 N. E. 420.

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court may always allow the jury to separate before they have retired to consider their verdict, but they should be cautioned not to converse with any one about the case.[47]

When the jury retire to the jury room to consider their verdict, they should in all cases be placed in charge of a sworn [48] officer, and should be kept together.[49] If any of them separate from their fellows from necessity, an officer should accompany them.

It has been held that, where the jury are required by law to be kept together, they cannot be allowed to separate, even with the defendant's consent, for the defendant ought not to be placed in the position of having either to consent, or perhaps to prejudice the jury by withholding his consent.[50] On this point, however, there are many cases to the contrary.[51]

[47] Rex v. Kinnear, 2 Barn. & Ald. 462; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559.

[48] The form of the oath differs in the various jurisdictions. It is, in substance, that the officer shall well and truly keep the jury in some convenient and private place (formerly without meat, drink, or fire); that he shall not permit any person to speak to them, nor speak to them himself, except to ask them if they have agreed on their verdict. An oath by the officer has been held essential. Brucker v. State, 16 Wis. 355; Philips v. Com., 19 Grat. (Va.) 485. But a departure from the statutory form of oath will not render the verdict bad. Hittner v. State, 19 Ind. 48. In some states it is held that, if the officer is a regularly sworn officer of the court, a special oath is not essential. See Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559; People v. Hughes, 29 Cal. 257; State v. Frier, 118 Mo. 648, 24 S. W. 220; State v. Crafton, 89 Iowa, 109, 56 N. W. 257; Atterberry v. State, 56 Ark. 515, 20 S. W. 411. But if he is not such an officer, but an unsworn person, the oath must be administered. McCann v. State, 9 Smedes & M. (Miss.) 465.

[49] State v. Populus, 12 La. Ann. 710; State v. Leunig, 42 Ind. 541; post, p. 559.

[50] Berry v. State, 10 Ga. 511; Wesley v. State, 11 Humph. (Tenn.) 502; Wiley v. State, 1 Swan (Tenn.) 256; Peiffer v. Com., 15 Pa. 468,

[51] Stephens v. People, 19 N. Y. 549 (two judges dissenting); Quinn v. State, 14 Ind. 589; State v. Mix, 15 Mo. 153; Smith v. Com., 14 Serg. & R. (Pa.) 70; State v. Frier, 118 Mo. 648, 24 S. W. 220; Henning v. State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756. In some states separation with consent of counsel for the state and for defendant is provided for by statute. See State v. Parker, 25 Wash. 405, 65 Pac. 776.

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The jury, after they have retired, or even before then, in cases of felony, should not be allowed to hold any communication with outsiders;[52] nor should the officer hold any communication with them, further than to ask them whether they have agreed to a verdict, or to attend to their necessities.[53]

After the jury have retired, the judge cannot go to their room and communicate with them, for, except in open court, he occupies the same relation as any other outsider.[54] He may recall them and communicate with them in open court,[55] and if they wish to communicate with him, to ask further instructions for instance, they may send him word by the officer, and they may then be recalled.[56] Such communications are a part of the proceedings, and the defendant should be personally present, though, if no further instructions are given, his absence will not be prejudicial, or render the proceeding invalid.[57]

The jury are generally kept in their room until they agree on a verdict, but in case of necessity they, or a part of them, may be taken out by an officer, and it has even been held that there is no impropriety in the officer's taking them out

53 Am. Dec. 594; State v. Parker, 25 Wash. 405, 65 Pac. 776; Woods v. State, 43 Miss. 364. It has been held that the defendant may consent to the jury's separating after they shall have agreed upon a verdict, and sealed it up. Reins v. People, 30 Ill. 256; Sanders v. State, 2 Iowa, 230; State v. Engle, 13 Ohio, 490; Friar v. State, 3 How. (Miss.) 422. This requirement should "receive a reasonable construction. There must be necessarily some separation, for the jurors do not all sleep in one bed, and in the dining room, where there are small tables, they cannot sit at the same table; but it is sufficient if they are segregated from mingling with the crowd." In the above case it was held that the verdict should not be disturbed because, on account of the heat, the jurors occupied five adjoining rooms at a hotel, and communicated with the bell boy in ordering water.

[52] Hoberg v. State, 3 Minn. 262 (Gil. 181); People v. Symonds, 22 Cal. 348; State v. Thorne, 39 Utah, 208, 117 Pac. 58; post, p. 560.

[53] Post, p. 560.

[54] Hoberg v. State, 3 Minn. 262 (Gil. 181); People v. Linzey, 79 Hun, 23, 29 N. Y. Supp. 560.

[55] Hall v. State, 8 Ind. 439.

[56] Com. v. Ricketson, 5 Metc. (Mass.) 412; Com. v. Bolger, 229 Pa. 597, 79 Atl. 113.

[57] Ante, p. 495; Wade v. State, 12 Ga. 25.

for recreation.[58] It seems that formerly, while deliberating on their verdict, they were kept without meat or drink,[59] but this is no longer required, and they may be given or may procure proper refreshments, providing they are obtained from a proper source.[60] It has been held that they may be given or may procure intoxicating liquor, if not in excess,[61] but, by the great weight of authority, this is improper, not only while they are deliberating on their verdict, but, at least in capital cases and other cases of felony, at any time during the trial.[62] Whether it will vitiate the verdict depends, as we shall see, upon the circumstances.

The jury must be given perfect freedom in their deliberations. Anything said to them by the court, or by the officer in charge, tending to force them to an agreement, will generally render the verdict invalid.[63]

The jury must reach an agreement properly. A gambling verdict—that is, a verdict arrived at by casting lots [64]—or a

[58] State v. Perry, 44 N. C. 330. And see King v. State, 91 Tenn. 617, 20 S. W. 169; State v. Clary, 136 La. 589, 67 South. 376, where it was held not error for the court to allow the jurors to be taken to a moving picture show. The fact that the jury are taken by the officer beyond the confines of the state will not vitiate the verdict on the ground that they were thus in legal effect dispersed, and no longer under the control of the officer, where there was in fact no dispersal, and the authority of the officer was not questioned. King v. State, supra.

[59] See U. S. v. Haskell, 4 Wash. 402, Fed. Cas. No. 15,321.

[60] People v. Douglass, 4 Cow. (N. Y.) 35, 15 Am. Dec. 332.

[61] State v. Madigan, 57 Minn. 425, 59 N. W. 490.

[62] Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; State v. Baldy, 17 Iowa, 39; People v. Douglass, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; State v. Bullard, 16 N. H. 139; post, p. 561.

[63] State v. Hill, 91 Mo. 423, 4 S. W. 121; Com. v. Poisson, 157 Mass. 510, 32 N. E. 906. Thus, it is error for the judge to tell the jury that, if they agree by a certain hour, they will be discharged; otherwise they will be held until they do agree. State v. Hill, supra. But see Pope v. State, 36 Miss. 121. Merely to urge agreement is not coercion. Dow v. State, 31 Tex. Cr. R. 278, 20 S. W. 583; State v. Palmer, 40 Kan. 474, 20 Pac. 270; Com. v. Kelley, 165 Mass. 175, 42 N. E. 573.

[64] A verdict reached by casting lots, or by each juror writing down the term of imprisonment he favors and then dividing the total number of years thus reached by 12, the number of jurors, is void, if

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verdict found on facts personally known by one of the jurors, and communicated to the others,[65] or a verdict to which one of the jurors has been coerced by the others to agree, etc., is illegal.[66]

Effect of Misconduct and Irregularities

Misconduct on the part of jurors in separating and departing from the officer's custody, or in drinking intoxicating liquors, or holding communications with outsiders when cautioned not to do so, or on the part of the officer in charge of the jury, or on the part of outsiders with respect to the jury, is not only a contempt of court which the court may summarily punish, but is also a misdemeanor, rendering the offender liable to a criminal prosecution. Misconduct and irregularities, however, in respect to the matters which we have been discussing, do not necessarily vitiate the verdict, and entitle the defendant, as of right, to a new trial. Greater strictness is observed in capital cases than in cases not capital, and in felonies than in misdemeanors, and where the misconduct or irregularity occurred after the jury retired to deliberate on their verdict, than where it occurred during the trial before retirement. There is such an irreconcilable conflict in the cases that nothing more can be done here than to refer to the cases. The student and practitioner must then follow up the matter by consulting the decisions of his own state. Because of the importance of the subject and the conflict of authority, it has been deemed advisable to collect a number of the cases from the various states.

Some of the courts have held that a verdict should be set aside in a capital case, if, at any time after the trial com-

there is a precedent agreement to abide by the result. Hunter v. State, 8 Tex. App. 75. Most courts hold that, even if there is no such agreement, the verdict will be set aside, as a verdict should always be the result of deliberation, and not in any way influenced by chance. Crabtree v. State, 3 Sneed (Tenn.) 302; Wood v. State, 13 Tex. App. 135, 44 Am. Rep. 701; Williams v. State, 15 Lea (Tenn.) 129, 54 Am. Rep. 404. But see Dooley v. State, 28 Ind. 239. And compare State v. Keehn, 85 Kan. 765, 118 Pac. 851.

[65] Richards v. State, 36 Neb. 17, 53 N. W. 1027; McWilliams v. State, 32 Tex. Cr. R. 269, 22 S. W. 970.

[66] See Fletcher v. State, 6 Humph. (Tenn.) 249.

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menced, though before the jury retired, any of them separated from their fellows, and were out of the officer's custody, so that they became accessible to improper outside influence, and that it will not do to say that the defendant was not in fact prejudiced.[67] And some courts have gone as far as this in cases of felony not capital.[68] On the other hand, many of the courts—indeed, most of them—hold that a verdict will not be set aside on this ground, if the defendant has not been prejudiced by the separation,[69] and the evidence does not warrant a reasonable inference of prejudice.[70] Prejudice will be presumed unless the contrary

[67] Com. v. McCaul, 1 Va. Cas. 271. "Although," it was said in this case, "there might be and probably was no tampering with any juryman in this case, yet in a free country, in deciding a particular cause, the decision is to be according to general principles as applied to that case; and more good will arise from preserving the sacred principle involved in this case than evil from granting a new trial, although in this individual instance a verdict has probably been given by twelve men in fact unbiased by the separation." 1 Va. Cas. 306. And see State v. Foster, 45 La. Ann. 1176, 14 South. 180; McLain v. State, 10 Yerg. (Tenn.) 241, 31 Am. Dec. 573; Maher v. State, 3 Minn. 444 (Gil. 329); McLean v. State, 8 Mo. 153. But see Rex v. Crippen, 103 L. T. Rep. 705.

[68] Com. v. McCaul, 1 Va. Cas. 271; State v. Strodemier, 41 Wash. 159, 83 Pac. 22, 111 Am. St. Rep. 1012.

[69] People v. Douglass, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; State v. O'Brien, 7 R. I. 336; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; State v. Belknap, 39 W. Va. 427, 19 S. E. 507; Cornwall v. State, 91 Ga. 277, 18 S. E. 154; State v. Dugan, 52 Kan. 23, 34 Pac. 409; State v. Miller, 18 N. C. 500; State v. Hester, 47 N. C. 83; State v. Tilghman, 33 N. C. 513; Jumpertz v. People, 21 Ill. 375; State v. Prescott, 7 N. H. 287; Roper v. Territory, 7 N. M. 255, 33 Pac. 1014; Keenan v. State, 8 Wis. 132; People v. Symonds, 22 Cal. 348; Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528; Stout v. State, 76 Md. 317, 25 Atl. 299; Wyatt v. State, 1 Blackf. (Ind.) 257; Creek v. State, 24 Ind. 151; Cornelius v. State, 12 Ark. 782; Coker v. State, 20 Ark. 53; State v. Barton, 19 Mo. 227; State v. Harlow, 21 Mo. 446; State v. Igo, 21 Mo. 459; Com. v. Manfredi, 162 Pa. 144, 29 Atl. 404; Gamble v. State, 44 Fla. 429, 33 South. 471, 60 L. R. A. 547, 103 Am. St. Rep. 150, 1 Ann. Cas. 285; State v. Schmidt, 137 Mo. 266, 38 S. W. 938.

[70] People v. Douglass, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; Rain v. State, 15 Ariz. 125, 137 Pac. 550; State v. Burns, 19 Wash. 52, 52 Pac. 316; Rex v. Crippen, 103 L. T. (Eng.) 705.

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clearly appears, or, in other words, the state has the burden of showing that there was no prejudice.[71]

There is also much conflict as to whether a new trial should be granted because the jurors held communications with outsiders,[72] or with the officer in charge of them.[73] And we meet with the same conflict of opinion as to when

[71] See the cases cited in the preceding note; and see Cartwright v. State, 71 Miss. 82, 14 South. 526; U. S. v. Swan, 7 N. M. 306, 34 Pac. 583; State v. Place, 5 Wash. 773, 32 Pac. 736; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760; People v. Thorne, 39 Utah, 208, 117 Pac. 58; State v. Tilden, 27 Idaho, 262, 147 Pac. 1056.

[72] That a new trial should be granted without regard to whether there was prejudice to the defendant, where the communication was after the jury had retired to consider their verdict, see Hoberg v. State, 3 Minn. 262 (Gil. 181). That a new trial will not be granted, even in such a case, where there was no prejudice, see King v. State, 91 Tenn. 617, 20 S. W. 169; State v. Fairlamb, 121 Mo. 137, 25 S. W. 895; Com. v. Roby, 12 Pick. (Mass.) 496; State v. Howell, 117 Mo. 307, 23 S. W. 263; State v. Tilghman, 33 N. C. 513; Cornwall v. State, 91 Ga. 277, 18 S. E. 154; People v. Symonds, 22 Cal. 348; State v. Allen, 89 Iowa, 49, 56 N. W. 261; Rowe v. State, 11 Humph. (Tenn.) 491; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; Pickens v. State, 31 Tex. Cr. R. 554, 21 S. W. 362; State v. Way, 38 S. C. 333, 17 S. E. 39; State v. Crane, 110 N. C. 530, 15 S. E. 231; Sedlock v. State, 141 Wis. 589, 124 N. W. 510. That prejudice will be presumed in such case, and a new trial granted, unless the state proves defendant was not prejudiced, see State v. Thorne, 39 Utah, 208, 117 Pac. 58; State v. McCormick, 20 Wash. 94, 54 Pac. 764; Boles v. State, 13 Smedes & M. (Miss.) 398. As to remarks and applause by bystanders not being ground for a new trial, see State v. Jackson, 112 N. C. 851, 17 S. E. 149; State v. Dusenberry, 112 Mo. 277, 20 S. W. 461; Burns v. State, 89 Ga. 527, 15 S. E. 748. But it has been held that the fact that, after the case was submitted to the jury, some of the jurors were allowed to stand on the courthouse porch, where they could hear citizens discussing the merits of the case, and insisting on the defendant's guilt, is ground for a new trial. Vaughan v. State, 57 Ark. 1, 20 S. W. 588.

[73] That improper communications between the officer and the jury after the jury have retired will not vitiate the verdict if the defendant was not prejudiced, see State v. Thompson, 87 Iowa, 670, 54 N. W. 1077; Reins v. People, 30 Ill. 256; State v. Tilghman, 33 N. C. 513; Pope v. State, 36 Miss. 121. It is otherwise if the defendant was prejudiced. State v. Langford, 45 La. Ann. 1177, 14 South. 181, 40 Am. St. Rep. 277; Brown v. State, 69 Miss. 398, 10 South. 579.

the drinking of intoxicating liquors is ground for a new trial.[74]

Any misconduct on the part of the jury which was prejudicial to the defendant will entitle him to a new trial.[75] As to this there can be no conflict of opinion.

[74] That the use of intoxicating liquors after the jury have retired to consider their verdict will vitiate the verdict, without regard to whether the defendant was prejudiced, see Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; People v. Douglass, 4 Cow. (N. Y.) 35, 15 Am. Dec. 332; State v. Baldy, 17 Iowa, 39; State v. Bruce, 48 Iowa, 530, 30 Am. Rep. 403; State v. Bullard, 16 N. H. 139; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760. But that the use of intoxicating liquors before the jury have retired will not vitiate the verdict if there was no prejudice, see State v. Bruce, 48 Iowa, 530, 30 Am. Rep. 403; State v. Madigan, 57 Minn. 425, 59 N. W. 490; State v. Reed, 3 Idaho, 754, 35 Pac. 706; Davis v. People, 19 Ill. 74; State v. Upton, 20 Mo. 397; Stone v. State, 4 Humph. (Tenn.) 27; Thompson v. Com., 8 Grat. (Va.) 637; Rowe v. State, 11 Humph. (Tenn.) 491; Pope v. State, 36 Miss. 121; Brown v. State, 137 Ind. 240, 36 N. E. 1108, 45 Am. St. Rep. 180; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; Com. v. Cleary, 148 Pa. St. 26, 23 Atl. 1110. But see, contra, People v. Douglass, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332. And that the use of intoxicating liquors even after the jury have retired will not vitiate the verdict, if there was no prejudice, see King v. State, 91 Tenn. 617, 20 S. W. 169; Rowe v. State, 11 Humph. (Tenn.) 491; State v. Sparrow, 7 N. C. 487; State v. Tilghman, 33 N. C. 513; People v. Sansome, 98 Cal. 235, 33 Pac. 202. If there was prejudice, a new trial should be granted in all cases. Brown v. State, 137 Ind. 240, 36 N. E. 1108, 45 Am. St. Rep. 180.

[75] People v. Mitchell, 100 Cal. 328, 34 Pac. 698. As to reading of newspapers, or possession of them, by the jury, see People v. Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102; State v. Dugan, 52 Kan. 23, 34 Pac. 409; Williams v. State, 33 Tex. Cr. R. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21; Cartwright v. State, 71 Miss. 82, 14 South. 526; State v. Wilson, 121 Mo. 434, 26 S. W. 357; State v. McCormick, 20 Wash. 94, 54 Pac. 764; State v. Williams, 96 Minn. 351, 105 N. W. 265; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; Ysaguirre v. State, 42 Tex. Cr. R. 253, 58 S. W. 1005. Statement by juror to his fellows of facts within his personal knowledge. Richards v. State, 36 Neb. 17, 53 N. W. 1027; McWilliams v. State, 32 Tex. Cr. R. 269, 22 S. W. 970; Mann v. State, 47 Tex. Cr. R. 250, 83 S. W. 195. And see ante, pp. 554, 560. Conduct of prosecutor in accompanying a juror home and taking dinner with him is ground for a new trial. Mann v. State, 47 Tex. Cr. R. 250, 83 S. W. 195. In Woolley v. State, 50 Tex. Cr. R. 214, 96 S. W. 27, it was held that comments by jurors during their deliberations on the failure of

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THE VERDICT

181. The verdict is the formal decision by the jury that the defendant is guilty or not guilty.
   (a) It must be unanimous.
   (b) It must be formally delivered by the jury and accepted by the judge in open court.
   (c) It may be received on Sunday.
   (d) It need not be in writing unless it is so required by statute.
   (e) It must be certain, and find everything that is necessary to support the judgment to be rendered. If it can be understood, informality or surplusage will not vitiate it.

182. Before the verdict is accepted by the court the jury may retract or change it, and if it is irregular they may be sent back to correct it. After it has been finally accepted, it cannot be retracted or changed in matter of substance, but it may, with the jury's consent, be amended in matters of form.

183. The court cannot, without the jury's consent, amend the verdict in matter of substance, nor can it do so with their consent after the verdict has been finally accepted. It may amend purely formal defects with, and in some states without, their consent.

184. A verdict is either,
   (a) General; that is, a finding of guilty or not guilty on the whole charge, and both on the law and the facts.
   (b) Special; that is, where the jury find the facts only, and leave the law to be applied by the court.
   (c) Partial; that is, where the jury find the defendant guilty of part of the charge only.

185. A verdict, after its final acceptance, cannot be impeached by the testimony or affidavits of a juror.

the defendant to testify are ground for a new trial. See, also, Thorpe v. State, 40 Tex. Cr. R. 346, 50 S. W. 383.

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The manner of arriving at the verdict having been considered, we come now to consider its rendition, and its sufficiency. The verdict is the unanimous and formal decision by the jury that the defendant is guilty or not guilty. It must be unanimous. When the jury have come to a unanimous determination with respect to their verdict, they return into court to deliver it, and the following formalities are generally observed: The clerk calls over their names, and asks them whether they have agreed on their verdict, to which, if they have, they reply in the affirmative. He then demands who shall say for them, to which they answer, their foreman. The clerk then tells the defendant to stand up, and says to the jury, "Look upon the prisoner, you that are sworn; how say you, is he guilty of the felony (or other crime) whereof he stands indicted, or not guilty?" The foreman answers "Guilty" or "Not Guilty." The clerk then records the verdict, and then says to the jury, "Hearken to your verdict as the court hath recorded it; you say that A. is guilty (or not guilty) of the felony (or other crime) whereof he stands indicted, and so say you all"; and the jury assent.[76] This is substantially the form of proceeding in all courts, though it will vary in unimportant details in the practice of the various states.[77] Failure to observe these formalities in unimportant details will not vitiate the verdict,[78] but departures in a material matter may do so. By the weight of authority, it is essential that the verdict shall be delivered in open court. If it is deliver-

[76] 1 Chit. Cr. Law, 635; 1 Bish. Cr. Proc. § 1001; Com. v. Roby, 12 Pick. (Mass.) 496. In Com. v. Gibson, 2 Va. Cas. 70, a verdict was brought in by the jury, but before the discharge of the jurors it was amended as to form, and then, one of the jurors having retired, unnoticed, the other eleven assented to the amended verdict. It was held that the amended verdict was void, since only eleven jurors assented to it.

[77] See Com. v. Tobin, 125 Mass. 203, 28 Am. Rep. 220; Rogers v. Com. (Va.) 19 S. E. 162; Norton v. State, 106 Ind. 163, 6 N. E. 126; Com. v. Gibson, 2 Va. Cas. 70; Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493; State v. Pankey, 104 N. C. 840, 10 S. E. 315.

[78] See 1 Bish. Cr. Proc. § 1001, and note; Com. v. Gibson, 2 Va. Cas. 70; Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493; Hall v. State, 3 Ga. 18; State v. Burge, 7 Iowa, 255.

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ed to the judge out of court, or in the court room when the court is not in session, it is void.[79] It must, of course, be delivered before expiration of the term of court.[80] As we have seen, the defendant must be present, unless he can and does waive his right to be present.[81]

The delivery and acceptance of a verdict are regarded as ministerial, and not judicial, acts, and a verdict, therefore, is not invalid because it was received on Sunday.[82]

In some states, by statute, the verdict is required to be delivered in writing,[83] but in the absence of a statute it is delivered orally,[84] and it has even been held that unless writing is required by statute it is irregular.[85]

In some but not all states the jury are allowed, in cases not capital, to seal up their verdict and separate, where they agree upon a verdict after the court has adjourned, and bring the sealed verdict into court when it reassembles.[86]

[79] State v. Mills, 19 Ark. 476; Waller v. State, 40 Ala. 325; Jackson v. State, 102 Ala. 76, 15 South. 351; Nomaque v. People, Breese (Ill.) 145, 12 Am. Dec. 157. That it may be received during an adjournment in some states, see Barrett v. State, 1 Wis. 175; In re Green, 16 Ill. 234; McIntyre v. People, 38 Ill. 514; Davis v. State, 14 Ind. 358; Longfellow v. State, 10 Neb. 105, 4 N. W. 420.

[80] Morgan v. State, 12 Ind. 448.

[81] Ante, p. 492.

[82] Hoghtaling v. Osborn, 15 Johns. (N. Y.) 119; Reid v. State, 53 Ala. 402, 25 Am. Rep. 627; True v. Plumley, 36 Me. 466; State v. Ricketts, 74 N. C. 187; State v. Wilson, 121 Mo. 434, 26 S. W. 357; McCorkle v. State, 14 Ind. 39; Meece v. Com., 78 Ky. 586; Powers v. State, 23 Tex. App. 42, 5 S. W. 153; Bales v. Com. (Ky.) 11 S. W. 470; State v. Canty, 41 La. Ann. 587, 6 South. 838. And see Blaney v. State, 74 Md. 153, 21 Atl. 547. Or on a legal holiday. State v. Atkinson, 104 La. 570, 29 South. 279. But judgment cannot be rendered thereon on Sunday. Hoghtaling v. Osborn, supra; Shearman v. State, 1 Tex. App. 215, 28 Am. Rep. 402; Baxter v. People, 3 Gilman (Ill.) 384.

[83] It has been held that if a verdict required by statute to be in writing is, by mistake, and without objection, delivered orally, and duly recorded and assented to by the jury, it is valid. Hardy v. State, 19 Ohio St. 579.

[84] Lord v. State, 16 N. H. 325, 41 Am. Dec. 729.

[85] Lord v. State, supra. But the written verdict may be disregarded, and an oral verdict delivered. Id.

[86] See Stewart v. People, 23 Mich. 63, 9 Am. Rep. 78; Com. v. Durfee, 100 Mass. 146; Com. v. Dorus, 108 Mass. 488; State v. Weber, 22

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In such a case they must affirm the verdict orally, and it is the verdict thus orally given that is the only true verdict.[87]

If the jury state that they cannot agree the court cannot do anything to coerce them into an agreement, but it may send them back to the jury room for further deliberations.[88] Or, if the court is satisfied that they will not be able to agree, it may discharge them, and in most states, as we have seen, their discharge will not prevent the state from again trying the defendant before another jury.[89]

Correction or Retraction by Jury

The control of the jury over their verdict does not cease as soon as it is delivered to the clerk, but only after it has been finally assented to by them, and accepted and recorded by the court.[90] At any time before then, they may correct it, or they may change their minds and withdraw their consent.[91] And they may, in the discretion of the court, be allowed to hear further evidence on points as to which they are in doubt.[92] After the verdict has been not only recorded, but finally accepted by the court, however, the jury have

Mo. 321; State v. Fenlason, 78 Me. 495, 7 Atl. 385; Com. v. Slattery, 147 Mass. 423, 18 N. E. 399.

[87] Com. v. Tobin, 125 Mass. 203, 28 Am. Rep. 220.

[88] Ante, p. 552.

[89] Ante, p. 444.

[90] Burk v. Com., 5 J. J. Marsh. (Ky.) 675; Com. v. George, 12 Pa. Super. Ct. 1.

[91] 1 Bish. Cr. Proc. § 1003; Sledd v. Com., 19 Grat. (Va.) 813; Burk v. Com., 5 J. J. Marsh. (Ky.) 675; State v. Austin, 6 Wis. 205; Rothbauer v. State, 22 Wis. 468; Ford v. State, 12 Md. 514; State v. Harden, 1 Bailey (S. C.) 3; Burton v. Com., 109 Va. 800, 63 S. E. 464. Thus, where they say "Not guilty," meaning to say "Guilty," they may correct the verdict, though the prisoner has been discharged, and has started to leave. Reg. v. Vodden, 6 Cox, Cr. Cas. 226. It is the safer practice to send the jury to their room, when their verdict is to be amended in substance, that they may there, in private, amend the verdict as they think proper. Burton v. Com., supra. But, if the defendant is not prejudiced, it may be amended in open court under the direction of the judge; but in such case the jury must assent to the verdict as amended. Com. v. Gibson, 2 Va. Cas. 70; Burton v. Com., 109 Va. 800, 63 S. E. 464.

[92] Burk v. Com., supra.

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no longer any control over it, in so far as its substance is concerned;[93] and they cannot retract it, or say that they did not in fact consent.[94]

The court is not bound to receive a verdict which is erroneous as a matter of law in its finding, or is defective in matter of form, unless the jury insist upon it.[95] When the verdict is delivered, and is found to be defective in form, the court may require the jury to correct or amend it;[96] and where it is erroneous as a matter of law, as where it fixes a greater or less term of punishment than the law allows, he may instruct the jury, and send them back to reconsider it.[97] As we have seen, however, he cannot coerce them into finding a verdict.[98]

Some courts hold that, though the verdict has been accepted and recorded, and even though the jury have been discharged, yet, if they have not left the court room and separated, they may be recalled, for the purpose of correcting or amending the verdict in matters of form only.[99]

[93] State v. Weeks, 23 Or. 3, 34 Pac. 1095; People v. Lee Yune Chong, 94 Cal. 379, 29 Pac. 776; State v. Dawkins, 32 S. C. 17, 10 S. E. 772. In the case last cited the jury returned a verdict of guilty and were discharged. They were reimpaneled the next day, and instructed that they might put in their verdict a recommendation to mercy. This they did and returned the verdict. It was held that the amended verdict was a nullity.

[94] 2 Hale, P. C. 299; Rex v. Wooller, 2 Starkie, 111; Mercer v. State, 17 Ga. 146. As to impeachment of verdict by jurors, see post, p. 574.

[95] In which case, of course, he may set it aside. But he cannot refuse to receive a verdict in which defendant is found guilty of a crime covered by the indictment, on the ground that his charge to the jury did not include that crime. Register v. State, 10 Ga. App. 623, 74 S. E. 429.

[96] Appeal of Nicely, 130 Pa. 261, 18 Atl. 737; Robinson v. State, 23 Tex. App. 315, 4 S. W. 904; Cook v. State, 26 Ga. 593.

[97] Mangham v. State, 87 Ga. 549, 13 S. E. 558; State v. Harris, 39 La. Ann. 1105, 3 South. 344; Nemo v. Com., 2 Grat. (Va.) 558; People v. Marquis, 15 Cal. 38; People v. Bonney, 19 Cal. 426; McGregg v. State, 4 Blackf. (Ind.) 101.

[98] Ante, p. 557.

[99] Reg. v. Vodden, 6 Cox, Cr. Cas. 226; Brister v. State, 26 Ala. 107; Com. v. Breyessee, 160 Pa. 451, 28 Atl. 824, 40 Am. St. Rep. 729. But see Ellis v. State, 27 Tex. App. 190, 11 S. W. 111; People v. Lee Yune Chong, supra.

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They cannot be so recalled, however, after they have separated.[1]

Polling the Jury

In order to make sure, before it is too late, that all of the jurors are in fact agreed on the verdict, either party is allowed, in most states as of right, to have the jury polled before the verdict is recorded; that is, to have each individual juror called by name, and asked whether the verdict as delivered by the foreman is his verdict.[2] If, on being asked the question, a juror dissents, then there is no verdict.[3] In a few states this is not allowed as of right.[4] A request to poll the jury comes too late after a verdict has been announced, recorded and affirmatively responded to by the entire jury.[5]

Amendment by Court

The court cannot at any time amend or change the verdict in any matter of substance without the jury's consent and direction;[6] and, as we have seen, it cannot do so with their consent after the verdict has been finally accepted and recorded.[7] It has been held, however, that it may at any time amend as to matters of form only.[8] If a verdict is oth-

[1] People v. Lee Yune Chong, 94 Cal. 379, 29 Pac. 776; Sargent v. State, 11 Ohio, 472; Ellis v. State, 27 Tex. App. 190, 11 S. W. 111; Mills v. Com., 7 Leigh (Va.) 751; Stuart v. Com., 28 Grat. (Va.) 950.

[2] 2 Hale, P. C. 299; Biscoe v. State, 68 Md. 294, 12 Atl. 25; Brister v. State, 26 Ala. 107; Nomaque v. People, Breese (Ill.) 145, 12 Am. Dec. 157; State v. John, 30 N. C. 330, 49 Am. Dec. 396; State v. Austin, 6 Wis. 205; Com. v. Schmous, 162 Pa. 326, 29 Atl. 644; Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493; Tilton v. State, 52 Ga. 478; McCullough v. State, 10 Ga. App. 403, 73 S. E. 546.

[3] State v. Austin, 6 Wis. 205; Burk v. Com., 5 J. J. Marsh. (Ky.) 675; State v. Davis, 31 W. Va. 390, 7 S. E. 24; State v. Harden, 1 Bailey (S. C.) 3. But the fact that one of them says he agreed reluctantly does not vitiate. Parker v. State, 81 Ga. 332, 6 S. E. 600. That on one juror expressing disagreement, the jury may be sent back to reconsider, see State v. Davis, 31 W. Va. 390, 7 S. E. 24.

[4] State v. Wise, 7 Rich. (S. C.) 412; Com. v. Roby, 12 Pick. (Mass.) 496; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

[5] Com. v. Schmous, 162 Pa. 326, 29 Atl. 644.

[6] Guenther v. People, 24 N. Y. 100; State v. McBride, 19 Mo. 239.

[7] Ante, p. 565.

[8] 2 Hawk. P. C. c. 47, § 9; Bledsoe v. Com. (Ky.) 11 S. W. 84; Martin v. State, 25 Ga. 494; Com. v. Lang, 10 Gray (Mass.) 11.

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erwise good, an improper amendment by the court may be rejected as surplusage.[9]

Sufficiency of Verdict—In General

The verdict must be sufficiently certain to clearly show what the jury intend, or it will be fatally defective, unless, as we have seen it may be, it is corrected by the jury.[10] It must also be responsive to the charge, and consistent, and find everything that is necessary to enable the court to render judgment.[11] If the jury acquit, nothing more is necessary than the words "Not guilty." If they convict of the whole charge the words, "Guilty as charged in the indictment," "Guilty as charged," or even "Guilty," in some cases, will be sufficient.[12]

[9] Guenther v. People, 24 N. Y. 100; post, p. 569.

[10] State v. Coon, 18 Minn. 518 (Gil. 464); People v. Piper, 50 Mich. 390, 15 N. W. 523; Guest v. State, 24 Tex. App. 530, 7 S. W. 242. A verdict, in a case where two defendants are jointly prosecuted, that reads, "We, the jury, find the defendant guilty as charged," is void for uncertainty. State v. Weeks, 23 Or. 3, 34 Pac. 1095. So is a verdict which reads, "We * * * do say that ——— ——— is guilty of manslaughter." Williams v. State, 6 Neb. 334. So a verdict, "Guilty as accessory," since it is uncertain whether an accessory before or after the fact is meant. State v. Green, 119 N. C. 899, 26 S. E. 112. So a verdict which does not show on which of several counts the defendant is found guilty. Day v. People, 76 Ill. 380. Or to which of several defendants the verdict applied. People v. Sepulveda, 59 Cal. 342. So of a verdict of guilty of murder, with an addition that the jury "beg the mercy of the court." Avant v. State, 88 Miss. 226, 40 South. 483, 117 Am. St. Rep. 737. See, also, Smith v. State, 75 Miss. 542, 23 South. 260.

[11] State v. Benjamin (La. Ann.) 14 South. 71; Reg. v. Gray, 17 Cox, Cr. Cas. 299; Westbrook v. State, 52 Miss. 777; Long v. State, 34 Tex. 566; State v. Harmon, 106 Mo. 635, 18 S. W. 128; Munson v. State, 21 Tex. App. 329, 17 S. W. 251. A verdict finding two of several defendants guilty of a riot is void, for two cannot make a riot. Rex v. Heaps, 2 Salk. 593. But a verdict finding the defendant "guilty of manslaughter, not a felony," was held valid, though inconsistent, since manslaughter is a felony, since the words "not a felony" could be rejected as surplusage. People v. Holmes, 118 Cal. 444, 50 Pac. 675.

[12] State v. Lee, 80 Iowa, 75, 45 N. W. 545, 20 Am. St. Rep. 401; Brown v. State, 111 Ind. 441, 12 N. E. 514; Hughes v. State, 65 Ind. 39; State v. Berning, 91 Mo. 82, 3 S. W. 588; Bond v. People, 39 Ill. 26; Hronek v. People, 134 Ill. 139, 24 N. E. 861, 8 L. R. A. 837, 23

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A verdict is not bad for informality or clerical errors in the language of it, if it is such that it can be clearly seen what is intended. "It is to have a reasonable intendment, and is to receive a reasonable construction, and must not be avoided except from necessity." [13]

And a verdict which is otherwise good will not be vitiated by the insertion of matter that may be rejected as surplusage.[14] Thus a verdict will not be vitiated because it was improperly added to or amended by the court, since the amendment may be rejected.[15]

Am. St. Rep. 652; People v. Perdue, 49 Cal. 425; People v. Whitely, 64 Cal. 211, 27 Pac. 1104; People v. West, 73 Cal. 345, 14 Pac. 848; State v. Jones, 69 N. C. 364; Jones v. Com., 31 Grat. (Va.) 830; Blount v. State, 49 Ala. 381; Curry v. State, 7 Tex. App. 91.

[13] Polson v. State, 137 Ind. 519, 35 N. E. 907; Cockerell v. State, 32 Tex. Cr. R. 585, 25 S. W. 421; Lewallen v. State (Tex. Cr. App.) 24 S. W. 907; Freel v. State, 21 Ark. 212; Nabors v. State, 6 Ala. 200; Guenther v. People, 24 N. Y. 100; Page v. Com., 9 Leigh (Va.) 683; Gipson v. State, 38 Miss. 295; Kellum v. State, 64 Miss. 226, 1 South. 174; Partain v. State, 22 Tex. App. 100, 2 S. W. 854; State v. Wilson, 40 La. Ann. 751, 5 South. 52, 1 L. R. A. 795; Shelton v. State, 27 Tex. App. 443, 11 S. W. 457, 11 Am. St. Rep. 200. On a trial of assault with intent to murder the jury returned a verdict finding the accused "guilty with assault by sutinge with intent to murder," and it was held sufficient to reasonably convey the idea that they intended to find him guilty of assault by "shooting" with intent to murder. State v. Wilson, supra. See, also, Petty v. State, 59 Tex. Cr. R. 586, 129 S. W. 615. In Williams v. Com., 140 Ky. 34, 130 S. W. 807, the verdict—a written one—read: "We, the jury, do agree and find the defendant $150.00 and six months in jail and work." The verdict was upheld, though there was no express finding of guilty.

[14] Gipson v. State, 38 Miss. 295; State v. Douglass, 1 G. Greene (Iowa) 550; People v. Boggs, 20 Cal. 433; Harvey v. Com., 23 Grat. (Va.) 941; State v. Hutchinson, 7 Nev. 53; Stephens v. State, 51 Ga. 236; McEntee v. State, 24 Wis. 43; Cheek v. Com., 87 Ky. 42, 7 S. W. 403; post, pp. 571, 573. In Burden v. State (Miss.) 45 South. 705, the verdict found the defendant guilty of assault and battery with intent to commit manslaughter. It was held that the words, "with intent to commit manslaughter," should be rejected as surplusage, and defendant sentenced for assault and battery. Where two were jointly indicted, but one was separately tried, a verdict finding both guilty is void as to the one not tried, but good as to the one tried. Ogee v. State, 190 Ala. 19, 67 South. 411.

[15] Guenther v. People, 24 N. Y. 100; ante, p. 567.

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Same—Finding Degree of Crime

In some states it is provided by statute that, whenever a crime is distinguished into degrees, the jury, if they convict, must find the degree of which the defendant is guilty. Under such a statute a verdict failing to specify the degree of the crime of which the jury convict is void.[16]

Same—As to Punishment

Where it is for the court to fix the punishment, the verdict should not do so, but, if it does, this part of the verdict may be rejected as surplusage.[17] Where the jury are required to fix the punishment, they must do so in their verdict, and must do so with certainty, or the verdict will be bad.[18] If they fix a greater punishment than the law allows, the verdict, if not corrected, is void, and the defect cannot be cured by remitting the excess.[19] Some courts hold that

[16] Johnson v. State, 30 Tex. App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930; People v. Bannister, 4 Cal. Unrep. Cas. 333, 34 Pac. 710; In re Black, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331; Allen v. State, 85 Wis. 22, 54 N. W. 999.

[17] Harvey v. Com., 23 Grat. (Va.) 941; Henderson v. People, 165 Ill. 607, 46 N. E. 711. And see State v. Hutchinson, 7 Nev. 53.

[18] Com. v. Scott, 5 Grat. (Va.) 697; Weatherford v. State, 43 Ala. 319; Hammett v. State, 52 Ga. 122; Wynn v. State, 1 Blackf. (Ind.) 28; Mills v. Com., 7 Leigh (Va.) 751; State v. Rohfrischt, 12 La. Ann. 382; People v. Littlefield, 5 Cal. 355; Padfield v. People, 146 Ill. 660, 35 N. E. 469; Roberts v. State, 33 Tex. Cr. R. 83, 24 S. W. 895; Eldridge v. Com., 87 Ky. 365, 8 S. W. 892.

[19] Allen v. Com., 2 Leigh (Va.) 727; Jones v. Com., 20 Grat. (Va.) 848; Robinson v. State, 23 Tex. App. 315, 4 S. W. 904; Nemo v. Com., 2 Grat. (Va.) 558. The verdict may be corrected in this as in other respects. Nemo v. Com., supra; ante, p. 565. As to rejecting excess as surplusage, see Veatch v. State, 60 Ind. 291; Cheek v. Com., 87 Ky. 42, 7 S. W. 403. In Washington v. State, 117 Ala. 30, 23 South. 697, the jury fixed the term of imprisonment and also, without right, prescribed the place of imprisonment. It was held that the unauthorized portion of the verdict might be rejected as surplusage. See, also, Henson v. State, 120 Ala. 316, 25 South. 23; Ex parte Robinson, 183 Ala. 30, 63 South. 177. In some states it is provided by statute that, if the jury assess a punishment, whether of imprisonment or fine, in excess of the limit prescribed by law for the offense of which they convict the defendant, the court shall disregard the excess and render judgment for the highest limit prescribed by law for the particular offense. See State v. Miles, 199 Mo. 530, 98 S. W. 25.

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a verdict fixing a less punishment than is authorized is void.[20] A recommendation to mercy is allowed in some states.[21] In others it is improper, but it will not vitiate, for it may be rejected as surplusage.[22]

General Verdict

A general verdict is simply a finding of not guilty or guilty on the whole charge, and both upon the law and the facts; as distinguished from a special verdict, which, as we shall see, is a finding on the facts only, leaving the court to apply the law to the facts found. The jury is always at liberty to find such a verdict.[23]

A general verdict of guilty is a conviction of the highest offense which is properly charged in the indictment.[24]

Where the indictment contains several counts, a general verdict of guilty or not guilty is a conviction or acquittal on every count that is good. And if one or more counts is bad a general verdict of guilty will be sustained as to those counts that are good.[25] This principle has also been applied where there was a general verdict of guilty on an indictment containing several counts, one of which was not sustained by any evidence.[26]

Special Verdict

A special verdict is where the facts of the case alone are found by the jury, and the legal inference to be derived

[20] Jones v. Com., supra; contra, Hoskins v. State, 27 Ind. 470.

[21] See Valentine v. State, 77 Ga. 470; Hannum v. State, 90 Tenn. 647, 18 S. W. 269.

[22] Stephens v. State, 51 Ga. 236.

[23] 4 Bl. Comm. 361; Co. Litt. 228; Reg. v. Allday, 8 Car. & P. 136; People v. Antonio, 27 Cal. 404.

[24] State v. Eno, 8 Minn. 220 (Gil. 190); Adams v. State, 52 Ga. 565; State v. McClung, 35 W. Va. 280, 13 S. E. 654. If the highest offense charged is not sustained by the proof, a general verdict of guilty must be set aside, though there was sufficient proof of an offense included in the charge. State v. Eno, 8 Minn. 220 (Gil. 190).

[25] Yarber v. State (Tex. Cr. App.) 24 S. W. 645; Baron v. People, 1 Parker, Cr. R. (N. Y.) 246; Guenther v. People, 24 N. Y. 100; People v. Curling, 1 Johns. (N. Y.) 320; State v. Lee, 114 N. C. 844, 19 S. E. 375; Brown v. State, 10 Ark. 607; Com. v. Howe, 13 Gray (Mass.) 26; State v. Jennings, 18 Mo. 435; State v. Montgomery, 28 Mo. 594; Parker v. Com., 8 B. Mon. (Ky.) 30; ante, p. 346.

[26] State v. Bugbee, 22 Vt. 32. And see State v. Long, 52 N. C. 24.

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from them is referred to the court. Though with us special verdicts are rare, the jury no doubt always have the right to find such a verdict unless prevented by statute, and the court must give the proper judgment on it.[27] A special verdict must state positively the facts themselves, and not merely the evidence adduced to prove them, and it must find all the facts necessary to constitute the crime charged and to enable the court to give judgment. The court cannot supply by intendment or implication any defects in this respect.[28] A special verdict cannot find facts which are not in issue, but such findings are mere surplusage.[29] The exact technical language of the indictment need not be followed.[30]

Partial Verdict

A partial verdict is a finding as to a part of the charge, as where the jury convict the defendant on one or more counts of the indictment, and acquit him of the residue, or convict him on one part of a divisible count, and acquit him of the residue. We have already, in discussing the question of variance, seen when such a verdict as this may be found.[31]

If the verdict expressly states that the defendant is guilty on a certain count, giving its number, or of the crime charged therein, specifying it, and not guilty on the other count or counts, or of the crime or crimes therein charged, there is no difficulty in understanding the verdict, and rendering

[27] Dowman's Case, 9 Coke, 7b; Com. v. Chathams, 50 Pa. 181, 88 Am. Dec. 539; Com. v. Eichelberger, 119 Pa. 254, 13 Atl. 422, 4 Am. St. Rep. 642; McGuffie v. State, 17 Ga. 497; State v. Nash, 97 N. C. 514, 2 S. E. 645; State v. Duncan, 2 McCord (S. C.) 129; State v. Ewing, 108 N. C. 755, 13 S. E. 10; State v. Spray, 113 N. C. 686, 18 S. E. 700; State v. Divine, 98 N. C. 778, 4 S. E. 477.

[28] Rex v. Francis, 2 Strange, 1015; 2 Hawk. P. C. c. 47, § 9; Rex v. Royce, 4 Burrows, 2073; Rex v. Plummer, J. Kel. 111; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; People v. Wells, 8 Mich. 104; State v. Finlayson, 113 N. C. 628, 18 S. E. 200; State v. Lowry, 74 N. C. 121. It must find the county in which the acts were committed, as this is an essential fact. Com. v. Call, supra. It must find the necessary intent and all other necessary elements. State v. French, 50 La. Ann. 461, 23 South. 606.

[29] Stephens v. State, 51 Ga. 236; McEntee v. State, 24 Wis. 43.

[30] Rex v. Dawson, 1 Strange, 19; Dowdale's Case, 6 Coke, 47a.

[31] Ante, p. 403.

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judgment on it;[82] but if it fails to show with certainty upon which count or counts, or of which of several offenses included in the charge, it is intended to convict, no judgment can be given.[83] The verdict must in all cases be sufficiently certain to enable the court to see of what offense the jury intend to convict, or it will be void.[84] If the verdict is sufficiently certain to meet this requirement it is sufficient to support a judgment, though it is inartificially drawn, or is couched in language that does not strictly follow the words of the charge.[85] The verdict will not be rendered insufficient by the insertion of matter which is immaterial and may be rejected as surplusage.[86]

Sometimes a verdict finds the defendant guilty on one or more counts, and is silent as to the other counts, or finds him guilty of an offense included in the charge, and says nothing about the higher offense charged. In such cases the verdict is sufficiently certain to support a conviction on the count or counts, or of the offense, specified or referred to. It amounts to an acquittal on the counts, or of the

[82] See Gipson v. State, 38 Miss. 295; Carter v. State, 20 Wis. 647; Guenther v. People, 24 N. Y. 100; Harris v. People, 64 N. Y. 148; Day v. People, 76 Ill. 380; Wright v. People, 33 Mich. 300; Page v. Com., 9 Leigh (Va.) 683.

[83] Campbell v. Reg., 1 Cox, Cr. Cas. 269; State v. Izard, 14 Rich. (S. C.) 209; Day v. People, 76 Ill. 380.

[84] Com. v. Lowery, 149 Mass. 67, 20 N. E. 697; State v. West, 39 Minn. 321, 40 N. W. 249; Sullivan v. State, 44 Wis. 595; Foster v. State, 88 Ala. 182, 7 South. 185; Bowen v. State, 28 Tex. App. 498, 13 S. W. 787.

[85] "We find the defendant not guilty in manner and form as charged in the indictment, but we find her guilty of murder in the second degree," was sustained as a conviction of murder in the second degree. Freel v. State, 21 Ark. 212. And, where the indictment contained several counts, a verdict of guilty "on the first charge" was sustained as a conviction on the first count. Nabors v. State, 6 Ala. 200. So, where an indictment contained counts for larceny and for embezzlement, a verdict of "guilty of embezzlement" was sustained as a conviction on the count charging embezzlement. Guenther v. People, 24 N. Y. 100. So where the verdict misnumbered the counts, but there was no doubt of the meaning and no prejudice. Newman v. People, 23 Colo. 300, 47 Pac. 278. And see Gipson v. State, 38 Miss. 295; Page v. Com., 9 Leigh (Va.) 683.

[86] Gipson v. State, 38 Miss. 295; ante, p. 569.

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offense, as to which it is silent.[37] And therefore, as we have seen, the defendant cannot be again tried on the latter charges.[38]

An irregularity in a verdict may be waived by the defendant. There is such waiver where defendant fails to enter an objection to the verdict.[39]

Impeachment of Verdict by Jurors

A juror cannot be allowed by his testimony, affidavit, or otherwise, to impeach the verdict after it has been recorded and finally accepted by the court.[40] He cannot, for instance, say that he did not intend to agree,[41] or that he intended to agree to a different verdict.[42] Jurors may testify as to any fact showing the existence of an extraneous influence, but they cannot give evidence as to the effect which such influence had on their minds, or as to the motives and influences generally which affected their deliberations.[43] By statute in the various states it may be shown in certain cases by the testimony of jurors that the verdict was illegally arrived at, as by lot.

[37] Guenther v. People, 24 N. Y. 100; Morris v. State, 8 Smedes & M. 762; Edgerton v. Com., 5 Allen (Mass.) 514; Weinzorpflin v. State, 7 Blackf. (Ind.) 186; Kirk v. Com., 9 Leigh (Va.) 627; State v. McNaught, 36 Kan. 624, 14 Pac. 277; Stoltz v. People, 4 Scam. (Ill.) 168; State v. Kattlemann, 35 Mo. 105; State v. McCue, 39 Mo. 112; Hechter v. State, 94 Md. 429, 50 Atl. 1041, 56 L. R. A. 457; ante, pp. 331, 403. Where the counts charge separate and distinct crimes, some courts limit the rule and require a finding on each count. Com. v. Carey, 103 Mass. 214; Wilson v. State, 20 Ohio, 26.

[38] Ante, p. 439.

[39] May v. State, 140 Ind. 88, 39 N. E. 701.

[40] Rex v. Wooller, 2 Starkie, 111; Smith v. State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; Cornwall v. State, 91 Ga. 277, 18 S. E. 154; State v. Dusenberry, 112 Mo. 277, 20 S. W. 461; State v. Best, 111 N. C. 638, 15 S. E. 930; Taylor v. Com., 90 Va. 109, 17 S. E. 812; State v. Rush, 95 Mo. 199, 8 S. W. 221; Com. v. White, 147 Mass. 76, 16 N. E. 707; Palmer v. People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; People v. Sidwell, 29 Cal. App. 12, 154 Pac. 290. But see McBean v. State, 83 Wis. 206, 53 N. W. 497.

[41] Rex v. Wooller, supra; Mercer v. State, 17 Ga. 146; Stanton v. State, 13 Ark. 317; State v. Bennett, 40 S. C. 308, 18 S. E. 886.

[42] State v. McNamara, 100 Mo. 100, 13 S. W. 938.

[43] Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917.

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CHAPTER XIII

PROCEEDINGS AFTER VERDICT

186. Motion in Arrest of Judgment.
187. Judgment and Sentence.
188. Cruel and Unusual Punishment.
189. New Trial.
190. Writ of Error.

MOTION IN ARREST OF JUDGMENT

186. Formerly almost any objection which would have been fatal on demurrer could be made the ground of a motion in arrest of judgment, but this rule has been to a great extent changed by statute. Such a motion will lie, however, whenever the indictment is insufficient to sustain a judgment, or the verdict is insufficient; but it will not lie for any defect which is cured by verdict at common law, or which may be and is cured by statute. It only lies for matter appearing on the record.

Before trial, as we have seen, if the indictment is fatally defective, or there appears anywhere else in the record such defect or irregularity as will render the proceedings void or a conviction erroneous, the defendant may successfully demur or move to quash.[1] After conviction, the proper proceeding in like case is a motion in arrest of judgment.

It was at one time held that a motion in arrest of judgment would lie for any defect which could have been attacked by a demurrer,[2] but in many states, as we have seen, statutes have been enacted curing certain formal defects if objection is not made before verdict, or at a previous stage of the trial. We have already discussed these statutes and their consti-

[1] See ante, p. 436.

[2] 4 Bl. Comm. 324; State v. City of Bangor, 38 Me. 592; State v. Doyle, 11 R. I. 574.

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tutionality.[3] In some states the grounds of motion in arrest are specified in the statutes, and the motion will not lie on any other ground.[4] Irrespective of statute, it is generally held that defects which are aided or cured by verdict cannot be made the ground of a motion in arrest.[5]

In all cases the defect must appear on the face of the indictment, or some other part of the record, for the motion will not reach objections depending upon facts dehors the record, such as irregularities in the custody and conduct of the jury.[6]

If the indictment is clearly insufficient to sustain a judgment, as where it fails to charge an offense, or fails to charge the offense with sufficient certainty to meet the requirement of the constitution, the motion will lie.[7] And it will lie because of the insufficiency of the verdict to sustain a judgment,[8] or for any other defect or error in the proceedings, apparent on the record, rendering the trial illegal or a judgment unauthorized.[9] As we have seen, misnomer of

[3] Ante, pp. 165, 364, 369, 372. See U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; Coleman v. State, 111 Ind. 563, 13 N. E. 100; People v. Kelly, 94 N. Y. 526; Jones v. State, 32 Tex. Cr. R. 110, 22 S. W. 149.

[4] State v. Smith, 12 Mont. 378, 30 Pac. 679. Thus in some states the motion in arrest raises only two questions: (1) That the offense was not within the jurisdiction of the court; (2) that the facts charged do not constitute a crime. Pittsburgh, C., C. & St. L. Ry. v. State, 178 Ind. 498, 99 N. E. 801.

[5] Ante, p. 367; Lutz v. Com., 29 Pa. 441; State v. Hodgson, 66 Vt. 134, 28 Atl. 1089.

[6] Bellasis v. Hester, 1 Ld. Raym. 281; Forbes v. Com., 90 Va. 550, 19 S. E. 164; Horsey v. State, 3 Har. & J. (Md.) 2; Com. v. Donahue, 126 Mass. 51; State v. Martin, 38 W. Va. 568, 18 S. E. 748; Hall v. Com., 80 Va. 562; State v. Conway, 23 Minn. 291; State v. Carver, 49 Me. 588, 77 Am. Dec. 275; Munshower v. State, 56 Md. 514; Herron v. State, 93 Ga. 554, 19 S. E. 243; State v. Casey, 44 La. Ann. 969, 11 South. 583.

[7] Ante, p. 181; Com. v. Morse, 2 Mass. 128; Com. v. Hinds, 101 Mass. 209; State v. Gove, 34 N. H. 510; Denley v. State (Miss.) 12 South. 698.

[8] Ante, p. 568; State v. McCormick, 84 Me. 566, 24 Atl. 938; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284.

[9] State v. Meyers, 68 Mo. 266; Com. v. Kimball, 21 Pick. (Mass.) 373. Repeal of statute creating offense, Rex v. McKenzie, Russ. & R. 429; Brennan v. People, 110 Ill. 535. And see ante, pp. 492, 511.

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the defendant is no gound for arresting judgment.[10] Nor can the insufficiency of the evidence to support the verdict be made the ground of such a motion. We have already in various places shown what defects are and what are not ground for motion in arrest of judgment.[11]

At common law a motion in arrest may be made at any time after verdict and before sentence, but it cannot be made after judgment.[12] In some states, by statute or rules of court, it is required to be made within a certain time after verdict, but this will not prevent the court from entertaining it after the expiration of the time so limited if it sees fit to do so.[13]

The court may arrest the judgment on its own motion. A motion in arrest by the defendant is not necessary to enable the court to act, though it is necessary to entitle the defendant to complain of its failure to act.[14] If the motion is granted and the judgment is arrested, the proceedings are set aside and judgment of acquittal entered.[15]

As we have seen, however, in discussing former jeopardy, a verdict on which judgment is arrested does not necessarily prevent another trial for the same offense.[16]

[10] Ante, p. 176.

[11] As to duplicity, see ante, p. 330. Misjoinder of counts, ante, p. 342. As to other defects in pleading, see the specific subject under that head, pp. 157–415.

[12] 1 Chit. Cr. Law, 662; Rex v. Robinson, 2 Burrows, 801; State v. O'Neil, 66 Vt. 356, 29 Atl. 376.

[13] See State v. Bryan, 89 N. C. 531.

[14] Rex v. Waddington, 1 East, 146; U. S. v. Plumer, 3 Cliff. 62, Fed. Cas. No. 16,056; Rex v. Burridge, 3 P. Wms. 499.

[15] 1 Chit. Cr. Law, 664.

[16] Ante, p. 451.

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JUDGMENT AND SENTENCE

187. It is the duty of the court to render judgment and pronounce sentence on the verdict. In cases of felony the defendant must first be asked whether he has anything to say why the court should not pass sentence upon him. The judgment must be within the limit fixed by law.

After the verdict has been accepted and recorded, and a motion in arrest or for a new trial that may have been made has been overruled, it becomes the duty of the court to render judgment and pronounce sentence. In capital cases, and, in some jurisdictions, in other cases of felony, the defendant must first be asked whether he has anything to say why sentence should not be passed upon him, and, in most jurisdictions, if this formality is omitted, the judgment will be set aside.[17] This does not mean, however, that a new

[17] Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377; Rex v. Geary, 2 Salk. 630; Rex v. Speke, 3 Salk. 358; Safford v. People, 1 Parker, Cr. R. (N. Y.) 474; Messner v. People, 45 N. Y. 1; Hamilton v. Com., 16 Pa. 129, 55 Am. Dec. 485; James v. State, 45 Miss. 572; Perry v. State, 43 Ala. 21; Crim v. State, 43 Ala. 53; State v. Jennings, 24 Kan. 642; Grady v. State, 11 Ga. 253; Keech v. State, 15 Fla. 591. Contra, where the defendant is represented by counsel. Warner v. State, 56 N. J. Law, 686, 29 Atl. 505, 44 Am. St. Rep. 415. In Dutton v. State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89, it was held that the omission to ask this question, even in a capital case, was not reversible error.

"A judgment is a decision or sentence of the law, pronounced by the court and entered upon its docket, minutes, or record. A mere oral decision is not a judgment * * * until it has been put in writing and entered as such." Easterling v. State, 11 Ga. App. 134, 74 S. E. 899. Whether such oral decision or statement is made before or after the signing of the judgment. Mathews v. Swatts, 16 Ga. App. 208, 84 S. E. 980. So, where defendant was duly sentenced to fine and imprisonment, and it was orally agreed between the judge, the district attorney, and the defendant that defendant should leave the county, and no return was made on the commitment, it was held that the court could enforce the sentence of fine and imprisonment, though defendant had complied with his part of the

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trial must be had. By the weight of authority the omission affects the sentence only, not the verdict, and a new sentence may be imposed after an opportunity has been afforded the defendant to plead in bar to it.[18]

When any corporal punishment is to be inflicted, it is necessary that the defendant shall be personally before the court when sentence is pronounced, but this is not necessary where a mere fine is to be imposed.[19]

It is generally agreed that a court has inherent power to suspend temporarily the pronouncement of sentence, and to continue to do so from time to time, for the purpose of hearing motions and other proceedings necessary to preserve to the defendant some legal right.[20]

agreement. Ex parte Oliver, 11 Okl. Cr. 536, 149 Pac. 117; Ex parte Hinson, 156 N. C. 250, 72 S. E. 310, 36 L. R. A. (N. S.) 352; Ex parte Lujan, 18 N. M. 310, 137 Pac. 587. The judgment must correspond with, or be responsive to, the verdict. Kidd v. Terr., 9 Okl. 450, 60 Pac. 114. If it is not, the cause must be remanded to the trial court for proper judgment. Id. Under statute in some states it may be corrected in the appellate court. Sayers v. State, 10 Okl. Cr. 195, 135 Pac. 944. But where the verdict finds defendant guilty of a higher offense than was warranted by the evidence, the trial court has power to pronounce judgment thereon for such lower offense, included in the one charged, as the evidence warrants. U. S. v. Linnier (C. C.) 125 Fed. 83.

[18] McCue v. Com., 78 Pa. 185, 21 Am. Rep. 7; People v. Nesce, 201 N. Y. 111, 94 N. E. 655; Dutton v. State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89.

[19] 1 Chit. Cr. Law, 695; 2 Hawk. P. C. c. 48, § 17; Rex v. Harris, 1 Ld. Raym. 267; Shiflett v. Com., 90 Va. 386, 18 S. E. 838; Davis v. Com., 13 Pa. Co. Ct. R. 545. Contra, in some cases by statute. Shiflett v. Com., supra. The death of accused after judgment and sentence abates all proceedings in the case. People v. St. Maurice, 166 Cal. 201, 135 Pac. 952; U. S. v. Dunne, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145. If the defendant becomes insane after sentence and judgment, the judgment cannot be executed while the insanity continues, but must be suspended. State v. Vann, 84 N. C. 722. If his insanity is suggested to the court, the method of determining whether he is sane is within the discretion of the court, and, in the absence of statute, the accused has no absolute right to have the question determined by a jury. The court may submit the question to experts. State v. Nordstrom, 21 Wash. 403, 58 Pac. 248, 53 L. R. A. 584.

[20] U. S. v. Wilson (C. C.) 46 Fed. 748; People v. Barrett, 202 Ill.

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Some courts go further, and hold that this power is not thus limited, but that the court may in its discretion suspend the pronouncement of sentence whenever it thinks fit and justice demands it.[21]

Where more than one defendant is convicted on a joint indictment the judgment must be several against each,[22] but sentence may be pronounced against them jointly.[23]

The judgment must be certain and definite at common law. A judgment that defendant be confined in jail until he pay "what shall be due," no definite sum being stated as due, is void,[24] as is a sentence to pay a fine "unless such a thing be done in futuro."[25] So at common law there could be no alternative judgment, and therefore a sentence that defendant "pay a fine, and, in default thereof be imprisoned thirty days," is void.[26] By statute in some states such alternative judgments are now allowed.[27]

Statutes in some states now provide for an indeterminate

287, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230; State v. Abbott, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112, Ann. Cas. 1912B, 1189.

[21] People ex rel. Forsyth v. Court of Sessions of Monroe County, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856; 2 Hale, P. C. 412; 2 Hawk. P. C. c. 51, § 8; Com. v. Dowdican, 115 Mass. 133; State v. Addy, 43 N. J. Law, 113, 39 Am. Rep. 547; Weaver v. People, 33 Mich. 296; People v. Reilly, 53 Mich. 260, 18 N. W. 849; Sylvester v. State, 65 N. H. 193, 20 Atl. 954; People v. Goodrich (Sup.) 149 N. Y. Supp. 406; Ex parte Hinson, 156 N. C. 250, 72 S. E. 310, 36 L. R. A. (N. S.) 352; Gehrmann v. Osborne, 79 N. J. Eq. 430, 82 Atl. 424. Some courts deny that this power exists at common law, except in cases where the delay in sentencing is necessary to prevent the loss by defendant of some legal right. U. S. v. Wilson (C. C.) 46 Fed. 748; People v. Barrett, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230; State v. Abbott, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112, Ann. Cas. 1912B, 1189.

[22] Caldwell v. Com., 7 Dana (Ky.) 229; Miller v. People, 47 Ill. App. 472. An otherwise valid judgment is not vitiated by erroneously inserting in it judgment against another person who was not tried. Agee v. State, 190 Ala. 19, 67 South. 411.

[23] 1 Chit. Cr. Law, 700; 6 Harg. St. Tr. 833.

[24] Rex v. Cotterall, Fitzgibbons, 256.

[25] Per Holt, C. J., Rex v. Mayor of Hertford, Holt, 320.

[26] In re Deaton, 105 N. C. 59, 11 S. E. 244; State v. Sturgis, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443.

[27] Wallace v. State, 126 Ga. 749, 55 S. E. 1042.

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sentence. Where such statutes are mandatory, a judgment assessing a definite term of imprisonment is void.[28]

Generally the minimum and maximum punishment for the particular offenses is fixed by statutes, varying in the different states, and it is within the discretion of the court to impose any punishment within those limits. In some states, and in some cases, the jury are required or authorized to fix the punishment in their verdict. A judgment for a greater or less punishment than that prescribed by law is error.[29] Jurisdiction to render the particular sentence im-

[28] Day v. Com., 162 Ky. 767, 173 S. W. 136; Orange v. State, 76 Tex. Cr. R. 194, 173 S. W. 297. In both of the cases cited above the trial court sentenced defendant for a definite term, when under the statute the sentence should have been for an indefinite term. In the first case the appellate court reversed the judgment and granted a new trial. In the second the appellate court reformed the sentence. In People v. Coleman, 251 Ill. 497, 96 N. E. 239, on the same facts, the court held that the case should be remanded to the trial court, with directions that that court enter a proper sentence. See further Ex parte Duff, 141 Mich. 623, 105 N. W. 138.

[29] Rex v. Bourne, 7 Adol. & E. 58; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Cox, 3 Idaho (Hasb.) 530, 32 Pac. 197, 95 Am. St. Rep. 29; State v. Williams, 40 S. C. 373, 19 S. E. 5. Thus, where the statute prescribes the punishment of imprisonment "or" fine, a judgment of imprisonment and fine is bad. Hargrove v. State, 33 Tex. Cr. R. 165, 25 S. W. 967. So, where a statute prescribes imprisonment and fine, a sentence of imprisonment without any fine is invalid. Woodruff v. U. S. (C. C.) 58 Fed. 766. Where the judgment is for a longer imprisonment or a greater fine than that prescribed by law, the judgment is not necessarily void in toto. By the weight of authority such judgment is valid to the extent that the court had power to sentence the defendant, and void only as to the excess, and the defendant may be held under such judgment for the period for which the court had authority to sentence him. In re Taylor, 7 S. D. 382, 64 N. W. 253, 45 L. R. A. 136, 58 Am. St. Rep. 843; In re Graham, 138 U. S. 461, 11 Sup. Ct. 363, 34 L. Ed. 1051; In re Paschal, 56 Kan. 123, 42 Pac. 373; Ex parte Burden, 92 Miss. 14, 45 South. 1, 131 Am. St. Rep. 511; U. S. v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631. Contra, Ex parte Page, 49 Mo. 291; Ex parte Cox, 3 Idaho (Hasb.) 530, 32 Pac. 197, 95 Am. St. Rep. 29. Where the judgment pronounced is for a less term of years or a smaller fine than is provided by law for the offense, the judgment is not necessarily void. In re Reed, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138. In some jurisdictions it is held that such judgment is, how-

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posed is just as essential as jurisdiction of the person of the defendant and of the subject-matter.[30]

When the defendant is in execution on a former judgment, sentence of imprisonment, and other penalties, may be given against him to commence from the expiration of the existing sentence.[31] And it is held in England and in some of our states that where a person is charged with several offenses at the same time, of the same kind, he may be sentenced to several terms of imprisonment, one to commence after the conclusion of the other.[32] In some states,

ever, error of which the defendant may take advantage. Taff v. State, 39 Conn. 82. Other jurisdictions hold that, since the defendant is not prejudiced by the error, he cannot complain of it. In re Reed, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138. Where a general verdict of guilty is entered on an indictment containing several counts, and some of the counts are later found bad, if the sentence does not exceed what might properly have been imposed on the good counts, it will be sustained. Haynes v. U. S., 101 Fed. 817, 42 C. C. A. 34; State v. Davidson, 12 Vt. 300. Contra, O'Connell v. Reg., 11 Cl. & Fin. 155.

[30] Ex parte Cox, 3 Idaho (Hasb.) 530, 32 Pac. 197, 95 Am. St. Rep. 29; Ex parte Burden, 92 Miss. 14, 45 South. 1, 131 Am. St. Rep. 511; Munson v. McClaughry, 198 Fed. 72, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302. Where the judgment complained of is erroneous in the extent of the punishment, the mode of punishment, or the place of punishment, the views of the courts "are as numerous and varied as the different liquors from the magician's bottle." Ex parte Tani, 29 Nev. 385, 91 Pac. 137, 13 L. R. A. (N. S.) 518. See this case for a review of the authorities.

[31] 1 Chit. Cr. Law, 718; Rex v. Wilkes, 4 Burrows, 2577; Ex parte Sargood, 86 Vt. 130, 83 Atl. 718.

[32] 1 Chit. Cr. Law, 718; Castro v. Reg., 6 App. Cas. 229; Rex v. Williams, 1 Leach, Crown Cas. 536; Brown v. Com., 4 Rawle (Pa.) 259, 26 Am. Dec. 130; In re Walsh, 37 Neb. 454, 55 N. W. 1075; In re White, 50 Kan. 299, 32 Pac. 36; In re Packer, 18 Colo. 525, 33 Pac. 578. Such a sentence should not fix the date on which each successive term of imprisonment shall begin, but should direct each term to commence at the expiration of the former term, since the former sentence may be shortened by good conduct or otherwise. In re Walsh, supra. The court may impose one sentence on a conviction for two or more offenses, provided the sentence is not in excess of the maximum allowed by law for all the offenses of which the defendant has been convicted. Myers v. Morgan, 224 Fed. 413, 139 C. C. A. 641. Contra, U. S. v. Peeke, 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314. In the absence of any statute, if two sentences are imposed,

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however, in case of corporal punishment, cumulative sentences are not allowed.[33]

We have seen that there is a conflict as to the power of a court to suspend the pronouncement of sentence. There is the same conflict as to the power of the court to suspend the execution of the sentence, after the sentence has been pronounced. Some of the conflict has apparently arisen from confusing the two questions.[34]

The courts frequently exercise this power by suspending sentence during good behavior. The power is not taken away from the courts by a statute merely making it their duty to impose the punishment prescribed.[35]

Excessive Punishment

The court, as stated above, cannot impose any greater punishment than is prescribed by law. But it or the jury, according to the practice, can impose any amount of punishment within the limits fixed by law for the particular offense, and in most states the sentence will not be interfered

and it is not stated that one of them shall take effect at the expiration of the other, the two periods of time will run concurrently and the two sentences be executed simultaneously. In re Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335; Ex parte Hunt, 28 Tex. App. 361, 13 S. W. 145. Contra, Ex parte Durbin, 102 Mo. 100, 14 S. W. 821. In In re Jennings (C. C.) 118 Fed. 479, the petitioner had been sentenced by a federal court to five years' imprisonment in a penitentiary in Kansas. The marshal, instead of conveying him there, surrendered him to the marshal of another district, where he was tried for another crime, convicted, and sentenced for life. He was imprisoned in Ohio. Five years later he was pardoned for this second offense. Held, that he had served his first sentence by his term of imprisonment in Ohio. But see Ex parte Brunding, 47 Mo. 255; Sartain v. State, 10 Tex. App. 651, 38 Am. Rep. 649.

[33] People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211.

[34] See Neal v. State, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175; Spencer v. State, 125 Tenn. 64, 140 S. W. 597, 38 L. R. A. (N. S.) 680; In re Webb, 89 Wis. 354, 62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846; State v. Barker, 79 Neb. 361, 112 N. W. 1143, 113 N. W. 197; Tanner v. Wiggins, 54 Fla. 203, 45 South. 459, 14 Ann. Cas. 718; Fuller v. State, 100 Miss. 811, 57 South. 806, 39 L. R. A. (N. S.) 242, Ann. Cas. 1914A, 96. For partial suspension of execution of sentence, see State v. Clifford, 84 N. J. Law, 595, 87 Atl. 97.

[35] People ex rel. Forsyth v. Court of Sessions of Monroe County, supra.

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with on the ground that the punishment is excessive.[36] If the punishment is cruel and unusual, within the constitutional prohibition to be presently explained, a different question is presented.

CRUEL AND UNUSUAL PUNISHMENT

188. In the federal Constitution, and in most, if not all, of the state Constitutions, there is a prohibition against cruel and unusual punishments.

This prohibition "is to be understood as forbidding any cruel or degrading punishment not known to the common law, and probably also any degrading punishments which, in the particular state, had become obsolete when its Constitution was adopted, and also all punishments which are so disproportioned to the offense as to shock the moral sense of the community." [37] Under this provision there

[36] People v. Kelly, 99 Mich. 82, 57 N. W. 1090; Ledgerwood v. State, 134 Ind. 81, 33 N. E. 631; People v. McGonegal, 136 N. Y. 62, 32 N. E. 616. In some states the court, on appeal, reviews the sentence in this respect, but it will not interfere unless the punishment imposed is clearly excessive. See Sutton v. People, 145 Ill. 279, 34 N. E. 420; West v. Com. (Ky.) 20 S. W. 219.

[37] Black, Const. Law, 510; In re Bayard, 25 Hun (N. Y.) 546; Cooley, Const. Lim. 329; Pervear v. Massachusetts, 5 Wall. 475, 18 L. Ed. 608; Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322. In Weems v. U. S., 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705, it was held that cruel and unusual punishment was inflicted by a statute under which the falsification of a public record by a public official was punished by fine and imprisonment at hard labor for a period of twelve years to twenty years, the prisoner being subject, as accessories to the main punishment, to carrying, during his imprisonment, a chain at the ankle, hanging from the wrist, to deprivation during imprisonment of civil rights, and to perpetual disqualification to enjoy political rights, and to surveillance of the authorities during life. In State v. Driver, 78 N. C. 423, a sentence for assault and battery upon a wife of imprisonment for five years, and at the expiration thereof to give security to keep the peace for five years in the sum of five hundred dollars, with sureties, was held to be cruel and unusual punishment. Ordinarily an excessive fine is held not to be unusual and cruel punishment; but in State v. Ross, 55 Or. 450, 104 Pac. 596, 106 Pac. 1022, 42 L. R. A. (N. S.) 601, 613, it

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can be no such punishment as torture, disemboweling, burning, branding, mutilation, the pillory or the ducking stool, but the ordinary modes of punishment, such as hanging, imprisonment, and fines, are not prohibited.[38] Nor is the provision violated by requiring the death penalty to be inflicted by shooting, or by electrocution, or by requiring the accused to be kept in solitary confinement until execution.[39] Punishment by requiring the accused to work out his fine by laboring on the street in chains is not cruel or unusual;[40] nor, it seems, is it a violation of the Constitution to punish by stripes.[41]

NEW TRIAL

189. A motion by the defendant for a new trial is proper where there was any error or irregularity during the trial which prevented substantial justice, or where the verdict is contrary to the evidence, or where evidence which would require a different finding has been discovered since the verdict.

A new trial may be granted for misconduct of the jury, as where they determined upon their verdict by casting lots,[42]

was held that a fine of $576,853.74, for larceny, which defendant was unable to pay at the time, or even during a lifetime of effort, though it was authorized by statute, was within the constitutional inhibition. Statutes have been passed in a few states, recently, providing for the operation of vasectomy on persons convicted of certain crimes. Such statute has been held constitutional in Washington (State v. Feilen, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. [N. S.] 418, Ann. Cas. 1914B, 512), and unconstitutional by the United States District Court (Davis v. Berry, 216 Fed. 413).

[38] Black, Const. Law, 510.

[39] People v. Kemmler, 119 N. Y. 580, 24 N. E. 9; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; Wilkerson v. Utah, 99 U. S. 130, 25 L. Ed. 345; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; Storti v. Com., 178 Mass. 549, 60 N. E. 210, 52 L. R. A. 520.

[40] Ex parte Bedell, 20 Mo. App. 125; Loeb v. Jennings, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376.

[41] Com. v. Wyatt, 6 Rand. (Va.) 694; Foote v. State, 59 Md. 264; Garcia v. Territory, 1 N. M. 415. But see Cooley, Const. Lim. 329.

[42] Ante, p. 557.

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or separated when they should not have done so, or held communications with outsiders, or were otherwise guilty of misconduct prejudicial to the defendant.[43] But, as we have seen, the testimony of the jurors themselves cannot be received to impeach their verdict.[44]

In most states a new trial may be granted on the merits, on the ground that the evidence is insufficient to sustain the verdict;[45] but the court will not set aside a verdict and grant a new trial on this ground unless the evidence is clearly insufficient. Ordinarily, if the evidence was conflicting, or if there is any evidence to sustain the verdict, a new trial will be denied, for the jury are the judges of the credibility of the witnesses and the weight of the evidence.[46]

Mere want of preparation on the part of the defendant is no ground for a new trial.[47] Nor will a new trial be granted merely because one of the witnesses made a mistake in testifying,[48] or has since been discovered to be incompetent.[49] But where material witnesses have been prevented by illness from attending,[50] or have gained credit on the trial by circumstances since falsified by affidavit, or are afterwards convicted of perjury, or otherwise shown to have testified falsely,[51] the court may, and generally will, allow a new trial.[52]

[43] Ante, p. 554.

[44] Ante, p. 574.

[45] Style, 462; 1 Chit. Cr. Law, 654; Rex v. Mawbey, 6 Term R. 622; Macrow v. Hull, 1 Burrows, 12; Williams v. State, 85 Ga. 535, 11 S. E. 859; Ball v. Com., 8 Leigh (Va.) 726; Com. v. Briggs, 5 Pick. (Mass.) 429; State v. Spidle, 44 Kan. 439, 24 Pac. 965.

[46] People v. Chun Heong, 86 Cal. 329, 24 Pac. 1021; U. S. v. Ducournau (C. C.) 54 Fed. 138; Hardison v. State, 94 Ga. 704, 19 S. E. 895; Nealy v. State, 89 Ga. 806, 15 S. E. 744.

[47] Ford v. Tilly, 2 Salk. 653; 1 Chit. Cr. Law, 656.

[48] Huish v. Sheldon, Sayer, 27. Contra, Richardson v. Fisher, 1 Bing. 145.

[49] Turner v. Pearte, 1 Term R. 717; Wolfforth v. State, 31 Tex. Cr. R. 387, 20 S. W. 741.

[50] Anon., 1 Salk. 645. But see Jackson v. State (Tex. Cr. App.) 25 S. W. 632.

[51] Lister v. Mundell, 1 Bos. & P. 427; State v. Moberly, 121 Mo. 604, 26 S. W. 364. But see State v. Anderson, 14 Mont. 541, 37 Pac. 1.

[52] 1 Chit. Cr. Law, 656.

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A new trial may also be granted for prejudicial errors in the charge of the court,[53] or because of the erroneous admission or exclusion of evidence, though generally not in such a case where there is ample competent evidence to sustain the verdict.[54]

Another ground upon which a motion for a new trial is frequently based is after-discovered evidence.[55] To authorize a new trial on this ground (1) the evidence must have been discovered since the trial;[56] (2) it must be such as reasonable diligence on the part of the defendant could not have secured on the former trial;[57] (3) it must be material, and not merely collateral or cumulative or corroborative or

[53] Anon., 2 Salk. 649; How v. Strode, 2 Wils. 273; State v. Hutchison, 121 Minn. 405, 141 N. W. 483. But the error must be prejudicial. Skinner v. State, 13 Ga. App. 370, 79 S. E. 181; State v. Marren, 17 Idaho, 766, 107 Pac. 993. It is not prejudicial error to sustain an objection to a question, a responsive answer to which may be either favorable or unfavorable to the party asking it, when it does not appear what was the answer expected. Beiser v. State, 10 Ala. App. 86, 65 South. 312.

[54] Rex v. Ball, Russ. & R. 132; People v. Walker, 26 Cal. App. 47, 146 Pac. 65; State v. Williams, 96 Minn. 351, 105 N. W. 265; Drury v. Terr., 9 Okl. 398, 60 Pac. 101; Kelly v. People, 229 Ill. 81, 82 N. E. 198, 12 L. R. A. (N. S.) 1169, 11 Ann. Cas. 226.

[55] Johnson v. State (Tex. Cr. App.) 22 S. W. 595; Cooper v. State, 91 Ga. 362, 18 S. E. 303; State v. Don Carlos, 38 S. C. 225, 16 S. E. 832; Bailey v. State, 36 Neb. 808, 55 N. W. 241.

[56] White v. State, 17 Ark. 404; State v. Cantlin, 118 Mo. 100, 23 S. W. 1091. In Hill v. State (Tex. Cr. App.) 53 S. W. 845, defendant moved for a new trial on the ground of newly discovered evidence, to prove insanity. There was strong evidence of insanity in the circumstances of the crime, and it was shown that he had been adjudged insane in another state, and had been discharged, as cured, shortly before the commission of the crime, and had recently run away from home. His relatives had not been informed of the accusation, or of his whereabouts, until after his conviction. His jailer made affidavit that since conviction he had acted as though he were insane. Held, that a new trial should be granted, though in strictness the evidence was not newly discovered.

[57] Lilly v. People, 148 Ill. 467, 36 N. E. 95; Bennett v. Com., 8 Leigh (Va.) 745; Thompson v. Com., 8 Grat. (Va.) 637; People v. Mack, 2 Parker, Cr. R. (N. Y.) 673; State v. Dimmitt, 88 Iowa, 551, 55 N. W. 531; Runnels v. State, 28 Ark. 121; Avery v. State, 26 Ga. 233.

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impeaching;[58] (4) it must be such as ought to produce a different result on the merits on another trial;[59] (5) it must go to the merits, and not rest on merely a technical defense.[60]

By the great weight of authority a new trial cannot be granted at the instance of the state after a verdict of acquittal.[61]

We have already shown, in the preceding pages, what constitute errors and irregularities during the trial, and it will be sufficient here to refer to the specific heads.

Objections which can be raised by motion in arrest of judgment are ordinarily no ground for motion for a new trial. A motion for a new trial does not lie because of defects in pleading.[62]

WRIT OF ERROR

190. At common law the proceedings and judgment of a subordinate court may be taken to an appellate court for review by writ of error, which is a writ issuing from the appellate court commanding the subordinate court to send up the entire record. Such a writ lies only to a court of record. It does not lie until after judgment, and lies only for errors of record. The modes of reviewing the judgment and proceedings in a criminal case are now almost entirely regulated by statute.

[58] Lilly v. People, 148 Ill. 467, 36 N. E. 95; Childs v. State, 94 Ga. 703, 19 S. E. 752; Mitchell v. State, 94 Ga. 704, 19 S. E. 893; State v. De Graff, 113 N. C. 688, 18 S. E. 507; State v. Howell, 117 Mo. 307, 23 S. W. 263; State v. Potter, 108 Mo. 424, 22 S. W. 89; Corley v. N. Y. & H. R. Co., 12 App. Div. 409, 42 N. Y. Supp. 941. But see Bailey v. State, 36 Neb. 808, 55 N. W. 241.

[59] Field v. Com., 89 Va. 690, 16 S. E. 865; Yeldell v. State (Tex. Cr. App.) 25 S. W. 424; Burgess v. State, 33 Tex. Cr. R. 9, 24 S. W. 286; Peterson v. State (Tex. Cr. App.) 24 S. W. 518; Simpson v. State, 93 Ga. 196, 18 S. E. 526; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; King v. State, 91 Tenn. 617, 20 S. W. 169; State v. Hendrix, 45 La. Ann. 500, 12 South. 621; State v. Nelson, 91 Minn. 143, 97 N. W. 652.

[60] Whart. Cr. Pl. & Prac. § 854; Cooper v. State, 91 Ga. 362, 18 S. E. 303.

[61] Ante, p. 453.

[62] White v. State, 93 Ga. 47, 19 S. E. 49.

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At common law the mode of reviewing the proceedings and judgment in a criminal case was by writ of error. This is a writ issuing from an appellate court commanding a subordinate court to send up the entire record in the case. At common law this writ would lie only for matters apparent on the record, and it could only issue to a court of record. This, however, has been changed by statute in many states.

In many of the states a writ of error is still used, the practice, however, being regulated almost entirely by statute. In other states the remedy by appeal is substituted, and in others the remedy is by a bill of exceptions.

By the weight of authority, a writ of error or appeal does not lie at the instance of the state.[63]

In England, by the Criminal Appeal Act of 1907, it is provided that on appeal by defendant the court of appeal may quash the original sentence and impose another sentence, warranted in law by the verdict, either increasing or decreasing the punishment.

In this country, under statutes providing that the court on appeal may modify the judgment, it has been held that on reversal for lack of evidence to prove the crime charged, or for failure of the indictment to charge the crime for which conviction was had, the court of appeal may enter a judgment for a lesser crime included in the crime charged, and properly proved.[64] But such exercise of power has been held unconstitutional.[65]

[63] Ante, p. 453. If the defendant becomes a fugitive pending an appeal or writ of error, the appeal will be dismissed. State v. Handy, 27 Wash. 469, 67 Pac. 1094; People v. Genet, 59 N. Y. 80, 17 Am. Rep. 315; Com. v. Andrews, 97 Mass. 543. But see State v. Jacobs, 107 N. C. 772, 11 S. E. 962, 22 Am. St. Rep. 912.

[64] Washington v. State, 83 Ark. 268, 103 S. W. 617; People v. O'Callaghan, 2 Idaho (Hasb.) 156, 9 Pac. 414; State v. McCormick, 27 Iowa, 402.

[65] In re Friedrich (C. C.) 51 Fed. 747.

CHAPTER XIV

EVIDENCE

191. Facts in Issue.
192–194. Facts Relevant to Facts in Issue.
195. Facts Necessary to Explain or Introduce Relevant Facts.
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219. Evidence Wrongfully Obtained.
220–222. Presumption of Innocence—Burden of Proof.
223. Witnesses—Competency—Examination.

FACTS IN ISSUE

191. Evidence of any fact in issue is admissible.[1]

As we have seen, the general issue in a criminal case is formed by the accusation and the plea of not guilty.[2] The plea of not guilty puts in issue not only every fact alleged in

[1] By the term "fact" we mean to include the fact that any particular mental condition existed or exists, as the fact that the defendant, when he committed the crime charged, was insane, or was actuated by malice, or that he acted with a certain intention, or that he acted with knowledge of certain facts.

[2] Ante, p. 473.

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the accusation which it is necessary to prove in order to secure a conviction, but it puts in issue every fact which will constitute a defense and prevent a conviction.[3] Every such fact may therefore be shown. The facts in issue are determined in each case by the charge in the indictment and by reference to the substantive criminal law.

On indictment for murder and a plea of not guilty, the following facts, among others, are or may be in issue: The fact that the deceased is dead; that defendant killed the deceased; the fact that he did so with malice aforethought; the fact that he was at the time so mentally insane, was acting under such an insane delusion, or, in some states, under such an insane irresistible impulse, or was of such tender years, as to be legally irresponsible; the fact that he did the killing by excusable accident, or in excusable self-defense, or under circumstances justifying him; and the facts that he had received, and that he acted under, such provocation from the deceased as reduced the homicide to manslaughter.

A plea of not guilty to an indictment for rape puts or may put in issue the fact that the defendant had carnal knowledge of the woman; the fact that she was his wife; the fact that she consented, etc.

A plea of not guilty to an indictment for larceny puts in issue the fact that the defendant took the property described in the indictment; that the property was the subject of larceny; that it belonged generally or specially to the person named as owner; that the defendant took it under such circumstances that he committed a trespass; that he carried it away; that he intended to steal it, etc.

[3] Ante, p. 473.

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FACTS RELEVANT TO FACTS IN ISSUE

192. Evidence of any fact which, though not itself in issue, is relevant to any fact in issue, is admissible.

EXCEPTIONS—(a) Unless it is declared inadmissible by some arbitrary rule of law.

(b) Unless the fact appears to be too remote to be material under all the circumstances of the case.

193. Evidence of a fact which is not relevant to any fact in issue is inadmissible.

194. A fact is relevant to a fact in issue if, according to the common course of events, either taken by itself or in connection with other facts, it logically tends in any degree to render probable the existence or nonexistence of that fact.

From these rules it will be noticed that evidence, though relevant, may be inadmissible or incompetent because it is immaterial, and evidence, though both relevant and material, may be incompetent because some rule of law to be hereafter stated declares it so. "Relevancy," "materiality," and "competency" are not synonymous terms, though often used as synonymous both in the text-books and by the judges.

Any fact is relevant to a fact in issue if it logically tends in any degree to show the existence or nonexistence of that fact. It is necessary, however, that the fact shall tend materially, in view of all the circumstances, to show the existence or nonexistence of the fact in issue. In other words, evidence to be admissible, must be both relevant and material. Unless the admissibility of evidence is settled by some arbitrary rule, or by controlling precedent, it is to be determined by reason in each particular case. The test is this: Does the fact offered in evidence, under all the circumstances of the particular case, according to the common course of events, logically and materially tend, when taken either by itself or in connection with other facts, to show

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the existence or nonexistence of a fact in issue?[4] If it does, then it is relevant and material.

Having ascertained the relevancy and materiality of the evidence, we must next see whether there is any rule of law rendering it incompetent. The defendant's bad character may tend to render probable the fact that he committed the crime under investigation, and so may the fact that he committed a similar crime a year before, and so may the fact that, a week after the crime was committed, a third person was heard to say that he saw the defendant commit it; but rules of law declare this evidence inadmissible. It is relevant, but incompetent. These rules will be presently stated and explained.

In a prosecution for homicide, a witness may testify that he saw the defendant kill the deceased. This is admissible,

[4] Com. v. Jeffries, 7 Allen (Mass.) 563, 83 Am. Dec. 712; Com. v. Abbott, 130 Mass. 473; State v. Alford, 31 Conn. 40. "The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future, existence or nonexistence of the other." Steph. Dig. Ev. (Chase's Ed.) 4. "It is only by appealing to hypothesis that questions of relevancy can be determined. 'My hypothesis,' so argues the prosecution, 'is that the act charged is part of a system of guilty acts.' To support such an hypothesis, proof of such a system is relevant. Or the defense argues, 'No man of good character would commit a crime such as here charged,' and, to sustain this hypothesis, evidence of good character is relevant." Whart. Cr. Ev. § 21. "Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which logically affects the issue. * * * Relevancy is to be determined by free logic, unless otherwise settled by statute or controlling precedent. All facts that go either to sustain or impeach a hypothesis logically pertinent are admissible. But no fact is relevant which does not make more or less probable such a hypothesis. Relevancy, therefore, involves two distinct inquiries to be determined by free logic, unless otherwise arbitrarily prescribed by jurisprudence: (1) Ought the hypothesis proposed, if true, to affect the issue? (2) Does the fact offered in evidence go to sustain this hypothesis?" Whart. Cr. Ev. §§ 23, 24. This statement makes no distinction between relevancy and materiality. It defines evidence which is both relevant and material, and therefore competent unless excluded by some arbitrary rule of law.

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because it is direct evidence of a fact in issue. Evidence that the defendant was near the scene of the crime shortly before or shortly after it was committed would be admissible, not as evidence of a fact in issue, because the defendant's presence there before or after the crime is not in issue, but as evidence of a fact relevant to the fact that the defendant killed the deceased, which is a fact in issue. It tends to render that fact probable. For the same reason, it might be shown that before the homicide the defendant had threatened to kill the deceased; that after the homicide he had blood on his clothes, or had in his possession property which the deceased had on his person just before he was killed; that there were tracks near the place corresponding to the shape of defendant's shoes; that a piece of gun wadding was found near the place (the deceased having been killed with a gun), and was like the wadding afterwards found in one barrel of the defendant's gun, the other barrel having been discharged;[5] or that the defendant and his alleged accomplice practiced shooting at a mark before the homicide.[6]

The defendant being charged with murder, the fact that he killed the deceased with malice aforethought is in issue, and any fact materially tending to show malice aforethought is admissible. Thus, it may be shown that at the time of the killing he was resisting a lawful attempt of the deceased to arrest him; that he was trying to rob the deceased, or to commit some other felony,—for under such circumstances the law implies malice aforethought, though there was no intention to kill. And in like manner it may be shown that he had previously threatened to kill the deceased; that he had quarreled with him; or that he was criminally intimate with the deceased's wife.

On the part of the defendant, it may be shown that he was at another place at the time of the killing, that he was on friendly terms with the deceased, that he is a man of good character, etc.; or, the killing being admitted, he may show that the deceased was assaulting him, or was in the act of

[5] Hodge v. State, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145.
[6] People v. McGuire, 135 N. Y. 639, 32 N. E. 146.

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adultery with his (defendant's) wife, for under such circumstances the killing would be manslaughter only.

On the prosecution of a woman for assault on a woman living in an adjoining tenement, where the defendant claimed that the injury was inflicted by accident, the state was allowed, for the purpose of showing that it was intentional, to prove that the defendant did not, after the injury, in any way interest herself in the injured woman.[7]

So, on a prosecution for homicide, where the defendant sets up self-defense, it may be shown that the defendant had previously threatened the deceased, or that the deceased had threatened the defendant, as tending to show which of them began the encounter.[8] And on the question whether the defendant had reasonable grounds to believe that his life was in danger at the hands of the deceased, it may be shown that the deceased, to the defendant's knowledge, was in the habit of carrying weapons, and was a violent and dangerous man.[9]

On the other hand, where, on indictment for murder, the defendant contends that he was an officer, and killed the deceased in overcoming his resistance to the execution of a lawful warrant of arrest, the state cannot show that the deceased was not guilty of the offense for which it was sought to arrest him, for the fact of his innocence is irrelevant.[10] So, on indictment for a murder said to have resulted from the hostile relations of certain clans, it was held not competent to show other murders committed by such clans, nor the fact that armed men were employed to protect the county seat against invasion from them.[11] And, on an indictment for murder, a witness was not allowed to testify that he heard a gun fired about a mile from where the deceased was killed.[12]

[7] State v. Alford, 31 Conn. 40.

[8] Campbell v. People, 16 Ill. 18, 61 Am. Dec. 49; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269; Stokes v. People, 53 N. Y. 174, 13 Am. Rep. 492.

[9] Horbach v. State, 43 Tex. 242; post, p. 631.

[10] Roten v. State, 31 Fla. 514, 12 South. 910.

[11] Spurlock v. Com. (Ky.) 20 S. W. 1095.

[12] Spurlock v. Com., supra.

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FACTS NECESSARY TO EXPLAIN OR INTRODUCE RELEVANT FACTS

195. Facts are admissible:

(a) If necessary to be known to explain or introduce a fact in issue, or relevant to the issue.

(b) If they support or rebut an inference suggested by any such fact.

(c) If they tend to establish or disprove the identity of any thing or person whose identity is in issue, or is relevant to the issue.

(d) If they fix the time or place at which any such fact happened.

(e) If they show the relation of the parties by whom any such fact was transacted.

(f) If they afforded an opportunity for its occurrence or transaction.

(g) If they are necessary to be known in order to show the relevancy of other facts.

Thus, on the question whether a writing published by one person of another is libelous or not, the position and relation of the parties at the time when the libel was published may be shown, as introductory to the facts in issue.

On the question whether A. wrote B. an anonymous letter, threatening him, and requiring him to meet the writer at a certain time and place to satisfy his demand, the fact that A. met B. at that time and place may be shown. The fact that A. had a reason, unconnected with the letter, for being at that time at that place, may be shown to rebut the inference suggested by his presence.[13]

On a prosecution for riot, where the defendant is shown to have marched at the head of a mob, the cries of the mob are admissible as explanatory of the nature of the transaction.[14]

[13] Barnard's Case, 19 How. State Tr. 815; Com. v. Brady, 7 Gray (Mass.) 320.

[14] Gordon's Case, 21 How. State Tr. 520.

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On the question whether A. poisoned B., the habits of B., known to A., which would afford A. an opportunity to administer the poison, are relevant.[15]

On the question whether an employé has been embezzling from his employer, it may be shown that the defendant lived beyond his means.[16] The defendant could show the sources from which he procured money, to rebut the inference arising from this fact.

MOTIVE

196. Any fact that shows a motive to commit the crime charged is admissible.

Any fact that supplies a motive for commission of the act charged by the defendant tends to render probable the fact that he did commit it, and is therefore relevant.[17]

Thus, on an indictment for murder, the fact that the deceased, 25 years before the murder, murdered a man at the instigation of the defendant, and that the defendant at or before that time used expressions showing malice against the man so murdered, are admissible as showing a motive on the defendant's part to commit the crime charged.[18] For the same reason it may be shown that the defendant had been living in adultery with the wife of the deceased,[19] or that the deceased had instituted a criminal prosecution against the defendant, in consequence of which the defend-

[15] Rex v. Donellan, Steph. Dig. Ev. (Chase's Ed.) 21.

[16] Hackett v. King, 8 Allen (Mass.) 144, 85 Am. Dec. 695.

[17] Rex v. Clewes, 4 Car. & P. 221; Com. v. Ferrigan, 44 Pa. 386; Com. v. Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; People v. Harris, 136 N. Y. 423, 33 N. E. 65; Sayres v. Com., 88 Pa. 291; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Perrin v. State, 81 Wis. 135, 50 N. W. 516; State v. Dickson, 78 Mo. 438; State v. Cohn, 9 Nev. 179; Burton & Conquest v. Com., 108 Va. 892, 62 S. E. 376.

[18] Rex v. Clewes, 4 Car. & P. 221. And see Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996.

[19] Com. v. Ferrigan, 44 Pa. 386; Pate v. State, 94 Ala. 14, 10 South. 665; Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; Reinhart v. People, 82 N. Y. 607.

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ant had made threats against the deceased, or otherwise shown ill will towards him.[20] And on indictment for wife murder, it may be shown that the defendant had previously assaulted, or ill treated, or quarreled with, or separated from, the deceased.[21] So, on indictment for wife murder by poisoning, it may be shown that the defendant stated that he had been secretly married to another woman, since it tends to show that the marriage was bigamous, and bears on the question of motive;[22] and, for the same reason, unlawful relations between the defendant and another woman may be shown.[23] And, on indictment for fratricide, it may be shown that the defendant was disinherited by his father's will, while the deceased was amply provided for; and that on a contest of the will, shortly before the homicide, the taking of the deceased's deposition was objected to by the defendant, and the hearing continued.[24]

So, on an indictment of a bookkeeper of a bank for larceny of money, testimony that the money stolen was not the bank's, but belonged to a third person, who had placed it there for sake-keeping, and that the defendant was, and had been for some months prior to the larceny, a defaulter to the bank, and had falsified the books to conceal the fact, is admissible for the purpose of showing a possible motive for the larceny in the desire to pay back to the bank the amount of the defalcations.[25]

And on indictment for arson it may be shown that the defendant had taken out heavy insurance on the building burned.[26]

[20] Hodge v. State, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145; Butler v. State, 91 Ga. 161, 16 S. E. 984; Martin v. Com., 93 Ky. 189, 19 S. W. 580; Franklin v. Com., 92 Ky. 612, 18 S. W. 532.

[21] Com. v. Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; Hall v. State, 31 Tex. Cr. R. 565, 21 S. W. 368; Painter v. People, 147 Ill 444, 35 N. E. 64.

[22] People v. Harris, 136 N. Y. 423, 33 N. E. 65.

[23] Johnson v. State, 94 Ala. 35, 10 South. 667; Wilkerson v. State, 31 Tex. Cr. R. 86, 19 S. W. 903; State v. MacFarland, 83 N. J. Law, 474, 83 Atl. 993, Ann. Cas. 1914B, 782.

[24] State v. Ingram, 23 Or. 434, 31 Pac. 1049.

[25] Perrin v. State, 81 Wis. 135, 50 N. W. 516.

[26] State v. Cohn, 9 Nev. 179. Or that bad feelings existed between

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PREPARATION FOR ACT

197. Any fact which shows preparation by the defendant for the act charged is admissible.

Evidence tending to show that the defendant made preparations to commit the act charged is relevant, for it tends to render probable the fact that he did commit it. Thus, the fact that the defendant before the commission of the crime procured or possessed the instruments, or instruments like those, with which the crime was committed, may be shown.[27]

On indictment for murder by shooting, it may be shown that before the killing the defendant and his alleged accomplice practiced shooting at a mark;[28] or that, about 30 minutes before the shooting, the defendant, with his hat pulled down over his face, approached and touched his alleged accomplice, and that thereupon both walked off towards the place where the murder was committed.[29]

So, on a prosecution for homicide, previous threats of the defendant to kill the deceased may be shown.[30]

SUBSEQUENT CONDUCT OR CONDITION OF DEFENDANT

198. Any conduct or condition of the defendant subsequent to the act charged, apparently influenced or caused by the doing of the act, and any act done in consequence of it, by or by the authority of the defendant, may be shown. But self-serving acts cannot be shown by the defendant.

the accused and the occupant of the building. State v. Barrett, 151 N. C. 665, 65 S. E. 894.

[27] R. v. Palmer, Steph. Dig. Ev. (Chase's Ed.) 15; Com. v. Blair, 126 Mass. 40; Colt v. People, 1 Parker, Cr. R. (N. Y.) 611; Com. v. Roach, 108 Mass. 289.

[28] People v. McGuire, 135 N. Y. 639, 32 N. E. 146.

[29] Rodriquez v. State, 32 Tex. Cr. R. 259, 22 S. W. 978.

[30] Com. v. Goodwin, 14 Gray (Mass.) 55; State v. Hoyt, 46 Conn. 330; Redd v. State, 68 Ala. 492.

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The fact that the defendant, after the alleged crime, caused circumstances to exist tending to give to the facts of the case an appearance favorable to himself;[31] that he destroyed or concealed things or papers which might criminate him, or prevented the presence, or procured the absence, of persons who might have been witnesses,[32] or suborned persons to give false testimony;[33] or that he fled or concealed himself or otherwise attempted to escape, or resisted arrest,[34] or made false statements as to his movements at or about the time of the crime, or as to other material facts,[35] or, after the crime, had possession of the fruits of the crime, as of the property stolen after a burglary, larceny, or robbery,[36] or his attempt to dispose or disposition of it[37]—may be shown against him.

The defendant cannot show self-serving acts before or subsequent to the crime, for this would permit him to make evidence for himself. Thus, on indictment for murder, the

[31] R. v. Patch, Steph. Dig. Ev. (Chase's Ed.) 15; Gardiner v. People, 6 Parker, Cr. R. (N. Y.) 157; State v. Williams, 27 Vt. 726; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

[32] Adams v. People, 9 Hun (N. Y.) 89.

[33] State v. Williams, supra; Donohue v. People, 56 N. Y. 208.

[34] Jamison v. People, 145 Ill. 357, 34 N. E. 486; Cummins v. People, 42 Mich. 142, 3 N. W. 305; Com. v. Tolliver, 119 Mass. 312; Fox v. People, 95 Ill. 71; Ryan v. People, 79 N. Y. 593; Horn v. State, 102 Ala. 144, 15 South. 278; State v. Mallon, 75 Mo. 355; State v. Taylor (Mo.) 22 S. W. 806. Or to escape from jail after arrest. Ryan v. State, 83 Wis. 486, 53 N. W. 836; Elmore v. State, 98 Ala. 12, 13 South. 427; State v. Howell, 117 Mo. 307, 23 S. W. 263; State v. Hobgood, 46 La. Ann. 855, 15 South. 406. Aiding escape of accomplice. People v. Rathbun, 21 Wend. (N. Y.) 509. Living under assumed name in another state. State v. Whitson, 111 N. C. 695, 16 S. E. 332. Possession of instruments to effect escape from jail. State v. Duncan, 116 Mo. 288, 22 S. W. 699. As to explanation of his conduct by the defendant, see Taylor v. Com., 90 Va. 109, 17 S. E. 812; Lewallen v. State, 33 Tex. Cr. R. 412, 26 S. W. 832.

[35] State v. Bradley, 64 Vt. 466, 24 Atl. 1053; Com. v. Johnson, 162 Pa. 63, 29 Atl. 280; Com. v. Goodwin, 14 Gray (Mass.) 55.

[36] Stover v. People, 56 N. Y. 315; State v. Brewster, 7 Vt. 122; State v. Hodge, 50 N. H. 510; Com. v. Parmenter, 101 Mass. 211. Provided the fact of such possession is not so long after the crime, or accompanied by such circumstances, as to render it immaterial. Sloan v. People, 47 Ill. 76; Jones v. State, 26 Miss. 247.

[37] Foster v. People, 63 N. Y. 619.

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defendant cannot show that he went to the house of deceased and offered to wait on him,[38] or that he offered to surrender himself.[39]

Silence of the defendant when charged with a crime is elsewhere considered.[40]

STATEMENTS ACCOMPANYING ACTS

199. Whenever any act may be proved, statements accompanying and explaining that act, made by or to the person doing it, may be proved, if they are necessary to understand it.

Thus, where the question was whether a person was insane, and the fact that he acted upon a letter received by him was part of the facts in issue, the contents of the letter were held admissible as statements accompanying and explaining his conduct.[41]

STATEMENTS IN THE PRESENCE OF DEFENDANT

200. When the defendant's conduct is in issue, or is relevant to the issue, statements made in his presence and hearing, by which his conduct is likely to be affected, are admissible.

If a statement made in the hearing of a person is such that, if false, he would naturally deny it, his silence and acquiescence tend to show that the facts stated are true.[42] So, if a person is accused of a crime, and does not deny it, or if he allows a statement imputing a crime to him to go unanswered, the statement and his conduct, including his silence

[38] State v. Whitson, 111 N. C. 695, 16 S. E. 332.

[39] State v. Smith, 114 Mo. 406, 21 S. W. 827. See State v. Wilkins, 66 Vt. 1, 28 Atl. 323.

[40] Post, p. 601.

[41] Steph. Dig. Ev. (Chase's Ed.) 19.

[42] State v. Wilkins, 66 Vt. 1, 28 Atl. 323.

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if he does not answer, or his reply if he does, may be shown on his prosecution for the crime.[43] The statement must have been made in his hearing, and must have been understood by him;[44] and it must have been such a statement, and made under such circumstances, that he could and should have replied[45]—or his silence cannot be regarded as raising any inference against him. Some courts hold that a person when under arrest is not called upon to deny charges, and that his silence when accused under such circumstances cannot be used against him.[46] Of course, it is always open for him to explain his silence and rebut the inference arising from it.[47]

CONDUCT AND COMPLAINT BY PERSON INJURED

201. In prosecutions for rape, the conduct of the woman, and particularly the fact that she made complaint after (according to some of the cases soon after) the crime was committed, may be shown; but the particulars of the complaint are not admissible.

This rule probably does not apply in any other cases than those of rape, unless the acts or complaint are done or made

[43] Rex v. Edmunds, 6 Car. & P. 164; Com. v. Brailey, 134 Mass. 527; Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342; Com. v. Brown, 121 Mass. 69; State v. Bradley, 64 Vt. 466, 24 Atl. 1053; Com. v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Brown v. State, 32 Tex. Cr. R. 119, 22 S. W. 596; State v. Belknap, 39 W. Va. 427, 19 S. E. 507; Com. v. Ballon, 229 Pa. 323, 78 Atl. 831. The fact that the defendant was under arrest at the time does not make such evidence inadmissible. People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[44] Lanergan v. People, 39 N. Y. 39; Com. v. Sliney, 126 Mass. 49.

[45] Bell v. State, 93 Ga. 557, 19 S. E. 244; Broyles v. State ex rel. De Long, 47 Ind. 251; People v. Willett, 92 N. Y. 29; Com. v. Walker, 13 Allen (Mass.) 570; Kelley v. People, 55 N. Y. 571, 14 Am. Rep. 342; Slattery v. People, 76 Ill. 217; Bob v. State, 32 Ala. 560.

[46] Com. v. McDermott, 123 Mass. 440, 25 Am. Rep. 120; Com. v. Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672. Contra, Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342; Murphy v. State, 36 Ohio St. 628; People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[47] Slattery v. People, supra.

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so soon after the crime that they may be considered a part of the res gestæ;[48] but it is well settled that the rule applies in cases of rape.[49] The evidence is admitted only in corroboration of the testimony of the woman, and it seems that unless she testifies it is not admissible.[50] The evidence is in most, but not all, states, confined to the fact of complaint, and the state cannot prove the terms or particulars—that is, what she said—unless it can do so as part of the res gestæ.[51]

Some of the cases require that the complaint shall have been made soon after the crime, and this would seem to be a good rule.[52] Other courts do not place this restriction on the competency of the evidence, but leave the delay to be considered by the jury in weighing the evidence.[53]

[48] Haynes v. Com., 28 Grat. (Va.) 942.

[49] State v. Bedard, 65 Vt. 278, 26 Atl. 719; State v. Langford, 45 La. Ann. 1177, 14 South. 181, 40 Am. St. Rep. 277; Baccio v. People, 41 N. Y. 265; State v. Knapp, 45 N. H. 148; State v. Warner, 74 Mo. 83; Johnson v. State, 17 Ohio, 593; Polson v. State, 137 Ind. 519, 35 N. E. 907; State v. Yocum, 117 Mo. 622, 23 S. W. 765; Proper v. State, 85 Wis. 615, 55 N. W. 1035; Johnson v. State, 21 Tex. App. 368, 17 S. W. 252; Territory v. Godfrey, 6 Dak. 46, 50 N. W. 481; Territory v. Kirby, 3 Ariz. 288, 28 Pac. 1134; People v. Bianchino, 5 Cal. App. 633, 91 Pac. 112.

[50] See Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608. In California it is held that this rule does not apply where the prosecutrix is too young to testify. People v. Bianchino, 5 Cal. App. 633, 91 Pac. 112.

[51] See the cases above cited, and see Higgins v. People, 58 N. Y. 377; State v. Langford, supra; State v. Ivins, 36 N. J. Law, 233; State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766; Thompson v. State, 38 Ind. 39; Castillo v. State, 31 Tex. Cr. R. 145, 19 S. W. 892, 37 Am. St. Rep. 794; People v. Stewart, 97 Cal. 238, 32 Pac. 8. Contra, State v. Kinney, 44 Conn. 153, 26 Am. Rep. 436; Burt v. State, 23 Ohio St. 394.

[52] Richards v. State, 36 Neb. 17, 53 N. W. 1027; People v. Loftus, 58 Hun, 606, 11 N. Y. Supp. 905. Where the prosecutrix was only five years old, it was held that complaints made a week after the offense was committed were not too remote. People v. Bianchino, 5 Cal. App. 633, 91 Pac. 112.

[53] State v. Mulkern, 85 Me. 106, 26 Atl. 1017; State v. Niles, 47 Vt. 82; State v. Byrne, 47 Conn. 465.

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RES GESTÆ

202. Every fact which is part of the same transaction as the facts in issue is to be deemed relevant to the facts in issue, although it may not be actually in issue, and although, if it were not part of the same transaction, it might be excluded as evidence of another crime, or as hearsay. Facts which are thus a part of the same transaction are said to be admissible as part of the res gestæ.

Facts which are not themselves in issue, but which are part of the same transaction as the facts in issue, or, as it is generally expressed, part of the res gestæ, are admitted because they explain or qualify the facts in issue, though, if they were not part of the same transaction, they might be excluded as hearsay, or might, though relevant, be excluded by some other arbitrary rule of law.[54]

Thus, on trial for murder of a police officer while repelling an attack from associates of a man in his custody, whom he had arrested half an hour before, as one of a number of men engaged in firing guns in a public place, evidence that the accused had been among the men so engaged is admissible as part of the res gestæ.[55]

So, where, on a trial for murder, the evidence shows that the defendant fired the fatal shot while making an assault, with two companions, on a dwelling occupied by the deceased, the state may prove that during the affray one of the defendant's companions, using the defendant's pistol, shot at and wounded another person.[56]

[54] Com. v. Costley, 118 Mass. 1; Lander v. People, 104 Ill. 248; Com. v. Densmore, 12 Allen (Mass.) 535; People v. Davis, 56 N. Y. 102; Eighmy v. People, 79 N. Y. 546; Little v. Com., 25 Grat. (Va.) 921; Banks v. State, 157 Ind. 190, 60 N. E. 1087; Watson v. State (Tex. Cr. App.) 50 S. W. 340; People v. Yund, 163 Mich. 504, 128 N. W. 742.

[55] State v. Donelon, 45 La. Ann. 744, 12 South. 922.

[56] People v. Parker, 137 N. Y. 535, 32 N. E. 1013.

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Other Crimes

When a man is being tried for one crime, the state cannot prove the commission by him of another crime, in no way connected with the crime charged.[57] But if the other crime was committed as part of the same transaction, and tends to explain or qualify the fact in issue, it may be shown.[58] Thus, on indictment for murder, evidence that the defendant, immediately after shooting the deceased, proceeded to shoot at and threaten the mother of the deceased, who was present and witnessed the killing, is admissible as part of the res gestæ to show the animus of the defendant.[59]

So, on a prosecution for obtaining money by false pretenses, where it appears that about the time of the offense the defendant induced the prosecuting witness to invest another sum of money in bonds which she was afterwards informed by letters were worthless, and that she showed the letters to the defendant, who refused an explanation, such letters are admissible, as part of the res gestæ, to show the defendant's intent to defraud.[60]

The other crime, however, must be a part of the same transaction.[61]

Hearsay

Ordinarily, declarations are inadmissible as hearsay,[62] but declarations which form part of the res gestæ are admissible.[63]

[57] Post, p. 607.

[58] Hargrove v. State, 33 Tex. Cr. R. 431, 26 S. W. 993; Davis v. State, 32 Tex. Cr. R. 377, 23 S. W. 794.

[59] Killins v. State, 28 Fla. 313, 9 South. 711. And see State v. Gainor, 84 Iowa, 209, 50 N. W. 947; Wilkerson v. State, 31 Tex. Cr. R. 86, 19 S. W. 903; Johnson v. State, 88 Ga. 203, 14 S. E. 208; Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81; People v. Mead, 50 Mich. 228, 15 N. W. 95; Hargrove v. State, 33 Tex. Cr. R. 431, 26 S. W. 993.

[60] People v. Lewis, 62 Hun, 622, 16 N. Y. Supp. 881.

[61] People v. Lane, 100 Cal. 379, 34 Pac. 856; post, p. 608.

[62] Post, p. 615.

[63] Post, p. 616; People v. Stanley, 101 Mich. 93, 59 N. W. 498; State v. Badnelley, 32 R. I. 378, 79 Atl. 834.

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Thus, on indictment for burglary, the complaining witness may testify that she gave the alarm, and told a police officer the direction she thought the burglar had taken in leaving the house.[64] And, on indictment for robbery, descriptions of the offender given by eyewitnesses immediately after the robbery have been admitted as part of the res gestæ.[65] And, on prosecution for murder while resisting arrest, a remark of a bystander to an officer that "there is the man that did it" (that is, committed the offense for which the arrest was being made) is admissible.[66] On a prosecution for murder, it may be shown that a person in the room with the deceased when he was shot saw a man with a gun pass a window, and thereupon exclaimed, "There's Butcher!" (a name by which the defendant was known).[67] On indictment for manslaughter by carelessly driving over the deceased, a statement made by the deceased, as to the cause of his accident, as soon as he was picked up, was allowed to be proved, though it was not a dying declaration.[68] And, on a prosecution for murder, a statement made by the defendant a few minutes after the homicide, and near the place, and in the presence and hearing of

[64] State v. Moore, 117 Mo. 395, 22 S. W. 1086.

[65] Jordan v. Com., 25 Grat. (Va.) 943.

[66] State v. Duncan, 116 Mo. 288, 22 S. W. 699.

[67] R. v. Fowkes, Steph. Dig. Ev. (Chase's Ed.) 9; Bedingfield's Case, 14 Am. Law Rev. 817, 15 Am. Law Rev. 1, 71. So of an exclamation by a boy four years old that "the bums killed pa with a broomstick," which was made from ten to thirty seconds after the fatal assault. State v. Lasecki, 90 Ohio St. 10, 106 N. E. 660, L. R. A. 1915E, 202, Ann. Cas. 1916C, 1182.

[68] Rex v. Foster, 6 Car. & P. 325. On an indictment against A. for murder by stabbing, a declaration by the deceased, made immediately after the mortal wound was inflicted, that "A. has stabbed me," is admissible as part of the res gestæ. Com. v. Hackett, 2 Allen (Mass.) 136. And see Com. v. M'Pike, 3 Cush. (Mass.) 184, 50 Am. Dec. 727; Pilcher v. State, 32 Tex. Cr. R. 557, 25 S. W. 24; People v. Simpson, 48 Mich. 474, 12 N. W. 662. But see Reg. v. Bedingfield, 14 Cox, Cr. Cas. 341, in which it was held, on indictment of A. for cutting B.'s throat, where the question was whether A. or B. himself did the cutting, a statement by B. when running out of the room immediately after the act was done was not allowed to be proved.

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eyewitnesses of the homicide, who were not introduced as witnesses by the state, should be admitted, at the instance of the defendant, as part of the res gestæ.[69]

The declaration must be part of the same transaction. Thus on the prosecution of a physician for killing a woman in attempting to procure an abortion, a statement, made by the woman after returning home from the defendant's office, as to what the defendant had said and done there, was excluded.[70]

OTHER CRIMES

203. Evidence of another crime than that charged is only admissible in the following cases:

(a) Where it falls within one of the rules heretofore stated, it is admissible.

(b) Where it shows the existence at the time of the crime charged of any intention, knowledge, good or bad faith, malice, or other state of mind, the existence of which is in issue or is relevant to the issue. But other crimes cannot be proved merely in order to show that the defendant was likely to commit the crime charged.

(c) When there is a question whether the act charged was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the defendant was concerned, is admissible. This is called the proof of facts showing system.

It is well settled that on a prosecution for one crime it cannot be shown that the defendant on another occasion committed another crime, even though it may be a crime of

[69] Little v. Com., 25 Grat. (Va.) 921.

[70] People v. Davis, 56 N. Y. 95. And see People v. Newton, 96 Mich. 586, 56 N. W. 69; Shoecraft v. State, 137 Ind. 433, 36 N. E. 1113. "The doctrine of res gestæ as applied to exclamations should have its limits determined, not by the strict meaning of the word 'contemporaneous,' but rather by the causal, logical, or psychological relation of such exclamation with the primary facts in controversy."

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the same sort,[71] unless the case falls within one of the exceptions hereafter stated.

Rules Heretofore Stated

If evidence of another crime is admissible under any of the rules heretofore stated, it is not rendered inadmissible merely because it shows the commission of another. Where evidence offered tends to prove commission of the crime charged, it is not inadmissible because it also tends to prove the commission by the defendant of another crime.[72]

Evidence of another and distinct crime is admissible if it was committed as part of the same transaction, and forms part of the res gestæ. On indictment for murder, for instance, it may be shown that the defendant, immediately before or at the time of the murder, robbed the deceased, or that he killed or attempted to kill a bystander.[73]

State v. Lasecki, 90 Ohio St. 10, 106 N. E. 660, L. R. A. 1915E, 202, Ann. Cas. 1916C, 1182.

[71] R. v. Cole, Steph. Dig. Ev. (Chase's Ed.) 24; Holder v. State, 58 Ark. 473, 25 S. W. 279; Chaffin v. State (Tex. Cr. App.) 24 S. W. 411; People v. Gibbs, 93 N. Y. 470; State v. Young, 119 Mo. 495, 24 S. W. 1038; Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; Shaffner v. Com., 72 Pa. 60, 13 Am. Rep. 649; People v. Lane, 100 Cal. 379, 34 Pac. 856; State v. Bates, 46 La. Ann. 849, 15 South. 204; State v. Kelley, 65 Vt. 531, 27 Atl. 203, 36 Am. St. Rep. 884; People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846; Campbell v. State, 55 Tex. Cr. R. 277, 116 S. W. 581. This rule extends to proof of an accusation of another crime, as well as to evidence of its commission. People v. Argentos, 156 Cal. 720, 106 Pac. 65. The general rule has been relaxed in prosecutions for illicit intercourse, incest, adultery, and seduction. In these cases many courts hold that previous acts of improper familiarity between the parties are admissible. State v. Hilberg, 22 Utah, 27, 61 Pac. 215; People v. Gibson, 255 Ill. 302, 99 N. E. 599, 48 L. R. A. (N. S.) 236. But not so similar acts between defendant and other parties. People v. Gibson, supra.

[72] State v. Madigan, 57 Minn. 425, 59 N. W. 490; Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; Horn v. State, 102 Ala. 144, 15 South. 278; State v. Phelps, 5 S. D. 480, 59 N. W. 471; Frazier v. State, 135 Ind. 38, 34 N. E. 817; People v. Argentos, 156 Cal. 720, 106 Pac. 65.

[73] Hargrove v. State, 33 Tex. Cr. R. 431, 26 S. W. 993; Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81; People v. Mead, 50 Mich. 228, 15 N. W. 95; ante, p. 605, and cases there cited.

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Again, if the commission of the other crime supplies a motive for the crime charged it may be proved.[74]

And it may be proved if it shows preparation for the crime charged,[75] or if it constitutes conduct subsequent to the crime charged, and was apparently influenced thereby.[76]

Acts Showing Intention, Knowledge, Good Faith, etc.

Whenever the existence of any particular intention, knowledge, good or bad faith, malice or other state of mind is in issue, and the commission of another crime tends to prove its existence, the other crime may be shown.[77] The evidence is admitted for this purpose only, and not to show that the defendant was likely to commit the crime in question. For the latter purpose it is never admissible. On indictment for receiving stolen goods from a certain person, it has been held that it cannot be shown that the defendant at other times received stolen goods from other persons,[78] but it may be shown that at other times he received other stolen goods from the same person, for the purpose of showing his knowledge that the goods in question had been stolen.[79] So where the defendant is charged with uttering

[74] Ante, p. 597; Painter v. People, 147 Ill. 444, 35 N. E. 64; People v. Dailey, 143 N. Y. 638, 37 N. E. 823; Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; Com. v. Choate, 105 Mass. 458; Com. v. Ferrigan, 44 Pa. 386; People v. Argentos, 156 Cal. 720, 106 Pac. 65. But it must tend to establish the specific motive underlying the crime charged, or a motive common to both crimes, or it is not admissible. People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

[75] Ante, p. 599; State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766; Com. v. Choate, 105 Mass. 458; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460; People v. Wood, 3 Parker, Cr. R. (N. Y.) 681.

[76] Ante, p. 599.

[77] Dunn's Case, 1 Moody, Crown Cas. 146; People v. Shulman, 80 N. Y. 373, note; Copperman v. People, 56 N. Y. 591; Com. v. Bradford, 126 Mass. 42; Com. v. Jackson, 132 Mass. 16; Kramer v. Com., 87 Pa. 299; People v. Weinseimer, 117 App. Div. 603, 102 N. Y. Supp. 579; Clark v. People, 224 Ill. 554, 79 N. E. 941.

[78] Coleman v. People, 55 N. Y. 81. See, also, State v. Bowen, 43 Utah, 111, 134 Pac. 623. Contra, where the different goods had been stolen from the same person. Sapir v. U. S., 174 Fed. 219, 98 C. C. A. 227.

[79] Dunn's Case, supra; Copperman v. People, 56 N. Y. 591.

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a forged instrument or counterfeit coin, knowing it to be counterfeit, it may be proved, for the purpose of showing the guilty knowledge, that before and after the act charged he uttered counterfeit coin or forged instruments.[80] And on an action or indictment for libel, other defamatory statements published by the defendant concerning the same person are admissible to show malice.[81] On indictment for murder it is always competent to show previous assaults or attempts by the defendant to kill the deceased for the purpose of rebutting the defense of accident, or self-defense, and to show the necessary malice aforethought.[82] And generally, for the purpose of showing a criminal intent or malice, previous attempts by the defendant to commit the same crime may be shown. Thus on indictment under a statute for maliciously burning a building, or at common law for arson, it may be shown that the defendant had set fire to the same building three days before.[83]

Facts Showing System

When there is a question whether the act charged was accidental or intentional, the fact that the act formed part of a series of similar acts, in each of which the defendant was concerned, is relevant, and the similar acts may be shown though they constitute separate crimes. The fact of system thus shown tends to prove that the act in question was not accidental but intentional.[84] Thus on indictment

[80] Reg. v. Francis, L. R. 2 Crown Cas. 128; Reg. v. Cooper, 1 Q. B. Div. 19; Com. v. Coe, 115 Mass. 481; Langford v. State, 33 Fla. 233, 14 South. 815; Mayer v. People, 80 N. Y. 364; Anson v. People, 148 Ill. 494, 35 N. E. 145.

[81] Barrett v. Long, 3 H. L. Cas. 414; State v. Riggs, 39 Conn. 498.

[82] Painter v. People, 147 Ill. 444, 35 N. E. 64.

[83] Com. v. Bradford, 126 Mass. 42; Com. v. McCarthy, 119 Mass. 354; Kramer v. Com., 87 Pa. 299; State v. Hallock, 70 Vt. 159, 40 Atl. 51. See and compare Raymond v. Com., 123 Ky. 368, 96 S. W. 515.

[84] Reg. v. Gray, 4 Fost. & F. 1102; People v. Wood, 3 Parker, Cr. R. (N. Y.) 681; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506; State v. Lapage, 57 N. H. 245, 294, 24 Am. Rep. 69; State v. Walton, 114 N. C. 783, 18 S. E. 945; Barnard v. U. S., 162 Fed. 618, 89 C. C. A. 376; State v. Dobbins, 152 Iowa, 632, 132 N. W. 805, 42 L. R. A. (N. S.) 735.

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for setting fire to a house in order to obtain the insurance, it may be shown that the defendant had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of these fires the defendant received payment from a different insurance office, since this tends to show that the fires were not accidental.[85]

On indictment for forgery and embezzlement it appeared that the defendant had been employed by the prosecutor to pay the wages of the latter's laborers, and that it was his duty to make entries in a book showing the amounts paid by him, and he made an entry showing that on a particular occasion he paid more than he really did pay. On the question whether the false entry was accidental or intentional it was held competent to show that for a period of two years the defendant made other similar false entries in the same book, the false entry in each case being in his favor.[86]

On indictment of a woman for poisoning her husband in September, 1848, where the question was whether the poison was accidentally or intentionally administered, it was held competent to show that the deceased's three sons had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by the defendant, though the defendant was separately indicted for murdering the sons.[87]

[85] Reg. v. Gray, supra.

[86] Reg. v. Richardson, 2 Fost. & F. 343. So, on an indictment against a police officer for accepting bribes, evidence of acceptance of previous bribes from the same person is admissible. People v. Grutz, 212 N. Y. 72, 105 N. E. 843, L. R. A. 1915D, 229, Ann. Cas. 1915D, 167.

[87] Reg. v. Geering, 18 Law J. M. Cas. 215. But where there is no possibility that the killing was done accidentally, evidence of a similar poisoning is inadmissible to show absence of accident or mistake. People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

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ACTS AND DECLARATIONS OF CONSPIRATORS

204. When two or more persons conspire to commit any offense, everything said, done, or written by one of them in the execution or furtherance of their common purpose is admissible as against each of them.

205. But statements by one conspirator as to measures taken, or acts done, in the execution or furtherance of such common purpose, are not admissible as such as against any of the others unless made in their presence. So a confession made by one conspirator after the conspiracy was ended is not admissible against another, when not made in his presence.

206. Evidence of acts or statements admissible under these rules cannot be given unless, apart from them, the existence of the conspiracy is prima facie proved.

When two or more persons conspire together to commit any offense, each makes the other his agent for the execution of their common purpose, and every act, or oral or written declaration, done or made by one of them in the execution or furtherance of this purpose is deemed to be done or made by all of them, and is therefore admissible against each.[88] But declarations by one of the conspirators, not in execution or furtherance of the common purpose, but merely as a narrative of past acts or measures done or taken in the execution or furtherance of such purpose cannot be

[88] Reg. v. Blake, 6 Q. B. 137; Rex v. Hardy, 24 How. State Tr. 451; American Fur Co. v. U. S., 2 Pet. 358, 7 L. Ed. 450; Williams v. State, 47 Ind. 568; Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81; Com. v. Brown, 130 Mass. 279; Com. v. O'Brien, 140 Pa. 555, 21 Atl. 385; People v. Collins, 64 Cal. 293, 30 Pac. 847; Seville v. State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; State v. Duffy, 124 Mo. 1, 27 S. W. 358; Musser v. State, 157 Ind. 423, 61 N. E. 1. And as against conspirator joining after the acts were done or declarations made. Baker v. State, 80 Wis. 416, 50 N. W. 518; State v. Crab, 121 Mo. 554, 26 S. W. 548. Threats by one conspirator on prosecution for murder. State v. Phillips, 117 Mo. 389, 22 S. W. 1079. Acts and declarations of employés of conspirator. State v. Grant, 86 Iowa, 216, 53 N. W. 120.

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deemed the acts or declarations of all, and are not admissible except against those who did or made them, or in whose presence they were done or made.[89]

Thus where the question was whether two persons conspired together to cause certain imported goods to be passed through the customhouse on payment of too small an amount of duty, the fact that one of them had made in a book a false entry, necessary to be made in order to carry out the fraud, was held admissible against the other; but the fact that he had made an entry on his check book showing that he had shared the proceeds of the fraud with the other was held not to be admissible against the latter.[90]

So where the question was whether the defendant committed high treason, the overt act charged being that he presided over an organized political agitation calculated to produce a rebellion, and directed by a central committee through local committees, the facts that meetings were held, speeches delivered, and papers circulated in different parts of the country, in a manner likely to produce rebellion by, and by the direction of, persons shown to have acted in concert with the defendant, were held admissible against the defendant, though he was not present at those transactions, and took no part in them personally; but an account given by one of the conspirators in a letter to a friend, of his own proceedings in the matter, not intended to further the common object, and not brought to the defendant's notice, was held inadmissible.[91]

Confessions or declarations made by one of the conspirators after the object of the conspiracy is abandoned or accomplished, not being declarations in the execution or furtherance of such object, are not admissible against the others when not made in their presence.[92] And, of course, dec-

[89] Reg. v. Blake, supra; Rex v. Hardy, supra; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; People v. Davis, 56 N. Y. 95; Heine v. Com., 91 Pa. 145.

[90] Reg. v. Blake, supra.

[91] Rex v. Hardy, supra.

[92] Brown v. U. S., 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010; State v. Grant, 86 Iowa, 216, 53 N. W. 120; People v. Arnold, 46 Mich. 268, 9 N. W. 406; Com. v. Ingraham, 7 Gray (Mass.) 46; State

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larations made or acts done by one conspirator before any conspiracy at all, and not ratified by the other, are not admissible against the latter.[93]

To render acts or declarations of one person admissible against another under this rule, the court must be first satisfied that, apart from them, there are prima facie grounds for believing in the existence of the conspiracy.[94] The conspiracy need not be shown by direct evidence as to the unlawful agreement. It is sufficient to make out a prima facie showing by circumstantial evidence.[95] The court will generally require such a showing before admitting evidence of the acts or declarations, but they may, in the discretion of the court, be admitted on the promise of the prosecuting attorney to afterwards show the conspiracy, and afterwards excluded on his failure to do so.[96]

v. Ross, 29 Mo. 32; State v. Donelon, 45 La. Ann. 744, 12 South. 922; Cable v. Com. (Ky.) 20 S. W. 220; State v. Minton, 116 Mo. 605, 22 S. W. 808; State v. Green, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872; People v. Stevens, 47 Mich. 411, 11 N. W. 220; Gore v. State, 58 Ala. 391; Novkovic v. State, 149 Wis. 665, 135 N. W. 465; Erber v. U. S., 234 Fed. 221, 148 C. C. A. 123; Hicks v. State, 11 Ga. App. 265, 75 S. E. 12. Flight of one conspirator is not admissible as evidence against the others. People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401.

[93] State v. Grant, supra; McGraw v. Com. (Ky.) 20 S. W. 279; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; State v. Melrose, 98 Mo. 594, 12 S. W. 250; State v. Hilderbrand, 105 Mo. 318, 16 S. W. 948.

[94] Crosby v. People, 137 Ill. 325, 27 N. E. 49; Ormsby v. People, 53 N. Y. 472; McGraw v. Com. (Ky.) 20 S. W. 279; Amos v. State, 96 Ala. 120, 11 South. 424; Baker v. State, 80 Wis. 416, 50 N. W. 518; Belcher v. State, 125 Ind. 419, 25 N. E. 545; Poff v. Com. (Ky.) 25 S. W. 883; Jones v. State, 58 Ark. 390, 24 S. W. 1073; Stager v. U. S., 233 Fed. 510, 147 C. C. A. 396.

[95] Smith v. State (Tex. Cr. App.) 20 S. W. 576; People v. Arnold, 46 Mich. 268, 9 N. W. 406; Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342.

[96] Hall v. State, 31 Fla. 176, 12 South. 449; Hamilton v. People, 29 Mich. 195; State v. Grant, 86 Iowa, 216, 53 N. W. 120; State v. Flanders, 118 Mo. 227, 23 S. W. 1086.

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HEARSAY

207. Hearsay evidence is the testimony given by a witness who relates, not what he knows personally but what others have told him, or what he has heard said by others, and is admissible only in exceptional cases.

DECLARATIONS OF PERSONS OTHER THAN DEFENDANT

208. Declarations by persons other than the defendant cannot be proved,

(a) Unless they are part of the res gestæ, or

(b) Unless they are admissible as dying declarations,[97] or

(c) Unless they are admissible as declarations by authority of the defendant,[98] or

(d) Unless they are admissible as evidence given in a former proceeding.[99]

It is only in very exceptional cases that the declarations of a third person can be shown. To prove the facts, the person himself must be called as a witness to testify as to the facts.[1] Thus it is error in a criminal case to admit the cry of a third person, "There he goes!" referring to the defendant, when the officer went out to arrest him, since, if the person making the declaration saw the defendant, he should be placed on the stand to testify to that fact.[2] So on an indictment for larceny it is not competent to prove statements of the owner of the property to the officer who made the

[97] Post, p. 617. [98] Post, p. 620. [99] Post, p. 627.

[1] U. S. v. Wilson (D. C.) 60 Fed. 890; Sanders v. State, 31 Tex. Cr. R. 525, 21 S. W. 258; Davis v. State, 32 Tex. Cr. R. 377, 23 S. W. 794; Id., 23 S. W. 796; Bedford v. State, 36 Neb. 702, 55 N. W. 263; People v. Newton, 96 Mich. 586, 56 N. W. 69; Shoecraft v. State, 137 Ind. 433, 36 N. E. 1113; State v. Dukes, 40 S. C. 481, 19 S. E. 134; State v. Terline, 23 R. I. 530, 51 Atl. 204, 91 Am. St. Rep. 650; People v. Colbath, 141 Mich. 189, 104 N. W. 633.

[2] Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811.

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arrest.[3] And on indictment for murder, or assault and battery, statements made by the person killed or assaulted, not so soon after the offense that they can be regarded as part of the res gestæ, and not being dying declarations, cannot be proved.[4]

Self-Accusing Declarations of Third Persons

Under this rule the defendant cannot prove self-accusing declarations or confessions of third persons to show that they, and not he, committed the crime charged.[5] And it makes no difference that the person making the declaration has since escaped [6] or died.[7]

Res Gestæ

There is an exception to this rule where the declaration forms a part of the res gestæ. Thus, on a prosecution for murder committed while resisting arrest, a remark of a bystander to an officer that "there is the man that did it" (i. e. committed the offense for which the arrest was being made), was held admissible on this ground.[8] And on a prosecution for murder, declarations made by the deceased during the affray in which he was killed, though not dying declarations, are admissible as part of the res gestæ.[9] And on indictment for assault with intent to kill, the wife of the person assaulted was allowed to testify as to what her husband told her about the assault immediately after his return home from the scene of it, a distance of a mile and a quarter, and while suffering from the wounds there inflicted.[10] This

[3] Bolling v. State, 98 Ala. 80, 12 South. 782.

[4] People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115; State v. Daugherty, 17 Nev. 376, 30 Pac. 1074; State v. Raven, 115 Mo. 419, 22 S. W. 376.

[5] State v. West, 45 La. Ann. 928, 13 South. 173; State v. Duncan, 116 Mo. 288, 22 S. W. 699; Welsh v. State, 96 Ala. 92, 11 South. 450; State v. Fletcher, 24 Or. 295, 33 Pac. 575; Horton v. State (Tex. Cr. App.) 24 S. W. 28; State v. Hack, 118 Mo. 92, 23 S. W. 1089.

[6] State v. West, 45 La. Ann. 14, 12 South. 7.

[7] Davis v. Com., 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 201.

[8] State v. Duncan, 116 Mo. 288, 22 S. W. 699.

[9] State v. Henderson, 24 Or. 100, 32 Pac. 1030.

[10] Moore v. State, 31 Tex. Cr. R. 234, 20 S. W. 563. This case probably goes too far. See People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115.

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question has already been considered, and some of the cases collected, in another place.[11]

DYING DECLARATIONS

209. In prosecutions for homicide, a statement made by the deceased as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is admissible, if it appears to the satisfaction of the judge that when the statement was made the deceased was in actual danger of death, and had given up all hope of recovery.

210. The deceased must have been competent as a witness, and the facts stated must be such that he could have testified to them.

Dying declarations are admissible under the circumstances above stated,[12] but not otherwise. In the first place, they are only admissible in a prosecution for causing the death of the declarant. They would not be admissible in a prose-

[11] Ante, p. 606.

[12] Rex v. Mosley, 1 Moody, Crown Cas. 98; State v. Talbert, 41 S. C. 526, 19 S. E. 852; Jones v. State, 71 Ind. 66; State v. Cronin, 64 Conn. 293, 29 Atl. 536; State v. Dickinson, 41 Wis. 299; Simons v. People, 150 Ill. 66, 36 N. E. 1019; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815; People v. Madas, 201 N. Y. 349, 94 N. E. 857, Ann. Cas. 1912B, 229. A dying declaration is not inadmissible because made under oath. State v. Talbert, supra. Dying declarations being hearsay, the only justification for the admission of them is the presumption that the near approach of death produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to misstate. Among such motives are malice and the desire for revenge. When, therefore, it appears that the declaration is tainted therewith, it is inadmissible. Reeves v. State, 106 Miss. 885, 64 South. 836, Ann. Cas. 1917A, 1245. A dying declaration may be made by acts, instead of words, as by nodding the head and pointing, when declarant is unable to speak. People v. Madas, 201 N. Y. 349, 94 N. E. 857, Ann. Cas. 1912B, 229. It is not ground for excluding a dying declaration that it does not appear that the declarant believed in God and rewards and punishments after death. State v. Hood, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964.

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cution for any other offense.[13] The dying declaration of A. that he murdered B. would not be admissible on a prosecution of C. for murdering B.[14]

If the deceased would have been incompetent to testify as a witness, his statement is not admissible.[15] Nor is the statement admissible if the facts stated are such as could not have been testified to by him, as where they are hearsay, or matter of opinion, or altogether irrelevant.[16] But the fact that the deceased was solicited and urged to make the statement, and did so reluctantly, or that it was brought out by leading questions, does not render it inadmissible.[17]

If the statement has been reduced to writing, and read over to and signed by the deceased, the written statement should be introduced;[18] but if for any reason the written statement is not competent, the declarations may be shown by parol evidence.[19]

A witness, to be competent to testify to dying declarations, must be able to accurately state the substance of them

[13] Reg. v. Hind, Bell, Crown Cas. 253; Scott v. People, 63 Ill. 508; People v. Davis, 56 N. Y. 95; Johnson v. State, 50 Ala. 456; State v. Dickinson, 41 Wis. 299; People v. Becker, 215 N. Y. 126, 109 N. E. 127, Ann. Cas. 1917A, 600. See State v. Meyer, 65 N. J. Law, 237, 47 Atl. 486, 86 Am. St. Rep. 634. In New York, by statute, dying declarations are admissible in prosecutions for abortion. Code Cr. Proc. N. Y. § 398a.

[14] Gray's Case, Ir. Cir. R. 76; Davis v. Com., 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 201.

[15] Greenl. Ev. § 157; Donnelly v. State, 26 N. J. Law, 463, 601; People v. Chin Mook Sow, 51 Cal. 597.

[16] State v. Eddon, 8 Wash. 292, 36 Pac. 139; Jones v. State, 71 Ind. 66; State v. Wood, 53 Vt. 560; Sullivan v. State, 102 Ala. 135, 15 South. 264, 48 Am. St. Rep. 22; People v. Shaw, 63 N. Y. 36. Thus a dying declaration that deceased did not believe that defendant intended to kill him is not admissible, since it is a mere statement of opinion. State v. Wright, 112 Iowa, 436, 84 N. W. 541; Jones v. Com. (Ky.) 46 S. W. 217. But the declaration is not inadmissible because some of its statements, standing by themselves, would be inadmissible. State v. Carter, 107 La. 792, 32 South. 183.

[17] Jones v. State, supra; Maine v. State, 9 Hun (N. Y.) 113.

[18] 1 Greenl. Ev. § 161; Jones v. State, 71 Ind. 66. But see Com. v. Haney, 127 Mass. 455.

[19] Allison v. Com., 99 Pa. 17; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200.

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as they were made, though he need not state them verbatim.[20]

To admit dying declarations is not a violation of the constitutional right of the defendant to confront the witnesses against him.[21]

It is absolutely essential in all cases to show that the declaration was made under a sense of impending death, and without any hope whatever of a recovery. Thus, where a statement of the deceased was taken down thus: "I make the above statement with the fear of death before me, and with no hope of recovery," and on its being read over to him he changed it to read, "with no hope at present of my recovery," the statement was held inadmissible.[22] The slightest hope of recovery will render the statement inadmissible.[23]

If the deceased had no hope of recovery at the time the declarations were made, the fact that he afterwards lived for some time,[24] or that the doctor was not without hope,[25]

[20] State v. Patterson, supra; State v. Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; People v. Chase, 79 Hun, 296, 29 N. Y. Supp. 376; Starkey v. People, 17 Ill. 17.

[21] Com. v. Carey, 12 Cush. (Mass.) 246, 249; State v. Dickinson, 41 Wis. 299.

[22] Reg. v. Jenkins, L. R. 1 Crown Cas. 187; Reeves v. State, 106 Miss. 885, 64 South. 836, Ann. Cas. 1917A, 1245. So, where declarant stated that she believed she was about to die, and that she hoped God would let her recover. People v. Brecht, 120 App. Div. 769, 105 N. Y. Supp. 436.

[23] Reg. v. Jenkins, supra; State v. Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; Com. v. Roberts, 108 Mass. 296; Com. v. Haney, 127 Mass. 455; Justice v. State, 99 Ala. 180, 13 South. 658; Ex parte Meyers, 33 Tex. Cr. R. 204, 26 S. W. 196; People v. Gray, 61 Cal. 164, 44 Am. Rep. 549; Jackson v. Com., 19 Grat. (Va.) 656; Brotherton v. People, 75 N. Y. 159.

[24] Com. v. Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762; Rex v. Mosley, 1 Moody, Crown Cas. 98; People v. Chase, 79 Hun, 296, 29 N. Y. Supp. 376; Jones v. State, 71 Ind. 66; Boulden v. State, 102 Ala. 78, 15 South. 341; State v. Wilson, 121 Mo. 434, 26 S. W. 357; State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322. In State v. Brumo, 153 Iowa, 7, 132 N. W. 817, the declaration was held admissible, though the declarant lived twenty days after it was made. This rule is governed by statute in some states. Thus in Georgia the

[25] Rex v. Mosley, supra.

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or that the deceased before or after making the declaration expressed some hope,[26] will not render them inadmissible. Such facts would, however, be taken into consideration by the court in determining whether the deceased was under a sense of impending death when he made the statement. It is generally only by considering all the circumstances, including the previous, contemporaneous, and subsequent declarations of the deceased, that the question can be determined.[27]

ADMISSIONS AND DECLARATIONS BY DEFENDANT

211. Declarations made by the defendant, or by a third person by his authority,[28] if relevant, are admissible against him, but they are not admissible in his favor.

If the defendant has made statements not amounting to a confession, but constituting an admission of facts in issue or relevant to the issue, they are admissible against him.[29]

statute (Pen. Code 1910, § 1026) provides that the declaration, to be admissible, must be made while the declarant was "in the article of death." Darby v. State, 9 Ga. App. 700, 72 S. E. 182.

[26] State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; Small v. Com., 91 Pa. 304; Swisher v. Com., 26 Grat. (Va.) 963, 21 Am. Dec. 330.

[27] State v. Cronin, 64 Conn. 293, 29 Atl. 536; People v. Simpson, 48 Mich. 474, 12 N. W. 662; McHargue v. Com. (Ky.) 23 S. W. 349. See People v. Warren, 259 Ill. 213, 102 N. E. 201, Ann. Cas. 1914C, 219; Gerald v. State, 128 Ala. 6, 29 South. 614; State v. Thompson, 49 Or. 46, 88 Pac. 583, 124 Am. St. Rep. 1015. A written statement, prepared while the declarant was in possession of all his faculties, and while he believed he would recover, intended to be signed in the event of a subsequent conviction of impending death, and which is so signed, is not admissible as a dying declaration. Harper v. State, 79 Miss. 575, 31 South. 195, 56 L. R. A. 372. But see Wilson v. Com. (Ky.) 60 S. W. 400.

[28] See People v. Brady, 4 Cal. Unrep. Cas. 661, 36 Pac. 349; ante, p. 612.

[29] Com. v. Sanborn, 116 Mass. 61; People v. Bosworth, 64 Hun, 72, 19 N. Y. Supp. 114; People v. Cassidy, 60 Hun, 579, 14 N. Y. Supp.

Thus a letter written by a person under arrest, containing statements tending to show his guilt, is admissible.[30] But statements made by the defendant not tending to connect him with the crime charged, such as admissions that he committed other crimes, etc., are not competent.[31]

Self-serving declarations by the defendant are not admissible in his favor.[32]

CONFESSIONS

212. A confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime, and is admissible against him, if voluntary.

213. No confession is deemed voluntary within this rule if it was caused by any inducement, threat, or promise proceeding from a person in authority, and having reference to the charge against the accused, whether addressed to him directly or brought to his knowledge indirectly, and if such inducement, threat, or promise gave the accused reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.

214. A confession is not involuntary merely because it appears to have been caused by the exhortations of a person in authority to make it as a matter of reli-

349; Id., 133 N. Y. 612, 30 N. E. 1003; State v. Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449; Thomas v. State, 100 Ala. 53, 14 South. 621; State v. Keeland, 39 Mont. 506, 104 Pac. 513. In Parker v. State, 46 Tex. Cr. R. 461, 80 S. W. 1008, 108 Am. St. Rep. 1021, 3 Ann. Cas. 893, it was held that such statements are not admissible, if elicited by severe cross-examination by an officer while defendant is under arrest.

[30] People v. Cassidy, supra.

[31] Territory v. Youree, 3 Ariz. 346, 29 Pac. 894; Com. v. Campbell, 155 Mass. 537, 30 N. E. 72; People v. Brown, 110 App. Div. 490, 96 N. Y. Supp. 957.

[32] Baker v. State, 80 Wis. 416, 50 N. W. 518; Threadgill v. State, 32 Tex. Cr. R. 451, 24 S. W. 511; State v. Talbert, 41 S. C. 526, 19 S. E. 852.

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gious duty, or by an inducement collateral to the proceeding, or by inducement held out by a person not in authority.

If the defendant has confessed that he committed the crime charged under the circumstances stated above, his confession is competent evidence against him.[33]

To render a confession admissible it must have been voluntary. It is not voluntary if it was caused by any inducement, threat, or promise proceeding from any person in authority, and having reference to the charge against the accused; as where it is made to a policeman or jailer, or prosecuting attorney, after a promise by him to do what he can to lighten the punishment, or after a statement that it will be better to confess, or holding out any other inducement with reference to the particular charge, or on his threatening to make it harder on the accused.[34] Where a handbill was issued by the secretary of state, promising a reward and pardon to any accomplice in a crime who would confess, and an accomplice, under the influence of a hope of pardon, made a confession, it was held that the confession could not be used against him.[35] It is immaterial whether the threat, inducement, or promise is addressed directly to the accused, or whether it is conveyed to him indirectly, as by some third person, or by intimation, or by manner. It is enough that it is conveyed in some way, and influences him in making the confession. The accused must have had reasonable grounds from such threat, inducement, or promise to suppose that by making the confession he would gain some ad-

[33] See Com. v. Johnson, 162 Pa. 63, 29 Atl. 280; Walker v. State, 136 Ind. 663, 36 N. E. 356. Confessions so made before the grand jury are admissible. Wisdom v. State, 42 Tex. Cr. R. 579, 61 S. W. 926.

[34] Reg. v. Boswell, Car. & M. 584; Beckham v. State, 100 Ala. 15, 14 South. 859; Com. v. Myers, 160 Mass. 530, 36 N. E. 481; Gallagher v. State (Tex. Cr. App.) 24 S. W. 288; Collins v. Com. (Ky.) 25 S. W. 743. The confession need not have been made immediately after the inducement, so long as it was made under the influence of it. State v. Drake, 113 N. C. 624, 18 S. E. 166.

[35] Reg. v. Boswell, supra.

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vantage or avoid some evil in reference to the proceedings against him.[36]

A confession is not involuntary merely because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty,[37] or by an inducement collateral to the proceeding,[38] or by inducements held out by some person not in authority.[39] The prosecutor, the prosecuting attorney, the magistrate or judge, the jailer, or other officer having the accused in custody, are persons in authority within the rules above stated.[40] The mere fact that a confession was made to a person in authority, even when in custody, does not render it involuntary. There must have been some inducement, threat, or promise from him.[41]

[36] People v. Phillips, 42 N. Y. 200; Flagg v. People, 40 Mich. 706.

[37] Rex v. Gilham, 1 Moody, Crown Cas. 186. For an officer to tell accused to tell the truth is advice merely, and not a threat. People v. Randazzio, 194 N. Y. 147, 87 N. E. 112.

[38] Rex v. Lloyd, 6 Car. & P. 393; Cox v. People, 80 N. Y. 501; State v. De Graff, 113 N. C. 688, 18 S. E. 507; State v. Tatro, 50 Vt. 483. Thus, where an officer promises to let the accused see his wife if he confesses, the confession is voluntary. Rex v. Lloyd, supra.

[39] Smith v. Com., 10 Grat. (Va.) 734 (collecting authorities); Shiflet v. Com., 14 Grat. (Va.) 652; Reg. v. Moore, 2 Denison, Crown Cas. 522; U. S. v. Stone (C. C.) 8 Fed. 232. It is held in some jurisdictions that confessions caused by inducements held out by a person not in authority are not admissible, if the inducements were made in the presence of a person in authority. State v. Sherman, 35 Mont. 512, 90 Pac. 981, 119 Am. St. Rep. 869. That a master is not a person in authority over his servant, see Smith v. Com., supra; Reg. v. Moore, supra. But see, to the effect that it is sufficient to exclude a confession if the person stood in such a relation to the accused that his communications must influence the accused. Com. v. Tuckerman, 10 Gray (Mass.) 173. And see People v. Wolcott, 51 Mich. 612, 17 N. W. 78.

[40] State v. Staley, 14 Minn. 105 (Gil. 75); Wolf v. Com., 30 Grat. (Va.) 833; Beckham v. State, 100 Ala. 15, 14 South. 859; Rector v. Com., 80 Ky. 468; People v. Phillips, 42 N. Y. 200; Flagg v. People, 40 Mich. 706; Draughn v. State, 76 Miss. 574, 25 South. 153.

[41] Cox v. People, 80 N. Y. 501; People v. Wentz, 37 N. Y. 303; Goodwin v. State, 102 Ala. 87, 15 South. 571; Com. v. Sego, 125 Mass. 213; Com. v. Cuffee, 108 Mass. 285; Com. v. Johnson, 162 Pa. 63, 29 Atl. 280; Willis v. State, 93 Ga. 208, 19 S. E. 43; Cornwall v. State, 91 Ga. 277, 18 S. E. 154.

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If a confession is extorted from the accused by such duress as he could not be expected to resist, as by the threatened or actual violence of a mob, it is not voluntary, and will be excluded.[42]

A confession is voluntary and admissible, notwithstanding threats, inducements, or promises by persons in authority, if it was not made until after the complete removal of the impression made thereby.[43]

Facts discovered in consequence of confessions improperly obtained, and so much of the confession as is corroborated by these facts, are admissible. Thus where a person accused of burglary made a confession to a policeman under circumstances rendering it involuntary, part of it being that the accused had thrown a lantern into a pond, and the lantern was found, this part of the confession, and the fact that the lantern was found, were held admissible.[44]

Whether the circumstances are such as to render a confession admissible is a question to be determined by the court before the confession is allowed to go before the jury.[45] There is a conflict of authority on the question of

[42] Jordan v. State, 32 Miss. 382; Young v. State, 68 Ala. 569; Miller v. People, 39 Ill. 457. The fact that the family and friends of the accused were not admitted to the jail until after the confession was made does not render the confession inadmissible. State v. Murphy, 87 N. J. Law, 515, 94 Atl. 640.

[43] Thompson v. Com., 20 Grat. (Va.) 724; Rex v. Clewes, 4 Car. & P. 221; Com. v. Howe, 132 Mass. 250; Reeves v. State (Tex. Cr. App.) 24 S. W. 518; People v. Mackinder, 80 Hun, 40, 29 N. Y. Supp. 842; Ward v. People, 3 Hill (N. Y.) 395; Com. v. Myers, 160 Mass. 530, 36 N. E. 481.

[44] Reg. v. Gould, 9 Car. & P. 364. And see Davis v. State (Tex. Cr. App.) 23 S. W. 687; Rains v. State, 33 Tex. Cr. R. 294, 26 S. W. 398; Whitney v. Com. (Ky.) 74 S. W. 257.

[45] Com. v. Culver, 126 Mass. 464; Goodwin v. State, 102 Ala. 87, 15 South. 571; State v. Patterson, 73 Mo. 695. Whether the inquiry shall be conducted in the presence of the jury has been held to be a matter within the discretion of the court. Lefevre v. State, 50 Ohio St. 584, 35 N. E. 52. If, after proof that the confession was voluntary, the defendant testifies that it was not voluntary, the issue raised is for the jury. Com. v. Shew, 190 Pac. 23, 42 Atl. 377; Wilson v. U. S., 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090.

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the burden of proving the voluntary character of the confession.[46]

Silence when Accused of Crime

As we have seen in another place, the silence of defendant when accused of a crime may be shown as an implied admission of guilt.[47]

Confession Made under Promise of Secrecy or Fraudulently Obtained

If a confession is admissible under the rules heretofore stated, it does not become inadmissible merely because it was made under a promise of secrecy, or in consequence of a deception practiced upon the accused for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to confess, and that evidence of it might be given against him.[48]

Confessions Made upon Oath

Evidence amounting to a confession may be used as such against the person who made it, although it was given upon oath, and although the proceeding upon which it was given had reference to the same subject-matter as the proceeding in which it is to be proved, and although the witness might

[46] In some jurisdictions a confession is presumed to be involuntary, and the burden is on the state to show the contrary. Reg. v. Thompson, 5 Reports, 392 [1893] 2 Q. B. 12; Thompson v. Com., 20 Grat. (Va.) 729; Young v. State, 68 Ala. 569; Nicholson v. State, 38 Md. 140. In other states it is presumed to be voluntary, and the burden is on the defendant to show that it was involuntary. Com. v. Sego, 125 Mass. 213; Rufer v. State, 25 Ohio St. 464.

[47] Ante, p. 601.

[48] Price v. State, 18 Ohio St. 418; White v. State, 32 Tex. Cr. R. 625, 25 S. W. 784; State v. Staley, 14 Minn. 105 (Gil. 75); State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; Eskridge v. State, 25 Ala. 30; King v. State, 40 Ala. 314; Jefferds v. People, 5 Parker, Cr. R. (N. Y.) 522; People v. Wentz, 37 N. Y. 303; Com. v. Cressinger, 193 Pa. 326, 44 Atl. 433. As to warning, see People v. Simpson, 48 Mich. 474, 12 N. W. 662; Com. v. Cuffee, 108 Mass. 285. In some states caution is required by statute. Rix v. State, 33 Tex. Cr. R. 353, 26 S. W. 505.

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have refused to answer the questions put to him;[49] but if, after refusing to answer the question, he was improperly compelled to answer it, his answer is not a voluntary confession.[50]

Against Whom Admissible

A confession is only admissible against the person who made it. A confession by one defendant is not competent evidence against his codefendant.[51] But it may be admitted as against the defendant who made it, if the court on request instructs the jury that it is to be considered only as against him. In such cases separate trials should be had.[52]

Corroboration of Confessions

An extrajudicial confession, in order to warrant a conviction, must be corroborated by other evidence tending to prove the corpus delicti.[53]

[49] Reg. v. Scott, 1 Dears. & B. Cr. Cas. 47; Reg. v. Robinson, L. R. 1 Cr. Cas. 80; Reg. v. Chidley, 8 Cox, Cr. Cas. 365; Com. v. King, 8 Gray (Mass.) 501; Dickerson v. State, 48 Wis. 288, 4 N. W. 321; Teachout v. People, 41 N. Y. 7; People v. Wieger, 100 Cal. 352, 34 Pac. 826; Smith v. Com. (Ky.) 26 S. W. 1100. Thus, answers given by a bankrupt on his examination may be used against him in a prosecution for offenses against the bankruptcy law. See cases first cited above. See, also, ante, p. 94.

[50] Reg. v. Garbett, 1 Denison, Cr. Cas. 236.

[51] Com. v. Ingraham, 7 Gray (Mass.) 46; Brown v. U. S., 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010; People v. Stevens, 47 Mich. 411, 11 N. W. 220; People v. Arnold, 46 Mich. 268, 9 N. W. 406; Gore v. State, 58 Ala. 391; ante, p. 613, and cases there cited.

[52] Ante, p. 503.

[53] People v. Hennessey, 15 Wend. (N. Y.) 147; U. S. v. Mayfield (C. C.) 59 Fed. 118; Ryan v. State, 100 Ala. 94, 14 South. 868; Collins v. Com. (Ky.) 26 S. W. 1; South v. People, 98 Ill. 261; People v. Lane, 49 Mich. 340, 13 N. W. 622; State v. Patterson, 73 Mo. 695; Blacker v. State, 74 Neb. 671, 105 N. W. 302, 121 Am. St. Rep. 751.

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EVIDENCE GIVEN IN FORMER PROCEEDING

215. Evidence given in a former proceeding is admissible for the purpose of proving the matter stated in a subsequent proceeding or in a later stage of the same proceeding, under the following circumstances:

(a) When the witness is dead.
(b) When he is insane.
(c) When he is so ill that he will probably never be able to travel.
(d) When he is kept out of the way by the adverse party.
(e) Provided the person against whom the evidence is to be given had the right and the opportunity to cross-examine the witness in the former proceeding.
(f) Provided the questions in issue were substantially the same in the first as in the second proceeding.
(g) Provided the same person is accused upon the same facts.

Some courts, but not all, hold that the fact that a witness who testified in a former proceeding is out of the jurisdiction of the court or cannot be found does not render his testimony admissible in a subsequent proceeding.[54] But it is otherwise if he has since died, or become insane,[55] or if he is so ill that he cannot attend, and will probably not be able

[54] Brogy v. Com., 10 Grat. (Va.) 722; U. S. v. Angell (C. C.) 11 Fed. 34; State v. Lee, 13 Mont. 248, 33 Pac. 690; People v. Newman, 5 Hill (N. Y.) 295; People v. Gordon, 99 Cal. 227, 33 Pac. 901. But see People v. Davis, 4 Cal. Unrep. Cas. 524, 36 Pac. 96; Lowery v. State, 98 Ala. 45, 13 South. 498; State v. Tyler, 46 La. Ann. 1269, 15 South. 624; Vaughan v. State, 58 Ark. 353, 24 S. W. 885. Where the proponent by a voluntary act has placed the witness beyond the jurisdiction of the court, the former testimony of such witness is inadmissible. Langham v. State, 12 Ala. App. 46, 68 South. 504.

[55] Mayor of Doncaster v. Day, 3 Taunt. 262; Rex v. Inhabitants of Eriswell, 3 Term R. 720; Bass v. State, 136 Ind. 165, 36 N. E. 124; Brown v. Com., 73 Pa. 321, 13 Am. Rep. 740; Stewart v. State (Tex. Cr. App.) 26 S. W. 203; State v. Able, 65 Mo. 357; State v. Milam, 65 S. C. 321, 43 S. E. 677.

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to attend,[56] or if he is kept away by the adverse party,[57] provided the other conditions mentioned above also exist. The person against whom the evidence is sought to be proved must have had the right and the opportunity to cross-examine the witness in the former proceeding.[58] If he had the opportunity, the fact that he did not avail himself of it is immaterial.[59] It is also necessary that in the second proceeding the same person shall be accused on the same facts.[60]

OPINION EVIDENCE

216. The fact that a person is of opinion that a fact in issue, or relevant to the issue, does or does not exist, is admissible only in exceptional cases.

A witness will not generally be allowed to state that he thinks or is of opinion that such and such a fact is or is not true. He must testify to the fact, and not state his opinion.[61] Thus, on a prosecution for murder, a witness cannot be asked whether there was anything in the looks of things in the room where the body was found that would indicate that a scuffle had taken place there. He can only state how the room looked, and let the jury draw the inference.[62]

[56] Rex v. Hogg, 6 Car. & P. 176; Chase v. Springvale Mills Co., 75 Me. 156.

[57] Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244; Reg. v. Scaife, 17 Q. B. 238, 243; State v. Houser, 26 Mo. 431. But see Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672.

[58] Wright v. Tatham, 1 Adol. & E. 3.

[59] Bradley v. Mirick, 91 N. Y. 293.

[60] Reg. v. Beeston, Dears. Crown Cas. 405. But see State v. Smith, 102 Iowa, 656, 72 N. W. 279.

[61] State v. Coella, 8 Wash. 512, 36 Pac. 474; Martin v. State, 90 Ala. 602, 8 South. 858, 24 Am. St. Rep. 844; Holmes v. State, 100 Ala. 80, 14 South. 864; Jones v. State, 58 Ark. 390, 24 S. W. 1073; Territory v. McKern, 3 Idaho (Hasb.) 15, 26 Pac. 123; Brinkley v. State, 89 Ala. 34, 8 South. 22, 18 Am. St. Rep. 87.

[62] State v. Coella, supra. So a witness cannot be asked for his opinion, from the appearance and acts of the parties at the time of the difficulty, as to which of the parties was in most danger of being shot. State v. Hamilton, 124 La. 132, 49 South. 1004, 18 Ann. Cas. 981.

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On the question of insanity nonexpert witnesses are allowed in some, but not all, states, to give their opinion, provided they state the facts known to them upon which their opinion is founded.[63]

There are some cases in which a witness may state whether from his personal observation a certain fact or condition existed, though in a sense he may be stating his opinion that it existed. Thus it is competent for a witness to state from his own observation that a person was or was not drunk,[64] or looked cross, or was nervous, excited, sick, etc.,[65] and a witness may give his opinion, based on personal observation, as to the identity of a person.[66] So, on a prosecution for cursing in the hearing of females, a witness may state whether, from his own observation, the females were near enough to have heard it.[67]

SAME—EXPERT TESTIMONY

217. Where there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter may be given.

The words "science or art" in the above rule include all subjects on which a course of special study or experience

[63] Cotrell v. Com. (Ky.) 17 S. W. 149; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; Upstone v. People, 109 Ill. 169; State v. Williamson, 106 Mo. 162, 17 S. W. 172; State v. Hayden, 51 Vt. 296; State v. Bryant, 93 Mo. 273, 6 S. W. 102; Hite v. Com. (Ky.) 20 S. W. 217; People v. Wreden, 59 Cal. 392; Byrd v. State, 76 Ark. 286, 88 S. W. 974. Contra, Com. v. Brayman, 136 Mass. 438; Holcomb v. Holcomb, 95 N. Y. 316.

[64] People v. Eastwood, 14 N. Y. 562; Com. v. Dowdican, 114 Mass. 257.

[65] Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; State v. Crafton, 89 Iowa, 109, 56 N. W. 257; Dimick v. Downs, 82 Ill. 570.

[66] People v. Stanley, 101 Mich. 93, 59 N. W. 498; People v. Young, 102 Cal. 411, 36 Pac. 770; State v. Dickson, 78 Mo. 438; Kent v. State, 94 Ga. 703, 19 S. E. 885; Beavers v. State, 103 Ala. 36, 15 South. 616; Mack v. State, 54 Fla. 55, 44 South. 706, 13 L. R. A. (N. S.) 373, 14 Ann. Cas. 78.

[67] McVay v. State, 100 Ala. 110, 14 South. 862.

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is necessary to the formation of an opinion.[68] Thus, on the question whether a person's death was caused by poison, the opinions of experts as to the symptoms produced by the poison by which the deceased is supposed to have died are admissible.[69] And on the question whether the defendant at the time of doing the act charged was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was wrong, the opinions of experts on the question whether the symptoms exhibited by the defendant commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of their acts, or of knowing that what they do is wrong, are competent.[70] An expert may also testify as to whether certain blood stains have been caused by human blood or the blood of animals.[71]

The opinions of experts as to a matter of common knowledge are not admissible, for the jury are as well able to judge of such facts without the aid of their opinions.[72]

Before an alleged expert is allowed to give his opinion, the judge must be satisfied that his skill in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.[73]

[68] State v. Merriman, 34 S. C. 16, 12 S. E. 619; Johnson v. Castle, 63 Vt. 452, 21 Atl. 534; Coyle v. Com., 104 Pa. 117; State v. Ginger, 80 Iowa, 574, 46 N. W. 657. "An expert is one having superior knowledge of a subject, acquired by professional, scientific, or technical training, or by practical experience, which gives him knowledge not had by persons generally, so as to enable him to aid the court or jury in determining the matters under consideration." Ausmus v. People, 47 Colo. 167, 107 Pac. 204, 19 Ann. Cas. 491.

[69] R. v. Palmer, Steph. Dig. Ev. (Chase's Ed.) 106. And see Stephens v. People, 4 Parker, Cr. R. (N. Y.) 396; Zoldoske v. State, 82 Wis. 580, 52 N. W. 778.

[70] R. v. Dove, Steph. Dig. Ev. (Chase's Ed.) 106; State v. Hayden, 51 Vt. 296; Real v. People, 42 N. Y. 270; Livingston v. Com., 14 Grat. (Va.) 592.

[71] Greenfield v. People, 85 N. Y. 75, 39 Am. Rep. 636.

[72] Cook v. State, 24 N. J. Law, 843; Manke v. People, 17 Hun (N. Y.) 410; People v. Clark, 33 Mich. 112; Knoll v. State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704; Noonan v. State, 55 Wis. 258, 12 N. W. 379; People v. Royal, 53 Cal. 62; State v. Klinger, 46 Mo. 224.

[73] Whart. Cr. Ev. § 406; Lynch v. Grayson, 5 N. M. 487, 25 Pac. 992; People v. McQuaid, 85 Mich. 123, 48 N. W. 161. A statute of

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Hypothetical Questions

The fact that the expert witness does not personally know the facts of the case does not render his opinion inadmissible. In such a case the facts are stated hypothetically, and he is asked to state his opinion assuming those facts to be true.[74] Or if the witness has heard the testimony as to the facts in the case, and it is clear, and not difficult to remember, he may be asked to state his opinion upon what he has so heard.[75]

Facts Bearing on Opinions of Experts

Facts not otherwise relevant are admissible if they support or are inconsistent with the opinions given by experts. Thus on the question in a homicide case whether the deceased was poisoned by a certain poison, the fact that other persons who were poisoned by that poison exhibited certain symptoms, which experts affirm or deny to be the symptoms of that poison, is admissible.[76]

CHARACTER

218. Evidence of the character of a person is admissible in the following cases:

(a) The fact that the defendant has a good character may be shown; but the state cannot show that he has a bad character, unless his character is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

(b) The character of the deceased as a violent and dangerous man may be shown in prosecutions for homicide, on the question whether the defendant acted in self-defense.

Michigan providing for the appointment of expert witnesses by the court in homicide cases, such appointment to be made known to the jury, and allowing the state and the defendant to use other experts, was held unconstitutional in People v. Dickerson, 164 Mich. 148, 129 N. W. 199, 33 L. R. A. (N. S.) 917, Ann. Cas. 1912B, 688.

[74] Whart. Cr. Ev. § 418.

[75] State v. Hayden, 51 Vt. 296; Cornell v. State, 104 Wis. 527, 80 N. W. 745.

[76] R. v. Palmer, Steph. Dig. Ev. (Chase's Ed.) 107.

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Character of Defendant

In a criminal case it is always permissible for the defendant to show that he bears a good character, as tending to show that it was not probable that he would commit the crime charged; and the fact that the evidence of his guilt is direct, instead of circumstantial, does not prevent the evidence of good character from being considered.[77]

If the character of the defendant is not in issue, as it would be on indictment for being a common barretor, a common drunkard, etc., and if the defendant does not introduce evidence of his good character, the state cannot show that he has a bad character, though the fact that he had a bad character might tend to show that he was likely to commit the crime charged.[78]

Character of Third Persons

As a general rule, the character of third persons is inadmissible.[79] There is an important exception to the rule, however, in prosecution for homicide, where the defendant claims that he acted in self-defense. In such a case, the defendant may show that the deceased was a violent and dangerous man, both for the purpose of showing a probability that the deceased, and not the defendant, commenced the difficulty, and, where his character was known to the defendant, for the purpose of showing that the defendant had reasonable cause to believe and did believe that his life was in danger.[80]

[77] Stover v. People, 56 N. Y. 319; Remsen v. People, 43 N. Y. 6; People v. Mead, 50 Mich. 228, 15 N. W. 95; Hall v. State, 132 Ind. 317, 31 N. E. 536.

[78] People v. White, 14 Wend. (N. Y.) 111; State v. Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535.

[79] State v. Staton, 114 N. C. 813, 19 S. E. 96; Omer v. Com., 95 Ky. 353, 25 S. W. 594; State v. Rose, 47 Minn. 47, 49 N. W. 404.

[80] Horbach v. State, 43 Tex. 242; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; Cannon v. People, 141 Ill. 270, 30 N. E. 1027; Abbott v. People, 86 N. Y. 460; Davis v. People, 114 Ill. 86, 29 N. E. 192; State v. Kennade, 121 Mo. 405, 26 S. W. 347; Alexander v. Com., 105 Pa. 1; State v. Nash, 45 La. Ann. 1137, 13 South. 732, 734; State v. Rollins, 113 N. C. 722, 18 S. E. 394; Trabune v. Com. (Ky.) 17 S. W. 186; Roberts v. State, 68 Ala. 156.

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How Proved

The term "character," as used in the rules above stated, means "reputation," as distinguished from "disposition." Evidence can be given only of general reputation, and not of particular acts by which reputation or disposition is shown.[81]

EVIDENCE WRONGFULLY OBTAINED

219. The fact that articles or admissions were wrongfully obtained from the defendant does not render them inadmissible in evidence.

As we have already seen, confessions obtained from the defendant, if otherwise competent, are not rendered inadmissible because they were obtained from him by deception, or while he was drunk, or under a promise of secrecy.[82] Nor are articles, if otherwise admissible in evidence, rendered inadmissible because they were wrongfully taken from him, as by an unlawful search or seizure.[83]

[81] Com. v. O'Brien, 119 Mass. 342, 20 Am. Rep. 325; Berneker v. State, 40 Neb. 810, 59 N. W. 372; State v. Coley, 114 N. C. 879, 19 S. E. 705; Patterson v. State, 41 Neb. 538, 59 N. W. 917. The state on cross-examination may ask as to specific acts. Goodwin v. State, 102 Ala. 87, 15 South. 571; Thompson v. State, 100 Ala. 70, 14 South. 878. But the state cannot rebut evidence of good character by proving specific acts. Patterson v. State, supra.

[82] Ante, p. 625.

[83] State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; Com. v. Brelsford, 161 Mass. 61, 36 N. E. 677; State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877; Id., 41 S. C. 551, 19 S. E. 691; State v. Flynn, 36 N. H. 64. Contra, where the evidence was obtained in such a manner as to amount to compelling the witness to incriminate himself. Underwood v. State, 13 Ga. App. 206, 78 S. E. 1103.

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PRESUMPTION OF INNOCENCE—BURDEN OF PROOF

220. The defendant is presumed to be innocent, and the burden is on the state to prove his guilt beyond a reasonable doubt.

221. If the state proves facts showing guilt, the burden is on the defendant to introduce some evidence of an affirmative defense. When he has done this, by the better opinion, the burden is on the state to rebut this evidence beyond a reasonable doubt.

222. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

In civil cases the plaintiff is only required to prove his case by a preponderance of the evidence, but in criminal cases the state must prove the defendant's guilt, and therefore every fact necessary to make him guilty, beyond a reasonable doubt. Every man is presumed to be innocent until the contrary is proved, and this presumption can only be rebutted by proving guilt by evidence so strong as to remove from the mind of the jury every reasonable doubt.[84]

A reasonable doubt, within the meaning of this rule, is not a mere imaginary, captious, or possible doubt, but a fair doubt, based on reason and common sense, and growing out

[84] Carlton v. People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; Parker v. State, 136 Ind. 284, 35 N. E. 1105; Vandeventer v. State, 38 Neb. 592, 57 N. W. 397; Rhea v. State, 100 Ala. 119, 14 South. 853. That the crime was committed within the jurisdiction of the court must be proved by the state; but the courts are not agreed on the quantum of proof. Some hold that it must be proved, like every other material allegation, beyond a reasonable doubt. Davis v. State, 134 Wis. 632, 115 N. W. 150; Wade v. State, 11 Ga. App. 411, 75 S. E. 494. Other courts hold that the venue is distinct from the determination of defendant's guilt, and need be proved only by a preponderance of the evidence. Cox v. State, 28 Tex. App. 92, 12 S. W. 493; Nichols v. State, 102 Ark. 266, 143 S. W. 1071; Norris v. State, 127 Tenn. 437, 155 S. W. 165.

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of the testimony in the case. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction to a moral certainty of the defendant's guilt.[85]

Shift of Burden of Proof

It is frequently said that the burden of proof shifts at different stages of the evidence. This is incorrect. The burden of proving defendant's guilt is at all times on the state. If, when all the evidence is in, the jury are not convinced beyond a reasonable doubt of the defendant's guilt, they should return a verdict of not guilty.[86]

As the proceeding goes on, the burden of going forward with evidence may be shifted from that party upon whom it first rested by his proving facts which raise a presumption in his favor. Thus, on a prosecution of a married woman for receiving stolen goods, the burden of proof is on the state. But where she is shown to have had possession of stolen goods soon after the theft, knowing them to have been stolen, the state has made out a case, and the burden of going forward with evidence is shifted to her to show matter of defense. She meets the burden by showing that she stole them in the presence of her husband. The burden is then shifted back to the state to show that she was not coerced by him.[87] So, on a prosecution for bigamy, if the

[85] People v. Finley, 38 Mich. 482; Garrett v. State, 97 Ala. 18, 14 South. 327; Culver v. State, 99 Ala. 193, 13 South. 527. It is not necessary that the evidence exclude every hypothesis other than that of guilt, but it is sufficient if the evidence shows guilt beyond a reasonable doubt—not a speculative, imaginary, or possible doubt. Garrett v. State, supra. A reasonable doubt has been defined as such a doubt as would make a man of ordinary prudence waver or hesitate in considering a matter of like importance to himself as the case on trial is to the defendant. State v. Roesener, 8 Wash. 42, 35 Pac. 357. It is proper for the court to refuse to charge that the degree of evidence required to convict a man must be such as to remove all doubt from the mind of a reasonable man, since a reasonable man may have an unreasonable doubt. Padfield v. People, 146 Ill. 660, 35 N. E. 469.

[86] Thayer, Ev. c. 9.

[87] 1 Russ. Crimes, 33; 2 Russ. Crimes, 337. Some courts hold that proof of the possession of goods soon after the theft raises the pre-

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state proves that the defendant was already married when he married the second time, the burden of showing some defense is on the defendant. If the defendant shows that he was a minor at the time of the first marriage, the state has the burden of proving that he married with his parents' consent.[88] So, where the defendant sets up insanity as a defense, the burden is on him to introduce some evidence of insanity.[89] But in all these cases when all the evidence is in, the burden of proving that defendant is guilty beyond a reasonable doubt is where it was at the beginning of the trial, on the state; and, if the jury are still in doubt whether the defendant committed the crime they should acquit.[90]

This being the principle, it would seem clear that where the defendant has introduced some evidence of an affirmative defense, like insanity, the burden should be on the state to rebut that evidence beyond a reasonable doubt, and many of the courts so hold.[91] But many of the courts hold that in such a case the burden is on the defendant to establish his

sumption of guilt, and shifts the burden of proof. Waters v. People, 104 Ill. 544. Contra, Stover v. People, 56 N. Y. 315; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Com. v. McGorty, 114 Mass. 299. So on indictment for homicide, where the defendant has made out a case of self-defense, the burden of proving that he was at fault in bringing on the difficulty is on the state. Holmes v. State, 100 Ala. 80, 14 South. 864.

[88] Rex v. Butler, Russ. & R. 61.

[89] See the cases hereafter cited.

[90] Thayer, Ev. c. 9; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.

[91] U. S. v. Faulkner (D. C.) 35 Fed. 730; State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; Baccigalupo v. Com., 33 Grat. (Va.) 807, 36 Am. Rep. 795; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Grubb v. State, 117 Ind. 277, 20 N. E. 257, 725; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Revoir v. State, 82 Wis. 295, 52 N. W. 84; Com. v. Gerade, 145 Pa. 289, 22 Atl. 464, 27 Am. St. Rep. 689; King v. State, 91 Tenn. 617, 20 S. W. 169; Hodge v. State, 26 Fla. 11, 7 South. 593; Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; Maas v. Ter., 10 Okl. 714, 63 Pac. 960, 53 L. R. A. 814; People v. Spencer, 179 N. Y. 408, 72 N. E. 461. In the absence of any evidence to raise a reasonable doubt, the prosecution is not obliged to prove sanity. Montag v. People, 141 Ill. 75, 30 N. E. 337; Armstrong v. State, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484.

insanity by a preponderance of the evidence, and that it is not enough to raise a reasonable doubt as to his sanity.[92] This is riding roughshod over the rule that in a criminal case the defendant's guilt must be proved beyond a reasonable doubt, for a man who commits an act while insane does not commit a crime. He is not merely excused from punishment. He is not guilty at all of any crime. Some courts have even gone so far as to hold that the defendant must establish his insanity beyond a reasonable doubt; that is to say, that if the jury have any reasonable doubt on the question, they must convict.[93]

There is a like conflict of opinion as regards the defense of alibi.[94]

Fact to be Proved to Render Evidence Admissible

The burden of proving any fact necessary to be proved in order to enable a person to give evidence of any other fact is on the person who seeks to give such evidence. Where the state wishes to introduce a dying declaration, the bur-

[92] Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; Loeffner v. State, 10 Ohio St. 598; Fisher v. People, 23 Ill. 283 (but see, contra, Langdon v. People, 133 Ill. 382, 24 N. E. 874); People v. McCann, 16 N. Y. 58, 69 Am. Dec. 642; Walker v. People, 88 N. Y. 81; State v. Starling, 51 N. C. 366; State v. Davis, 109 N. C. 780, 14 S. E. 55; State v. McCoy, 34 Mo. 531, 86 Am. Dec. 121; State v. Schaefer, 116 Mo. 96, 22 S. W. 447; State v. Trout, 74 Iowa, 545, 38 N. W. 405, 7 Am. St. Rep. 499; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Rather v. State, 25 Tex. App. 623, 9 S. W. 69; Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193; Gunter v. State, 83 Ala. 96, 3 South. 600; Maxwell v. State, 89 Ala. 150, 7 South. 824; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Bawden, 90 Cal. 195, 27 Pac. 204; Fogarty v. State, 80 Ga. 450, 5 S. E. 782; Coates v. State, 50 Ark. 330, 7 S. W. 304; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Moore v. Com., 92 Ky. 630, 18 S. W. 833; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State v. Lewis, 20 Nev. 333, 22 Pac. 241; People v. Dillon, 8 Utah, 92, 30 Pac. 150.

[93] Reg. v. Stokes, 3 Car. & K. 188; State v. Brinyea, 5 Ala. 244; State v. Huting, 21 Mo. 476; People v. Myers, 20 Cal. 518; State v. Spencer, 21 N. J. Law, 202; State v. De Rance, 34 La. Ann. 186, 44 Am. Rep. 426.

[94] See Com. v. Choate, 105 Mass. 451; Howard v. State, 50 Ind. 190; Walters v. State, 39 Ohio St. 215.

den is on it to show that it was made under such a sense of impending death as to render it competent; and, if the defendant seeks to introduce such evidence, the same burden is on him.[95]

223. WITNESSES—THEIR COMPETENCY AND THE MODE OF EXAMINING THEM

Though there is very little difference between civil and criminal cases as regards the competency of witnesses, the mode of examining them, etc., so that the matter might well be omitted, it cannot be out of place to state shortly the general rules.[96]

Who May Testify

All persons are competent to testify in all cases except as follows:

A witness is incompetent if, in the opinion of the judge, he is prevented by extreme youth,[97] disease affecting the mind,[98] or any other cause of the same kind,[99] from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.[1]

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; but such

[95] Ante, p. 617, and cases there cited.

[96] The rules are taken almost verbatim from Stephen's Digest of Evidence.

[97] See Com. v. Mullins, 2 Allen (Mass.) 295; Comer v. State (Tex. Cr. App.) 20 S. W. 547; McGuire v. People, 44 Mich. 286, 6 N. W. 669, 38 Am. Rep. 265; State v. Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605; State v. Doyle, 107 Mo. 36, 17 S. W. 751.

[98] Walker v. State, 97 Ala. 85, 12 South. 83; Coleman v. Com., 25 Grat. (Va.) 865, 18 Am. Rep. 711; Worthington v. Mencer, 96 Ala. 310, 11 South. 72, 17 L. R. A. 407; Lopez v. State, 30 Tex. App. 487, 17 S. W. 1058, 28 Am. St. Rep. 935.

[99] State v. Weldon, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126.

[1] The question is for the court, and generally its ruling will not be reviewed. Com. v. Mullins, supra, and other cases above cited.

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writing must be written and such signs made in open court.[2] Evidence so given is deemed to be oral evidence.

At common law an atheist cannot testify as a witness,[3] but in most states it is otherwise by statute.[4]

At common law a person who has been convicted of an infamous crime is not a competent witness;[5] but this rule also has been changed by statute in some jurisdictions.[6]

In criminal cases the accused person and his or her wife or husband, and every person and the wife or husband of every person jointly indicted and tried with him, are incompetent to testify,[7] except that in any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify.[8]

In most states by statute the accused is now allowed to testify in his own behalf, but he cannot be compelled to testify.

[2] State v. Weldon, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 1[illegible] his
[3] Butts v. Swartwood, 2 Cow. (N. Y.) 431; Omichund to su
Willes, 549; People v. Matteson, 2 Cow. (N. Y.) 433 (3) any
of competency is whether he believes in the existe[illegible]26.
will punish him if he swears falsely. Butts v. [illegible]ainted ot[illegible]
[4] Hronek v. People, 134 Ill. 139, 24 N.[illegible]e expressio[illegible] v. Barker,
Am. St. Rep. 652. [illegible]note. The test
[5] Logan v. U. S., 144 U. S. 263, 1[illegible]citors, their cle[illegible]
S. v. Hall (D. C.) 53 Fed. 352; St[illegible] their clients.[20] [illegible]nce of a God who
not if convicted in another stat[illegible]n through w[illegible] Swartwood, supra.
tency is removed by pardon. [illegible]ements.[21] [illegible]E. 801, 8 L. R. A. 837, 23
142 U. S. 450, 12 Sup. Ct. 2[illegible]
Tex. App. 1, 17 S. W. 430. 4.
[6] Williams v. Dickenson, [illegible], 90 Mo. 149, [illegible] Sup. Ct. 617, 36 L. Ed. 429; U.
Gloin, 91 N. Y. 241; State[illegible]ryes, 1 Sim. (N[illegible]e v. Randolph, 24 Conn. 363. But
[7] Reg. v. Payne, L. R.[illegible]ple v. Blakeley[illegible]. Logan v. U. S., supra. Incompe-
Mo. 350, 19 S. W. 656; Tex. App. 604, [illegible]Logan v. U. S., supra; Boyd v. U. S.,
N. W. 165, 17 L. R. A. 6 S. W. 544; [illegible]2, 35 L. Ed. 1077; Martin v. State, 21
54 N. W. 486; People [illegible]
erwise where the defe[illegible]oster, 1 Hurl. & [illegible]28 Fla. 90, 9 South. 847; People v. Mc-
28 Fla. 511, 10 South. [illegible]16, 28 Am. St. R[illegible] v. Peterson, 35 S. C. 279, 14 S. E. 617.
Supp. 114; Linsday v. [illegible]ewherter, 46 I[illegible] 1 Crown Cas. 349; State v. Ulrich, 110
to man and mistress. [illegible] People v. Quanstrom, 93 Mich. 254, 53
[8] Reeve v. Wood, 5 [illegible]Rastall, 4 Term[illegible] 723; People v. Westbrook, 94 Mich. 629,
South. 427; People [illegible] v. Hayne, 1 Car.-[illegible]. Langtree, 64 Cal. 256, 30 Pac. 813. Oth-
R. A. 723; State [illegible]v. Quirk, L. R. 5 C[illegible]unts are tried separately. Adams v. State,
St. Rep. 349; People [illegible]06; People v. Bosworth, 64 Hun, 72, 19 N. Y.
[illegible] Cr.Proc.(2d Ed.)—[illegible]People, 63 N. Y. 143. The rule does not apply
Sims v. State, 30 Tex. App. 605, 18 S. W. 410.
[illegible]est & S. 364; Johnson v. State, 94 Ala. 53, 10
[illegible]. Quanstrom, 93 Mich. 254, 53 N. W. 165, 17 L.
[illegible]. Chambers, 87 Iowa, 1, 53 N. W. 1090, 43 Am
[illegible]le v. Westbrook, 94 Mich. 629, 54 N. W. 486.

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In some states the defendant is allowed to make a statement to the jury not under oath.

Privileged Communications

No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage.[9]

It is doubtful whether a judge is compellable to testify as to anything which came to his knowledge in court as such judge.[10] It seems that a barrister cannot be compelled to testify as to what he said in court in his character of a barrister.[11]

No one can be compelled to give evidence relating to any affairs of state, as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned,[12] or to give evidence of what took place in either house of congress, or of a state legislature, without the leave of the house, though he may state that a particular person acted as speaker.[13]

In cases in which the government is immediately concerned no witness can be compelled to answer any question, the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offenses. In ordinary criminal prosecutions it is for the judge to decide whether the permission of any such question would or would not, under the circumstances of the particular case, be injurious to the administration of justice.[14]

[9] Campbell v. Chace, 12 R. I. 333; Com. v. Griffin, 110 Mass. 181; State v. Mathers, 64 Vt. 101, 23 Atl. 590, 15 L. R. A. 268, 33 Am. St. Rep. 921; State v. Ulrich, 110 Mo. 350, 19 S. W. 656.

[10] Reg. v. Gazard, 8 Car. & P. 595.

[11] Curry v. Walter, 1 Esp. 456.

[12] Beatson v. Skene, 5 Hurl. & N. 838; Appeal of Hartranft, 85 Pa. 433, 27 Am. Rep. 667; Totten v. U. S., 92 U. S. 105, 23 L. Ed. 605.

[13] Chubb v. Salomons, 3 Car. & K. 77; Plunkett v. Cobbett, 5 Esp. 136.

[14] Hardy's Case, 24 How. State Tr. 811; Reg. v. Richardson, 3 Fost. & F. 693; State v. Soper, 16 Me. 293, 33 Am. Dec. 665; U. S. v. Moses, 4 Wash. C. C. 726, Fed. Cas. No. 15,825.

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As we have seen in another place, neither a petit juror nor a grand juror can give evidence as to what passed between the jurymen in the discharge of their duties. Nor, as a rule, can a grand juror give evidence as to what any witness said when examined before the grand jury, though as to this there are some exceptions.[15]

No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client during, in the course, and for the purpose of such employment.[16] This rule does not extend to (1) any such communication as aforesaid made in furtherance of any criminal purpose;[17] (2) any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not;[18] (3) any fact with which such legal adviser became acquainted otherwise than in his character as such.[19] The expression "legal adviser" includes barristers and solicitors, their clerks, and interpreters between them and their clients.[20] It does not include officers of a corporation through whom the corporation has elected to make statements.[21]

[15] Ante, pp. 142, 574.

[16] State v. Dawson, 90 Mo. 149, 1 S. W. 827.

[17] Follett v. Jefferyes, 1 Sim. (N. S.) 17; Charlton v. Coombes, 32 L. J. Ch. 284; People v. Blakeley, 4 Parker, Cr. R. (N. Y.) 176; Orman v. State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662; Id., 24 Tex. App. 495, 6 S. W. 544; Everett v. State, 30 Tex. App. 682, 18 S. W. 674.

[18] Brown v. Foster, 1 Hurl. & N. 736; Rahm v. State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

[19] State v. Mewherter, 46 Iowa, 88; Com. v. Goddard, 14 Gray (Mass.) 402.

[20] Wilson v. Rastall, 4 Term R. 753; Taylor v. Foster, 2 Car. & P. 195; Foote v. Hayne, 1 Car. & P. 545.

[21] Mayor v. Quirk, L. R. 5 C. P. 106.

The privilege is personal, and cannot be set up by the other party.[22]

No one can be compelled to disclose to the court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any dispute arose as to the matter referred to.[23]

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Medical men and (probably) clergymen may, at common law, be compelled to disclose communications made to them in professional confidence, but the rule has in some states been changed by statute.[24]

Witness not to be Compelled to Criminate Himself

Both under most of our constitutions, and at common law, it is the rule that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness (or the wife or husband of the witness) to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for;[25] but no one is excused from answering any question only because the answer may establish or tend to establish that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the state or of any other person.[26] If a defendant offers himself

[22] Smith v. Boatman Savings Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119.

[23] Minet v. Morgan, L. R. 8 Ch. App. 361; Duttenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 362.

[24] Duchess of Kingston's Case, 20 How. State Tr. 572; Gillooley v. State, 58 Ind. 182; People v. Gates, 13 Wend. (N. Y.) 311; Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; Steagald v. State, 22 Tex. App. 464, 3 S. W. 771.

[25] Black, Const. Law, 497, and cases there cited; Reg. v. Boyes, 1 Best & S. 330; Rex v. Inhabitants of Cliviger, 2 Term R. 263; Rex v. Inhabitants of Bothwick, 2 Barn. & Adol. 639; Com. v. Nichols, 114 Mass. 285, 19 Am. Rep. 346; 2 Story, Const. § 1788; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; State ex rel. Lanning v. Lonsdale, 48 Wis. 348, 4 N. W. 390; State v. Briggs, 9 R. I. 361, 11 Am. Rep. 270. If, by statute, the testimony could not be used against him, or if he could not be prosecuted for the crime disclosed, the rule does not apply. See Kendrick v. Com., 78 Va. 490; People v. Kelly, 24 N. Y. 74.

[26] Steph. Dig. Ev. (Chase's Ed.) 209.

as a witness, he cannot refuse to answer questions asked him on cross-examination.[27] The witness may waive this privilege by answering questions without objection,[28] and, if he answers so as to disclose part of the transaction, he waives his right to refuse to answer further.[29]

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Corroboration, when Required

In most, but not all, states, when the only proof against a person charged with a criminal offense is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so.[30]

In some states, by statute, a conviction cannot be had in a criminal case on the testimony of an accomplice, unless corroborated by other evidence;[31] in other states, in prosecutions for seduction, rape, and similar crimes, there can be no conviction on the uncorroborated testimony of the woman;[32] but the rule is otherwise at common law.[33]

[27] People v. Casey, 72 N. Y. 393; Com. v. Nichols, 114 Mass. 285, 19 Am. Rep. 346; People v. Dupounce, 133 Mich. 1, 94 N. W. 388, 103 Am. St. Rep. 435, 2 Ann. Cas. 246.

[28] Com. v. Shaw, 4 Cush. (Mass.) 594, 50 Am. Dec. 813. No one but the witness can object.

[29] Com. v. Pratt, 126 Mass. 462. But see Reg. v. Garbett, 1 Denison, Cr. Cas. 236.

[30] Roguemore v. State, 28 Tex. App. 55, 11 S. W. 834; Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Fort v. State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; Stape v. People, 85 N. Y. 390; Smith v. Com. (Ky.) 17 S. W. 182; Boyd v. State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; Com. v. Hayes, 140 Mass. 366, 5 N. E. 264; People v. Ogle, 104 N. Y. 511, 11 N. E. 53. But see, contra, Ingalls v. State, 48 Wis. 647, 4 N. W. 785; State v. Harkins, 100 Mo. 666, 13 S. W. 830. The witness must be an accomplice to need corroboration. Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471; Com. v. Graves, 97 Mass. 114; Campbell v. Com., 84 Pa. 187.

[31] People v. Bunkers, 2 Cal. App. 197, 84 Pac. 364, 370.

[32] People v. Kearney, 110 N. Y. 188, 17 N. E. 736; State v. McGlothlen, 56 Iowa, 544, 9 N. W. 893; Armstrong v. People, 70 N. Y. 38.

[33] See State v. Nichols, 29 Minn. 357, 13 N. W. 153; State v. McGlothlen, supra. The question whether a person is an accomplice is for the jury. People v. Bunkers, 2 Cal. App. 197, 84 Pac. 364, 370.

As we have already seen, there can be no conviction on an extrajudicial confession unless corroborated by other evidence of the corpus delicti.[34]

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Number of Witnesses Necessary

In trials for treason no one can be convicted unless he pleads guilty, except upon the oath of two lawful witnesses to the same overt act.[35]

If upon a trial for perjury the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted.[36]

Excluding Witnesses from Court Room

While one witness is testifying the court may, in its discretion, exclude the other witnesses from the court room.[37]

It cannot exclude the defendant, however, nor can it exclude one defendant while his codefendant is testifying.[38]

If a witness who has been excluded disobeys the court's order, he is guilty of contempt of court, and may be punished, but this does not render him incompetent, or prevent his being examined, if the party offering him as a witness was not privy to the contempt.[39]

Failure to Call Witnesses

The failure of the state or of the defendant to call a witness, particularly an eyewitness of the act charged, may, by the weight of authority, be taken into consideration by the

[34] Ante, p. 626.

[35] Const. U. S. art. 3, § 3.

[36] Steph. Dig. Ev. (Chase's Ed.) 213; Rex v. Mayhew, 6 Car. & P. 315; Com. v. Parker, 2 Cush. (Mass.) 219; U. S. v. Wood, 14 Pet. 440, 10 L. Ed. 527; State v. Hayward, 1 Nott & McC. (S. C.) 547; State v. Heed, 57 Mo. 252; State v. Blize, 111 Mo. 464, 20 S. W. 210; People v. Hayes, 70 Hun, 111, 24 N. Y. Supp. 194.

[37] Zoldoske v. State, 82 Wis. 580, 52 N. W. 778; Vance v. State, 56 Ark. 402, 19 S. W. 1066; Dickson v. State, 39 Ohio St. 73; Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471.

[38] Ante, p. 492.

[39] Grant v. State, 89 Ga. 393, 15 S. E. 488; Dickson v. State, supra; Taylor v. State, 130 Ind. 66, 29 N. E. 415; Cook v. State, 30 Tex. App. 607, 18 S. W. 412.

jury,[40] but it does not raise any legal presumpti cence or of guilt.[41]

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Compelling State to Call Witnesses

Where the prosecution fails to call all the ey to the crime, the court may, in the exercise of its compel it to do so; and it should compel it where the witnesses are few in number.[42] Ordin ever, the court will not interfere.[43]

Examination in Chief, Cross-Examination, and Re-e

Witnesses examined in open court must be first in chief, they may then be cross-examined, an examined.

Whenever any witness has been examined in ch been intentionally sworn, or has made a promise ration, as hereinbefore mentioned, for the purpose evidence, the opposite party has a right to cros him; but the opposite party is not entitled to cros merely because a witness has been called to produ ment on a subpœna duces tecum, or in order to be After the cross-examination is concluded, the p called the witness has a right to re-examine him.

The court may in all cases permit a witness to b either for further examination in chief or for furtl examination; and if it does so the parties have th further cross-examination and further re-examin spectively.[44]

It is held in England that if a witness dies, or incapable of being further examined, at any sta

[40] People v. Hovey, 92 N. Y. 554; Rice v. Com., 102 Pa.

[41] Bleecker v. Johnston, 69 N. Y. 309; Hill v. Com., 88 V S. E. 330, 29 Am. St. Rep. 744.

[42] People v. Kenyon, 93 Mich. 19, 52 N. W. 1033; Th State, 30 Tex. App. 325, 17 S. W. 448.

[43] State v. Russell, 13 Mont. 164, 32 Pac. 854; Hill v. Co 633, 14 S. E. 330, 29 Am. St. Rep. 744; People v. Wright, 362, 51 N. W. 517.

[44] Com. v. McGorty, 114 Mass. 299. A witness may be r restate his testimony on a given point at the request of after the jury has retired to consider their verdict. Stri State, 115 Ga. 222, 41 S. E. 713.

examination, the evidence given before he became incapable is good;[45] but in this country the rule seems to be otherwise, where there was no opportunity to cross-examine.[46]

If, in the course of a trial, a witness who was supposed to be competent appears to be incompetent, his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it;[47] but if a witness is known to be incompetent when he is sworn, and no objection is made, the rule does not apply.[48]

To What Matters Cross-Examination and Re-examination must be Directed

The examination and cross-examination must relate to facts in issue or relevant thereto; and in most states the cross-examination must be confined to the facts to which the witness testified on his examination in chief.[49]

The re-examination must be directed to the explanation of matters referred to in cross-examination;[50] and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

As a rule, the state and the defendant must on examination in chief make out its or his whole case,[51] but the court may, in its discretion, allow evidence to be given out of the proper order. The rule is general that the order of introducing evidence is in the discretion of the court.

Leading Questions

Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in an ex-

[45] Rex v. Doolin, Jebb, Crown Cas. 123.

[46] Steph. Dig. Ev. (Chase's Ed.) 224; People v. Cole, 43 N. Y. 508.

[47] Reg. v. Whitehead, L. R. 1 Crown Cas. 33; State v. Damery, 48 Me. 327.

[48] Steph. Dig. Ev. (Chase's Ed.) 222.

[49] Steph. Dig. Ev. (Chase's Ed.) 223; People v. Beach, 87 N. Y. 508; Donnelly v. State, 26 N. J. Law, 463, 601; State v. Smith, 49 Conn. 376; Austin v. State, 14 Ark. 555.

[50] Schaser v. State, 36 Wis. 429; People v. Beach, supra.

[51] State v. Alford, 31 Conn. 40.

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amination in chief, or a re-examination,[52] unless the witness appears to be hostile to the party introducing him,[53] or "when the examination relates to items, dates, or numerous details, where the memory ordinarily needs suggestion, or when it is necessary to direct the witness' attention plainly to the subject-matter of his testimony."[54] With the permission of the court, such questions may be asked in cross-examination.[55]

Questions Lawful in Cross-Examination

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend (1) to test his accuracy, veracity, or credibility; or (2) to shake his credit, by injuring his character. Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness, as where he was asked as to the commission of a crime, or as to immoral conduct; but it is submitted that the court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify.[56]

Exclusion of Evidence to Contradict Answers to Questions Testing Veracity

When a witness under cross-examination has been asked and has answered any question which is relevant to the inquiry only so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him,

[52] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

[53] Id.

[54] Steph. Dig. Ev. (Chase's Ed.) 224; People v. Mather, supra.

[55] People v. Mather, supra.

[56] Steph. Dig. Ev. (Chase's Ed.) 225, and cases there cited; State v. Ward, 49 Conn. 429; Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340; People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507; People v. Irving, 95 N. Y. 541. The rule applies to cross-examination of the defendant. Hanoff v. State, 37 Ohio St. 178, 41 Am. Rep. 496; People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302.

except in the following cases:[57] (1) If a witness is asked whether he has been previously convicted of any felony or misdemeanor, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.[58] (2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted.[59]

Statements Inconsistent with Present Testimony may be Proved

Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and, if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it.[60] The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he is "adverse" (i. e. hostile) to the party by whom he was called, and permits the question.[61] In other cases, as we shall see, a party cannot impeach his own witness, though he is not precluded from introducing witnesses who will testify to the contrary.[62]

Impeaching Credit of Witness

The credit of a witness may be impeached by the adverse party, by the evidence of persons from his own community who will swear that they know the general reputation of the witness for truth and veracity, that his reputation is bad,

[57] Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492.

[58] Steph. Dig. Ev. (Chase's Ed.) 227.

[59] Steph. Dig. Ev. (Chase's Ed.) 228.

[60] Steph. Dig. Ev. (Chase's Ed.) 229, and cases there cited; State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; People v. Devine, 44 Cal. 452; State v. Glynn, 51 Vt. 577. In some states this foundation for the impeaching evidence is not necessary. Com. v. Hawkins, 3 Gray (Mass.) 463; State v. Glynn, supra.

[61] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

[62] Note 71, infra.

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and that they would not believe him on oath.[63] In some states the inquiry may be as to the witness' general moral character.[64] In most states the impeaching witness must or may be asked whether he would believe the other witness on oath;[65] but in a few states this question cannot be asked.[66] In all states the inquiry is confined to general reputation, and specific acts by the witness sought to be impeached cannot be shown.[67]

The impeaching witness may be cross-examined, and may also be impeached in the manner stated above.[68]

Impeaching witnesses cannot, on their examination in chief, give the reasons for their belief; but they may be asked their reasons on cross-examination, and their answers cannot be impeached.[69]

The party introducing a witness cannot thus impeach him[70] unless, as is the case in some jurisdictions, it is permitted by statute. But a party is not precluded by the testimony of a witness introduced by him from introducing other witnesses who will testify to the contrary.[71]

A party whose witness is sought to be impeached may introduce evidence of good reputation in order to sustain his credit.[72]

Where a witness has been impeached by proving statements made by him in conflict with his testimony, some

[63] Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821; State v. Randolph, 24 Conn. 363; Laclede Bank v. Keeler, 109 Ill. 385; Lenox v. Fuller, 39 Mich. 268.

[64] State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; Walton v. State, 88 Ind. 9.

[65] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Hamilton v. People, 29 Mich. 173; Laclede Bank v. Keeler, 109 Ill. 385.

[66] Walton v. State, 88 Ind. 9; State v. Rush, 77 Mo. 519.

[67] Com. v. Lawler, 12 Allen (Mass.) 586.

[68] People v. Mather, supra; State v. Lawlor, 28 Minn. 216, 9 N. W. 698.

[69] 2 Phil. Ev. 503.

[70] People v. Jacobs, 49 Cal. 384.

[71] State v. Knight, 43 Me. 11, 134.

[72] Hamilton v. People, 29 Mich. 173; Com. v. Ingraham, 7 Gray (Mass.) 46.

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courts allow his credit to be sustained by proof of good reputation,[73] but other courts do not allow it.[74]

Offenses against Women

When a man is prosecuted for rape, or an attempt to ravish, it may be shown, in most jurisdictions, that the woman against whom the offense was committed was of a general immoral character, although she is not cross-examined on the subject.[75] In some states the woman may in such case be asked whether she has had connection with other men, but her answer cannot be contradicted.[76] She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she (probably) may be contradicted.[77]

So, in a prosecution for seduction, the unchastity of the woman may be shown.[78]

[73] George v. Pilcher, 28 Grat. (Va.) 299, 26 Am. Rep. 350; Haley v. State, 63 Ala. 83; Sweet v. Sherman, 21 Vt. 23.

[74] Webb v. State, 29 Ohio St. 351.

[75] Rex v. Clarke, 2 Starkie, 241; Woods v. People, 55 N. Y. 515, 14 Am. Rep. 309. But not where the woman was under the age of consent. State v. Eberline, 47 Kan. 155, 27 Pac. 839.

[76] Reg. v. Holmes, L. R. 1 Crown Cas. 334; State v. Reed, 39 Vt. 417, 94 Am. Dec. 337. Contra, Com. v. Harris, 131 Mass. 336; Richie v. State, 58 Ind. 355.

[77] Rex v. Martin, 6 Car. & P. 562; Woods v. People, supra.

[78] Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378.

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CHAPTER XV

HABEAS CORPUS

224–228. In General.

IN GENERAL

224. The writ of habeas corpus is a remedy by which a person illegally deprived of his liberty may secure his release.

225. The writ may be issued:
(a) By a court in term time.
(b) By a judge in vacation.

226. The application may be made:
(a) By the person imprisoned.
(b) By another for him.

227. The writ is used principally to obtain a review of:
(a) The legality of an arrest or commitment.
(b) The regularity of extradition process.
(c) The right to or amount of bail.
(d) The jurisdiction of the court imposing a sentence.

228. The writ commands the person detaining the relator to bring him before the court and show the reason of the imprisonment.

Nature and History of Writ

The writ of habeas corpus is the remedy provided by law by which any person illegally deprived of his liberty may secure a speedy release.[1] "The right of the subject to the benefit of the writ of habeas corpus * * * was one of the great points in controversy during the long struggle in England between arbitrary government and free institu-

[1] Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ex parte Coupland, 26 Tex. 386; Com. v. Chandler, 11 Mass. 83; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; Williamson's Case, 26 Pa. 9, 67 Am. Dec. 374.

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tions. * * * From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus to bring his case before the King's Bench. If no specific offense were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offense were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the crown and the people of England from the time of Magna Charta were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Car. II, commonly known as the 'Great Habeas Corpus Act.' This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. * * * The great and inestimable value of the habeas corpus act of 31 Car. II is that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly in the manner specified in the statute." [2] The writ of habeas corpus is expressly recognized in the United States Constitution, and in the Constitutions of many of the states, in provisions which forbid the suspension of the privilege of the writ except when, in cases of rebellion or invasion, the public safety requires it.[3]

[2] Taney, C. J., in Ex parte Merryman, Taney, 246, Fed. Cas. No. 9,487. And see Bushell's Case, 1 Vaughan, 135; Crowley's Case, 2 Swainst. 5; Watson's Case, 9 Adol. & E. 731.

[3] Const. U. S. art. 1, § 9; 1 Stimson, Am. St. Law, §§ 126, 127. As to the power to suspend, see Kemp's Case, 16 Wis. 382; Warren v. Paul, 22 Ind. 276; Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 4,761; In re Oliver, 17 Wis. 703; In re Fagan, 2 Spr. 91, Fed. Cas. No. 4,604; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281. But see People v. Gaul, 44 Barb. (N. Y.) 98. Suspension of the writ is no defense in an action for an illegal arrest, the person wrongfully arrested being merely deprived of this method of securing his release. Griffin v. Wilcox, 21 Ind. 372. Contra, McCall v. McDowell, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673.

Jurisdiction—By Whom Issued

All courts of general jurisdiction have power to issue writs of habeas corpus. Or, when the courts are not in session, the judges thereof may issue it. Justices of the United States Supreme Court can issue the writ anywhere in the United States; judges of the circuit and district courts, anywhere within their respective jurisdictions.[4] In the states the same principle obtains. Application for the writ should be made in each case to the court or judge nearest to the applicant,[5] unless a good excuse exists why the application cannot be so made.[6]

Questions Reviewable—When Discharge Granted

Where a court which has issued a writ of habeas corpus finds that the applicant is privileged from arrest, it will order his discharge.[7] And so, if the court does not have the powers of a committing magistrate, it will discharge one who has been illegally arrested, as on a void warrant, although there is evidence that he is guilty of the offense charged.[8] On the other hand, if the court inquiring on habeas corpus has the power to commit, it will not grant a discharge if there is sufficient evidence of guilt to warrant the binding over of the prisoner, even though his arrest was entirely illegal.[9]

[4] Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; Rev. St. U. S. 1878, §§ 752–754 (U. S. Comp. St. 1916, §§ 1280–1282).

[5] Thompson v. Oglesby, 42 Iowa, 598; Ex parte Ainsworth, 27 Tex. 731; Ex parte Lynn, 19 Tex. App. 120; In re White, 33 Neb. 812, 51 N. W. 287; In re Doll, 47 Minn. 518, 50 N. W. 607; Ex parte Ellis, 11 Cal. 222.

[6] Absence of such judge might show a sufficient excuse, but allegations that he was prejudiced would not. Ex parte Lynn, 19 Tex. App. 120; Bethuram v. Black, 11 Bush (Ky.) 628. And see People v. Burtnett, 13 Abb. Pr. (N. Y.) 8.

[7] Ex parte Dakins, 16 C. B. 77.

[8] State v. Potter, 1 Dud. (S. C.) 296; Ex parte Bennett, 2 Cranch C. C. 612, Fed. Cas. No. 1,311; Lough v. Millard, 2 R. I. 436.

[9] Rex v. Goodall, Sayer, 129; Rex v. Marks, 3 East, 157; O'Malia v. Wentworth, 65 Me. 129; State v. Buzine, 4 Har. (Del.) 572; Ex parte Granice, 51 Cal. 375; State v. Killet, 2 Bailey (S. C.) 289; Jones v. Timberlake, 6 Rand. (Va.) 678; Ex parte Smith, 5 Cow. (N. Y.) 273. Some cases hold that only the jurisdiction of the committing magistrate and the sufficiency of the commitment will be reviewed. Ex parte Jackson, 45 Ark. 158; State v. Bloom, 17 Wis. 521; Com.

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The writ of habeas corpus may be used to test the regularity of extradition process [10] It may be employed when bail is refused,[11] or an excessive amount demanded.[12] After indictment, a release may be secured by habeas corpus if it appears on the face of the indictment that no crime is charged.[13]

This writ does not lie to release a person who is held for trial on an indictment charging him with a crime of which he has already been once in jeopardy, as it will be presumed

v. Taylor, 11 Phila. (Pa.) 386; Davis' Case, 122 Mass. 324. As to whether the constitutionality of the law under which the arrest was made will be inquired into on habeas corpus, the authorities are conflicting. That it will not, see Platt v. Harrison, 6 Iowa, 79, 71 Am. Dec. 389; Com. v. Lecky, 1 Watts (Pa.) 66, 26 Am. Dec. 37; Ex parte Fisher, 6 Neb. 309. See, contra, Ex parte Burnett, 30 Ala. 461; Ex parte Rollins, 80 Va. 314; Ex parte Mato, 19 Tex. App. 112.

[10] Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; People v. Brady, 56 N. Y. 182; In re Briscoe, 51 How. Pr. (N. Y.) 422; In re Watson, 2 Cal. 59; Ex parte White, 49 Cal. 434; Hibler v. State, 43 Tex. 197; Hall v. Patterson (C. C.) 45 Fed. 352; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234; 30 L. Ed. 425. But see Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421; Ex parte Brown (D. C.) 28 Fed. 653. This writ does not lie from a federal court to release a person who has been unlawfully abducted from one state to another and is held in the latter state upon process of law for an offense against that state. Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283; Pettibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047.

[11] In re Troia, 64 Cal. 152, 28 Pac. 231; Com. v. Keeper of Prison, 2 Ashm. (Pa.) 227, In re Barronet, 1 El. & Bl. 1; U. S. v. Hamilton, 3 Dall. 17, 1 L. Ed. 490; Jones v. Kelly, 17 Mass. 116; Whiting v. Putnam, 17 Mass. 175; Ex parte Champion, 52 Ala. 311; Finch v. State, 15 Fla. 633; Snowden v. State, 8 Mo. 483.

[12] Lynch v. People, 38 Ill. 494; Ex parte Bryant, 34 Ala. 270; Street v. State, 43 Miss. 1; Drury v. State, 25 Tex. 45. But see People v. Dixon, 4 Parker, Cr. R. (N. Y.) 651; People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77.

[13] In re Corryell, 22 Cal. 178; Ex parte Kearny, 55 Cal. 212; Ex parte Boland, 11 Tex. App. 159; State v. Brewster, 35 La. Ann. 605. Mere defects in the indictment will not be considered. Ex parte Whitaker, 43 Ala. 323; In re Kowalsky, 73 Cal. 120, 14 Pac. 399; Emanuel v. State, 36 Miss. 627; Ex parte Twohig, 13 Nev. 302. But see In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102. Nor the guilt of the accused. People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; Id., 25 Wend. (N. Y.) 483, 37 Am. Dec. 328.

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that the trial court will grant the relator the proper relief when he comes to trial.[14] But it will be granted if the trial court is actually proceeding to try relator after he has been once acquitted of the offense.[15]

Judgments of courts having criminal jurisdiction will not be reviewed on habeas corpus as to irregularities in their proceedings [16] or the sufficiency of the evidence to sustain a conviction.[17] The only questions that can be examined are whether the court had jurisdiction [18] of the case, and whether the sentence rendered was within its power.[19]

[14] People v. Warden of City Prison, 87 Misc. Rep. 595, 150 N. Y. Supp. 24.

[15] Ex parte Davis, 48 Tex. Cr. R. 644, 89 S. W. 978, 122 Am. St. Rep. 775.

[16] Ex parte Hubbard, 65 Ala. 473; Ex parte Brown, 63 Ala. 187; Ex parte Sam, 51 Ala. 34; Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546. Thus error in the consolidation of indictments cannot be inquired into in habeas corpus proceedings. De Bara v. U. S., 99 Fed. 942, 40 C. C. A. 194. Nor can error in impaneling the grand jury, or in the grand jury indicting without competent evidence, or irregularities in the finding of the indictment by the grand jury, Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849; or errors of law in the trial of the case, Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969; or in erroneously dismissing the jury, State v. Floyd, 22 N. D. 183, 132 N. W. 662.

[17] Ex parte Bird, 19 Cal. 130; Stoner v. State, 4 Mo. 614; Darrah v. Westerlage, 44 Tex. 388. There is a conflict of authority as to whether this writ lies to test the legal existence of a court organized and created under color of a statute. See State ex rel. Bales v. Bailey, 106 Minn. 138, 118 N. W. 676, 19 L. R. A. (N. S.) 775, 130 Am. St. Rep. 592, 16 Ann. Cas. 338; In re Norton, 64 Kan. 842, 68 Pac. 639, 91 Am. St. Rep. 255.

[18] Ex parte Sam, 51 Ala. 34; Ex parte Nye, 8 Kan. 99; Devine's Case, 11 Abb. Pr. (N. Y.) 90; Bray v. State, 140 Ala. 172, 37 South. 250; Chemgas v. Tynan, 51 Colo. 35, 116 Pac. 1045.

[19] Stevens v. McClaughry, 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390; Glasgow v. Moyer, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147. An excessive sentence will not necessarily be void, so as to entitle to a discharge. Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786; Ex parte Mooney, 26 W. Va. 36, 53 Am. Rep. 59. But see Ex parte Kelly, 65 Cal. 154, 3 Pac. 673. In Stevens v. McClaughry, supra, the court said: "Here is the true distinction between the cases in which the writ of habeas corpus may and those in which it may not issue: If the judgment or sentence challenged is without the

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These rules apply to judgments of inferior courts;[20] to summary convictions;[21] to the proceedings of military tribunals;[22] and to commitments for contempt. In cases of the last sort, a release will not be granted on habeas corpus if the court ordering the commitment had jurisdiction,[23] unless the acts charged do not constitute a contempt,[24] or the sentence or commitment is void because made indefinite [25] or for a longer time than the court had power to order.[26] The writ of habeas corpus can be used to secure the release of one who is kept in prison after a pardon has been granted,[27] or after he has become entitled to a discharge by reason of the statute of limitations.[28] In a very few jurisdictions habeas corpus proceedings take the place of a writ of error.[29]

jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue."

[20] See cases in the two preceding notes.

[21] In re Glenn, 54 Md. 572; Ex parte Reed, 100 U. S. 23, 25 L. Ed. 538; Com. v. Lecky, 1 Watts (Pa.) 66, 26 Am. Dec. 37; Bell v. State, 4 Gill (Md.) 305, 45 Am. Dec. 130.

[22] McConologue's Case, 107 Mass. 154; Wall's Case (C. C.) 8 Fed. 85; McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049.

[23] People v. Cassells, 5 Hill (N. Y.) 164; In re Perry, 30 Wis. 268; Ex parte Cohn, 55 Cal. 193; Ex parte Cottrell, 59 Cal. 420.

[24] People ex rel. Hackley v. Kelly, 24 N. Y. 75; Ex parte Perkins (C. C.) 29 Fed. 900; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216.

[25] People v. Pirfenbrink, 96 Ill. 68; In re Hammel, 9 R. I. 248; In re Brown, 4 Colo. 438.

[26] Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; Holman v. Mayor, 34 Tex. 668; State v. Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115.

[27] Greathouse's Case, 2 Abb. (U. S.) 382, Fed. Cas. No. 5,741; People v. Cavanagh, 2 Parker, Cr. R. (N. Y.) 650; In re Edymoin, 8 How. Pr. (N. Y.) 478; Ex parte Crump, 10 Okl. Cr. 133, 135 Pac. 428, 47 L. R. A. (N. S.) 1036.

[28] State v. Maurignos, T. U. P. Charlt. (Ga.) 24.

[29] People v. Cunningham, 3 Parker, Cr. R. (N. Y.) 531; Kirby v. State, 62 Ala. 51; State v. Glenn, 54 Md. 572; Tomlin v. Fisher, 27 Mich. 524. As to this use in the federal courts, see Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Lange, 18 Wall. 163, 21 L. Ed.

Jurisdiction as between State and Federal Courts

In all cases where a person is imprisoned by state authority in violation of the Constitution, laws, and treaties of the United States, he will be discharged by the federal courts on habeas corpus;[80] but this power will not be used so as to obstruct the ordinary administration of the criminal laws of the state through its own tribunal. In cases where a person seeks relief by habeas corpus from a sentence imposed by a state court for error infringing rights guaranteed by the United States Constitution, occurring in the course of the trial, the federal courts, in the exercise of their discretion, ordinarily require that the person shall have made his objections in the trial court, and, if they were there overruled, that he shall have taken the question for review to the highest court to which a writ of error could be sued out from the Supreme Court of the United States; and, if he has failed to do so, the decision of the state court will not be reviewed by a federal court on habeas corpus.[81]

A state court has no authority to issue a writ of habeas corpus for the discharge of a person held under the author-

872; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; In re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151.

[80] Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; Ex parte Yarbrough, 110 U. S. 651, 654, 4 Sup. Ct. 152, 28 L. Ed. 274; U. S. v. Jailer, 2 Abb. (U. S.) 265, Fed. Cas. No. 15,463; In re Brosnahan (C. C.) 4 McCrary, 1, 18 Fed. 62; In re Farrand, 1 Abb. (U. S.) 140, Fed. Cas. No. 4,678; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; Ex parte Hanson (D. C.) 28 Fed. 127; In re Ah Lee (D. C.) 6 Sawy. 410, 5 Fed. 899; Parrott's Case, 6 Sawy. 376, 1 Fed. 481; In re Wong Yung Quy, 6 Sawy. 237, 47 Fed. 717; In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; Ex parte Kenyon, 5 Dill. 385, Fed. Cas. No. 7,720; Church, Hab. Corp. 378.

[81] In re Wood, 140 U. S. 278, 11 Sup. Ct. 738, 35 L. Ed. 505; In re Jugiro, 140 U. S. 291, 11 Sup. Ct. 770, 35 L. Ed. 510; Ex parte Royall, 117 U. S. 254, 6 Sup. Ct. 742, 29 L. Ed. 872; In re Duncan, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219; In re King (C. C.) 51 Fed. 434; In re Friedrich (C. C.) 51 Fed. 747. This rule will be relaxed where the case is one of which the public interest demands a speedy determination, and the ends of justice will be promoted thereby. Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073.

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ity, or claim and color of the authority, of the United States, by an officer of that government.[32] If it does not appear on the application for the writ by what authority the person is illegally restrained of his liberty, it is the duty of the federal officer having the custody of the person to show, by proper return, information in this respect. But after the judge is fully apprised by the return that the person is held by the officer by the authority of the United States, he can proceed no further. Formerly a distinction was attempted to be drawn by many of the state courts between cases in which the person was held by undisputed lawful authority in contradistinction to cases where he was held by claim or color of authority,[33] but it is now settled that such a distinction cannot be made.[34]

Application for Writ—By Whom

A person unlawfully restrained of his liberty may apply for the writ to secure his own release; or, if he is unable to do so, or is not permitted to make the application, a relative or friend may make the application for him.[35] In such

[32] Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597; Norris v. Newton, 5 McLean, 92, Fed. Cas. No. 10,307; Ex parte Robinson, 6 McLean, 355, Fed. Cas. No. 11,935.

[33] Phelan's Case, 9 Abb. Pr. (N. Y.) 286; Ohio & M. R. Co. v. Fitch, 20 Ind. 498; Skeen v. Monkeimer, 21 Ind. 1; Ex parte Kelly, 37 Ala. 474; In re Gregg, 15 Wis. 479; In re Spangler, 11 Mich. 298; Shirk's Case, 5 Phila. (Pa.) 333; Ex parte McRobets, 16 Iowa, 600; Ex parte Holman, 28 Iowa, 89, 4 Am. Rep. 159; Ex parte Hill, 5 Nev. 154; McConologue's Case, 107 Mass. 154; Com. v. Fox, 7 Pa. 336; In re Tarble, 25 Wis. 390, 3 Am. Rep. 85.

[34] Tarble's Case, 13 Wall. 397, 20 L. Ed. 597.

[35] For example, a parent, People v. Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; Com. v. Briggs, 16 Pick. (Mass.) 203; In re Mitchell, R. M. Charlt. (Ga.) 489; Ex parte McClellan, 1 Dowl. P. C. 81; U. S. v. Green, 3 Mason, 482, Fed. Cas. No. 15,256; Com. v. Hamilton, 6 Mass. 273; a guardian, Villareal v. Mellish, 2 Swanst. 538; Ferguson v. Ferguson, 36 Mo. 197; a daughter, Com. v. Curby, 3 Brewst. (Pa.) 610; a husband, Ex parte Newton, 2 Smith (Eng.) 617; Ex parte Sandilands, 12 Eng. Law & Eq. 463; Rex v. Mead, 1 Burrows, 542; a wife, Cobbett v. Hudson, 15 Adol. & E. 988; In re Ferrens, 3 Ben. 442, Fed. Cas. No. 4,746; a sister of an orphan, In re Daley, 2 Fost. & F. 258; but not a mere stranger, In re Poole, 2 McArthur (D. C.) 583; Ex parte Child, 15 C. B. 238; Linda v. Hudson, 1 Cush. (Mass.)

a case, however, there must be a showing, to the s
of the court, that the person himself is unable to
application.[36] A writ may be issued at any perioc
prisonment which is wrongful.

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Same—Form of Application

"A petition for habeas corpus must be verified,[37]
allege facts showing an illegal imprisonment.
ground of the petition is that the prisoner has bee
ted without reasonable or probable cause, it mu
what the evidence on the examination was, in such
perjury may be assigned upon the allegations if
false."[38] In all cases, at least probable cause for
a release from custody must be shown in the app
In some states it is the practice to grant a rule ni
prosecuting officer to show cause why the writ s
issue.[40]

Form of Writ—To Whom Directed—Service

The writ of habeas corpus runs in the name of t
dent of the United States, or of the state,[41] and
signed by the judge or officer authorizing it.[42] It
ed to the person who is claimed to wrongfully d

385. One need not be actually deprived of his liberty at t
be entitled to the writ. If he is under arrest, though a
bail, he is entitled to it. Mackenzie v. Barrett, 141 Fed.
C. A. 280, 5 Ann. Cas. 551. The court will not grant the
is obvious that, before return can be made, the restraint
terminated. Ex parte Baez, 177 U. S. 378, 20 Sup. Ct.
Ed. 813.

[36] In re Parker, 5 Mees. & W. 31; In re Thompson,
(N. S.) 19.

[37] Ex parte Walpole, 84 Cal. 584, 24 Pac. 308. Or accom
an affidavit. De Lacy v. Antoine, 7 Leigh (Va.) 438.

[38] Ex parte Walpole, supra.

[39] Sim's Case, 7 Cush. (Mass.) 285; Ex parte Watkins, 3
7 L. Ed. 650; U. S. v. Lawrence, 4 Cranch, C. C. 518, Fed.
15,577.

[40] Ex parte Farley (C. C.) 40 Fed. 66; In re Jordan (D. C
238; In re Rafferty, 1 Wash. 382, 25 Pac. 465; Ex parte C
52 Ala. 311.

[41] Church, Hab. Corp. § 110. [42] St. 31, Car. II.

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prisoner,[43] and commands him to have the body of such person before the court or judge at a time and place mentioned therein, and to show the cause of the detention. The writ may be served by an officer or by a private person.[44] Notice must be given to the prosecuting officer of the issuing of the writ.[45]

Return

A return in writing must be made by the person to whom the writ is directed.[46] In most states it is required by statute to be verified,[47] though at common law this was not necessary.[48] It must either deny the detention of the person alleged to be detained,[49] or show the reason for his imprisonment.[50] The body of the person detained must be produced in court, or cause must be shown why it is not, such as a denial of the detention.[51] The return may be controverted by the relator if he deems the facts not truly returned.[52] The court may allow the return to be amended.[53] After the return and the hearing of the evidence, if no cause for imprisonment of the relator appears, he will be discharged.[54]

[43] See Yudkin v. Gates, 60 Conn. 426, 22 Atl. 776; Nichols v. Cornelius, 7 Ind. 611; Com. v. Ridgway, 2 Ashm. (Pa.) 247; People v. Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644.

[44] See St. 31 Car. II.

[45] Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; People v. Pelham, 14 Wend. (N. Y.) 48; Lumm v. State, 3 Ind. 293.

[46] Seavey v. Seymour, 3 Cliff. 439, Fed. Cas. No. 12,596.

[47] A return to a federal court must be verified. Rev. St. U. S. 1878, § 757 (U. S. Comp. St. 1916, § 1285).

[48] Watson's Case, 9 Adol. & E. 731; In re Hakewill, 12 C. B. 223. And see Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.

[49] U. S. v. Green, 3 Mason, 482, Fed. Cas. No. 15,256.

[50] State ex rel. Nelder v. Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676; Eden's Case, 2 Maule & S. 226.

[51] Rex v. Bethuen, And. 281; Rex v. Wright, 2 Strange, 901.

[52] In re Milburn, 59 Wis. 24, 17 N. W. 965; State v. Scott, 30 N. H. 274; In re Powers, 25 Vt. 261.

[53] In re Hopson, 40 Barb. (N. Y.) 34; People v. Cavanagh, 2 Parker, Cr. R. (N. Y.) 650.

[54] In re Doo Woon (D. C.) 18 Fed. 898, 9 Sawy. 417.

Second Application—Appeal

A refusal to discharge under one writ does not prevent another application to a different court, unless there is a statute to that effect; and even then a second writ can be granted on new facts or evidence.[55] In the absence of such a statute, the decision on the first application would be given great weight, and, as a rule, would not be disturbed unless on new facts shown.[56]

For the reason that a second application might be made, at common law no appeal or writ of error was allowed from a decision on an application for a writ.[57] But now, by statute, such appeals are allowed in the federal courts and in many of the states.

If a person once discharged on habeas corpus is rearrested, he should be again discharged on a new writ.[58] But he could be subsequently indicted for the offense.

[55] Ex parte Pattison, 56 Miss. 161; People v. Fancher, 1 Hun (N. Y.) 27; Ex parte Robinson, 6 McLean, 360, Fed. Cas. No. 11,935; In re Breck, 252 Mo. 302, 158 S. W. 843.

[56] Ex parte Lawrence, 5 Bin. (Pa.) 304; Ex parte Campbell, 20 Ala. 89; In re Breck, 252 Mo. 302, 158 S. W. 843. Where liberty has been secured under one writ, the doctrine of res judicata applies, and is conclusive until the condition of the person whose liberty is in question has changed. In re Breck, supra.

[57] Yates v. People, 6 Johns. (N. Y.) 337; Hammond v. People, 32 Ill. 446, 83 Am. Dec. 286; People v. McAnally, 221 Ill. 66, 77 N. E. 544, 5 Ann. Cas. 590.

[58] In re Da Costa, 1 Parker, Cr. R. (N. Y.) 129; Com. v. McBride, 2 Brewst. (Pa.) 545.

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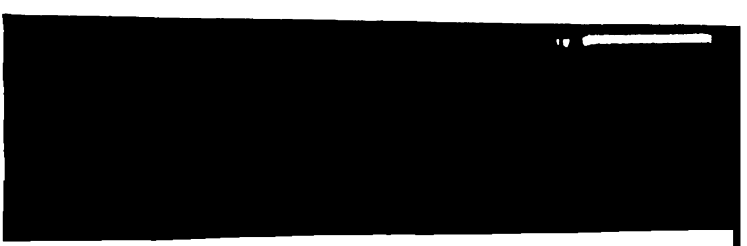

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