

HEARD'S  
CRIMINAL  
PLEADING

G. Norman Lieber

U. S. A.

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THE PRINCIPLES  
OF  
CRIMINAL PLEADING.



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PRINCIPLES  
OF  
CRIMINAL PLEADING

BY  
FRANKLIN FISKE HEARD



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TO THE  
HONORABLE NATHAN CLIFFORD, LL.D.,

IN APPRECIATION OF

HIS EXACT KNOWLEDGE OF THE CRIMINAL LAW,  
AND EMINENT JUDICIAL QUALITIES,

THIS WORK IS INSCRIBED BY

THE AUTHOR.



## P R E F A C E.

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IN this work I have endeavored to state those doctrines and rules of the law of Criminal Pleading which are common to all the United States; omitting what is purely local law, and citing only such cases as seem necessary to illustrate and support the text. Indeed, the revision of my collection of cases for publication has been a matter of selection rather than of accumulation.

Lord Bacon, in the preface to his Rules and Maxims, says that he might have made an ostentation of learning by vouching authorities, but that he abstained from it, "having the example of Mr. Littleton and Mr. Fitzherbert, whose writings are the institutions of the laws of England, whereof the one forbeareth to vouch authority altogether, and the other never reciteth a book but when he thinketh the case so weak of credit in itself as it needs a surety."

I acknowledge the assistance I have derived from the works of the English writers on various branches of the law. I have availed myself of their labors wherever I have found them useful.

The rule which pervades Pleading, especially Criminal Pleading, is, that the law must be kept separate from the fact.<sup>1</sup> An indictment is a statement, not of law, but of fact. The criminal nature of an offence is a conclusion of law from the facts and circumstances of the case. The indictment, therefore, should set out precisely all the facts and circumstances which render the defendant guilty of the offence charged.<sup>2</sup> And whatever system of Pleading prevails, whether at Common Law, or under a Code, this rule must ever be observed.

It has been remarked by high authority, that if the practice of Special Pleading were entirely banished from courts of justice, the science of Pleading would still be the most instructive branch of the Common Law. And in no other way can the Criminal Law be so quickly, so easily and so thoroughly mastered as by studying the law of Criminal Pleading. Indeed, a knowledge of Criminal Pleading is a knowledge of Criminal Law. In an indictment, every ingredient which constitutes the crime must be distinctly and accurately alleged. A knowledge of what allegations are essential, and a clear understanding of the meaning of such allegations constitute a knowledge of the Criminal Law.

Boston, July, 1879.

<sup>1</sup> *Regina v. Nott*, 4 Q. B. 783, per Coleridge, J.

<sup>2</sup> 1 Stark. Crim. Pl. 89. *Commonwealth v. Slack*, 19 Pick. 307.

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# CRIMINAL PLEADING.

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## CHAPTER I.

### THE PRINCIPAL ENGLISH AUTHORITIES IN THE CRIMINAL LAW.

“THE comparative weight of credit of authorities, where they conflict, is a matter of professional science, which is not regulated by any determinate rules.”<sup>1</sup>

As to text-books, it may be observed that any text-book, however carefully compiled, is but a superior sort of index to the authorities. Decisions are given in the text-books in a form so condensed, and the facts upon which they are founded are so sparingly detailed, that the Reports must be referred to, when any case special in its character arises. It was remarked by Lord Manners, that “It is always unsatisfactory to abstract the reasoning of the court from the facts to which that reasoning is meant to apply. It has a tendency only to misrepresent one judge and to mislead another.”<sup>2</sup>

It may, perhaps, be thought that many of the English decisions, being upon statutes of local application, must possess but local value. The same

<sup>1</sup> First Rep. of the English Crim. Law Comm. p. 18.

<sup>2</sup> *Revell v. Hussey*, 2 Ball & Beatty, 286.

remark might, however, be made of nearly all modern reports, and not less in regard to those of most of the United States than of the English reports. It will be found that with the construction of a statute the decision of a principle is often connected; and it is well known that into our American statutes relating to the criminal law we have often imported the principles, and sometimes the very language, of the legislation of England. It has been observed with great truth, that "the accident of a case may be of no value, while its principle shall be of much; and it requires an exact understanding of the case, and a view of all its scope and bearings, to say what principle may not, in some form, be contained in it, lying in latency, perhaps, but not the less existent."<sup>1</sup>

**Archbold (John Frederick). Pleading and Evidence in Criminal Cases.**—The second edition was published in 1825.

"Precedents by persons who are deceased," said Mr. Justice Coleridge, "are had recourse to as a sort of authority, and no doubt they are justly entitled to it; but in this particular case, with all the respect I feel for Mr. Archbold and Mr. Jervis, I find that the two precedents differ, and I think the best course to adopt is not to pronounce an opinion upon them, but to look at the words of the act."<sup>2</sup>

In *Regina v. Webb*,<sup>3</sup> it was said at the bar that Archbold's forms have not received any public approbation, nor are they to be considered as law. Pollock,

<sup>1</sup> The Reporters, p. 165.

<sup>2</sup> *Rex v. Kendrick*, 3 Nev. & Man. M. C. 407, A.D. 1835.

<sup>3</sup> 2 C. & K. 939; Temple & Mew C. C. 28.

C. B., in answer, observed: "Mr. Archbold's publications are remarkable for their accuracy, and I know no person who has contributed more to the profession, by his great diligence and learning. His works are prepared with the greatest care." But in *Regina v. Ion*,<sup>1</sup> when the eleventh edition of Archbold's Criminal Pleading by Welsby was cited, the same learned judge said that Mr. Welsby was "not yet an *authority*."

The nineteenth edition, published in 1878, contains nearly 1,200 pages. "I will say nothing of the arrangement," says the most recent of the English writers on Criminal Law,<sup>2</sup> "as I suppose no one ever paid the smallest attention to it, since the book was originally published more than fifty years ago. It has an arrangement, however, and a very perplexed one. A

<sup>1</sup> 2 Denison C. C. 488. If it was intended by this remark to intimate that the rule is that a writer on law is not to be considered an authority in his lifetime, —

"It is a custom

More honour'd in the breach than in the observance."

"Though etiquette," writes Mr. Warren, "usually forbids the citation in our courts, of the works of living text-writers, as authority, or otherwise than as illustrations, even this thin veil is dropped in citing the works of living authors of great weight and celebrity, especially after they have attained to judicial rank. The writings, for instance, of Lord St. Leonards have for a long series of years enjoyed, and deservedly, this distinction." Law Studies, vol. ii. 731, 3d London ed. In his judgment in the case of *Martin v. Mackonochie*, 3 Q. B. D. 756, 760, the Lord Chief Justice "paid to Sir Robert Phillimore, a living author, the very unusual compliment of quoting his valuable book on Ecclesiastical Law as a legal authority." Per Lord Penzance in *Combe v. Edwards*, 3 P. D. 120.

In 1837 when East's Pleas of the Crown was cited, Park, J., remarked that living authors were not to be cited as authorities. *Rex v. Atkinson*, 7 C. & P. 671.

<sup>2</sup> Stephen Dig. Crim. Law, p. x.

series of very able and learned persons, Lord Chief Justice Jervis, the late Mr. Welsby, and my friend, Mr. Bruce, the stipendiary magistrate of Leeds, have devoted an infinite deal of trouble to the task of making it a complete magazine of every statute, every case, and every dictum of every text-writer of reputation upon every subject connected with indictable offences and criminal pleading and procedure. It is an invaluable book of reference, but to try to read it is like trying to read a directory arranged partly on geographical and partly on biographical principles."

**Bacon (Matthew).** — A New Abridgment of the Law. Seventh ed., with additions by Sir H. Gwillim and C. E. Dodd. 8 vols. 8vo. London: 1832.

The first volume of the first edition was published in 1736.<sup>1</sup> "It is well known that Bacon's Abridgment was compiled from the MSS. of Chief Baron Gilbert."<sup>2</sup> In Viner's Abridgment, Connusance of Pleas, C. pl. 3, in the margin, it is quoted as Gilbert's New Abridgment. "A text-book of the highest reputation."<sup>3</sup> "A sufficient authority."<sup>4</sup> "The Abridgments of Viner and Bacon, and the Digest of Comyns — books of the highest authority."<sup>5</sup>

**Campbell (John, Lord).** — Reports of Cases determined at Nisi Prius, in the Courts of King's Bench and Common Pleas, and on the Circuit from 1807 to 1816. 4 vols. 8vo. London: 1809 to 1816.

<sup>1</sup> Per Bovill, C. J., in *Vickery v. London, Brighton, &c. R. Co.* L. R. 5 C. P. 170.

<sup>2</sup> Per Blackburn, J., in *Regina v. Ritson*, L. R. 1 C. C. 204.

<sup>3</sup> Per Kelly, C. B., in *Regina v. Ritson*, L. R. 1 C. C. 203.

<sup>4</sup> Per Blackburn, J., in *Regina v. Ritson*, L. R. 1 C. C. 204.

<sup>5</sup> Per Lord Penzance in *Combe v. Edwards*, 3 P. D. 125.

Lord Cranworth, L. C., recently observed: "Although that was merely a dictum in a nisi prius case, yet on all occasions I have found, on looking at the reports, by the late Lord Campbell, of Lord Ellenborough's decisions, that they really do, in the fewest possible words, lay down the law, very often more distinctly and more accurately than it is to be found in many lengthened reports; and what is so laid down has been subsequently recognized as giving a true view of the law as applied to the facts of the case."<sup>1</sup> "We may depend upon the accuracy of this reporter," said Blackburn, J., in delivering his judgment in an important case in the Exchequer Chamber.<sup>2</sup>

**Carrington (F. A.) and J. Payne.**— Reports of Cases argued and ruled at Nisi Prius, in the Courts of King's Bench, Common Pleas, and Exchequer; together with Cases tried on the Circuits and in the Central Criminal Court; from 1823 to 1841. 9 vols. 8vo. London: 1825 to 1841.

These Reports are cited in criminal cases oftener than any other, probably from the reason that they contain more criminal law cases. In a recent case, Blackburn, J., said of these Reports and of 'Espi-

<sup>1</sup> Williams v. Bayley, L. R. 1 H. L. 213.

<sup>2</sup> Redhead v. Midland Railway Co. 8 B. & S. 401; L. R. 2 Q. B. 438. "The Reports of Lord Campbell have long been proverbial for their accuracy and value." Warren Law Studies, 432 note, 2d ed. Lord Campbell writes: "I myself am bound to honor Sir James Dyer as the first English lawyer who wrote for publication 'Reports of Cases' determined in our municipal courts, — being followed by a long list of imitators, containing my humble name. I am afraid that the hope of immortality from Law Reports is visionary." Lives of the Chief Justices, vol. i. pp. 211, 227, 3d ed.

nasse's Reports,<sup>1</sup> that "neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood."<sup>2</sup>

**Carrington (F. A.) and J. R. Marshman.** — Reports of Cases at Nisi Prius, &c. from 1840 to 1842. 8vo. London: 1843.

**Carrington (F. A.) and A. V. Kirwan.** — Reports of Cases argued at Nisi Prius, &c. from 1843 to 1853. 2 vols. and vol. 3, parts 1, 2. Vols. 2 and 3 contain also Crown Cases Reserved. 8vo. London: 1845 to 1853.

**Coke (Sir Edward).** — The Third Part of the Institutes of the Laws of England: concerning High Treason, and other Pleas of the Crown, and Criminal Causes. Royal 8vo. London: 1797 or 1817.

"Sir Edward Coke's Third Institute is a treatise of great learning, and not unworthy of the hand that produced it; but yet seems by no means a complete work, many considerable heads being either wholly omitted in it or barely touched upon."<sup>3</sup> In his Preface, the author gives this account of his work: "We have in

<sup>1</sup> In *Small v. Nairne*, 13 Q. B. 844, Lord Denman, C. J., said: "I am tempted to remark, for the benefit of the profession, that 'Espinasse's Reports, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord Coke's Reports.'" This remark is quoted by Coleridge, J., in *Wenman v. Mackenzie*, 5 E. & B. 453.

<sup>2</sup> *Redhead v. Midland Railway Co.* 8 B. & S. 401; 9 B. & S. 531; L. R. 2 Q. B. 437; L. R. 4 Q. B. 388.

<sup>3</sup> Preface to the first edition of Hawkins's Pleas of the Crown.

this Third Part of the Institutes cited our ancient authors, and bookes of the law, viz. Bracton, Britton, the Mirror of Justices, Fleta, and many ancient records, never (that we know) before published, to this end, that seeing the Pleas of the Crown are for the most part grounded upon, or declared by statute lawes, the studious reader may be instructed what the common law was before the making of those statutes, whereby he shall know, whether the statutes were introductory of a new law, declaratory of the old, or mixt, and thereby perceive what was the reason and cause of the making of the same, which will greatly conduce to the true understanding thereof."

Lord Campbell, in his Life of Lord Coke, says "His law books were still his unceasing delight; and he now (A.D. 1629-1634) wrote his Second, Third, and Fourth Institutes, which, though very inferior to the First, are wonderful monuments of his learning and industry."<sup>1</sup> And in a very recent case, Chief Baron Kelly characterized Comyns's Digest, Coke's Third Institute, and Bacon's Abridgment, as "text-books of the highest reputation."<sup>2</sup>

<sup>1</sup> Lives of the Chief Justices, vol. i. p. 339, 3d ed. The Second, Third, and Fourth Institutes were published under an order of the House of Commons. Journals, 12th May, 1641. "Upon debate this day had in the Commons House of Parliament, the said House did then desire and hold it fit that the heir of Sir Edward Coke should publish in print the Commentary on Magna Charta, the Pleas of the Crown, and the Jurisdiction of Courts, according to the intention of the said Sir Edward Coke; and that none but the heir of the said Edward Coke, or he that shall be authorized by him, do presume to publish in print any of the aforesaid books or any copy hereof." The first edition of the Third Institute was published in 1644.

<sup>2</sup> Regina v. Ritson, L. R. 1 C. C. 203. And Lord Hardwicke, C. J., said, that, though Coke's Institutes were good authorities as to mat-

In the Introduction to the Oxford Edition of Britton, the relation of the Institutes to the earlier authorities is thus stated: "As Britton was the first text-book written in French, so Coke's Institutes was the first important work upon our law composed in the English language. The great authority of his name, the vastness of his learning, and his familiar knowledge of the original materials of our law, — a knowledge so difficult of acquisition, and in which no one in later times could fairly hope to rival him, — have so accustomed his successors to depend upon his works for information as to our older law, that in modern times it has become unusual to recur to the sources from which his learning was derived; and our ancient writers have been suffered to throw only that amount of light upon our jurisprudence which is reflected from them by the pages of Coke. The repulsive form in which alone our earlier authors have been accessible has contributed to confine the researches of the student; and for the practical purposes of legal discussion it has been found a convenient rule to limit the citation of early authorities to those which appear under the sanction of the great Commentator."

**Comyns (Sir John).** — Digest of the Laws of England [translated from the original, written in French]. First ed., 5 vols. fol. 1762–67. Continuation, by a Gentleman of the Inner Temple, 1 vol. fol. 1776. Second ed., 5 vols. fol. 1780. Third ed. by S. Kyd, 6 vols. royal 8vo. 1792. Fourth ed. by S. Rose, 6

ters of law, yet they were no legal evidence of the historical facts mentioned in them, and that the same has been held as to Camden's *Britannia*, and such like books. *Rex v. Reffit*, *Cunningham*, 62, 3d ed.

vols. royal 8vo. 1800. Fifth ed. by Anthony Hammond, 8 vols. royal 8vo. 1822.

This incomparable Digest has long been held in the highest estimation, not only for the extraordinary accuracy of its legal positions, but for its masterly distribution of the various heads of the law. It is constantly cited as direct authority. Being founded on an entirely new and comprehensive system of arrangement, and framed upon an accurate, profound, and scientific distribution of the several parts of English jurisprudence, this Digest is esteemed the most perfect model of an abridgment of the English law. "It is the best Digest extant upon the entire body of the law," says Chancellor Kent. "The best book of reference," observes the editor of Wynne's *Eunomus*, "is Comyns's Digest." "A work almost perfect in its kind," says Judge Story.<sup>1</sup> "He is the most fortunate jurist who possesses the earliest edition. Of the later editions, in octavo, we can say little by way of commendation. They have the gross fault of a total departure from the style, brevity, accuracy, and simplicity of Comyns; a departure which is utterly without apology, as it exhibits, on the part of the editor, either an incapacity for the task or an indifference to the manner of executing it. Mr. Kyd's edition has the negative merit of having done but little injury; Mr. Rose's, in 1800, has interwoven a miserable patchwork; and Mr. Hammond's, in 1824, has even less merit, containing the substance of his indexes to the common law and chancery reports, thrown together with a strange neglect of the symmetry of the original work."

<sup>1</sup> *Miscellaneous Writings*, pp. 389-393, ed. 1852.

“ We have the opinion of Chief Baron Comyns, of Mr. Justice Buller, and the opinion of the learned editor of Williams’s Saunders ; and greater authorities so far as names are concerned cannot be cited,” said Chief Baron Pollock.<sup>1</sup> “Coke, Hale, and Comyns, three of the very greatest expositors of the law of England,” said Chief Justice Cockburn.<sup>2</sup>

“ No additional weight is given to decisions,” said Mr. Justice Metcalf, “ by the insertion of the doctrine thereof in legal treatises, however eminent may be their authors.”<sup>3</sup> But with deference to any opinion of that learned judge, it is submitted that this statement is not strictly true. In a recent case, Baron Martin remarked with reference to Williams’s edition of Saunders, that “ the omission of a case from such a book throws, in my opinion, great doubt upon its authority.”<sup>4</sup> And Sir William Scott once observed : “ This dictum, wherever it comes from, derives some confirmation from its reception into the Digest of Lord Chief Baron Comyns.”<sup>5</sup> And Chief Baron Kelly : “ This appears to me to be a satisfactory and binding authority ; and the more so because I find that one hundred and fifty years afterwards it is quoted in a book of the highest authority, viz. Comyns’s Digest, which alone would make it a satisfactory guide for us upon the present occasion.”<sup>6</sup>

<sup>1</sup> *Dyer v. Best*, 35 L. J. Exch. 107.

<sup>2</sup> *Regina v. Herford*, 3 El. & El. 131.

<sup>3</sup> *Fullam v. West Brookfield*, 9 Allen, 7.

<sup>4</sup> *Dyer v. Best*, 35 L. J. Exch. 106 ; L. R. 1 Exch. 156, A. D. 1866.

<sup>5</sup> *The Gratitude*, 3 Chr. Rob. 269.

<sup>6</sup> *Brinsmead v. Harrison*, L. R. 7 C. P. 552, 553, in Cam. Scacc. And per Blackburn, J., at p. 554, “ that great lawyer, Chief Baron Comyns, gives the high authority of his sanction to the decision.”

**Court for Crown Cases Reserved.**—In 1845 Lord Denman drew up and submitted to the Home Secretary a paper entitled “The Court of all the Judges,” in which the origin, constitution, and procedure of the Court for the consideration of the Crown Cases Reserved is stated, “with a view to the much needed reform of that tribunal.”<sup>1</sup> “This court,” he writes, “is a voluntary meeting of the judges without commission or mandate, without seconds or officers. It has met and consulted from an early period of our history to determine questions of importance. Many of the cases reported by Lord Coke were finally decided there. The judgment, indeed, was pronounced in that court to which the record belonged; but it is believed to have been always conformable to the conclusion at which the assembled judges, or the majority of them, had arrived. The meetings were held in the apartment called the Exchequer Chamber, but were never called by that name and style, which, indeed, properly belonged to other courts differently constituted.

“After a cause had undergone the usual discussion at the bar, the two junior judges argued the disputed point on opposite sides, then the two next, and so on, till the Chief Justice, and sometimes the Lord Chancellor, took a part. This was most frequently done in civil cases. In Crown cases, the more correct course was to direct a special verdict to be found at the Assizes, or Old Bailey Sessions, and then remove the record into the Court of King’s Bench, when judgment was given according to law. But even then, when the matter was difficult or important, the

<sup>1</sup> This valuable paper is published in the “Memoir of Lord Denman,” vol. ii. p. 442, appendix vii.

judges of that court sometimes called their brethren from the other courts into deliberation with them."

The statements of fact in the Crown Cases Reserved are always drawn up by the judges respectively before whom the questions arise; and each judgment, also, was understood to be settled by some one of the judges, until the practice has obtained in later years, in many cases, for each member of the court to pronounce a separate judgment.<sup>1</sup> And previous to this practice, and even now, the judges do not always "set down the reasons and causes of their judgments."<sup>2</sup> The doctrine that the reasons for a decis-

<sup>1</sup> Alderson, B. "I desire to express my entire concurrence, because I think it important that the rule should be laid down clearly and distinctly by every member of the court." *Straker v. Graham*, 4 M. & W. 726.

<sup>2</sup> 3 Rep. Pref. p. 5. Bovill, C. J. "The question is a simple one, and it is not usual in these cases to give reasons for our judgment at length." *Regina v. Summers*, L. R. 1 C. C. 183.

Lord Eldon observed that "It was always useful to state the reasons which influenced the mind of the judge in giving judgment. If pronounced by a judge from whose decision there lay an appeal, counsel and the advisers of parties had an opportunity of weighing well the grounds of the decision; and when the matter came to the court of last resort, where the principles were settled which must regulate the decisions of inferior tribunals, it was their duty to consider all the principles to which facts in all their varieties might afterwards be applied." *Wright v. Ritchie*, 2 Dow, 383. And again, the same great authority said: "Upon a subject which has been so much the topic of discussion and decision, it would be a waste of time to trace the doctrine from beginning to end through all the cases, as has been my habit; which I hope will produce at least this degree of service, that I shall leave a collection of doctrine and authority that may prove useful." *Butcher v. Butcher*, 1 Ves. & B. 96. "I never give a judicial opinion upon any point until I think I am master of every material argument and authority relative to it," said Lord Mansfield, in *Rex v. Wilkes*, 4 Burr. 2549. And it is related of Lord Wensleydale, that he considered a judgment imperfect if it did not refer to every case in the books that bore on the question.

ion should be given, so that the grounds on which it rested being understood, the judgment itself may be afterwards confidently applied, was thus tersely stated by Lord Mansfield: "It is not only a justice due to the crown and the party in every criminal cause where doubts arise, to weigh well the grounds and reasons of the judgment, but it is of great consequence to explain them with accuracy and precision in open court, especially if the questions be of a general tendency, and upon topics never before fully considered and settled—— that the criminal law of the land may be certain and known."<sup>1</sup>

In 1848 a court for the hearing of Crown Cases Reserved was created by statute 11 & 12 Vict. ch. 78, consisting of all the fifteen judges, or five of them,<sup>2</sup> among whom shall be the three chiefs, or one of them, for the purpose of determining "any question of law which shall have arisen at the trial;"<sup>3</sup> a case for that purpose being grantable at the discretion of the judge who presides at the trial, who himself thus authentically points out to the court the doubt or difficulty with which it is called upon to deal. This important

<sup>1</sup> *Rex v. Wilkes*, 4 Burr. 2549.

<sup>2</sup> Upon a division of the court on a point of law, it is usual to direct a rehearing before the fifteen judges; but where the division is on the facts, and not on the law applicable to them, judgment will be delivered according to the opinion of the majority. *Regina v. Elliott*, Leigh & Cave C. C. 103, 108. *Regina v. Burrell*, Leigh & Cave C. C. 354, 364. So, also, if there is a conflict of decision, the case will be reserved for a larger number of judges. But the court of the fifteen judges is a court of the same jurisdiction, not a superior one. Per Kelly, C. B., in *Regina v. Robinson*, L. R. 1 C. C. 82.

<sup>3</sup> The effect of quashing the conviction is the same as if the prisoner had been acquitted.

tribunal is invested with the amplest powers to secure substantial justice; to hear, and finally determine, the questions submitted to them; to reverse, affirm, or amend the judgment given at the trial; to avoid such judgment, and order an entry on the record, that in the opinion of the court the prisoner ought not to have been convicted;<sup>1</sup> to arrest the judgment, or order it to be given at some future session of oyer and terminer and jail delivery, if the delivery of such judgment has been suspended; or to make such other order as justice may require. But the act leaves the reservation of all points of law entirely in the discretion of the presiding judge; and this detracts in no little degree from its value, and puts the judge himself in a false position. It imposes on him a most unpleasant duty, — that of determining whether his own decision should be the subject of review. This ought not to be. The right of appeal should be absolute, and should never rest in the discretion of the judge, whose judgment the appeal is sought to reverse, whether the appeal should be granted or not.<sup>2</sup>

The Supreme Court of Judicature Act, 1873, 36 & 37 Vict. ch. 66, and The Supreme Court of Judicature Act, 1875, 38 & 39 Vict. ch. 77, have modified the above-cited statute of 11 & 12 Vict. ch. 78.

<sup>1</sup> See *Regina v. Mellor, Dearsly & Bell* C. C. 468; *Regina v. Clark*, L. R. 1 C. C. 54.

<sup>2</sup> The present Lord Chief Baron of the Exchequer Division, then Sir Fitzroy Kelly, in the year 1844, introduced into the House of Commons a bill to allow the right of appeal in criminal cases. His speech on introducing the bill was masterly, and the question was dealt with in a manner not to be surpassed. This speech is reported in Hansard, vol. lxxv. p. 11, 3d series.

No authority in the law can exceed such as is furnished by the Reports of the Crown Cases Reserved. Great is the weight of the considered and accurately reported opinions of the Judges, who, after hearing a case well argued, have consulted, deliberated, and, in the last resort, decided.

CHRONOLOGICAL LIST OF THE REPORTERS OF CROWN  
CASES RESERVED.

Leach, 2 vols., 4th ed., 1815 <sup>1</sup>	. 1730 to 1815.
Russell and Ryan, 1 vol.	. . . . 1799 to 1824.
Moody, 2 vols.	. . . . 1824 to 1844.
Denison, 2 vols.	. . . . 1844 to 1852.
Dearsly, 1 vol.	. . . . 1852 to 1856.
Dearsly and Bell, 1 vol.	. . . . 1856 to 1858.
Bell, 1 vol.	. . . . 1858 to 1860.
Leigh and Cave, 1 vol.	. . . . 1861 to 1865.
The Law Reports, Crown Cases Reserved, 2 vols.	. . . . 1865 to 1875.
The Crown Cases Reserved are now published in the Law Re- ports, Queen's Bench Divis- ion.	
Temple and Mew's Criminal Ap- peal Cases, 1 vol.	. . . . 1848 to 1851.

**Cox (Edward W.).**—Reports of Cases in Criminal Law, Argued and Determined in all the Courts in England and Ireland. 13 vols. 8vo. London: 1843 to the present time.<sup>2</sup>

<sup>1</sup> This is the only correct edition; the preceding are incorrect, imperfect, and unreliable.

<sup>2</sup> Vol. xiv. is in course of publication.

“The nisi prius rulings, reported (often in a very unsatisfactory way) in Cox’s Criminal Cases are not very numerous. Three 8vo volumes contain the reports for 1861–74, and a large proportion of them are of little value. It is matter of regret that decisions, necessarily given with little consideration and under great pressure, should be reported at all.”<sup>1</sup>

**East (Sir Edward Hyde).**—A Treatise of the Pleas of the Crown. 2 vols. 8vo. London: 1803.

“A work of good authority.”<sup>2</sup> It is a work in which the author has treated the subject in a scientific manner. The law is clearly and accurately stated.

**Foster (T. Campbell), and W. F. Finlason.**—Reports of Cases decided at Nisi Prius and at the Crown Side on Circuit; with Select Decisions at Chambers. 1856 to 1867. 4 vols. 8vo. London: 1858 to 1867.

“It is to be borne in mind,” say the Reporters,<sup>3</sup> “that the scope of Nisi Prius Reports is not so much disputed questions of law (which, if doubtful, are generally reversed) as the practical application of admitted principles of law in which it is most often that any difficulty exists. In other words, the object of these Reports is not merely nor mainly citations for authority, but practical utility.”

**Foster (Sir Michael).**—A Report of some Proceedings on the Commission for the Trial of the Rebels in

<sup>1</sup> Stephen Dig. Crim. Law, pp. xiv, xv.

<sup>2</sup> Per Shaw, C. J., in *Commonwealth v. Webster*, 5 Cush. 306.

<sup>3</sup> 4 F. & F. 585 note. See, also, the preface to the first vol. of Carrington and Payne’s Reports, and the Advertisement to the second vol. of Lewin’s Crown Cases.

the year 1746, in the County of Surrey; and of other Crown Cases. To which are added Discourses upon a few Branches of the Crown Law. First ed. fol. Oxford: 1762. Third Edition, with an Appendix containing new Cases, and additional Notes and References by Michael Dodson, Esq. 8vo. London: 1792, 1809.

Lord Chief Justice De Grey speaks of Sir Michael Foster as one "who may be truly called the Magna Charta of liberty of persons, as well as fortunes."<sup>1</sup> And Chief Justice Shaw in a celebrated case judicially observed: "Sir Michael Foster was an eminent judge of the highest court of criminal jurisdiction, many years before our Revolution, when the people of Massachusetts were under English jurisdiction. He was also a most acute, discriminating and exact writer, whose chapter on the law of Homicide has been a work of standard authority on that subject for a century."<sup>2</sup> And in a previous case he characterizes this book as "an authority of the highest character."<sup>3</sup> "A masterly treatise."<sup>4</sup>

Referring to the necessity of stating in the report of a case all the circumstances which are material and which enter into the true merits of the case,<sup>5</sup> the author observes: "Imperfect reports of facts and circumstances, especially in cases where every circumstance weigheth *something* in the scale of justice, are

<sup>1</sup> 3 Wils. 203, quoted 9 Met. 111.

<sup>2</sup> Commonwealth v. York, 9 Met. 111.

<sup>3</sup> Commonwealth v. Roby, 12 Pick. 509.

<sup>4</sup> Per Whiteside, C. J., in Mulcahy v. The Queen, Irish Rep. 1 Com. Law, 33.

<sup>5</sup> He here speaks of Sir John Strange as "over-studious of brevity."

the bane of all science that dependeth upon the precedents and examples of former times.”<sup>1</sup>

**Gabbett (Joseph).**—A Treatise on the Criminal Law; comprehending all Crimes and Misdemeanors punishable by Indictment; and Offences cognizable summarily by Magistrates; with the Modes of Proceeding upon each. In two volumes. Vol. I. On Crimes and Indictable Misdemeanors. Vol. II. Of the Practice of the Criminal Law. Royal 8vo. Dublin: 1843.

“My object has been,” says the author, “to embrace the whole science and practice of the Criminal Law. I have, throughout, felt a great anxiety that the work should be accurate; and I have been also anxious that it should recommend itself by a lucidus ordo, which I have always looked upon as a principal merit in all compositions.” And faithfully and successfully did the author accomplish his task. It is one of the best books, which comprises the whole body of the Criminal Law, extant.

**Hale (Sir Matthew).** *Historia Placitorum Coronæ.*—The History of the Pleas of the Crown, published from the original Manuscripts by Sollom Emlyn. A new Edition by Thomas Dogherty. 2 vols. 8vo. London: 1800. First ed. 2 vols. fol. London: 1736.

This work has justly been characterized as “the most famous book ever published on the subject of the English Criminal Law.”<sup>2</sup> It will never cease to

<sup>1</sup> Crown Law, p. 294, quoted in the “Advertisement” to Burrow’s Reports.

<sup>2</sup> Ruins of Time, exemplified in Sir Matthew Hale’s History of the Pleas of the Crown. By Andrew Amos. p. xxiii.

be appealed to, in a legal discussion involving a recurrence to first principles.

A learned writer thus discourses of Coke's Third Institute and Hale's History of the Pleas of the Crown:—

“In the course of the seventeenth century two remarkable works on the Criminal Law were written, which not only gave an authentic view of it as it stood in the earlier and later parts of the century, but are still regarded as books of the highest authority. Coke's Third Institute is, like the rest of its author's works, altogether unsystematic. It is little more than a digest, showing incidentally the progress made by the law since it was first reduced to shape.

“Hale's History of the Pleas of the Crown differs widely from Coke's Third Institute in point of style and composition, and handles systematically several subjects which Coke touches upon in a fragmentary and occasional manner. Some, but few, additions were made to the body of the criminal law between the dates of the two works; but in the main the law continued, as it was, a system strangely antiquated, unsystematic, and meagre, but of reasonable dimensions, and apparently sufficient for practical purposes.”<sup>1</sup>

Every one who relies on Lord Hale should remember, 1st, That he corrected his manuscripts only to the twenty-seventh chapter; 2dly, That Lord Hale, “not having always had leisure to consult the books themselves, had frequently copied from the misprinted quotations in the margin of Lord Coke's third volume of his Institutes;” which also clearly

<sup>1</sup> Stephen General View of the Crim. Law, pp. 65, 66.

shows that he had relied on Lord Coke's statements themselves.<sup>1</sup>

It may be observed that writers subsequent to Lord Hale have stated absolutely many things which he delivered under various degrees of assent and modifications of doubt. They have omitted such expressions as "but this is but hearsay," "it might be a question," "it seemeth," "sed tamen quære," "quære de hoc" &c. It has been well said<sup>2</sup> that these are "by no means arbitrary words, without much meaning; but are inserted with the utmost deliberation and judgment. These ancient writers advanced timidly over such slippery ways as those of the common law; but by suppressing their misgivings, and rushing in where they trod with alarm, an easy passage has been opened by their successors over the legal Alps. Neither will it appear strange, if some decisions of mean or odious origin, and which are entitled to no weight of their own, have acquired a factitious importance from being recorded simply as precedents in Sir M. Hale's treatise: like insects in amber, which are themselves neither rich nor rare, but which are made precious by the mausoleum wherein they are entombed."<sup>3</sup>

"The Treatise published under the name of Sir Matthew Hale," observes Mr. Sergeant Hawkins, "is

<sup>1</sup> Pref. to Hale P. C. pp. xi, xii. <sup>2</sup> Russell on Crimes, 182 note, 4th ed. Very soon after the first edition of his Reports was published in 1763, Mr. Justice Foster retracted what he had said in that edition respecting Lord Hale's inaccuracy. See p. xxxii. of the 3d ed.

<sup>2</sup> Amos Ruins of Time, p. 2.

<sup>3</sup> "We see spiders, flies, or ants entombed and preserved forever in amber, a more than royal tomb."—Lord Bacon.

indeed very useful, and written in a clear method, and with great learning and judgment; but it is certainly very imperfect in the whole, and seems to be only a model or plan of a work of this kind, which is said to have been intended by him.”<sup>1</sup> And therefore, when Lord Campbell writes of the Pleas of the Crown, that it is a “*complete* digest of the Criminal Law as it existed in Sir M. Hale’s day,” he must be understood as expressing, in an equitable sense, that what was intended to be done was done.

The History of the Pleas of the Crown has had no rival among treatises on the Criminal Law of England for authority, influence, and reputation. It tells the story of what, two centuries ago, was regarded as appropriate to the circumstances, and in harmony with the sentiments of society, and was extolled as the acme of juridical wisdom.

**Hawkins (William).**— A Treatise of the Pleas of the Crown. The eighth Edition, with the Statutes and Decisions down to the present Time, by John Curwood. 2 vols. 8vo. London: 1824. The first edition was published in 1716.

The author was a consummate master of the crown law, and one of the most lucid of writers. His work is at once remarkable for its singular accuracy and completeness. “Hale and Hawkins are justly regarded, not as respectable compilers, but as standard authorities,” said Mr. Justice Gaston,<sup>2</sup> who was himself a great criminal-law lawyer. “A work of high authority, and a writer that never was supposed to have taken too favorable a view to those prose-

<sup>1</sup> 1 Hawk. P. C. Pref. to the first ed.

<sup>2</sup> State v. Johnson, 1 Ired. 363.

cuted.”<sup>1</sup> “Great authority,” said Brett, L. J., in a very recent case.<sup>2</sup> That very cautious judge, Sir Michael Foster, speaks of him as “a modern writer on the crown law, the best we have except Hale.”<sup>3</sup>

**Kelyng (Sir John).**—Reports of Crown Cases in the Time of King Charles II. Third Edition, containing Cases never before printed. Edited by Richard Loveland Loveland. London: 1873.

There have been two editions of Sir John Kelyng's Crown Cases; the first published in London, 1708, folio, and the second, Dublin, 1789, octavo. Neither of these contain all the cases Sir John Kelyng collected and left in manuscript. In a copy of the folio edition which recently came into the possession of the publishers of the third edition, there is written, by an unknown hand, the following note on the margin of the page containing Lord Chief Justice Holt's address to the Reader:—

“But not all, for he had collected more cases, and had two MSS. collections of his own reports in ye crown law, and these here printed are in ye one MSS. (tho' not all, but most fitt to be printed for publike use). Ye other MSS. had some considerable cases in it (as his son Sir John Keyling told me), those of ye Ch. Jn. Keyling in ye first volume or MSS. not here printed. I have added in ye spare paper in this book with reference to ye place where they should come in had they been here printed so w<sup>th</sup> what printed and in ye spare paper wrote makes one of the MSS.”

<sup>1</sup> Per Perrin, J. in *Regina v. O'Connell*, 1 Cox C. C. 378.

<sup>2</sup> *Leyman v. Latimer*, L. R. 3 Exch. D. 356.

<sup>3</sup> Foster Crown Law, 207.

“ These additional Cases are given in this edition, and for the purpose of readily distinguishing them, are printed in red ink. The whole work has been most carefully revised, and the references verified, those to Hale, Hawkins, and Foster being to the last editions of those writers.”

“ A Treatise on High Treason,” first printed in 1793, being a kindred subject, and containing numerous references to Kelyng, has been added at the end of the volume. This treatise is singularly accurate in statement and lucid in style.

Kelyng is “ a book of high authority.”<sup>1</sup> But it has been observed that it “ is a book which can never be referred to without reprobating the course which appears there to have been taken, of judges and crown counsel meeting together to settle, revise, and rule beforehand the points of the trial; and we must not forget that the book was edited by Lord Holt, and the preface written by him.”<sup>2</sup>

**Lewin (Sir Gregory A.).** — A Report of Cases determined on the Crown Side on the Northern Circuit, from the Summer Circuit of 1822 to the Summer Circuit of 1838; with a few Cases of earlier Date. 2 vols. 12mo. London: 1834–39.

“ Lewin was not an accurate reporter.”<sup>3</sup>

**Roscoe (Henry).** — Digest of the Law of Evidence in Criminal Cases. Ninth ed. London: 1878.

This edition contains over 1,100 very closely

<sup>1</sup> 2 Russell on Crimes, 244, 4th ed.

<sup>2</sup> Per Fitzgerald, J., in *Mulcahy v. The Queen*, Irish Rep. 1 Com. Law, 64.

<sup>3</sup> Per Blackburn, J., in *Regina v. Francis*, 43 L. J. M. C. at p. 100.

printed pages. It is very complete and accurate. The matter is arranged in alphabetical order.

**Russell (Sir William Oldnall).**—A Treatise on Crimes and Misdemeanors. Fourth ed. By Charles Sprengel Greaves, Esq. Q. C. 3 vols. Royal 8vo. London: 1865.<sup>1</sup>

This work is confined to Indictable Offences, and does not treat of Criminal Procedure. It is remarkable for its lucid style, singular accuracy and completeness. In a recent Crown Case Reserved, Chief Baron Pollock judicially observed: "The editor of Russell on Crimes is known as a gentleman of great learning, ability, and research."<sup>2</sup> "The most authoritative text-book on Crimes."<sup>3</sup>

**Starkie (Thomas).**—A Treatise on Criminal Pleading, with Precedents of Indictments, Special Pleas &c. Second ed. 2 vols. 8vo. London: 1828.

This excellent book is cited in England as direct authority.<sup>4</sup> "A text writer, to whose opinions I shall always pay the greatest respect," said Mr. Justice Coleridge.<sup>5</sup> The edition of 1828 is the same as the second edition of 1822, with the exception of a new title-page.

**Staunforde (William).**—Les Plees del Coron. 4to. London: In ædibus Richardi Tottelli, 1574.

This is the first work which treats the subject of

<sup>1</sup> The fifth edition edited by Samuel Prentice, Esq., was published in 1877.

<sup>2</sup> *Regina v. Curgerwen*, L. R. 1 C. C. 3. "The very learned editor of Russell on Crimes." Per Whiteside, C. J., in *Regina v. Fox*, 10 Cox C. C. 505.

<sup>3</sup> Per O'Hagan, J., in *Regina v. Fanning*, 17 Irish C. L. Rep. 305

<sup>4</sup> *Regina v. Drury*, 3 Cox C. C. 544, 546, A.D. 1849.

<sup>5</sup> *Doe v. Suckermore*, 5 A. & E. 706.

criminal law professedly and in detail.<sup>1</sup> It was certainly printed as early as 1574,<sup>2</sup> in French, and there have been several editions of it. The author was a Judge of the Common Pleas in the reign of Queen Mary.<sup>3</sup> "In Master Staunford, there is force and weight, and no common kind of style: in matter none hath gone beyond him, in method none hath overtaken him. And surely his method may be a law to the writers of the law which shall succeed him."<sup>4</sup>

In the Preface to the first edition of Hawkins's Pleas of the Crown, it is said: "The Treatise of Sir William Staunforde seems to be writ with great judgment, but he takes in a very small compass, scarce mentioning any offences under felonies."

"Right profitable," says Lord Coke, "are the ancient books of the common law, yet extant; and those also of later times, as the Old Tenures, Old Natura Brevium, Littleton, Doctor and Student, Perkins, Fitzherbert's Natura Brevium, and Staunford; of which the Register, Littleton, Fitzherbert, and Staunford are most necessary and of greatest authority and excellency."<sup>5</sup> And again: "Staun-

<sup>1</sup> "Is agreed to be a very judicious author." Per Parker, C. J., in *Jones v. Givin*, Gilb. Cas. 194.

<sup>2</sup> Mr. Spilsbury (Lincoln's Inn and Library, p. 167) and Mr. Justice Willes say that the first edition was published in 1583. *Mansell v. The Queen*, 8 El. & Bl. 108. The author has a copy published in 1574. In Clarke's *Bibliotheca Legum* an edition of 1557 is noted.

<sup>3</sup> Per Parke, B., in *Regina v. Thurborn*, 1 Denison C. C. 389; 2 C. & K. 833.

<sup>4</sup> Fulbecke *Study of the Law*, A.D. 1599. "His most learned book of the Pleas of the Crown hath made him forever famous amongst men of his own profession," says old Fuller in the "Worthies of Middlesex," vol. ii. p. 42, ed. 1811.

<sup>5</sup> 3 Rep. Pref.

ford was a man excellently learned in the common law.”<sup>1</sup>

It may, perhaps, be well to remind the student that, in reading the Reports, he ought to pursue a course exactly the reverse in chronological order from that adopted in any other kind of reading; for, commencing with those of recent date, and getting the present law well fastened upon his memory, he should read the decisions upwards, until he has traced the principles and practice involved in analogous cases to their very source. By these means, he will avoid getting his mind imbued with old law and ancient cases, which have perhaps become obsolete, or for a considerable time have been overruled.<sup>2</sup>

<sup>1</sup> 10 Rep. Pref. On the trial of Sir Nicholas Throckmorton for treason, in the year 1554, Sergeant Staunford and Sergeant Dyer were of counsel for the Crown. Sir Nicholas was a man of great talents and singular energy of mind, and defended himself with marked ability. He pressed the Queen's counsel so hard with authorities that Sergeant Staunford said to him, "If I had thought you were so well furnished with book cases, I would have come better prepared for you." Jardine Crim. Trials, vol. i. p. 98.

<sup>2</sup> Goldsmith Eq. 56, 6th ed. 1 Kent Comm. 479.

## CHAPTER II.

## INTRODUCTION.

By the provision of Magna Charta, no person can be taken or imprisoned but by the lawful judgment of his peers, or the law of the land. Lord Coke, in commenting upon this clause of Magna Charta — *nisi per legem terræ* — adopts the construction that the clause meant “without process of law, that is, by indictment or presentment of good and lawful men.”<sup>1</sup> Chancellor Kent says: “The words, *by the law of the land*, as used originally in Magna Charta, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of *due process of law* is, that it means law in its regular course of administration, through courts of justice.”<sup>2</sup> It is a constitutional and statutory provision universally recognized and affirmed throughout this country. that no person can be taken or imprisoned unless by the law of the land, that is, prosecution by indictment and trial by jury for all the higher crimes and offences.<sup>3</sup>

<sup>1</sup> 2 Inst. 50.

<sup>2</sup> 2 Kent Comm. 13.

<sup>3</sup> *Saco v. Wentworth*, 37 Maine, 172. *Jones v. Robbins*, 8 Gray, 329, 343.

An accused person must be put on trial on some regular and established form of accusation. What that must be depends on the local law. In many of the States there must be an indictment by grand jury, while in others an information filed by the public prosecutor is allowed to be substituted. But prosecution by indictment is the most usual and constitutional course for bringing offenders to justice on criminal charges. The requirement of a presentment by grand jury was once exceedingly important for the security it gave against the institution of unfounded, unjust, and oppressive prosecutions by the government. And though this has been considered a needless precaution under popular institutions, and therefore is done away with in some of the States, the courts will nevertheless exercise a supervision over the proceedings of the public prosecutor, to see that his authority is not exercised unjustly and oppressively.<sup>1</sup>

It is the purpose of this work to state with as much brevity as is consistent with clearness and with reference to the best authorities, the technical form of this accusation, — what certainty of legal terms and language, and what enumeration and detail of facts and circumstances are necessary to “fully and plainly, substantially and formally” describe the crime or offence to the person accused.

Actions are commonly divided into *criminal*, or such as concern pleas of the crown, and *civil*, or such as concern common pleas.<sup>2</sup> The system of pleading,

<sup>1</sup> 2 Story Const. § 1949.

<sup>2</sup> Co. Litt. 284 b. 1 Tidd, 1, 9th ed. In the ancient writers the word “cause” or “action” included criminal as well as civil suits. Brac-

at common law, is, in principle, the same, both in civil and in criminal cases.<sup>1</sup> There is no distinction except that according to the spirit in which our law is administered, if there is a difference, more strictness is required in criminal than in civil pleading; and in the former a defendant is allowed to take advantage of nicer exceptions.<sup>2</sup> An indictment is to a criminal action what a declaration is to a civil action. And when the criminal law is silent as to the form of an indictment, in any particular case, resort may be had to the rules and principles which are applicable to the structure of a declaration in a civil action.<sup>3</sup>

An *indictment* is a written accusation at the suit of the government, found and presented on oath by a

ton, lib. iii. ch. 1. In Hale's Pleas of the Crown, indictments are spoken of as "*criminal causes*." Vol. ii. p. 160. And in the Index there is this passage under the head of Certiorari: "*Criminal causes* not capital, as indictments for riots, may be removed into B. R. by certiorari," &c.

<sup>1</sup> Per Lord Denman, C. J., in *Campbell v. The Queen*, 11 Q. B. 810. Per Willes, J., in *Regina v. Rearden*, 4 F. & F. 77, 80. Per Blackburn, J., in *Heymann v. The Queen*, L. R. 8 Q. B. 105. Per Bramwell, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 619. *Quinn v. The State*, 35 Ind. 487. "The rules of the criminal and the civil law are in many respects different, and have little or no bearing on each other," said Erle, J., in *Regina v. Wiley*, 2 Denison C. C. 45, — "a dictum," writes Mr. Greaves, "that ought ever to be kept in remembrance in considering criminal cases." 2 Russell on Crimes, 566 note.

The law of evidence is the same in criminal and civil suits. Per Lord Coleridge, C. J., in *Regina v. Francis*, L. R. 2 C. C. 133. A fact must be established by the same evidence, whether it is to be followed by a criminal or a civil consequence. *Lord Melville's Case*, 29 Howell State Trials, 764.

<sup>2</sup> Per Lord Mansfield, C. J., in *Rex v. Beech*, 1 Leach C. C. 134. Per Bramwell, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 619.

<sup>3</sup> 2 Gabbett Crim. Law, 197. *State v. Hand*, 1 Eng. 167.

grand jury duly constituted and sworn, charging one or more persons with the commission of a crime.<sup>1</sup> In the commencement of the twelfth article of the Declaration of Rights, "No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him," the makers very accurately describe a good indictment.<sup>2</sup> In Hale's Pleas of the Crown it is said that "An indictment is nothing else but a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature."<sup>3</sup> The most concise description of the objects of an indictment which the author has ever seen is that contained in the joint opinion of Lord Denman, at the time Attorney-General, and Sir William Horne, Solicitor-General: "The first principles of law require that the charge should be so preferred as to enable the court to see that the facts amount to a violation of the law, and the pris-

<sup>1</sup> "An indictment is a written accusation of an offence preferred to, and presented on oath as true, by a grand jury at the suit of the government." 2 Story Const. § 1784. It is clear, both upon reason and the authorities, that in old times the word "indictment" included any charge made by an inquest which had power to make the inquiry, and that when the charge made by them was reduced to writing, it was called an "indictment." A coroner's inquisition is comprehended by the word "indictment." *Regina v. Ingham*, 5 B. & S. 274. A presentment and indictment differ. 2 Inst. 739. Comb. 225. A "presentment" is properly that which the grand jurors find and present to the court from their own knowledge or observation. Every indictment which is found by the grand jurors is presented by them to the court. And therefore every indictment is a presentment, but every presentment is not an indictment. 4 Stephen Comm. 300, 7th ed. *Commonwealth v. Keefe*, 9 Gray, 291. 2 Story Const. § 1784.

<sup>2</sup> Per Shaw, C. J., in *Jones v. Robbins*, 8 Gray, 342.

<sup>3</sup> 2 Hale P. C. 169.

oner to understand what facts he is to answer or disprove.”<sup>1</sup>

A criminal *information* is a criminal cause or matter; it only differs in mere form from an indictment; instead of the jurors presenting a bill the Queen's coroner prefers the information, but to all intents and purposes the one is as much a criminal matter as the other.<sup>2</sup>

The term *complaint* is a technical one, descriptive of proceedings before magistrates.<sup>3</sup>

In the criminal courts of the country, to convict by a “summary” proceeding is to withdraw from the defendant the advantage of a jury. In the common law courts, to deal with a matter “summarily on motion” implies the substitution of affidavits for witnesses, and very often the exclusion of an appeal.<sup>4</sup>

In describing the different requisites of an indictment, information, or complaint, in order to avoid repetition, the term “indictment” only will be used, the same rules being in general applicable to all.

But these rules are applicable, strictly speaking, to those *complaints* only which relate to offences within the jurisdiction of a magistrate. Although, in all other cases, this accuracy ought to be adhered to, yet the magistrate has no right to quash the complaint

<sup>1</sup> Forsyth Constitutional Law, p. 458.

<sup>2</sup> Per Lord Coleridge, C. J., in *Regina v. Steel*, 2 Q. B. D. 40.

<sup>3</sup> *Commonwealth v. Davis*, 11 Pick. 436, per Shaw, C. J. The word “indictment,” in a statute giving jurisdiction over offences committed within one hundred yards of the dividing line of two counties, to the courts of either county, includes proceedings by “complaint.” *Commonwealth v. Gillon*, 2 Allen, 502.

<sup>4</sup> Per Lord Penzance in *Combe v. Edwards*, 3 P. D. 142.

for informalities, and discharge the party for that cause ;<sup>1</sup> his duty in all cases beyond his jurisdiction being nothing more than to examine into the grounds of the complaint, for the purpose of deciding whether the party accused shall be bailed, committed, or discharged.

The Constitutions of this country have not changed the common law upon this subject,<sup>2</sup> and there is no necessity nor even apology for a careless or incorrect manner of conducting any judicial process, especially one which controls the personal liberty of the citizen, and requires him to defend himself against a criminal accusation. When, therefore, a magistrate institutes such a process, it is his duty to make it conformable to the requirements of technical precision.

The science of pleading is governed either by positive rules or by a known course of precedents.<sup>3</sup> The objects of these rules are precision and brevity. "I will remark," said Lord Cranworth in 1854, "even at the hazard of that obloquy which attaches in the present day, and not improperly attaches, to mere formalists, that I should be glad to see strictness and accuracy and precision of statement in all pleadings, as being in my opinion alike conducive to the benefit

<sup>1</sup> *Commonwealth v. Flynn*, 3 Cush. 525, 529. *Commonwealth v. Phillips*, 16 Pick. 211, 214. *Commonwealth v. Dean*, 21 Pick. 334. *Commonwealth v. Messenger*, 4 Mass. 462.

<sup>2</sup> On the contrary, they are but a declaration and affirmation of the ancient rule of the common law, that no one shall be held to answer to an indictment or information unless the crime with which he is intended to be charged is set forth with precision and fulness. *Petition of Right*, 3 Car. I. § 5. *Commonwealth v. Blood*, 4 Gray, 32, 33.

<sup>3</sup> *Woolf v. City Boat Co.* 7 C. B. 104, per Maule, J.

of litigants, the furtherance of public justice, and the great convenience of courts of justice."<sup>1</sup>

Lord Bacon thus wrote of the "known course of *precedents*": "Collect the different forms of pleading of every sort. For this is both a help to practice; and besides, these forms disclose the oracles and mysteries of laws. For many things lie concealed in the laws, which in these forms of pleading are more fully and clearly revealed."<sup>2</sup> "We are in the habit of looking at precedents as containing the law," said Bramwell, L. J., "but that is when there is a series of them, so that we may be sure that they would not be in existence or perpetuated unless they had received the sanction of the courts."<sup>3</sup> Pleadings are always evidence of the law;<sup>4</sup> and books of entries are the best authorities in the absence of decided

<sup>1</sup> *Dudgeon v. Thomson*, 1 Macqueen, 727.

<sup>2</sup> *De Augustis*, Bk. viii. Aph. 88. "The forms of the law are the indices and conservatories of its principles." Gibson, C. J., in *Fritz v. Thomas*, 1 Whart. 71. "Sometimes the forms of the law are of the essence of the law, and an adherence to them is essentially necessary to a due administration of justice." Per Clopton, J., in *Buckland v. Commonwealth*, 8 Leigh, 740.

<sup>3</sup> *Bradlaugh v. The Queen*, 3 Q. B. D. 620. "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." Per Bigelow, C. J., in *Commonwealth v. Hersey*, 2 Allen, 179.

<sup>4</sup> Per Buller, J., in *Read v. Brookman*, 3 T. R. 161. *Smith v. Commonwealth*, 54 Penn. State, 209, 214. "Pleaders are much to be commended for preserving the ancient, settled, and approved precedents. They are the best evidence of the law itself." Per Ruffin, J., in *State v. Moses*, 2 Dev. 464. "It is very fit to see the precedents before we determine it." Per Holt, C. J., in *Regina v. Saintiff*, 6 Mod. 256.

cases.<sup>1</sup> "It is well known," writes Barrington, "that there is no legal argument which hath such force, in our courts of law, as those which are drawn from the words of ancient writs."<sup>2</sup>

It is obviously most important that indictments should, as far as possible, be uniform, and that precedents which have acquired an ascertained and understood meaning should be used in preference to new modes of expression, the meaning of which must necessarily contain the elements of uncertainty and doubt.<sup>3</sup> "The object of having certain recognized forms of pleading is to prevent the time of the court from being occupied with vain and useless speculations as to the meaning of ambiguous terms," observed Pollock, C. B.<sup>4</sup> And in a celebrated case Lord Campbell, C. J., said that "the due administration of criminal justice requires that the forms of judicial procedure should be observed. These forms are devised for the detection of guilt and for the protection of innocence."<sup>5</sup> "It is of great importance to follow the ancient form of precedents," said Abbott, C. J.; "for if we depart from them in one instance, one deviation will naturally lead to another, and, by de-

<sup>1</sup> Per Ashhurst, J., in *Boothman v. Surry*, 2 T. R. 10. *Commonwealth v. Clapp*, 16 Gray, 238.

<sup>2</sup> *Observations upon the Statutes*, 96, 2d ed.

<sup>3</sup> *Rex v. Stevens*, 5 B. & C. 246. S. C. sub nom. *Rex v. Richards*, 7 D. & R. 665.

<sup>4</sup> *Williams v. Jarman*, 13 M. & W. 133. It was well said by Chief Justice Eyre in 1797, that "Infinite mischief has been produced by the facility of the courts in overlooking matters of form; it encourages carelessness, and places ignorance too much upon a footing with knowledge among those who practise the drawing of pleadings." *Morgan v. Sargent*, 1 B. & P. 59.

<sup>5</sup> *Regina v. Bird*, 2 Denison C. C. 216.

grees, we shall lose that certainty which it is the great object of our system of law to preserve.”<sup>1</sup>

“An unnecessary departure from precedents,” remarked Bronson, C. J., “whether it spring from the love of change, or be the result of negligence or ignorance on the part of the pleader, ought not to be encouraged.”<sup>2</sup> “We cannot withhold the expressions of our regret,” say the Supreme Judicial Court of Massachusetts, “that a needless departure from the usual and judicially sanctioned forms of indictment so often embarrasses and delays, and sometimes wholly stops, the course of justice.”<sup>3</sup> “Undoubtedly it is advisable in most cases,” observed Lord Ellenborough, C. J., “and especially in indictments, to adhere to old forms, even if it were only for the sake of uniformity of proceedings.”<sup>4</sup> “It is very desirable to adhere to the known forms,” said Pollock, C. B., “instead of making experiments to see with how small amount of legal averment an indictment can be sustained.”<sup>5</sup> “On the other hand, there is no rule that redundancy of allegation is prejudicial to an indictment.”<sup>6</sup>

<sup>1</sup> *Wright v. Clements*, 3 B. & Ald. 507.

<sup>2</sup> *Anstice v. Holmes*, 3 Denio, 245. “I think it a great pity,” said Mr. Justice Quain, “that the well-established form of pleading, which all the precedents show, should have been departed from.” *Redway v. McAndrew*, L. R. 9 Q. B. 76.

<sup>3</sup> *Commonwealth v. Keefe*, 9 Gray, 291.

<sup>4</sup> *Rex v. Marsden*, 4 M. & S. 168.

<sup>5</sup> *Regina v. Webb*, 1 Denison C. C. 344. “We consider the propriety of pursuing the usual and regular course of pleading,” said Whiteside, C. J., “and deprecate all novelty in such matters. This count departs from the ancient precedent and form. It is in that sense an experiment, which is always to be deprecated in the administration of the criminal law.” *Regina v. O'Neill*, Irish Rep. 6 Com. Law, 4, 5.

<sup>6</sup> Per Maule, J., in *Regina v. Clark*, Dearsly C. C. 202.

Some of the rules of criminal pleading are, it will be observed, of a general nature, and embrace the whole indictment, whereas others have reference to its several parts. As to the general requisites, the first and most important one is, that the indictment should have a precise and sufficient certainty. The rules which regulate this branch of pleading were sometimes founded in considerations which no longer exist either in our own or in English jurisprudence; but a rule, being once established, it still prevails, although, if the case were new, it might not now be incorporated into the law.<sup>1</sup>

It may here be observed that no erasures, interlineations,<sup>2</sup> or abbreviations<sup>3</sup> should be used in any criminal proceedings. The question whether certain words have been interlined or erased in an indictment is for the court, and leaving it to the jury is ground of exception.<sup>4</sup> Although these imperfections cannot be taken advantage of on motion in arrest of judgment,<sup>5</sup> still they furnish a proper ground for a motion addressed to the discretion of the court to quash the

<sup>1</sup> *United States v. Gooding*, 12 Wheat 474. "It is to be remembered that we must hold that to be law now, which would have been law when such a felony was capital." Per Bramwell, B., in *Regina v. Middleton*, 42 L. J. M. C. 85; L. R. 2 C. C. 57.

<sup>2</sup> If there is a caret indicating where the interlined words come in, the court will take notice of the caret and read the indictment correctly. *Rex v. Davis*, 7 C. & P. 319, Patteson, J.

<sup>3</sup> The word "and" may be (but should not be) expressed by the sign "&." *Commonwealth v. Clark*, 4 Cush. 596.

<sup>4</sup> *Commonwealth v. Davis*, 11 Gray, 4. *Commonwealth v. Riggs*, 14 Gray, 376. *Remon v. Hayward*, 2 Ad. & El. 666.

<sup>5</sup> *Commonwealth v. Fagan*, 15 Gray, 194. *Commonwealth v. Desmarteau*, 16 Gray, 1, 16.

indictment, before plea pleaded, or perhaps before the party is put on his trial.<sup>1</sup> But they are unclerical, objectionable, and are to be avoided in indictments of every grade. As was observed by Chief Justice Shaw on another occasion, "Such looseness and carelessness in instituting criminal proceedings are not to be encouraged."<sup>2</sup>

No part of an indictment should be in figures; and, therefore, numbers, dates &c., must be stated in words at length. A contrary practice is unclerical, uncertain, and liable to alteration; and the courts which have sustained such practice have uniformly cautioned against it. The only exception to this rule is where a fac-simile of a written instrument is to be set out: in which case it must be set out in words and figures, as in the original itself.

No part of an indictment should be written with a pencil.<sup>3</sup> The imperfection of this mode of writing and the liability to which it is subject of obliteration, erasure, and alteration, and the great facility it affords to fraud and forgery, are overwhelming reasons why it should not be used.<sup>4</sup> This mode of writing is in direct contravention of the rule of the common law which requires an indictment, which is a record, to be engrossed on parchment.<sup>5</sup>

<sup>1</sup> Commonwealth v. Desmarteau, 16 Gray, 16.

<sup>2</sup> Commonwealth v. Barhight, 9 Gray, 114. If the accidental mutilation of the indictment by cutting it into several pieces does not destroy its identity or prevent its being restored to a condition in which it can be rendered intelligible and substantially complete in all essential particulars, such mutilation is not ground for arresting the judgment. Commonwealth v. Roland, 97 Mass. 598.

<sup>3</sup> See May v. State, 14 Ohio, 461.

<sup>4</sup> See Geary v. Physic, 7 D. & R. 653; 5 B. & C. 234; 13 Met. 538.

<sup>5</sup> Co. Litt. 260 a. Rex v. Warshaner, 1 Moody C. C. 466; 7 C. & P. 429. 2 Russell on Crimes, 812 note, 4th ed.

“It is a clear principle that the language of all pleadings,” said Mr. Justice Erle, “must be construed by the rules of pleading, and not by the common interpretation put on ordinary language; for nothing, indeed, differs more widely in construction than the same matter when viewed by the rules of pleading, and when construed by the language of ordinary life.”<sup>1</sup> On the contrary, Lord Ellenborough, C. J., observed that, “except in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use, or that in indictments or other pleadings a different sense is to be put upon them than what they bear in ordinary acceptance.”<sup>2</sup> “Common sense,” said Mr. Justice Parker, “is not to be deemed a stranger to legal process, but as very influential in ascertaining the force and effect of words and sentences which, although technical, are to receive a sensible construction.”<sup>3</sup> And Mr. Justice Coleridge: “It has been held of late here that the courts have more common sense than some of the old decisions give them credit for. We have considered that such expressions as ‘Frozen Snake’<sup>4</sup> and ‘Man Friday’<sup>5</sup> may

<sup>1</sup> *Regina v. Thompson*, 16 Q. B. 846. An indictment may have a certainty in common parlance, and yet want legal certainty. Per Patteson, J., in *Regina v. Rowed*, 2 Gale & Dav. 522.

<sup>2</sup> *Rex v. Stevens*, 5 East, 259. *State v. Pratt*, 14 N. H. 456. “We must read and understand the language used in indictments as the rest of mankind would understand the same language if it were used in other instruments, with the exception of those cases where the law requires technical terms to be used.” Per Lord Tenterden, C. J., in *Rex v. Somerton*, 7 B. & C. 466.

<sup>3</sup> *Commonwealth v. Runnels*, 10 Mass. 520.

<sup>4</sup> *Hoare v. Silverlock*, 12 Q. B. 624.

<sup>5</sup> *Forbes v. King*, 1 Dowl. 672.

be understood by us as a person out of court understands them.”<sup>1</sup>

The following rule may be safely followed in construing pleadings and allegations in criminal and in civil cases: “Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”<sup>2</sup>

The precision of pleadings, at common law, whether in criminal or civil cases, has ever been remarkable; and until a recent period was carried to an extravagant length, tending to an excessive subtlety, and overstrained observance of form,<sup>3</sup> very prejudicial to the interests of justice. This blemish on our jurisprudence, the result, it must be observed, of an overweening attachment to a right principle, it has been the tendency of modern jurisprudence and legislation to efface; though the steps of that improvement have been cautious and progressive.<sup>4</sup>

In practice, indeed, more persons escape through defects in the evidence, than could escape through flaws in the indictment under the strictest rules of pleading. Moreover, a defect in the evidence acquits

<sup>1</sup> *Regina v. Rowlands*, 17 Q. B. 684.

<sup>2</sup> Gen. Sts. of Mass. ch. 3, § 7, cl. 1. *Commonwealth v. Doran*, 14 Gray, 39.

<sup>3</sup> “The courts no longer look at pleadings as on special demurrer.” *Redway v. McAndrew*, L. R. 9 Q. B. 75, per Blackburn, J.

<sup>4</sup> Per Willes, J., in delivering the opinion of the judges in *Mulcahy v. The Queen*, L. R. 3 H. L. 321, 322. *Commonwealth v. Woodward*, 102 Mass. 159. 4 Stephen Comm. 370, 7th ed.

a criminal forever ; a defect in the indictment but preserves him for another trial.

Although the variances which are fatal at first sight, in criminal cases, are numberless, yet in England practically their amount is reduced to a very narrow compass by the extensive powers of amendment which different statutes, as in civil cases, have vested in the judge at the trial. The most recent one, which virtually includes many which preceded it, is the 14 & 15 Vict. ch. 100. It is stated in the preamble that "offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case." The effect of this statute has been virtually to abolish the multitude of technical subtleties, which were formerly the means of defeating justice, and procuring unreasonable verdicts of acquittal after the substance of the charge had been proved.

On this head, it has been said by a learned writer, that no general rule can be laid down for the guidance of the court in all cases. It is very possible that an amendment, which in one case might not prejudice a prisoner, might in another case prejudice him materially. The inclination of the court will still be in favorem vitæ. The court will look at all the circumstances of the case to ascertain whether the transaction would be changed by the amendment, and will not forget that the protection of the weak from oppression, and of the presumptively innocent from injustice, are higher objects, even in the estimation of positive law, than the detection and punishment of the guilty.

## CHAPTER III.

THE VENUE.—THE COMMENCEMENT.—AVERMENTS,  
HOW MADE.

## 1. The Venue.

THE venue in the margin is the only part of the commencement of an indictment that requires attention. The purpose of a venue, in the margin of an indictment, is to designate the county in which the party accused is to be tried; and that, by the common law, always was the county in which the offence was committed.<sup>1</sup> Or, if the jurisdiction of the court extends only to part of the county, or includes more than one county, the venue in the margin should be coextensive with the jurisdiction of the court; that is, it should be descriptive of the limit to which the jurisdiction of the court is confined, and the offence must have been committed within the limit so described.<sup>2</sup> This is the general rule of the common law; but many exceptions have been made to it by statute.

But it was never necessary to insert the county in the margin if it was inserted in the body of the caption. In Hale's Pleas of the Crown it is said that "the name of the county must be in the margin of

<sup>1</sup> Archb. Crim. Pl. 26, 19th ed. *Commonwealth v. Quin*, 5 Gray, 480. *Commonwealth v. Desmond*, 103 Mass. 445.

<sup>2</sup> *Regina v. Stanbury*, Leigh & Cave C. C. 128.

the record, *or* repeated in the body of the caption.”<sup>1</sup> It is usual to name the county in the margin; and if, in the body of the caption, the county is not named, but is termed “the county aforesaid,” it will be taken to be the county named in the margin. If, however, a proper venue is set forth in the caption, there can be no reason for inserting it in the margin.<sup>2</sup> In a complaint, it has never been the practice to insert the county in the margin.<sup>3</sup> The venue is in this form: “Middlesex, to wit.”

The venue in the margin does not make the indictment show that the court has jurisdiction to try the offence unless it is specially referred to in the body of the indictment. But where a special venue is laid in the body of the indictment, no objection can be taken by motion in arrest of judgment, or by writ of error for the want of a proper or perfect venue in the margin.<sup>4</sup>

## 2. The Commencement.

The commencement of every indictment is thus:—  
“Middlesex, to wit: The jurors<sup>5</sup> for the Commonwealth,<sup>6</sup> *or*, State, upon their oath<sup>7</sup> present, that”

<sup>1</sup> 2 Hale P. C. 166. *Commonwealth v. Quin*, 5 Gray, 480.

<sup>2</sup> 1 Saund. 308. 1 Wms. Notes to Saund. 511.

<sup>3</sup> *Commonwealth v. Quin*, 5 Gray, 481.

<sup>4</sup> See *Regina v. O'Connor*, 5 Q. B. 16; *Dav. & Meriv.* 761; *Regina v. Albert*, 5 Q. B. 37; *Dav. & Meriv.* 89; *Regina v. Stowell*, 5 Q. B. 44; *Dav. & Meriv.* 189.

<sup>5</sup> The difference is unimportant between “upon their oath” and “upon their oaths.” *Commonwealth v. Sholes*, 13 Allen, 554. *State v. Dayton*, 3 Zab. 49.

<sup>6</sup> They need not be described as “grand jurors.” No other jurors than grand jurors are authorized by law to find and return indictments. *Commonwealth v. Edwards*, 4 Gray, 1. *United States v. Williams*, 1 Clifford, 5, 13.

<sup>7</sup> *State v. Nixon*, 18 Vt. 70, 75.

&c., proceeding to state the offence for which the defendant is indicted. An indictment commencing — “The jurors *of* our Lady the Queen” &c., is sufficient on motion in arrest of judgment, or on writ of error; the words “of our Lady the Queen,” may be rejected as surplusage, the jurors intended being those mentioned in the caption of the indictment.<sup>1</sup>

An indictment presented by the grand jurors “upon their oath and affirmation” need not state the reason why any of the jurors affirmed instead of being sworn.<sup>2</sup> It is held in New Jersey, that when an indictment purports to be found on the affirmation of some of the grand jurors, it must appear by the indictment that they were authorized by law to take an affirmation instead of an oath.<sup>3</sup> But the court so held, because they felt bound by previous decisions in that State; saying: “We are not disposed to favor exceptions of this kind, which have nothing to do with the justice of the case; and, were the question now to arise for the first time, we should hesitate before we gave it our sanction.”

After the passing of the St. 3 & 4 W. IV. ch. 49, enabling Quakers and Moravians, in all places and for all purposes, to make affirmation instead of taking an oath, upon the calling of the grand jury at the Worcester assizes, one of them, a Quaker, made his affirmation; whereupon Baron Alderson directed that all the indictments should commence thus: “The

<sup>1</sup> Broome *v.* The Queen, 12 Q. B. 834. Regina *v.* Turner, 2 M. & Rob. 214, per Parke, B.

<sup>2</sup> Commonwealth *v.* Fisher, 7 Gray, 492. This is the form adopted in most of the States.

<sup>3</sup> State *v.* Harris, 2 Halst. 361.

jurors, &c., upon their oath and affirmation, present ”  
&c.<sup>1</sup>

It is essential that it should appear in an indictment that it was found upon the oath of the jurors. And each count must appear to have been found upon oath. It is true that one count may refer to another, and thereby that which, if alone considered, would appear to be defective, may be sufficient. But a defective count can be thus aided only when there is a reference to another count for the allegation or fact required to make the defective count perfect.<sup>2</sup> If there is nothing in a second or subsequent count either of allegation or reference, from which it can be made to appear to have been presented per sacramentum suum, that count is fatally defective.<sup>3</sup>

The commencement of a second or subsequent count is in form thus: “And the jurors aforesaid upon their oath aforesaid do further present that” &c., proceeding to state the offence.

### 3. Averments, How Made.

With respect to the form in which averments are made, as the principal charge of the indictment is introduced at the commencement with the words, “The jurors &c., upon their oath present that ”

<sup>1</sup> 9 C. & P. 78. It seems that no objection can be sustained to the caption of an indictment for an allegation that the grand jurors were “sworn and affirmed,” without showing that those who were sworn were persons who ought to have been affirmed, or that those who were affirmed were persons who ought to have been sworn. *Mulcahy v. The Queen*, L. R. 3 H. L. 306, 322.

<sup>2</sup> *Regina v. Waverton*, 17 Q. B. 562; 2 *Denison C. C.* 347; *S. C.* 2 *Lead. Crim. Cas.* 157.

<sup>3</sup> *State v. McAllister*, 26 *Maine*, 374.

&c., so the usual way of making a subsequent averment is, "And the jurors aforesaid upon their oath aforesaid do further present that" &c.; or, if it be connected with what has immediately preceded it, it may be introduced simply thus: "And that" &c., then proceeding to state the matter of the averment.<sup>1</sup> The introductory words, "And the jurors aforesaid" &c., do not necessarily indicate a new count, but are frequently used to introduce further matter in the same count.<sup>2</sup>

But when the matter of the averment is but a mere adjunct of some person or thing preceding, it does not require even this technical mode of introducing it. Thus the word "being" is often taken as a direct allegation.<sup>3</sup> In Comyns's Digest, Indictment G. 5, it is said to be sufficient if the indictment allege "quod A existens such an officer of such an age &c. fecit, without saying tunc existens; for where this word relates to the person, and is not collateral, it shall have a general construction."<sup>4</sup> An indictment charged that A. B. on &c., *being the servant of H.*, on the same day &c., one gold ring &c., then and there being in the possession of H. and being his goods and chattels, feloniously did steal: Held, that the fair import of the charge was, that A. B. was the

<sup>1</sup> Archb. Crim. Pl. 70, 19th ed. 2 Gabbett Crim. Law, 240.

<sup>2</sup> Per Le Blanc, J., in *Rex v. Haynes*, 4 M. & S. 221.

<sup>3</sup> *Regina v. Pelham*, 8 Q. B. 964, per Patteson, J. *Noden v. Johnson*, 16 Q. B. 218, 227. *Smith v. Adkins*, 8 M. & W. 362. 2 Hawk. P. C. ch. 25, §§ 61, 112. "No doubt, an averment by a participle is as good as by a verb, if the word be so intended as to show that an allegation is meant." *Regina v. Waverton*, 17 Q. B. 565, per Lord Campbell, C. J.

<sup>4</sup> *Rex v. Johnson*, 2 Roll. 226. Per Littledale, J., in *Rex v. Somerton*, 7 B. & C. 467.

servant of H. at the time when the theft was committed. "A. B." is the nominative case to the verb "steal," and the words "being the servant of H.," are the description of the person of A. B.<sup>1</sup>

The allegation "being an unmarried girl," is sufficient.<sup>2</sup> So, "dans plagam mortalem,"<sup>3</sup> or "sciens that" &c.,<sup>4</sup> is a good averment. "That A., knowing that B. was indicted for forgery, concealed a witness against him," is a sufficient averment that B. was indicted.<sup>5</sup> "Then and there distilling" is a sufficient affirmative allegation that the defendant did distil.<sup>6</sup> So, where an indictment for perjury stated that, "at and upon the hearing of the said complaint," the defendant deposed &c., this was holden to be a sufficient averment that the complaint was heard.<sup>7</sup> The special matter of the ability of a person to perform an act is sufficiently implied in and averred by an averment that he unlawfully "neglected" to do that act.<sup>8</sup>

The word "whilst" does not carry an averment with it. Where a count charged that the prisoner, intending to injure B. S., being a person of unsound intellect and incapable of taking care of himself,

<sup>1</sup> *Rex v. Somerton*, 7 B. & C. 463.

<sup>2</sup> *Rex v. Moor*, 2 Lev. 179. *Rex v. Boyall*, 2 Burr. 832.

<sup>3</sup> March, pl. 127. *Savage's Case*, Yelv. 28. *Turns v. Commonwealth*, 6 Met. 234. *Gibson v. Commonwealth*, 2 Va. Cas. 111, 120. 2 Wms. Saund. 61 m, 6th ed. As to the ground on which *Long's Case*, 5 Rep. 120, proceeded, see the note of the learned editors of the edition 1826, vol. iii. p. 251.

<sup>4</sup> *Regina v. Page*, 9 C. & P. 756.

<sup>5</sup> *Rex v. Lawley*, 2 Strange, 904; *Fitzg.* 122, 263.

<sup>6</sup> *United States v. Fox*, 1 Lowell, 199.

<sup>7</sup> *Rex v. Aylett*, 1 T. R. 70.

<sup>8</sup> *Regina v. Ryland*, L. R. 1 C. C. R. 99; 37 L. J. M. C. 10. This was a decision by a majority of the court.

*whilst* B. S. was under the care, custody and control of the prisoner, maliciously and unlawfully kept, confined and imprisoned B. S. &c., the Court of Queen's Bench arrested the judgment for want of a positive averment that B. S. was under the care and control of the prisoner at the time she committed the acts alleged in the indictment. "They were all said to have been done *whilst* the lunatic was under her care and control; but there was no averment that he ever was so."<sup>1</sup>

<sup>1</sup> Regina v. Pelham, 8 Q. B. 959.

## CHAPTER IV.

## THE NAME AND ADDITION OF THE DEFENDANT.

The defendant must be described by his Christian name and surname, or by the name or names by which he is most commonly known. In case of doubt he may be variously described under an *alias dictus*.

THE defendant must be described in the indictment by his full Christian name<sup>1</sup> and surname. A name which he has usually gone by or acknowledged is sufficient; and, if there be a doubt which of two names is the right one, the second may be added after an *alias dictus*, thus: "C. D. otherwise called E. F." In some cases the initials by which a person is commonly known have been accepted as adequate substitutes for the full Christian name. But the question has generally arisen in cases where the surname is expressed by initials in the captions and jurats of complaints and in the signatures of the foreman of the grand jury and of the Attorney-General or other

<sup>1</sup> A single vowel or a single consonant is a good Christian name by itself. *Tweedy v. Jarvis*, 27 Conn. 42. *Regina v. Dale*, 17 Q. B. 64. Lord Campbell, C. J.: "There is no doubt that a vowel may be a good Christian name; why not a consonant? I have been informed by a gentleman of the bar, sitting here, on whose accuracy we can rely, that he knows a lady who was baptized by the name of 'D.' Why may not a gentleman as well be baptized by a consonant?"

prosecuting officer,<sup>1</sup> or in some part of the record other than the body of the indictment.

It has often been decided that the middle name is an essential part of the name, and its omission a misnomer, and a fatal defect, if properly objected to.<sup>2</sup> This rule applies to the name of the defendant or of any third person mentioned in the body of the indictment.

The word "junior" is no part of the name.<sup>3</sup> It is mere description of the person, and intended only to designate between different persons of the same name. It is a casual and temporary designation. It may exist one day and cease the next. The omission or insertion of this word in an indictment is of no importance; and this rule also applies to the name of the defendant or of any third person mentioned in the body of the indictment.<sup>4</sup>

Where a father and son have the same name, and are both indicted, some distinction as — "the elder," "junior," or "the younger," should be adopted; but where the father alone is the defendant, the distinction is unnecessary.<sup>5</sup>

<sup>1</sup> *Rice v. People*, 15 Mich. 9. *Wassels v. State*, 26 Ind. 30. *East-erling v. State*, 35 Missis. 210.

<sup>2</sup> *Commonwealth v. Perkins*, 1 Pick. 388. *Commonwealth v. Hall*, 3 Pick. 262. *Trull v. Howland*, 10 Cush. 113. *Commonwealth v. Shearman*, 11 Cush. 546. *Commonwealth v. McAvoy*, 18 Gray, 235. *Regina v. McAnerney*, Irish Circ. Rep. 270. *Crampton, J. State v. Hughes*, 1 Swan, 261.

<sup>3</sup> Neither is "younger," or "second."

<sup>4</sup> *People v. Collins*, 7 Johns. 549, 553. *People v. Cook*, 14 Barb. 261, 299. *Kincaid v. Howe*, 10 Mass. 203. *Commonwealth v. Perkins*, 1 Pick. 388. *Commonwealth v. Beckley*, 3 Met. 330. *Cobb v. Lucas*, 15 Pick. 7. *Commonwealth v. Parmenter*, 101 Mass. 211. *Brainard v. Stilphin*, 6 Vt. 9. *Regina v. Withers*, 4 Cox C. C. 17, Rolfe, B.

<sup>5</sup> 2 *Gabbett Crim. Law*, 217. *Rex v. Bailey*, 7 C. & P. 264.

A woman may be described as a single woman, spinster, or widow, or as the wife of a person described by his name and addition. And if these additions are erroneous, the only remedy is by a plea in abatement. Where a woman was described in the indictment as A. B., "wife of C. D.," it was held that this allegation was a mere addition, and, if erroneous as such, the only remedy was by a plea in abatement, and that the plea of not guilty was a waiver of all objections of this nature, and put in issue only the material allegations necessary to constitute the offence charged in the indictment.<sup>1</sup>

In an indictment against the inhabitants of a county, city, town, or other district, it is unnecessary to describe any of them by these names or additions. They may be indicted by their corporate name. In the case of a town where exception was taken to an indictment, that the defendants were improperly described as "the town of Dedham in the county of Norfolk," instead of "the inhabitants of the town of D.," it was held that the party was rightly named.<sup>2</sup>

Corporations are indicted by their corporate name, which must be set out in full and with absolute precision.<sup>3</sup> After a corporation has been once described by its corporate name at the commencement, it may be styled "the defendant" throughout the body of the indictment.

<sup>1</sup> *Commonwealth v. Lewis*, 1 Met. 151. *Commonwealth v. Butler*, 1 Allen, 5. *State v. M'Gregor*, 41 N. H. 407.

<sup>2</sup> *Commonwealth v. Dedham*, 16 Mass. 141. *Lowell v. Morse*, 1 Met. 473, 474.

<sup>3</sup> *Rex v. Patrick*, 1 Leach C. C. 253. *Regina v. Birmingham & Gloucester Railway Co.* 3 Q. B. 223; 2 G. & D. 236. *State v. Vermont Central Railroad*, 23 Vt. 583.

If a party is indicted in respect of his office, it is sufficient to allege that he is such officer. And at common law, an addition of his office was necessary.<sup>1</sup> An allegation of "being" in a particular office or situation, is equivalent to a direct averment, that the defendant was in that office or situation at the time of the fact.<sup>2</sup>

If the name of a prisoner 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 the jurors by the keeper of the prison, will be sufficient. But an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, is insufficient.<sup>3</sup>

But whatever mistake may be made in his name, the defendant can take advantage of it by plea in abatement only; if he pleads over, he thereby waives all objections to the indictment on that account. If, on his arraignment, he does not plead in abatement, he admits himself rightly designated by the names stated. The issue for the jury of trials is, not what is the individual's name, but whether the person, who has pleaded in chief on his arraignment, is guilty of the offence charged against him. The verdict follows the indictment. The exception therefore is not open in arrest of judgment, or on error.<sup>4</sup>

<sup>1</sup> Com. Dig. Indictment, G. 1. 1 Stark. Crim. Pl. 45, 2d ed.

<sup>2</sup> *Rex v. Johnson*, 2 Roll. 226. 2 Hawk. P. C. ch. 25, § 112. 1 Stark. Crim. Pl. 162.

<sup>3</sup> *Rex v. —*, Russell & Ryan C. C. 489. *Commonwealth v. A Man whose Name is Unknown*, 6 Gray, 489.

<sup>4</sup> *Turns v. Commonwealth*, 6 Met. 224. *Commonwealth v. Dedham*, 16 Mass. 141. *Commonwealth v. Darcey*, 12 Allen, 539. *Commonwealth v. Fredericks*, 119 Mass. 199.

It is obviously necessary that the name of the defendant should be repeated to every distinct allegation; yet it will suffice to mention it once, as the nominative case, in one continuing sentence.<sup>1</sup>

It has been decided that, when the name of the defendant or of any person necessarily mentioned in the indictment, has been once stated in full, he may be afterwards described in the same or subsequent counts, by his Christian name only, as "the said A."<sup>2</sup> But the word "said" does not import into a second count and there incorporate a previous description of a person.<sup>3</sup>

In 2 Gabbett Crim. Law, 248, and in 1 Chit. Crim. Law, 250, it is stated that one count in an indictment may refer to a former count in describing the defendant as "the said A. B.," to avoid repetition of the description of him in the former; and that though the former count be defective, this will not vitiate the other which refers to it. And the law is the same when the jury acquit the defendant on a former count, and find him guilty on that in which he is described only by reference to the former.<sup>4</sup>

The Statute of Additions, 1 Hen. V. ch. 5, A.D. 1413, required that there should also be given to defendants in an indictment the *additions* of their

<sup>1</sup> 2 Gabbett Crim. Law, 214.

<sup>2</sup> Commonwealth v. Melling, 14 Gray, 388. Commonwealth v. Hagarman, 10 Allen, 401. Or, "the said A. B." Commonwealth v. Clapp, 16 Gray, 237.

<sup>3</sup> Rex v. Cheere, 4 B. & C. 902; 7 D. & R. 461. Regina v. Waters, 1 Denison C. C. 356; S. C. 2 Lead. Crim. Cas. 152, 2d ed. Regina v. Martin, 9 C. & P. 215. Commonwealth v. Sullivan, 6 Gray, 478, 479.

<sup>4</sup> Commonwealth v. Clapp, 16 Gray, 237.

“estate *or* degree, *or* mystery,” and also of the “towns *or* hamlets, *or* places *and* counties of which they were or be, or in which they be or were conversant;” and all this to identify his person: and many authorities are to be found in the books as to the sufficiency of the statement of these matters; *estate* and *degree* meaning the defendant’s rank in life, *mystery* meaning his trade, art, or occupation. And formerly, if either the name of the defendant or the addition, either of degree or mystery, or of place, were omitted or wrongly stated, it was matter for plea in abatement. But modern legislation and judicial decisions both in England and in this country, have, for all practical purposes, rendered this branch of the law obsolete. It has therefore been deemed unnecessary to notice the numerous decisions on this statute. In some of the States, however, the Statute of Additions is not repealed, nor is the rule of the common law with respect to the description of the party indicted abrogated by statute.

It is the usual and better course to state the addition of the defendant as of the place where the offence was committed, thus — “C. D. of B. in the county of S.,” although his place of abode may be in another county; because he is considered as having been conversant in the county where the offence was committed.<sup>1</sup>

The name of the defendant needs no proof, unless a misnomer is pleaded in abatement, in which case the substance of the plea is, that he is named and called by the name of C. D., and ever since has

<sup>1</sup> 2 Gabbett Crim. Law, 217. Commonwealth *v.* Taylor, 113 Mass. 1.

always been known and called by that name ; with a traverse of the name stated in the indictment. The affirmative of this issue, which is on the defendant, is usually proved by parol evidence that he has always been known and called by the name alleged in his plea, and not by the name stated in the indictment. This plea is usually answered by a replication that he was and is as well known and called by the one name as by the other. The question whether a person is as well known by one name as another is a question of reputation, of custom and usage, and not to be determined by records, nor limited to names used in his presence.<sup>1</sup> But to prove this, evidence that he has once or twice been called by the name in the indictment will not suffice.<sup>2</sup>

But the best and most usual practice is to allow the plea, as the defendant must set forth his right name therein, and a new complaint may be immediately preferred against him, and he will be concluded by his own averment.

<sup>1</sup> Commonwealth v. Gale, 11 Gray, 320.

<sup>2</sup> 3 Greenl. Ev. § 22.

## CHAPTER V.

THE NAMES OF PERSONS OTHER THAN THE DEFENDANT MENTIONED OR REFERRED TO IN THE INDICTMENT.

The names of the person or persons against whom the offence is committed, or whose description is involved in the statement of the offence, must be specified in the body of the indictment.

But in such case it may be alleged, according to the fact; that the name of any such person is unknown to the jurors.

THE Christian name and surname of any person whose description is involved in the statement of the offence must be fully and accurately stated. A repugnancy or absurdity in this particular will vitiate an indictment.<sup>1</sup> All the law requires on this subject is certainty to a common intent.<sup>2</sup> It is a rule that it is a fatal variance where a third party named in the pleadings is not known by the name therein stated. The law has never considered it material to be put to the jury as a separate and distinct issue, and it has been ever considered sufficient that it is not withdrawn from their consideration.<sup>3</sup>

It is not necessary to describe a party by what is,

<sup>1</sup> 2 Hawk. P. C. ch. 25, § 72, p. 321, ed. Curwood.

<sup>2</sup> *Regina v. Sulls*, 2 Leach C. C. 861, 862. *Attorney-General v. Hawkes*, 1 Tyrwh. 3, 5. *Regina v. Gregory*, 8 Q. B. 508, 513.

<sup>3</sup> *Attorney-General v. Hawkes*, 1 Tyrwh. 3, 5, 7.

in strictness, his right name. He may be described by the name he has assumed, though it is not his right name.<sup>1</sup> And a person is well described by the name by which he is generally known.<sup>2</sup> A variance or an omission in this particular is much more serious than a mistake in the name of the defendant; as the latter, as we have already seen, can only be taken advantage of by plea in abatement, while the former will be sufficient ground for arresting the judgment, when the error appears on the record, or for acquittal, when a variance arises on the trial.<sup>3</sup> But if the name proved be *idem sonans* with that stated in the indictment, and different in spelling only, the variance will be immaterial. The true rule is, that if the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial.<sup>4</sup> Thus, *Segrave* for *Seagrave* is no variance,<sup>5</sup> nor is *Benedetto* for *Beniditto*,<sup>6</sup> nor is *McNicole* for *McNicoll*,<sup>7</sup> nor *Augustina* for *Augustine*, nor *Chicopee* for *Chickopee*.<sup>8</sup> So, on an

<sup>1</sup> *Rex v. Norton*, Russell & Ryan C. C. 510. *Commonwealth v. Desmarteau*, 16 Gray, 1, 17.

<sup>2</sup> *Attorney-General v. Hawkes*, 1 Tyrwh. 3. *Rex v. Williams*, 7 C. & P. 298.

<sup>3</sup> *Commonwealth v. Wade*, 17 Pick. 395. *Commonwealth v. Clair*, 7 Allen, 526. *Commonwealth v. Hoffman*, 121 Mass. 369. *Commonwealth v. Pope*, 12 Cush. 272. *Commonwealth v. Shearman*, 11 Cush. 546. *Commonwealth v. Tompson*, 2 Cush. 551. A transposition of the order in which names are borne causes a variance. Thus it is a variance to describe Henry Jules Steiner as Jules Henry Steiner. *Regina v. James*, 2 Cox C. C. 227, Pollock, C. B.

<sup>4</sup> *Ward v. State*, 28 Alabama, 60. *Commonwealth v. Jennings*, 121 Mass. 47. *Commonwealth v. Gill*, 14 Gray, 400.

<sup>5</sup> *Williams v. Ogle*, 2 Strange, 889.

<sup>6</sup> *Ahitbol v. Beniditto*, 2 Taunt. 401.

<sup>7</sup> *Regina v. Wilson*, 1 Denison C. C. 284.

<sup>8</sup> *Commonwealth v. Desmarteau*, 16 Gray, 1, 15.

indictment for committing an offence on one John Whyneard, it appeared that his name was spelt Winyard, but it was pronounced Winnyard; the judges, on a case reserved, held that the prisoner had been rightly convicted.<sup>1</sup> But an indictment charging the prisoner with having personated "Peter M'Cann" is not supported by evidence that he personated "Peter M'Carn."<sup>2</sup> So it has been decided that "Shakespeare" cannot be considered idem sonans with "Shakepear."<sup>3</sup>

The question whether one name is idem sonans with another is not a question of spelling, but of pronunciation, depending less upon rule than upon usage, which, when it arises in evidence on the general issue,<sup>4</sup> is for the jury and not for the court.<sup>5</sup>

<sup>1</sup> *Rex v. Foster*, Russell & Ryan C. C. 412. From the report of this case it does not distinctly appear that the question of the identity of the names was submitted to the jury.

<sup>2</sup> *Rex v. Tannet*, Russell & Ryan C. C. 351.

<sup>3</sup> *Rex v. Shakespeare*, 10 East, 83.

<sup>4</sup> In *State v. Havelly*, 21 Missouri, 498, it was held that it is a question for the court when it arises on demurrer to a plea in abatement. Scott, J., dissenting. In this case *Regina v. Davis*, ubi infra, was reviewed.

<sup>5</sup> *Regina v. Davis*, 2 Denison C. C. 231; *Temple & Mew* C. C. 557. In this case the objection was taken on *motion in arrest of judgment*! As reported in 5 Cox C. C. 238, Lord Campbell, C. J., said: "This conviction must be reversed. If it is put as a matter of law, it is quite impossible for this court to say that the two words are idem sonantia. The objection is said to have been taken *in arrest of judgment*; but I never heard of such a ground for arresting the judgment since the great case of *Stradling v. Styles*." *Commonwealth v. Donovan*, 13 Allen, 571. *Commonwealth v. Gill*, 14 Gray, 400. *Commonwealth v. Jennings*, 121 Mass. 47. To the case of *Commonwealth v. Stone*, 103 Mass. 421, the language of the court in *Commonwealth v. Mehan*, 11 Gray, 323, is applicable; viz., that the question of idem sonans was left to the jury, so as to lead them "to suppose that the difference between the names was to be entirely disregarded."

If the name of the injured party cannot be proved, it will suffice to describe him as a person "whose name is to the jurors aforesaid unknown."<sup>1</sup> The ignorance of the grand jury or of a private prosecutor as to the name of a person upon or in relation to whom a crime has been committed, does not shelter the criminal. If the name of a third person, which, if known, should be inserted in the indictment or complaint, is in fact unknown to the grand jury or the complainant, it may be so alleged; and the defendant is not thereby deprived of his protection against being tried twice for the same offence, for if indicted again he may plead his acquittal or conviction upon the first indictment, and aver the person to be the same.<sup>2</sup>

The fact that the grand jury or the complainant might with reasonable diligence have ascertained the name may be evidence that they or he knew the name; but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation. After the evidence has been introduced, the question is not whether the name might have been known, but whether the allegation that it was not known is sus-

<sup>1</sup> *Commonwealth v. Hendrie*, 2 Gray, 503. *Commonwealth v. Crawford*, 9 Gray, 129. *Commonwealth v. Intoxicating Liquors*, 116 Mass. 21.

After the murder of King Charles I., the judges, according to the report, "met several times," and "these things following were resolved." Kelyng thus reports the tenth resolution: "It being agreed that the murder of the king should be specially found, with the circumstances in the indictment. And it being not known who did that villanous act; it was resolved, that it should be laid that Quidam ignotus, with a visor on his face did the act; and that it was well enough, and the other persons be laid to be present, aiding and assisting thereunto." Kel. p. 11, 8d ed.

<sup>2</sup> *Judgment in Commonwealth v. Sherman*, 13 Allen, 249. *Attorney-General v. Hawkes*, 1 Tyrwh. 5.

tained by the proof; it is a question, upon all the evidence, of accord or variance between the allegation and the proof, not of diligence or carelessness in making the accusation.<sup>1</sup> The inquiry is, not what the grand jury could or ought to have known, but what they did know. In the absence of all evidence on the subject, their averment that they did not know might be sufficient; but if it should be a question in relation to which there was evidence, the burden of proof would be upon the Commonwealth.<sup>2</sup>

It has been 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.<sup>3</sup> A misnomer of the person against whom the offence was committed, or whose description is involved in the statement of the offence, will not be fatal, if the name inserted be immaterial and may be rejected as surplusage.<sup>4</sup> In no case is it necessary to state the

<sup>1</sup> Judgment in *Commonwealth v. Sherman*, 13 Allen, 249, 250.

<sup>2</sup> *Commonwealth v. Glover*, 111 Mass. 401. *Commonwealth v. Stoddard*, 9 Allen, 282, 283. *Commonwealth v. Thornton*, 14 Gray, 41. It was suggested by the court in *Commonwealth v. Sherman*, *ubi supra*, that the defendant might move the court to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars. But with deference it is submitted that this is quite foreign to the nature and purpose of a bill of particulars. They never can supply the place of a necessary allegation in an indictment or other criminal pleading.

<sup>3</sup> *Rex v. Bush, Russell & Ryan* C. C. 372. Judgment in *Commonwealth v. Sherman*, 13 Allen, 250, explaining *Regina v. Stroud*, 2 Moody C. C. 270, more fully reported, 1 C. & K. 187. *Commonwealth v. Hill*, 11 Cush. 141.

<sup>4</sup> *Rex v. Morris*, 1 Leach C. C. 109. *Regina v. Crespin*, 11 Q. B. 913. *Rex v. Healey*, 1 Moody C. C. 1. *Commonwealth v. Randall*, 4 Gray, 36. *Commonwealth v. Hunt*, 4 Pick. 252.

addition of estate, degree, or mystery of such person. The Statute of Additions extends only to the party indicted.<sup>1</sup>

The law on this subject may be stated in the following rules:—

1st. It is not necessary to describe a party by what is, in strictness, his right name; but it will be sufficient to state any name he has assumed, or by which he is generally known.

2d. If the name of the injured party cannot be proved, it will suffice to describe him as a person “whose name is to the jurors unknown.”

3d. An illegitimate child is not entitled to the surname either of the mother or of the putative father, but can only acquire a surname by reputation.<sup>2</sup>

4th. If a parent and child bear the same name, it will suffice in an indictment to describe the latter by that name without the addition of “junior.”<sup>3</sup>

5th. If a parent and a child both bear the same Christian name and surname, and this name occur in an instrument without any addition of “senior” or “junior,” it will be presumed, in the absence of evidence to the contrary, that the parent was intended.<sup>4</sup>

<sup>1</sup> *Rex v. Sulls*, 2 Leach C. C. 861. *Commonwealth v. Varney*, 10 Cush. 402.

<sup>2</sup> *Rex v. Clark*, Russell & Ryan C. C. 358. *Rex v. Waters*, 7 C. & P. 250. 1 Taylor Ev. § 293, 7th ed.

<sup>3</sup> *Rex v. Peace*, 3 B. & Ald. 579. *Rex v. Hodgson*, 1 Lewin C. C. 236, Parke, J. *Rex v. Bailey*, 7 C. & P. 264. 1 Taylor Ev. § 293.

<sup>4</sup> *Stebbing v. Spicer*, 8 C. B. 827. *Lepiot v. Browne*, 1 Salk. 7. *Sweeting v. Fowler*, 1 Stark. 106. *Jarman v. Hooper*, 6 M. & G. 827. 1 Taylor Ev. § 195, 7th ed. 3 Greenl. Ev. § 22.

## CHAPTER VI.

## TIME.

It is an undoubted principle that no indictment whatsoever can be good without precisely showing a certain year and day of the material facts alleged in it. 2 Hawk. P. C. ch. 25, § 77.<sup>1</sup>

THE law requires such a specification of the time and place of every material fact, constituting the offence, and for which a special venue, as it is technically termed, must be laid, that any uncertainty or incongruity in these respects is fatal. No indictment, therefore, can be good, without precisely showing a certain day and year in which such facts as are issuable and triable occurred; and if the day of the month alone, without the year, be inserted, it is bad, and cannot be supplied by indictment.<sup>2</sup>

The time laid in an indictment should be before action brought.<sup>3</sup> And this in general is the sole requirement.<sup>4</sup> "The day laid in the indictment is cir-

<sup>1</sup> *State v. Beckwith*, 1 Stewart, 318. *Roberts v. State*, 19 Alabama, 526. *Commonwealth v. Adams*, 1 Gray, 481. *Commonwealth v. Moore*, 11 Cush. 600. *State v. Baker*, 34 Maine, 52. *State v. Hanson*, 39 Maine, 337. *State v. Offutt*, 4 Blackf. 355. *United States v. Smith*, 2 Mason, 143, 145.

<sup>2</sup> Com. Dig. Indictment, G. 2. 2 Gabbett Crim. Law, 221.

<sup>3</sup> 1 East P. C. 125.

<sup>4</sup> There is a class of cases where time is of the essence of the crime; where an act committed at one time is not a crime, at another is a crime, e. g. laws relating to the observance of the Sabbath.

cumstance and form only, and not material in point of proof." And it is a general rule, applicable alike to civil and criminal pleading, which allows the pleader to depart in his pleading, and vary in his allegation from the time alleged.<sup>1</sup> Therefore the jury are not bound to find the defendant guilty on that particular day, but may find the crime to have been committed either before or after the time laid, "so it be prior to the finding of the indictment"; for the question is not *when* the fact was done, but whether it was done or not.<sup>2</sup> Thus, if an indictment lay the offence on an uncertain or impossible day,<sup>3</sup> or where it lays it on a future day,<sup>4</sup> or lays one and the same offence at different days, or on such a day as makes the indictment repugnant to itself, it is void;<sup>5</sup> and no defect of this kind can be aided by the verdict.<sup>6</sup>

It is not necessary to mention the *hour* at which the offence was committed,<sup>7</sup> unless rendered essential by the statute on which the indictment is drawn;<sup>8</sup>

<sup>1</sup> Spicer v. Matthews, Fortescue, 375.

<sup>2</sup> Syer's Case, 3 Inst. 230. Sir Henry Vane's Case, Kel. 19, 3d ed. Gilb. Ev. p. 870, ed. Lofft. "For form sake, there is a particular time laid in the indictment, but the proof is not to be tied up to that time; but if it be proved at any time before or after, so it be before the indictment preferred, it is well enough." Rex v. Charnock, 12 Howell State Trials, 1398, per Holt, C. J.

<sup>3</sup> Serpentine v. State, 1 How. Missis. 256, 260.

<sup>4</sup> 2 Hawk. P. C. ch. 25, § 77. Commonwealth v. Doyle, 110 Mass. 103. Markley v. State, 10 Missouri, 291. State v. Litch. 33 Vt. 67. State v. Pratt, 14 N. H. 456. State v. Blaisdell, 49 N. H. 81.

<sup>5</sup> State v. Dandy, 1 Brev. 395. McGehee v. State, 26 Alabama, 154.

<sup>6</sup> 2 Hawk. P. C. ch. 25, § 77.

<sup>7</sup> March, pl. 127. 2 Hawk. P. C. ch. 25, § 76. Com. Dig. Indictment, G. 2.

<sup>8</sup> Davies v. The King, 10 B. & C. 89; 5 Man. & Ryl. 78. Regina v. Moylan, 2 Crawford & Dix, 500.

and if it is stated no exception is allowed to it.<sup>1</sup> In indictments for burglary, it has been considered necessary, and such are the usual precedents, to state some particular hour of the night, in which the burglary was alleged to have been committed. 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, *night-time*, and yet not have committed the crime of burglary; the time in which that offence can be committed being not so far extended as to embrace the night-time, 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.<sup>2</sup>

The rule that time and place must be added to every material fact in an indictment necessarily leads to the inquiry what are the material facts which must be so alleged to have been done on a particular day, and at a particular place. Every act which is a necessary ingredient to constitute the offence must be laid with time and place; but time and place need not be repeated to mere circumstances accompanying those acts.<sup>3</sup> There is no distinction to be observed between offences of commission and omission.<sup>4</sup> The rules of criminal pleading apply equally to misfeasances and nonfeasances. No reason exists

<sup>1</sup> *Rex v. Clarke*, 1 Bulst. 203.

<sup>2</sup> *Rex v. Waddington*, 2 East P. C. 513. *State v. Bancroft*, 10 N. H. 105. *Commonwealth v. Williams*, 2 Cush. 589. But see *Regina v. Thompson*, 2 Cox C. C. 445, per Patteson, J.

<sup>3</sup> March, pl. 127. Com. Dig. Indictment, G. 2.

<sup>4</sup> But see 2 Hawk. P. C. ch. 25, § 79; Com. Dig. Indictment, G. 2. 2 Gabbett Crim. Law, 223; Archb. Crim. Pl. 51, 19th ed.

why an offence of omission, or a mere nonfeasance, should not be pleaded with time and place, as well as an offence of commission. If it be an indictable offence to omit doing an act at a particular time, or at a particular place, an indictment should, undoubtedly, show that it was not done at that time, or at that place.<sup>1</sup>

When the alleged offence may have continuance, 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.<sup>2</sup> But those other days must be alleged with the same legal exactness which is required in alleging a single day. Such exactness is obtained by alleging that the offence was committed on a day certain and on divers other days between two days certain. If the other days are not alleged with the same certainty as the first day is, the indictment is insufficient, unless the allegation of the other days can be wholly disregarded, and rejected as surplusage. And the general rule is well established, that when an offence, which may have continuance, 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.<sup>3</sup> The law has been so understood and administered ever since the decision in *The King*

<sup>1</sup> Archb. Crim. Pl. 51, 19th ed.

<sup>2</sup> *Wells v. Commonwealth*, 12 Gray, 326. *Commonwealth v. Tower*, 8 Met. 527. *United States v. Fox*, 1 Lowell, 201.

<sup>3</sup> 2 Hawk. P. C. ch. 25, § 82. *People v. Adams*, 17 Wend. 476. *United States v. La Coste*, 2 Mason, 140. *State v. Jasper*, 4 Dev. 327. *Wells v. Commonwealth*, 12 Gray, 326, 328. *Commonwealth v. Traverse*, 11 Allen, 260. *State v. Munger*, 15 Vt. 290, 296.

*v. Dixon and wife.*<sup>1</sup> In that case the defendants were indicted for keeping a common gaming-house on a day certain, "and on divers other days, as well before as after;" without any specification of those days. On demurrer to the indictment, it was held that though the time was uncertain as to all but one day, yet that the king should have judgment for the offence of keeping the house on that day. The demurrer in that case admitted just what the plea of *nolo contendere* admitted in the case of *Wells v. Commonwealth*,<sup>2</sup> namely, all that was well alleged in the indictment. In both indictments, the keeping of a bad house on a day certain was well alleged, but the keeping of it on other days was defectively alleged. In both, the act admitted to have been done on a single day was a full and complete statute offence. There was no necessity, though it was not improper, to allege the offence with a *continuando*; and it having been defectively so alleged, such allegation was surplusage. And if, in either case, the defendants had been found guilty by a verdict, and had moved in arrest of judgment, the motion would have been overruled.<sup>3</sup>

In the case of what is sometimes termed a cumulative offence, that is, an offence which can be committed only by a repetition of acts of the same kind, which acts may be on the same day or on different days,<sup>4</sup> it is proper to allege it to have been committed

<sup>1</sup> 10 Mod. 335, A.D. 1715. *Commonwealth v. Maxwell*, 2 Pick. 142.

<sup>2</sup> 12 Gray, 326.

<sup>3</sup> *Wells v. Commonwealth*, 12 Gray, 328, 329.

<sup>4</sup> As for instance, the being a common seller of intoxicating liquors. *Commonwealth v. Higgins*, 16 Gray, 19. *Commonwealth v. Gallagher*, 1 Allen, 592. *Commonwealth v. Cogan*, 107 Mass. 212. *Commonwealth v. Mitchell*, 115 Mass. 141.

on a certain day named, and on divers other days between that day and a subsequent day named. "Time enters into the essence of the offence, and with entire certainty fixes the identity."<sup>1</sup> This mode of alleging the time limits the offence to the precise period stated in the indictment.

The rule that the time limits the offence to the precise period stated in the indictment applies to the case of a cumulative offence where the acts constituting such offence are alleged to have been committed on a certain day named. The evidence must be confined to that day, and evidence of the commission of the offence before or after that day is incompetent.<sup>2</sup>

An indictment is sufficient in which the year of the commission of the offence is laid by reference to the caption.<sup>3</sup> An allegation that the offence was committed "on the tenth day<sup>4</sup> of September now past," is insufficient; it does not, either in terms, or by reference, state any year; since every passed September

<sup>1</sup> *Commonwealth v. Pray*, 13 Pick. 364. *Commonwealth v. Briggs*, 11 Met. 573. *Commonwealth v. Elwell*, 1 Gray, 463. *Wells v. Commonwealth*, 12 Gray, 329, explaining *Commonwealth v. Adams*, 4 Gray, 27.

<sup>2</sup> *Commonwealth v. Elwell*, 1 Gray, 462. *Commonwealth v. Gardner*, 7 Gray, 494. *Commonwealth v. Sullivan*, 5 Allen, 513. *Commonwealth v. Traverse*, 11 Allen, 260. *Commonwealth v. Foley*, 99 Mass. 500. *Commonwealth v. Carr*, 111 Mass. 424. *Commonwealth v. Sego*, 125 Mass. 214, 215.

<sup>3</sup> *Com. Dig. Indictment, G. 2. Jacobs v. Commonwealth*, 5 S. & R. 315. *Commonwealth v. Edwards*, 4 Gray, 2.

<sup>4</sup> On error it was decided that the omission of the words "day of," to adopt the language of the court, "careless as it is in an indictment, might be suffered to pass." *Simmons v. Commonwealth*, 1 Rawle, 142.

is "now past."<sup>1</sup> Where the indictment charged that the crime was committed "on the third day of August eighteen hundred and forty-three," omitting the words, "the year of our Lord," and even the word "year," it was held to be fatally defective, at common law.<sup>2</sup> But the omission of the words "the year of our Lord" does not vitiate. When an offence is alleged to have been committed "in the year eighteen hundred and fifty-seven," it means that year in the Christian era, and it means nothing else.<sup>3</sup>

The day of the month, and the year when the offence is alleged to have been committed, should be written out in words at length, and should not be expressed by figures.<sup>4</sup> In America, the weight of authority seems to be contrary to the law as here stated. But at all events, a contrary practice is unclerical, uncertain, and liable to alteration; and the courts which have sustained such practice have uniformly cautioned against it. In complaints, in cases where magistrates have final jurisdiction, subject of course to an appeal, the same precision of pleading is required as in an indictment. And it has been decided, both in cases of complaints and indictments, that the letters "A.D." preceding the words

<sup>1</sup> *Commonwealth v. Griffin*, 3 Cush. 523. The words "within one month last past," in a warrant, signify one month next before the making of the complaint. *Commonwealth v. Certain Intoxicating Liquors*, 6 Allen, 599.

<sup>2</sup> *State v. Lane*, 4 Ired. 121. *Wells v. Commonwealth*, 12 Gray, 328.

<sup>3</sup> *Hall v. State*, 3 Kelly, 18. *Engleman v. State*, 2 Indiana, 91. *Commonwealth v. Doran*, 14 Gray, 37. *Commonwealth v. Sullivan*, 14 Gray, 97.

<sup>4</sup> *Finch v. State*, 6 Blackf. 533. *State v. Voshall*, 4 Indiana, 589.

expressing the year of the commission of the offence, are sufficiently certain, having acquired an established use in the English language.<sup>1</sup> A complaint which states that the offence was committed "on the fifteenth day of July, 1855," is insufficient. To make the allegation of time sufficient there should have been words, or at least letters, which have acquired an established use in the English language, so added to or connected with the figures contained in it, as to describe or indicate with certainty the era to which it was intended that they should refer.<sup>2</sup>

An allegation that the offence was committed from a day named "to the day of making this presentment," or "to the day of finding this indictment," fixes the time with sufficient certainty by reference

<sup>1</sup> *Commonwealth v. Clark*, 4 Cush. 596. *State v. Reed*, 35 Maine, 489. *Commonwealth v. Hagarman*, 10 Allen, 401, 402. *Commonwealth v. Walton*, 11 Allen, 238, 240. *State v. Seamons*, 1 Iowa, 418. *Winfield v. State*, 3 Iowa, 339. *Rawson v. State*, 19 Conn. 292. *State v. Tuller*, 34 Conn. 280. In *State v. Hodgeden*, 3 Vt. 481, in the indictment, the letters and figures used were "A.D. 1830," and they were held to be sufficient.

<sup>2</sup> *Commonwealth v. McLoon*, 5 Gray, 91. *Wells v. Commonwealth*, 12 Gray, 328. In *Commonwealth v. Hutton*, 5 Gray, 89, the complaint, which was held to be insufficient, contained no allegation of time except "the third day of June instant," and no reference to the date of the complaint. And in *Commonwealth v. Keefe*, 7 Gray, 332, in which the date was rejected as surplusage, the complaint did not refer to it, but duly set forth the time of the commission of the offence in words at length. In *Commonwealth v. Hutton*, 5 Gray, 90, Metcalf, J., quoted the following language of Lord Denman, C. J.: "On the first impression we always feel desirous to get over objections of this kind, if we can; but we must abide by established rules. The objection is one which we cannot avoid giving effect to. We shall thus induce more accuracy in future." *Regina v. Bloxham*, 6 Q. B. 533. The date of the jurat may be expressed in figures. *Commonwealth v. Keefe*, 7 Gray, 332. *Commonwealth v. Hagarman*, 10 Allen, 401.

to that stated in the caption, or as shown by the certificate of the clerk indorsed on the indictment. When there is nothing on the record showing the day when the indictment was found, this is equivalent to an averment that the offence was committed between the first day alleged, and the day on which the term of the court commenced. If the day of returning the indictment was later, and that fact appears by indorsement thereon, such date may be shown, where the offence was in fact committed after the first day of the term of the court.<sup>1</sup>

But when the time is laid from a day certain and "to the day of the *finding, presentment* and filing of this indictment," the last allegation is wholly uncertain and indefinite.<sup>2</sup> The ground of the decision in this case, as stated by the court and as explained in a subsequent case, is this: "The day of the finding and presentment is not necessarily, nor by any reasonable intendment, identical with the day of the filing of the indictment. They are separate and distinct acts, performed by two distinct and separate agencies. The former is the act of the grand jury; the latter is the duty of the clerk. They cannot be simulta-

<sup>1</sup> Commonwealth v. Stone, 3 Gray, 453. Commonwealth v. Wood, 4 Gray, 11. Commonwealth v. Hoye, 9 Gray, 292. Commonwealth v. Keefe, 9 Gray, 290. Commonwealth v. Snow, 14 Gray, 20. Commonwealth v. Langley, 14 Gray, 21. This principle applies to a *complaint* in which the time is alleged on a day named, "and from that day to the day of receiving this complaint," or "to the day of exhibiting this complaint," which last date is certified by the magistrate at the foot of the complaint. Commonwealth v. Kingman, 14 Gray, 85. Commonwealth v. Donnelly, 14 Gray, 86 note. Commonwealth v. Hagarman, 10 Allen, 401. Commonwealth v. Walton, 11 Allen, 238. Commonwealth v. Blake, 12 Allen, 188.

<sup>2</sup> Commonwealth v. Adams, 4 Gray, 27.

neous, nor is it necessary that the one should take place within any fixed or certain time after the other. Indeed, in ordinary practice, they often occur on different days. It was therefore impossible to ascertain with accuracy within what limits the charge alleged in the indictment was intended to be confined." It is manifest from this passage, that "the finding and presentment" were regarded by the court as one and the same act, and that the word "presentment" had no meaning different from, or additional to, the word "finding," but was mere repetition and redundancy. It is perfectly clear that the word "present" means nothing more than that the jury "represent" or "show" to the court that a certain person has committed a certain offence. In this connection, therefore, there is no difference between the legal meanings of a finding and a presentment.<sup>1</sup>

It is true that generally, in criminal prosecutions, it is not necessary that the precise time alleged should be proved. But every indictment must allege a precise day, and the time alleged must be such that the record will show that an offence has been committed, and that the court may ascertain from it what punishment is to be imposed. When a statute makes an act punishable from and after a given day, the time of the commission of the act is an essential ingredient of the offence, to the extent that it must be alleged to have been after such day. So if a statute changes the punishment of an existing offence by imposing a severer penalty, with a clause saving from its operation offences already committed,

<sup>1</sup> *Commonwealth v. Adams*, 4 Gray, 11, as explained in *Commonwealth v. Keefe*, 9 Gray, 290.

the allegation of time is material. The nature and character of the offence, and the penalty affixed to it depend upon the time when the act charged is committed. If in such a case an indictment alleges the act to have been committed before the passage of the statute enlarging the penalty, the offence charged and the punishment annexed to it are different from the offence and punishment, if the act is committed after such time. They are different offences, and an allegation of one is not sustained by proof of the other. Otherwise the defendant would be exposed to a greater punishment upon a trial than he would be upon a plea of guilty.<sup>1</sup>

Although the averment of time in an indictment is purely technical, and need not correspond with the evidence on the trial, still, on a motion in arrest of judgment, that fact, like all others, is to be taken to be truly stated.<sup>2</sup> And where under a statutable offence time is material, the time stated in the indictment must in arrest of judgment be taken to be the true time, without a distinct and substantive averment in the words of the statute.<sup>3</sup>

But the date specified in the indictment has been so far disregarded, that where a court had no jurisdiction to try a criminal, except for an offence committed after a certain day, and the offence was the same offence before that day as afterwards, the judges held that no objection could be taken to the indictment in arrest of judgment, for alleging that the act

<sup>1</sup> Judgment in *Commonwealth v. Maloney*, 112 Mass. 284.

<sup>2</sup> *Commonwealth v. Hitchings*, 5 Gray, 485. *United States v. Fox*, 1 Lowell, 203.

<sup>3</sup> *Rex v. Brown*, M. & M. 163, Littledale, J.

was done before that day, the jury having expressly found that this was not correct.<sup>1</sup>

Where dates are material, and are laid under a videlicet, they may be taken without the videlicet, and taken to be true, after verdict in order to support the indictment. Where material matter is laid under a videlicet, it must be taken after verdict to have been proved as laid.<sup>2</sup>

Where the time is limited for making a complaint or preferring an indictment, the time laid should be within the time so limited. When an exception takes the case out of the statute, the correct course, on principle, is to state the exact time when the offence was committed, and then aver the exception. It should appear on the face of the indictment that the defendant has been indicted *within the time* prescribed by the laws of the land. And the defendant, when an indictment is prima facie barred by the statute, is entitled to know the particular exception on which the prosecution seeks to avoid its operation. Where this view obtains, and the offence is on the face of the indictment barred, advantage may be taken of the defect by motion to quash, demurrer, motion in arrest of judgment, or writ of error.<sup>3</sup>

Where a prosecution is to be commenced, or an act shown to be done within a limited time, an express averment is unnecessary, provided it appear

<sup>1</sup> *Rex v. Treharne*, 1 Moody C. C. 298.

<sup>2</sup> *Ryalls v. The Queen*, 11 Q. B. 781, in *Cam. Scacc. Regina v. Scott, Dearsly & Bell* C. C. 47.

<sup>3</sup> *State v. Robinson*, 29 N. H. 274. *People v. Miller*, 12 Cal. 291. *McLane v. State*, 4 Georgia, 335. *State v. Rust*, 8 Blackf. 195, in error. *Hatwood v. State*, 18 Indiana, 492. 1 *Wharton Crim. Law*, §§ 275, 446. *Contra, United States v. Cook*, 17 Wall. 168.

from the time stated that the prosecution or act was commenced or done within the prescribed limit.<sup>1</sup> Thus an indictment for homicide must show that the death was within a year and day after the stroke. It is sufficient, where the stroke is laid on one day, and the death on another, to allege the death to have happened on some one day which is within a year and a day of the stroke, without expressly averring that the party died within that particular period of time from the stroke.<sup>2</sup>

In indictments the offence is never laid as having been committed "after the passing of the statute," though that took place very recently before. The defendant is charged with the fact as being "contrary to the form of the statute."<sup>3</sup>

<sup>1</sup> And after a general verdict, the court will presume that, although a time beyond the statute is laid, a time within was proved. *Lee v. Clarke*, in error, 2 East, 333.

<sup>2</sup> *Rex v. Stevens*, 5 East, 259, per Lord Ellenborough, C. J. *Regina v. Parker*, Leigh & Cave C. C. 462, 463.

<sup>3</sup> *Harding v. Stokes*, Tyrw. & Gran. 605, per Parke, B. See *Regina v. Rawlinson*, Gilb. Cas. 242, per Parker, C. J.

## CHAPTER VII.

## PLACE.

“No indictment can be good without expressly showing some place wherein the offence was committed; which must appear to have been within the jurisdiction of the court in which the indictment is taken, and must also be alleged in such a manner as is perfectly free from all repugnance and inconsistency.” 2 Hawk. P. C. ch. 25, § 83.<sup>1</sup>

EVERY material fact must be stated with time and place, in order that the grand jury may appear to have jurisdiction to find the indictment, and also that the traverse jury may be drawn from the proper county to try the case.<sup>2</sup> Jurisdiction, in this connection, means *local* jurisdiction; otherwise persons accused might be punished for offences committed in another State, if the quality of the offence alone gave jurisdiction. The objection on the score of omitting a local venue is not merely technical, but is real and important; for the allegation of material facts as occurring in the county is not only that which authorizes

<sup>1</sup> Com. Dig. Indictment, G. 2. *Rex v. Hollond*, 5 T. R. 624, 625. *Rex v. Haynes*, 4 M. & S. 214.

<sup>2</sup> *Regina v. O'Connor*, 5 Q. B. 31. *Rex v. Haynes*, 4 M. & S. 214. “The rule which was formerly adopted, that time and place must be added to every material averment in an indictment, has been frequently broken upon since the case of *Rex v. Hollond*, 5 T. R. 607, A.D. 1794, for the jury are now summoned not de vicineto, but de corpore comitatus.” Per Williams, J., in *Regina v. Gompertz*, 14 L. J. M. C. 118.

the grand jury to entertain the indictment, but also generally empowers the court to proceed against the offenders.<sup>1</sup> And it has been decided that a count, containing no statement of venue, either by reference or otherwise, is bad at common law, after verdict, although a venue is stated as usual in the margin of the indictment. The venue in the margin only implies that the indictment is found by a grand jury of the county named; it does not make the indictment show that the court has jurisdiction to try the offence, unless it is specially referred to in the body of the indictment. And the court cannot import into the body of the indictment, for the purpose of showing local jurisdiction, the county written in the margin, as is done in civil actions.<sup>2</sup>

Any inconsistency or uncertainty vitiates the indictment. Thus, if one and the same offence be laid at two different places; <sup>3</sup> or "at the town of B. afore-said," where no such town was mentioned before,<sup>4</sup> the indictment is void. So, where the indictment described the place as being "in the county afore-said," where there were two different counties before mentioned, it was held bad, although one of the counties was mentioned in the defendant's addition merely.<sup>5</sup> An allegation that the defendant "at B.

<sup>1</sup> *Regina v. O'Connor*, 5 Q. B. 34, 35.

<sup>2</sup> *Regina v. O'Connor*, 5 Q. B. 16; *Dav. & Meriv.* 761.

<sup>3</sup> 2 *Hawk. P. C.* § 83.

<sup>4</sup> *Rex v. Cholmley*, *Cro. Car.* 465. *Commonwealth v. Pray*, 13 *Pick.* 359, 361. *Rex v. Mathews*, 5 *T. R.* 162.

<sup>5</sup> *Sir H. Roll's Case*, 1 *Rol.* 223. A contrary decision was made in the case of *People v. Breese*, 7 *Cowen*, 429. The *ratio decidendi* was that as towns are created by public statutes, the court will take judicial notice in what county each town lies. This is equivalent to an express allegation that the town is in that county.

in the county of W. did convey from place to place within said Commonwealth intoxicating liquor," does not sufficiently state the places from which and to which the liquor was conveyed; whether from one place in a town or city to another place in the same town or city, or from one town or city to another.<sup>1</sup>

Time and place are thus usually pleaded: "That C. D. of &c., on the first day of June in the year of our Lord —, at B. in the county of S.," or "in the county aforesaid," referring to the county in the margin; unless indeed another county has been mentioned before, and then because it is uncertain to which county the word "aforesaid" refers, it is necessary to insert the name of the county. In either case, to mention the *place* only, without the addition of the words "in the county aforesaid," or, "the county of S.," is held insufficient, notwithstanding the place has been before alleged to be *in the county*. But in civil cases it is otherwise; for it is held sufficient to name the place only in the declaration, because the place is always construed to refer to the county in the margin, although another county has been mentioned before.<sup>2</sup>

And now since both the grand jury and the traverse jury are returned from the body of the county, it is sufficient to state only the county, or part of the county to which the jurisdiction of the court is limited, in all cases which are not of a local nature.

<sup>1</sup> Commonwealth v. Reily, 9 Gray, 1.

<sup>2</sup> 1 Wms. Saund. 308 a. 1 Wms. Notes to Saund. 511. In Rex v. Burrige, 3 P. Wms. 439, 496, the charge of aiding an escape "at Ivelchester" was tied up, by the word "aforesaid," to "Ivelchester" in the county of Somerset. Judgments of Patteson, J., and Williams, J., in Regina v. Albert, 5 Q. B. 42, 43; and of Coltman, J., in Thorne v. Jackson, 3 C. B. 664. Regina v. O'Connor, 5 Q. B. 33.

All that is necessary is, to allege that the offence was committed in the county,<sup>1</sup> and prove that it was committed at any place within the county,<sup>2</sup> though charged to have been committed in a particular town. This rule has long been recognized and acted upon.<sup>3</sup> Thus, it has been held not requisite to mention more than the county, in an indictment for murder,<sup>4</sup> assault,<sup>5</sup> affray,<sup>6</sup> simple larceny,<sup>7</sup> gaming,<sup>8</sup> disturbing the worship of a religious society<sup>9</sup> &c.

In indictments for those offences which the law regards as bearing a *local character*, the proof respecting the place must correspond with the allegation. The distinction between local and transitory offences is not very clearly drawn: but in the former category may be safely included, among others, burglary,<sup>10</sup> but

<sup>1</sup> Commonwealth v. Barnard, 6 Gray, 488. Thayer v. Commonwealth, 12 Met. 9.

<sup>2</sup> Therefore a special verdict finding the defendant guilty of the offence charged in the indictment, but not finding him guilty in the county where it is alleged to have been committed, cannot be supported. Rex v. Hazel, 1 Leach C. C. 368. Commonwealth v. Call, 21 Pick. 509.

<sup>3</sup> 2 Hawk. P. C. ch. 25, § 84. Rex v. Charnock, 1 Salk. 288. 2 Gabbett Crim. Law, 213. Wingard v. State, 13 Georgia, 396. Barnes v. State, 5 Yerg. 186. Carlisle v. State, 32 Indiana, 55. Heikes v. Commonwealth, 26 Penn. State, 513. State v. Goode, 24 Missouri, 361.

<sup>4</sup> State v. Lamon, 3 Hawks, 175. Contra, per Parsons, C. J., in Commonwealth v. Springfield, 7 Mass. 13.

<sup>5</sup> Commonwealth v. Tolliver, 8 Gray, 386. Commonwealth v. Creed, 8 Gray, 387.

<sup>6</sup> State v. Warner, 4 Indiana, 604.

<sup>7</sup> Commonwealth v. Lavery, 101 Mass. 207. People v. Honeyman, 3 Denio, 121. Haskins v. People, 16 N. Y. 344.

<sup>8</sup> Covy v. State, 4 Port. 186.

<sup>9</sup> State v. Smith, 5 Harring. Del. 490.

<sup>10</sup> 2 Russell on Crimes, 47, 4th ed. Regina v. St. John, 9 C. & P. 40.

not *highway*-robbery;<sup>1</sup> house-breaking;<sup>2</sup> stealing in a dwelling-house;<sup>3</sup> arson;<sup>4</sup> being found by night armed with intent to break into a dwelling-house &c., and to commit a felony therein;<sup>5</sup> desecrating and disfiguring a burying-ground;<sup>6</sup> sacrilege;<sup>7</sup> riotously demolishing churches, houses, machinery &c.;<sup>8</sup> maliciously firing a dwelling-house, perhaps an out-house, but not a stack;<sup>9</sup> forcible entry;<sup>10</sup> keeping and maintaining a common nuisance;<sup>11</sup> house of ill-fame;<sup>12</sup> nuisances to highways;<sup>13</sup> malicious injuries to sea-banks, mill-dams, or other local property.<sup>14</sup>

The principle is, that where the place is material, the place stated as venue is to be taken to be the true place; therefore, if it is not expressly stated where the building &c., is situated, it shall be taken to be situated at the place named by way of venue.<sup>15</sup>

In many cases it is sufficient to allege and prove the town, or other local district, less than a county,

<sup>1</sup> *Rex v. Dowling*, Ry. & M. N. P. C. 433, *Littledale, J.* There is no such crime known to the law as "highway" robbery.

<sup>2</sup> *Rex v. Bullock*, 1 *Moody C. C.* 324 note.

<sup>3</sup> *Rex v. Napper*, 1 *Moody C. C.* 44.

<sup>4</sup> *People v. Slater*, 5 *Hill*, 401.

<sup>5</sup> *Regina v. Jarrald*, *Leigh & Cave C. C.* 301.

<sup>6</sup> *Commonwealth v. Wellington*, 7 *Allen*, 299.

<sup>7</sup> *Archb. Crim. Pl.* 40, 17th ed.

<sup>8</sup> *Rex v. Richards*, 1 *M. & Rob.* 177.

<sup>9</sup> *Rex v. Woodward*, 1 *Moody C. C.* 323. *People v. Slater*, 5 *Hill*, 402.

<sup>10</sup> 2 *Leon*. 186.

<sup>11</sup> *Commonwealth v. Heffron*, 102 *Mass.* 148. *Commonwealth v. Logan*, 12 *Gray*, 136, 138.

<sup>12</sup> *State v. Nixon*, 18 *Vt.* 70.

<sup>13</sup> *Archb. Crim. Pl.* 971, 972, 19th ed.

<sup>14</sup> 1 *Taylor Ev.* § 281, 7th ed.

<sup>15</sup> *Rex v. Napper*, 1 *Moody C. C.* 44. *Commonwealth v. Lamb*, 1 *Gray*, 493.

in which the offence was committed ; but, in some, a more accurate description is necessary. Thus, an indictment for not repairing a highway must specify the situation of the road within the town, and any substantial variance between the description and the evidence is material.<sup>1</sup> So, on an indictment for night poaching it has been held, by a majority of the judges, that the locus in quo must be described either by name, ownership, occupation, or abuttals, and that it is not sufficient to allege that the prisoner was found "in a certain close in the parish of A."<sup>2</sup> An indictment for an *affray* cannot be sustained unless it contain an averment that the offence was committed in a public street or highway, and unless that averment be supported by corresponding proof.<sup>3</sup>

Where the place is stated as matter of local description, and not as venue merely, any variance between the description of it in the indictment and the evidence will be fatal even though the injury be partly local, and partly transitory ; for, the whole being one entire fact, the local description becomes descriptive of the transitory injury.<sup>4</sup> The rule is the same, in this respect, in criminal cases as in civil actions.<sup>5</sup>

And where the place is stated as matter of local description, and not as venue, it is necessary to prove

<sup>1</sup> *Rex v. Great Canfield*, 6 Esp. 136. *Rex v. Marchioness of Downshire*, 4 Ad. & El. 232 ; 5 Nev. & Man 662. *Regina v. Waverton*, 17 Q. B. 562. *Rex v. St. Weonard's*, 6 C. & P. 582. *Regina v. Steventon*, 1 C. & K. 55. *Commonwealth v. North Brookfield*, 8 Pick. 463.

<sup>2</sup> *Rex v. Ridley, Russell & Ryan* C. C. 515. *Rex v. Crick*, 5 C. & P. 508, *Vaughan, B.* *Regina v. Eaton*, 2 Denison C. C. 274 ; S. C. sub nom. *Regina v. Uezzell*, 3 C. & K. 150.

<sup>3</sup> *Regina v. O'Neill*, Irish Rep. 6 C. L. 1.

<sup>4</sup> *Regina v. Cranage*, 1 Salk. 385.

<sup>5</sup> Archb. Crim. Pl. 218, 19th ed.

it as laid, although it need not have been stated.<sup>1</sup> Mr. Justice Crampton once observed, "If you choose to go out of your way to make a special averment, and to allege a particular place in the indictment, the question is, whether you are bound to prove it. I think you are."<sup>2</sup> A well-considered case in New York illustrates this principle. In an indictment for arson, the dwelling-house was described as located in the sixth ward of the city of New York; the evidence showed it to be in the fifth ward, and the variance was held to be fatal.<sup>3</sup>

It would be extremely difficult, observes an eminent writer, to advance any sensible argument in favor of this distinction which the law recognizes between local and transitory offences. On an indictment, indeed, against a town for not repairing a highway, it may be convenient to allege, as it will be necessary to prove, that the spot out of repair is within the town charged; and in those very few cases where the statute upon which an indictment is framed, gives the penalty to the poor of the parish in which the offence is committed, a similar allegation may be properly inserted; but why a burglar should be entitled to more accurate information respecting the house he is charged with having entered, than the highway robber can claim as to the spot where his offence is stated to have been committed, it is impossible to say; either full information should be given in all cases or in none.<sup>4</sup>

<sup>1</sup> *State v. Crogan*, 8 Iowa, 523. *Moore v. State*, 12 Ohio State, 387.

<sup>2</sup> *Regina v. M'Kenna*, Irish Circ. Rep. 416.

<sup>3</sup> *People v. Slater*, 5 Hill, 401.

<sup>4</sup> 1 Taylor Ev. § 283, 7th ed.

It is a principle which runs through all the cases, that a crime must be alleged to have been committed in the county where it is prosecuted.<sup>1</sup> It is this allegation that gives jurisdiction to the court. Thus an allegation that an offence was committed "at West Brookfield," without saying in the county of Worcester, is insufficient. Metcalf, J.: "It does not appear in this complaint that West Brookfield, the place where the defendant is charged with having sold intoxicating liquor, is either a town, or a place within the county of Worcester. It therefore does not appear that any magistrate in this county, or any court held in this county, *has jurisdiction of the offence set forth in the complaint.*"<sup>2</sup>

But a contrary decision was made in the case of *Tower v. Commonwealth*.<sup>3</sup> It was there held that the omission to allege the county was a mere *formal* defect and could not be taken advantage of on error. Chapman, C. J.: "It is alleged that the offence was committed at Framingham, but it is not alleged that Framingham is in the county of Middlesex. This defect is formal; for the court knows judicially, and all the inhabitants of Framingham, where the defendant lives, are bound to know in fact that the town is in that county. The complaint is entitled 'Middlesex ss.' Advantage of the formal defect was not taken seasonably." But with deference it is submitted that this decision is erroneous, and directly in conflict with all the preceding cases. The error

<sup>1</sup> *Thayer v. Commonwealth*, 12 Met. 9. *Commonwealth v. Cummings*, 6 Gray, 487. *Commonwealth v. Springfield*, 7 Mass. 9.

<sup>2</sup> *Commonwealth v. Barnard*, 6 Gray, 488.

<sup>3</sup> 111 Mass. 417.

assigned was clearly for a substantial defect. And it is a principle of universal application that an objection to the jurisdiction may be taken advantage of at any stage of the proceedings.<sup>1</sup>

It is no objection, in the case of a transitory felony, on the plea of not guilty, that there is no such place in the county as that in which the offence is stated to have been committed. The objection can only be taken advantage of by plea in abatement.<sup>2</sup>

<sup>1</sup> *Regina v. Heane*, 4 B. & S. 947.

<sup>2</sup> *Rex v. Woodward*, 1 Moody C. C. 323.

## CHAPTER VIII.

## TIME AND PLACE. — THEN AND THERE.

The words *ad tunc et ibidem* in the subsequent clauses of an indictment, are of the same effect as if the day and year, town and county, mentioned in the former part of it, had been expressly repeated. 2 Hawk. P. C. ch. 25, § 78.

It is a general rule, that the time and place of every material fact which is issuable and triable must be plainly and consistently alleged; and such a degree of precision does the law exact in this respect, that any uncertainty or incongruity in the description of time and place vitiates the indictment. And the same observation applies to all compound offences, where the material facts have been done at different times; it being, in such cases, necessary to lay a time and place for each constituent part of the offence. But if all the acts constituting the offence be supposed to have been done at the same time, it is sufficient, as to all the acts after the first, to allege time and place by the words "then and there," thus referring to the time and place mentioned for the first act; without saying "on the day and year aforesaid at B. aforesaid in the county aforesaid," which is the usual mode of alleging time

and place, or repeating the day and year, town and county, to every act.<sup>1</sup>

But the mere conjunction "and," without adding "then and there," will in many cases be insufficient. In Hawkins's Pleas of the Crown is this passage: "It is said not to be sufficient, in indictments of death, to allege that the defendant assaulted the party at a certain day, and feloniously struck him, without expressly adding that he struck him *ad tunc et ibidem*; and yet both sentences being joined with the copulative, it is the most natural import of the whole, that the stroke and assault were both at the same time &c., and such certainty seems to be sufficient in declarations in civil actions, *and even in indictments of trespasses*. But in indictments of death a more express certainty is said to be required, because the stroke which caused the death, being a crime of a different nature, and much higher than the assault, may be well enough intended to have happened at a different time; and therefore the precise time of each must certainly be expressed."<sup>2</sup>

But in the case of *Commonwealth v. Barker*,<sup>3</sup> it was decided that an indictment for murder was sufficient, which alleged that the defendant, at Worcester in the county of Worcester on the 2d of January 1853, with a certain axe, feloniously did strike M. B., giving unto the said M. B. then and there, with the axe aforesaid, feloniously, wilfully and of his malice aforethought, one mortal wound; that the

<sup>1</sup> 2 Hale P. C. 180. *Rex v. Browne*, Jebb C. C. 21. *State v. Cotton*, 4 Foster, 143. *State v. Bacon*, 7 Vt. 219. 2 Gabbett *Crim. Law*, 223.

<sup>2</sup> 2 Hawk. P. C. ch. 23, § 88; ch. 25, § 77.

<sup>3</sup> 12 Cush. 186, and 4 Gray, 208, 209.

words "then and there" needed not to be repeated before the allegation of the mortal wound; because, notwithstanding the English decisions to the contrary, it was deemed most clear that no one, upon reading the indictment, could fail to understand that the mortal wound was alleged to have been given at Worcester on the day named in the indictment. "We are of opinion," said the court, "that a charge expressed in a plain, intelligible and explicit manner, and in the accustomed legal phraseology, and found by a jury to be true, is sufficient to warrant a judgment against the person thus charged, whether that charge be *of a misdemeanor* or of a capital offence." And it has been decided that an indictment, which alleges that the defendant, at a time and place named, feloniously assaulted C. D., and, being then and there armed with a dangerous weapon, did actually strike him on his head with said weapon, is sufficient, without repeating the words "then and there" before the words "did actually strike."<sup>1</sup> The court said that the insertion of those words, immediately before the allegation of the striking, would have been useless repetition. And quoted the language of Chief Justice Ewing, in a similar case: "There might have been, with the words 'then and there,' a greater deference to tautology, but not thereby a more explicit or intelligible averment."<sup>2</sup>

The word "instantly" is not equivalent to the word "then." Thus, an allegation that "A. B. *then and there* received a mortal shock and concussion, of which said mortal shock &c., A. B. *instantly* died,"

<sup>1</sup> Commonwealth v. Bugbee, 4 Gray, 206, 208.

<sup>2</sup> State v. Price, 6 Halst. 210.

is insufficient. Lord Denman, C. J.: "It is contended that *instantly* is equivalent to *then*, which word was employed immediately before in connection with the shock described; and that word is admitted to be sufficient. We think it not equivalent. *Then*, adtunc, means the very time at which the other event happened: it therefore involves the same day; and such is the known sense of the term in pleading. But of *instantly* the more natural and usual sense is, instantly *after*: we do not know what the pleader may mean by that allegation,—possibly five minutes or an hour, some time on the succeeding day, or even a longer time. By the course of precedents such words as *instanter* and *incontinenter* do not dispense with a direct allegation of time; we repeatedly find them associated with it."<sup>1</sup>

The word "immediately" is of too uncertain a signification to be used when time constitutes part of the offence. Thus, in an indictment for robbery, the exact time of taking the money must be averred. And, therefore, where, on an indictment for robbery, a 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 by nine of the judges to be insufficient to charge the prisoners with the crime of robbery, because the word "immediately" has great latitude, and is not of any determinate signification, and is frequently used to import, "as soon as it conveniently could be done."<sup>2</sup>

<sup>1</sup> *Regina v. Brownlow*, 3 Per. & Dav. 52; 11 Ad. & El. 119. *Lester v. State*, 9 Missouri, 658.

<sup>2</sup> *Rex v. Francis*, Cunningham, 275, 3d ed; 2 Strange, 1015; *Cas. Temp. Hardw.* 113; *Comyns*, 478.

The word "being," exists, relates to the time of the indictment, rather than of the offence, unless necessarily connected with some matter which confines it to the offence;<sup>1</sup> and, therefore, an indictment for a forcible entry into land, *being* the owner's freehold, without saying "*then being*," is insufficient.<sup>2</sup>

Where it was averred that A., B., and C. feloniously and of their malice aforethought made an assault upon S., and then and there feloniously struck the said S., and then and there gave the said S. a mortal wound, it was held sufficient; for the conjunction "and" couples the sentences together, so that the words "feloniously and of their malice aforethought" first mentioned, refer to all the subsequent verbs, and the words "then and there" make all to be done at one and the same instant; "otherwise too much repetition and tautology would be made of the said words."<sup>3</sup>

An indictment alleged that the defendants on a certain day and at a certain place "did *by night* unlawfully enter divers closes there situate, and were *then and there* in the said closes armed with guns for the purpose of then and there taking and destroying game." The judgment was reversed, because the word "night" was confined to the first branch of the sentence, and the words "then and there" referred only to the day and place first stated. Lord Tenterden, C. J.: "If the words 'by night' had oc-

<sup>1</sup> So the participle "not having" applies to the time of the indictment, and not to the time of the fact. *Rex v. Mason*, 2 Show. 126.

<sup>2</sup> *Poynts's Case*, Cro. Jac. 214. *Bridges's Case*, Cro. Jac. 639. 2 Gabbett Crim. Law, 224.

<sup>3</sup> *Haydon's Case*, 4 Rep. 41 a, 41 b. *Rex v. Nicholson*, 1 East P. C. 346. *Turns v. Commonwealth*, 6 Met. 225, 234.

curred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole, but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows.<sup>1</sup> The two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed, or the intent with which they entered; the second branch states that they were in the closes armed for the purpose of destroying game, but not that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct, the indictment is bad, and the judgment must be reversed."

And it is to be observed that in some cases the words "then and there" are more certain than even a repetition of the day and year; and the latter are not sufficient where, in order to complete the offence, connected acts must be shown to have been done *at the same time*. In this case it is absolutely necessary to use the words "then and there." This doctrine may thus be stated. The words "then and there" are relative, and refer to some foregone averment, and their effect must be determined by that allegation to which they refer. If that is a single act done, and it then avers that "then and there" another fact occurred, it necessarily imports that the two were precisely coexistent and the word "then" refers to a precise time. A repetition of the day merely imports

<sup>1</sup> *Davies v. The Queen*, 10 B. & C. 89. See *Cureton v. The Queen*, 1 B. & S. 208, 219.

that the second act was committed some time during the same day. But where the antecedent averment fixes no precise time, and alleges no precise, single, definite act, the word "then," used afterwards, fixes no one definite time.<sup>1</sup> Thus, the judgment was reversed on a writ of error, because, where the possession of ten or more counterfeit bills at *the same time* was of the essence of the offence, the indictment merely alleged possession of ten bills on one day, and not at once on that day.<sup>2</sup>

When two distinct times and places have been mentioned in, and at, which the substantive offence has been committed, and reference is afterwards made to time and place by the words "then and there," the allegation will be deemed defective, as it will be uncertain to *which* time and place the "then and there" refer. And it is no answer to the objection to say that "then and there" will refer grammatically to the last antecedent time and place. It must be certain to every intent.<sup>3</sup>

In Ogle's case,<sup>4</sup> the indictment stated that A. B. at N. made an assault upon C. D. of F. and him adtunc et ibidem with a certain sword, percussit &c. It was there said: "This indictment is not good, because two places are named before, and if it refers to both, it is impossible, and if only to one, it must refer to the last, and then it is insensible." The sense is ambig-

<sup>1</sup> Rex v. Williams, 1 Leach C. C. 529. Commonwealth v. Butterick, 100 Mass. 12, 17. Commonwealth v. Goldstein, 114 Mass. 272, 276.

<sup>2</sup> Edwards v. Commonwealth, 19 Pick. 124.

<sup>3</sup> State v. Jackson, 39 Maine, 291. Jane v. State, 3 Missouri, 61. State v. McCracken, 20 Missouri, 411. State v. Hayes, 24 Missouri, 358.

<sup>4</sup> 2 Hale P. C. 180.

uous: the assault may as well have been made at N. in the county *aforesaid*, as at F. in the county *aforesaid*, of which place the defendant is described by his addition. It is just as sensible, whether the reference is made to the one or to the other. There was therefore an uncertainty which was held to be fatal.<sup>1</sup>

In Finch's Discourse of Law,<sup>2</sup> it is said, "Words of construction must be referred to the next antecedent, *where the matter itself doth not hinder.*"<sup>3</sup> This authority was considered as decisive in a case in the Court of Exchequer Chamber.<sup>4</sup> The indictment alleged that the defendant at the township of Wavertree, in the county of Lancaster, in and upon a common highway *there*, leading from a certain public road (of which the termini are described) to a certain other public road (of which the termini are also described, and which are from *Wavertree* to the township of *Little Woolton*), by a certain wall *there*, extending into *the said* highway, unlawfully hath encroached. It was contended, that the latter word *there* must, of necessity, be referred to the *last* antecedent, that is, to *Little Woolton*. Tindal, C. J., delivered the judgment of the court: "The answer appears to us to be, that the only way of reading the indictment so as to make sense of it, is by considering the township of *Little Woolton* to be stated in the indictment merely as the terminus of one of the two cross highways; and in that case there can be no ambiguity in the indictment, as the word *there* cannot refer to that highway, but must,

<sup>1</sup> Wright v. The King, 3 Nev. & Man. 900; 1 Ad. & El. 448.

<sup>2</sup> Bk. i. ch. 3, p. 8, ed. 1759.

<sup>3</sup> The original French edition does not contain this qualification. Ed. 1613, 3 b.

<sup>4</sup> Wright v. The King, 1 Ad. & El. 434; 3 Nev. & Man. 892.

of necessity, refer to the highway in question, namely, that at *Wavertree*. And if there is no necessary ambiguity in the construction of an indictment, we are bound not to create one, by reading the indictment in the only way which will make it unintelligible. In this case the nuisance by erecting a wall, which is local, must be at *Wavertree*, where the road has already been described to be; it could not possibly be at *Little Woolton*. There is therefore no uncertainty; and the word *there* must consequently be held to refer to the only antecedent which can make *sense* of the indictment, that is, to *Wavertree*.”

But the court will give effect to the time and place alleged in the venue as applicable to subsequent parts of the indictment when no other place is named to which they may equally, or, as the case may be, directly refer.<sup>1</sup>

Although the allegation of a specific time and place for each material fact is thus important, it never is necessary (except in the cases hereinafter mentioned) that they should be laid according to the truth; for if the time stated is proved to be previous to the finding of the indictment, and within the time limited for preferring it (where any time is limited), and the place stated (not being matter of local description) is also proved to be within the county, or other extent of the court's jurisdiction, a variance between the indictment and evidence as to the time

<sup>1</sup> *Jeffries v. Commonwealth*, 12 Allen, 145, 151, 152. *Commonwealth v. Lamb*, 1 Gray, 493. *Commonwealth v. Crowther*, 117 Mass. 116. *Rex v. Napper*, 1 Moody C. C. 44. *Rex v. Hargrave*, 5 C. & P. 170; 1 Nev. & Man. M. C. 299.

when and the place where the offence was committed is not material.<sup>1</sup>

There are, however, some exceptions to this rule :

1. The dates of bills of exchange and other written instruments must be truly stated when necessarily set out.

2. Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered.

3. If any time stated in the indictment is to be proved by matter of record, it must be truly stated.

4. If the statute upon which the indictment is founded give the penalty to the town in which the offence was committed, the name of the town must be truly stated.

5. If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated.

6. Where a place named is part of the description of a written instrument, or is to be proved by matter of record, it must be truly stated.

7. If the place where the fact occurred be a necessary ingredient in the offence, it must be truly stated.

And the slightest variance in these several respects, between the indictment and the evidence, will be fatal, and the defendant must be acquitted.<sup>2</sup>

<sup>1</sup> The time and place laid in an indictment are form and circumstance only, and not material in point of proof ; and evidence of the offence charged on any other day before the indictment was found, or at any other place within the county, except in matters of local description, will support the indictment. *Rex v. Charnock*, 12 Howell State Trials, 1398, per Holt, C. J. *Commonwealth v. Campbell*, 103 Mass. 439. *Commonwealth v. Tolliver*, 8 Gray, 386. *Commonwealth v. Creed*, 8 Gray, 387.

<sup>2</sup> 2 Gabbett Crim. Law, 226, 227. Archb. Crim. Pl. 53, 54, 19th ed.

## CHAPTER IX.

CERTAINTY AS TO THE FACTS AND CIRCUMSTANCES  
CONSTITUTING THE OFFENCE.

"In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation." Const. U. S. Amend. vi.

"It is generally a good rule in indictments, that the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court, that the indictors have not gone upon insufficient premises." 2 Hawk. P. C. ch. 25, § 57.

THE salutary rule of the common law, 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 fulness, that he may be fully prepared to meet, and, if he can, to answer 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 country, by the highest authority known to the laws, namely, an express provision in the Constitution of the United States that "the accused shall enjoy the right to be informed of the nature and cause of the accusation;"<sup>1</sup> or, as it is

<sup>1</sup> In *United States v. Mills*, 7 Peters, 142, this constitutional right was construed to mean, that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States*

expressed in other Constitutions, that he shall not "be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him."<sup>1</sup> The object of this provision was to secure substantial privileges and benefits to parties criminally charged; not to require particular forms except where they are necessary to the purposes of justice and fair dealing towards persons accused, so as to insure a full and fair trial.<sup>2</sup>

By our criminal law the accused cannot obtain a new trial on the ground of surprise, or on the ground that, if he had more accurately known the offence with which he was charged, he could have satisfactorily established his innocence. Particularity in the indictment is, therefore, required. Both the jury and the prisoner ought to know precisely what the charge is, which the former have to investigate, and the latter has to meet.<sup>3</sup>

Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment must, therefore, contain an allegation of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal they must always be done with a crimi-

*v. Cook*, 17 Wall. 174, that "every ingredient of which the offence is composed must be accurately and clearly alleged." *United States v. Cruikshank*, 92 U. S. 557, 558.

<sup>1</sup> *Commonwealth v. Phillips*, 16 Pick. 213. *Commonwealth v. Brown*, 13 Met. 368. *Commonwealth v. Blood*, 4 Gray, 32, 33.

<sup>2</sup> *Commonwealth v. Holley*, 3 Gray, 459. *Commonwealth v. Hall*, 97 Mass. 573, 574.

<sup>3</sup> Per Cockburn, C. J., in *Regina v. Jarrald*, Leigh & Cave C. C. 307, 308.

nal mind, the existence of that criminality of mind must always be alleged.<sup>1</sup> If, in order to support the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negated, that negative must be alleged. The first allegation thus mentioned is always contained in the preliminary assertion that the accused did the thing or things complained of "fraudulently," "falsely," "unlawfully," or "feloniously" &c. And that is the whole effect of this preliminary allegation.<sup>2</sup>

The necessity and the form of the allegations may be exemplified in an indictment for false pretences or perjury. To support a charge of obtaining money &c., by false pretences, it is necessary to show, and, therefore, to allege, that the prisoner, with a criminal

<sup>1</sup> The Court of Queen's Bench has very recently observed that the mens rea "is an essential ingredient in an offence. It is true it may be dispensed with by statute, but the terms which should induce us to infer that it is dispensed with must be very strong." *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337.

<sup>2</sup> Judgment of Brett, J. A., in *Regina v. Aspinall*, 2 Q. B. D. 56 57. In a very recent celebrated case, this accomplished judge said: "In that case almost every sentence of the judgment delivered by me on behalf of Lord Justice Mellish and myself was, I may venture to say, the result of many cases; as to each sentence a laborious examination of cases was made, and it was intended to express what we considered to be the result of those cases, and I cannot find better words now in which to express the result." *Bradlaugh v. The Queen*, 3 Q. B. D. 626.

mind, stated something which, if true, would be an existing fact; that he did so with intent to procure the possession of money &c.; that he knew his statement was — that is to say, that so far as his mind was concerned he intended that his statement should be — false; that by the statement he did so act on the mind of the prosecutor as that he did thereby obtain money &c.; that the statement was in fact untrue, in the sense of being incorrect. And both the last allegations are necessary facts of the charge; for although the accused had a criminal intent, and believed that his statement was false, yet if in fact either the prosecutor was not thereby persuaded, or by chance the statement was not incorrect, the charge is not supported, the crime is not committed. And it was for the want of the allegation that the pretences relied on by the prosecutor as the material false ones were in fact untrue, that the indictment was held bad in *The King v. Perrott*.<sup>1</sup> So in perjury it is a necessary allegation that the statement on oath relied upon as perjury was false in fact, in the sense of being incorrect in fact. Though the accused believed he was swearing a falsehood, and was thereby morally perjured, yet if by chance his statement were true in fact, he could not be convicted of perjury.<sup>2</sup>

There is another rule with regard to pleading which must be enunciated, the rule with regard to the effect to be given to pleadings after verdict. It is thus stated in *Heymann v. The Queen*:<sup>3</sup> “Where

<sup>1</sup> 2 M. & S. 379.

<sup>2</sup> Judgment of Brett, J. A., in *Regina v. Aspinall*, L. R. 2 Q. B. D. 57.

<sup>3</sup> L. R. 8 Q. B. 102, 105; 12 Cox C. C. 383.

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, then, after verdict, the *defective averment*, which might have been bad on demurrer, is cured by the verdict." Upon this it should be observed that the averment spoken of is "an averment imperfectly stated," i. e. an averment which is stated but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment. If there be such a total omission, the verdict is no cure. It is one thing to cure an imperfect averment, and another to supply an omission. And when it is said that the verdict could not have been found without proof of the averment, the meaning is, the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused.<sup>1</sup>

Another rule is, that in considering an indictment on a writ of error, and, therefore, after verdict, it is not necessary for, and it is not open to, the court to inquire what facts were proved at the trial. The question is, whether assuming the facts which are accurately alleged in the indictment to have been proved as alleged, and the facts which are imperfectly alleged to have been proved in a sense adverse to the accused, the charge would be supported. If it could, the indictment, on error after verdict, is sufficient. But if, assuming both the above-mentioned

<sup>1</sup> Judgment of Brett, J. A., in *Regina v. Aspinall*, 2 Q. B. D. 57, 58.

allegations of facts, the perfect and imperfect allegations, to be proved respectively as before stated, the charge would not be supported for want of the existence of some other allegation, affirmative or negative, which has been totally omitted, then the indictment is bad notwithstanding the verdict. The verdict is only to be taken as conclusive evidence that the facts alleged in the indictment accurately and inaccurately were proved in a sense adverse to the accused. If those facts so proved would not support the charge, the indictment is bad on a writ of error.<sup>1</sup>

It is undoubtedly a rule that an indictment for any offence must show that the offence has been committed, and must show how it has been committed; and if these particulars are omitted judgment will be arrested. It is not enough to indict a person for that he committed murder or murdered A. B.; at common law it must be shown what he did; so that if the acts charged are proved to have been perpetrated, it would be shown that he committed murder; in other words, it is not enough to allege that he committed the crime, it must be shown how he committed it. Similarly in an indictment for burglary, it is not enough to allege that the accused committed a burglary, or to allege that he committed a burglary at the house of A.; it must be charged that he burglariously entered between certain hours, with other circumstances showing how the crime was committed, and those facts must be stated which constitute the crime said to have been committed. For this rule three reasons are assigned, all

<sup>1</sup> Judgment of Brett, J. A., in *Regina v. Aspinall*, 2 Q. B. D. 58.

of which are of a substantial character. One of these reasons is, that the person indicted for the commission of a crime may know what charge he has to meet; if he were charged with murder or burglary generally, he would not know what particular act was alleged against him, and what he had to meet. Another reason is that, if convicted or acquitted on an indictment of that kind, the accused could not plead or prove, with the same facility as otherwise he might, a plea of *autrefois convict* or *autrefois acquit*. The third reason is, that a defendant is entitled to take the opinion of the court before which he is indicted by demurrer, or by motion in arrest of judgment, or the opinion of a Court of Error by writ of error, on the sufficiency of the statements in the indictment. It is true that a defendant has the decision of the judge presiding at the trial as to the validity of the indictment, yet it is not unreasonable that he should be at liberty in some way to question the decision of that judge. These three reasons clearly exist with reference to the form of indictment, which accordingly must show not only that the accused committed the offence, but must also state the facts which constitute it.<sup>1</sup>

It follows from this principle, that wherever the offence consists of words written or spoken, those words must be stated in the indictment; if they are not, it will be defective upon demurrer, in arrest of judgment or upon writ of error. Accordingly the Court of Appeal determined that in an indictment for publishing an obscene book, it is not sufficient to

<sup>1</sup> See the Judgment of Bramwell, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 615, 616.

describe the book by its title only, but the words complained of must be set out; and if they are omitted, the defect is not aided by verdict, and the indictment is bad in arrest of judgment or on error.<sup>1</sup>

An indictment must contain a certain description of the crime and precise and technical allegations of the facts and circumstances which constitute it, without inconsistency or repugnancy, so as to identify the accusation, that the defendant may be tried in a court of appellate jurisdiction for one and the same offence as in a court of the first instance,<sup>2</sup> and lest the grand jury should find an indictment for one offence and the defendant be put on trial for another without any authority.<sup>3</sup> These precautions and precision in pleading are also necessary in order that the defendant may know what crime he is called upon to answer, and whether or not the facts and circumstances constitute an indictable offence, to the end that he may demur or plead to the indictment accordingly, as well as that the jury may appear to be warranted in their conclusion of "guilty" or "not guilty" upon the premises delivered to them; and that the court may see a definite offence on the record and pronounce the judgment and award the punishment which the law prescribes. This precision in pleading is also necessary, in order that the conviction or acquittal of the defendant may insure his subsequent protection, should he again be questioned on

<sup>1</sup> *Bradlaugh v. The Queen*, 3 Q. B. D. 607, reversing the judgment of the Queen's Bench Division, 2 Q. B. D. 569.

<sup>2</sup> *Commonwealth v. Blood*, 4 Gray, 31. *Commonwealth v. Phelps*, 11 Gray, 72. *Commonwealth v. Burke*, 14 Gray, 81.

<sup>3</sup> *Commonwealth v. Dean*, 109 Mass. 352.

the same ground, and that he may be enabled to plead his conviction or acquittal, or a pardon, of the same offence in bar of any subsequent proceedings.<sup>1</sup> And finally that the public may know what law is to be derived from the record.<sup>2</sup> These are the requisites of a good indictment. They were thus tersely stated by Chief Justice Shaw: "Whilst it is important to the administration of public justice, and the reasonable execution of the laws, that indulgence should not be too readily yielded to mere technical niceties and subtleties, it is also important that every man accused of crime should have a reasonable opportunity to know what the charge is, that he may not be called to meet evidence at the trial that he could not have anticipated from the charge, that the court may know what judgment to render, and that the party tried, and either acquitted or convicted, may be enabled by reference to the record to shield himself from any future prosecution for the same offence."<sup>3</sup>

The general theory and purposes of an indictment may be thus described. Every offence consists of certain acts or circumstances committed or omitted

<sup>1</sup> Lord Chief Justice De Grey in delivering the unanimous opinion of all the judges in the House of Lords on a writ of error brought by the defendant in *Rex v. Horne*, 2 Cowp. 682, to reverse the judgment of the Court of King's Bench. *Regina v. Rowed*, 3 Q. B. 180; 2 G. & D. 518. *White v. The Queen*, Irish Rep. 10 C. L. 526; 13 Cox C. C. 318. *Rex v. Morley*, 1 Y. & Jerv. 225. *Regina v. Bidwell*, 1 Denison C. C. 227. *Commonwealth v. Maxwell*, 2 Pick. 143. *Commonwealth v. Child*, 13 Pick. 202. *Commonwealth v. McLoon*, 5 Gray, 92, 93. *United States v. Cook*, 17 Wall. 174. *United States v. Reese*, 92 U. S. 225. *United States v. Cruikshank*, 92 U. S. 558.

<sup>2</sup> *Rex v. Hollond*, 5 T. R. 623. *Rex v. Morley*, 1 Y. & Jerv. 224.

<sup>3</sup> *Commonwealth v. Phillips*, 16 Pick. 214.

under certain circumstances. The criminal nature of an offence is a conclusion of law from the facts and circumstances of the case. The indictment, therefore, should set out precisely all the facts and circumstances which render the defendant guilty of the offence charged, otherwise the law resulting from the facts would be a question for the jury.<sup>1</sup> The case of *The King v. Everett*<sup>2</sup> well illustrates this principle. Lord Tenterden, C. J.: "The information alleges that the defendant was a person employed in the service of the customs, and that it was his duty as such person so employed in the service of the customs, to arrest and detain all such goods and merchandises as should within his knowledge be imported into the country, which upon such importation would become forfeited by virtue of any Acts of Parliament. The allegation that the defendant 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 to have been stated in the information. 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 clearly is 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. There is not any fact stated in consequence of which the law casts on the

<sup>1</sup> *Regina v. Bidwell*, 1 Denison C. C. 227. *Regina v. Nott*, 4 Q. B. 783, per Coleridge, J. *Commonwealth v. Slack*, 19 Pick. 307.

<sup>2</sup> 8 B. & C. 114; 2 M. & R. 35.

defendant the duty of making seizures." Mr. Justice Bayley: "By the statute three descriptions of persons are authorized to seize, and the information fails to bring the defendant within either of them. It merely states that he was employed in the service of the customs, and that it was his duty to seize. The latter allegation is matter of law; but there are no facts stated to show that it was his duty to seize: there is a conclusion drawn, but there are no premises from which to draw it."<sup>1</sup>

Each count in an indictment ought to charge one single crime. The reason given for this by Lord Chief Justice Holt is, that "*each offence requires a separate and distinct punishment according to the quantity of the offence, and it is not possible for the court to proportion the fine or other punishment to it, unless it is singly and certainly laid.*" Thus, a count for extortion ought to charge a single offence only; because every extortion from every particular person is a separate and distinct offence, and each offence requires a separate and distinct punishment, and therefore a count charging the defendant with extorting divers sums exceeding the ancient rate for ferrying men and cattle over a river is bad on motion of arrest of judgment.<sup>2</sup>

Notwithstanding these general rules, a different *degree* of particularity is required in relation to different crimes. And although Lord Mansfield laid

<sup>1</sup> This case was stated and followed in *United States v. Stowell*, 2 Curtis C. C. 153, 161. Similar decisions were made in the cases of *State v. Fitts*, 44 N. H. 621, and *Commonwealth v. Doherty*, 103 Mass. 443.

<sup>2</sup> *Rex v. Roberts*, Carth. 226.

down the rule that every crime ought to appear on the record with "scrupulous certainty,"<sup>1</sup> yet where the crime cannot be stated with *complete* certainty, it is sufficient to state it with such certainty as it is capable of.<sup>2</sup> Thus in the case of *Commonwealth v. Webster*,<sup>3</sup> it was decided that a count in an indictment for murder was sufficient, which charged that the prisoner committed the crime at a certain time and place, "in some way and manner, and by some means, instruments, and weapons, to the jurors unknown," when the circumstances of the case will not admit of greater certainty in stating the means of death. And when a criminal purpose is intended, but the offenders have not proceeded far enough to fix the particular individuals to be victimized, they need not be particularly named: thus where a conspiracy was entered into to injure persons who should on a future day purchase stock, it was held that it was unnecessary to specify the particular persons intended to be injured.<sup>4</sup> In conspiracy the general allegation that

<sup>1</sup> *Rex v. White*, Cald. 187.

<sup>2</sup> Purcell Crim. Pl. 41. 2 Russell on Crimes, 44 note, 4th ed.

<sup>3</sup> 5 Cush. 295, 323. *Commonwealth v. Desmarteau*, 16 Gray, 12. *Commonwealth v. Strangford*, 112 Mass. 292.

<sup>4</sup> *Rex v. De Berenger*, 3 M. & S. 67. Lord Ellenborough, C. J.: "The defendants could not, except by a spirit of prophecy, divine who would be the purchasers on a subsequent day." *Regina v. Aspinall*, 2 Q. B. D. 59, 60. *White v. The Queen*, Irish Rep. 10 C. L. 526; 13 Cox C. C. 318. In the case of *King v. The Queen*, 7 Q. B. 782, 795, the defect, on which the Court of Exchequer Chamber acted, was that the indictment charged a conspiracy to cheat and defraud "certain liege subjects being tradesmen." It was held that such an allegation in such form in pleading meant "certain definite tradesmen alleged to be known to the defendants at the time of the criminal agreement," and, therefore, that such definite tradesmen

the defendants agreed to use "false pretences" is sufficient. The agreement in those cases may not have determined what the pretences should be; but in murder or burglary it is otherwise. In those crimes there must be an intent to murder some particular individual, or to break into some particular house.<sup>1</sup>

Certainty to a certain intent in general, however, is all that is required.<sup>2</sup> This certainty has been construed to mean, "what upon a fair and reasonable construction may be called certain, without recurring to *possible* facts, which do not appear."<sup>3</sup> Therefore, in cases where this degree of certainty is required, everything which the pleader should have stated, and which is not either expressly alleged, or by necessary implication included in what is alleged, must be presumed against him.<sup>4</sup> "That which is apparent to the court by necessary collection out of the record need not to be averred."<sup>5</sup>

The court will construe the words of a pleading according to their ordinary and usual acceptance, and technical terms according to their technical meaning. An indictment is not vitiated by ungrammatical language or clerical errors, if the real meaning is sufficiently expressed. An indictment is not objectionable as ambiguous or obscure, if it be clear

ought, in describing the conspiracy, to be named, or an excuse be averred for not naming them.

<sup>1</sup> Regina v. Aspinall, 2 Q. B. D. 60. Per Crompton, J., in Regina v. Jarrald, Leigh & Cave C. C. 303.

<sup>2</sup> Co. Litt. 303 a. Rex v. Long, 5 Rep. 121 a.

<sup>3</sup> Per Buller, J., in Rex v. Lyme Regis, 1 Dougl. 159.

<sup>4</sup> Archb. Crim. Pl. 58, 19th ed. Purcell Crim. Pl. 42.

<sup>5</sup> Co. Litt. 303 b.

enough according to reasonable intendment or construction, though not worded with absolute precision.<sup>1</sup> "And if there is no necessary ambiguity in the construction of an indictment," said Chief Justice Tindal, "we are not bound to create one, by reading the indictment in the only way which will make it unintelligible."<sup>2</sup>

Words must be referred to that antecedent to which the tenor of the indictment and the principles of law required it should refer, whether exactly according to the rules of syntax or not.<sup>3</sup> "The court will not arrest the course of justice merely because pleaders are careless or unskilful in punctuation, or do not make such a collocation of words as renders their meaning perfectly perspicuous on the first reading."<sup>4</sup>

These rules are very wide in their terms. A reference to the cases will show their scope and application. In *Commonwealth v. Hall*,<sup>5</sup> the indictment was for a nuisance, by erecting in a public highway "a number of sheds and buildings," which could easily have been separately described. In *Commonwealth v. Brown*,<sup>6</sup> the indictment was for fraudulently con-

<sup>1</sup> *Regina v. Stokes*, 1 Denison C. C. 307; 2 C. & K. 536. *Commonwealth v. Butler*, 1 Allen, 4. Per Lord Denman in *O'Connell v. The Queen*, 11 Clark & Fennelly, 380, 381.

<sup>2</sup> *Wright v. The King*, 1 Ad. & El. 448. "There is no rule that we are perforce to read the expressions of an indictment so as to make nonsense of it, and murder a plain and intelligible meaning." Per Williams, J., in *Regina v. King*, 7 Q. B. 795.

<sup>3</sup> *Commonwealth v. Call*, 21 Pick. 515. *Jeffries v. Commonwealth*, 12 Allen, 152. *Commonwealth v. Kelly*, 123 Mass. 417.

<sup>4</sup> *Commonwealth v. Price*, 10 Gray, 476.

<sup>5</sup> 15 Mass. 239.

<sup>6</sup> 15 Gray, 189.

veying real estate without giving notice of an encumbrance thereon, and merely described it as "a certain parcel of real estate situated in Salem in the county of Essex." Bigelow, C. J.: "There is nothing by which to fix the identity of the offence. The indictment lacks certainty to a common intent. The defendant may have owned other parcels of land in the city of Salem, which he conveyed to the prosecutor on the day alleged. From the indictment alone, therefore, it is impossible to say with certainty to what parcel of land the charge relates, or to know that the conveyance proved at the trial was of the same parcel as that on which the indictment was founded. Whenever, in charging an offence, it is necessary to describe a house or land, the premises must be set out in terms sufficiently certain to identify them." In *Commonwealth v. Maxwell*,<sup>1</sup> the indictment, which was held bad for not stating the number of persons entertained by the defendant on the Lord's day, was upon a statute which made him liable to a penalty for each person so entertained.

But these general rules are not without exceptions; for there are classes of cases to which they do not apply. Wherever the crime consists of a series of acts, they need not be specially described. An offence is in its nature indivisible. It may consist of a series of acts, but that series constitutes but one offence. It may not only require a series of acts, but a duration of time to constitute the offence; but when the acts and the time are properly proved, the offence is single and indivisible. In general, when the charge is

<sup>1</sup> 2 Pick. 29. This is one of the best cases to be found in the books.

that a certain trade has been carried on, or that the defendant has sustained a particular character, as that of a common barrator, scold &c., it is not essential to set out the particular acts which go to make up the trading or course of life. It would be otherwise if each were a crime, or if, by the statute definition, a fixed number of separate acts made up the crime.<sup>1</sup> So the offence of being "a common seller" of intoxicating liquor without license, where the indictment charged the offence generally, was held, from the nature of the offence, well charged.<sup>2</sup>

There is another class of cases which form an exception to the general rule. It is sufficient to charge a person generally with keeping a house of ill fame, a disorderly house, or a common gaming-house. Although all the acts which make up these general offences, are in themselves unlawful, it is not necessary to set them forth. The several acts may be indicted and punished separately, but the keeping the house is a distinct offence, and as such liable to punishment.<sup>3</sup>

In an indictment for soliciting or inciting to the commission of a crime, or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance.<sup>4</sup> With respect to the descrip-

<sup>1</sup> *United States v. Fox*, 1 Lowell, 199, 201. *Commonwealth v. Davis*, 11 Pick. 432. *Commonwealth v. Pray*, 13 Pick. 362. *Stratton v. Commonwealth*, 10 Met. 217, 220.

<sup>2</sup> *Commonwealth v. Pray*, 13 Pick. 362. *Commonwealth v. Odlin*, 23 Pick. 275.

<sup>3</sup> *Rex v. Higginson*, 2 Burr. 1232. Per Holroyd, J., in *Rex v. Rogier*, 1 B. & C. 272, 275. *Commonwealth v. Stahl*, 7 Allen, 305. *Commonwealth v. Pray*, 13 Pick. 362.

<sup>4</sup> *Rex v. Higgins*, 2 East, 5.

tion of the solicitation or endeavor it seems that general words are sufficient, because the endeavor, attempt, or solicitation is in general made up of a number of petty circumstances, which cannot be set out on the record.<sup>1</sup>

It is a principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.<sup>2</sup> Where a statute, for instance, makes the maliciously killing of cattle a felony, it is not sufficient in an indictment on the statute to charge the defendant with killing “cattle” generally, but the species of cattle, as horse, mare, gelding, cow, heifer, ox &c., must be stated.<sup>3</sup>

A general mode of pleading is allowed where great prolixity is thereby avoided.<sup>4</sup> This rule of pleading is indefinite in its form; its extent and application, however, may be collected with some degree of precision from the examples by which it is illustrated in the books. The case of the *United States v. Gooding*<sup>5</sup> is an apt illustration of the rule. In an indictment under the statute against the owner of a ship for fitting her out for an illegal voyage, it is not necessary

<sup>1</sup> *Rex v. Fuller*, 1 B. & P. 180; 2 Leach C. C. 790. *Commonwealth v. McGovern*, 10 Allen, 193. 1 Stark. Crim. Pl. 146.

<sup>2</sup> *United States v. Cruikshank*, 92 U. S. 558. *Commonwealth v. Chase*, 125 Mass. 202.

<sup>3</sup> *Rex v. Chalkley*, Russell & Ryan C. C. 258.

<sup>4</sup> Co. Litt. 303 b. 2 Wms. Saund. 411 note 4. *Mints v. Bethil*, Cro. Eliz. 749. *Gray v. Friar*, 15 Q. B. 909.

<sup>5</sup> *United States v. Gooding*, 12 Wheat. 460, 475.

to specify the particulars of the fitting out, which is a compound of various minute acts, almost incapable of exact specification; it is sufficient to charge the offence in the words of the statute.

In criminal pleading, in some cases, an act may be stated either according to the fact, or according to its legal effect or operation.<sup>1</sup> Thus, it is a general rule, in civil actions and in misdemeanors, that when a declaration or an indictment alleges that a person did an act, such allegation is sustained by proof that he caused it to be done by another.<sup>2</sup> It is not necessary, in such case, to allege that the act was done through the agency of another.<sup>3</sup> An indictment which charges the defendant with publishing a libel is supported by evidence that he procured another person to publish it.<sup>4</sup> And an indictment which charges the defendant with selling lottery tickets contrary to law, is supported by proof that he sold them by his servant.<sup>5</sup> So an indictment which alleges that the defendant sold intoxicating liquor is supported by evidence that he sold it by his servant or agent.<sup>6</sup> And in all felonies in which the punishment of the principal in the first

<sup>1</sup> *Rex v. Healey*, 1 Moody C. C. 1.

<sup>2</sup> "The principle of common law, *Qui facit per alium facit per se*, is of universal application, both in criminal and civil cases." Per Hosmer, C. J., in *Barkhamsted v. Parsons*, 3 Conn. 1. Note to *Rex v. Almon*, 1 Lead. Crim. Cas. 149.

<sup>3</sup> *Commonwealth v. Bayley*, 7 Pick. 279. *Commonwealth v. Park*, 1 Gray, 554. *Brucker v. Fromont*, 6 T. R. 659.

<sup>4</sup> *Rex v. Gutch*, M. & M. 437.

<sup>5</sup> *Commonwealth v. Gillespie*, 7 S. & R. 469, 478.

<sup>6</sup> *Commonwealth v. Park*, 1 Gray, 553. A sale to an agent of an undisclosed principal may be alleged as a sale to either. *Commonwealth v. Kimball*, 7 Met. 308. *Commonwealth v. McGuire*, 11 Gray, 460.

degree and of the principal in the second degree is the same, the pleader may charge the principal in the second degree either as principal in the first degree, or, as being present, aiding and abetting, at his option.<sup>1</sup>

An indictment which may apply to either of two different definite offences, and does not specify which, is bad.<sup>2</sup>

<sup>1</sup> The Coal-Heavers' Case, 1 Leach C. C. 64. Commonwealth v. Knapp, 9 Pick. 496. Commonwealth v. Chapman, 11 Cush. 422. Brister v. State, 26 Alabama, 108, 131. Regina v. Crisham, C. & Marsh. 187. Regina v. Downing, 1 Denison C. C. 52; 2 C. & K. 382. Commonwealth v. Desmarteau, 16 Gray, 14.

<sup>2</sup> Rex v. Marshall, 1 Moody C. C. 158. Contra, Larned v. Commonwealth, 12 Met. 241.

## CHAPTER X.

## INDUCEMENT.

**The office of an inducement is explanatory, and does not, in general, require exact certainty.<sup>1</sup>**

By the term *inducement* is meant that part of a declaration or an indictment which contains a statement of the facts out of which the charge arises, or which are necessary or usual to make that charge intelligible.<sup>2</sup> In short, it includes all the allegations which do not involve the special charge alleged against the defendant;<sup>3</sup> and although it is usual with good pleaders to introduce these facts as a preliminary statement, since by so doing the whole charge is rendered more perspicuous, yet the pleading is equally good in law, though the inducement is inserted at the very end of the declaration, or be interwoven, by way of parenthesis, with the charge itself;<sup>4</sup> for it will then, as Baron Parke expressed it, "be inducement put in the wrong place."<sup>5</sup> And the same principle applies to an indictment.

There is a distinction between the allegation of

<sup>1</sup> *The City v. Lamson*, 9 Wall. 482. *Lord v. Tyler*, 14 Pick. 165.

<sup>2</sup> Per Tindal, C. J., in *Taverner v. Little*, 5 Bing. N. C. 685. Per Lord Abinger, C. B., in *Wright v. Lainson*, 2 M. & W. 744.

<sup>3</sup> Gould Pl. ch. 3, § 9.

<sup>4</sup> Per Lord Abinger, C. B., in *Dunford v. Trattles*, 12 M. & W. 534. 1 Taylor Ev. § 219, 1st ed.

<sup>5</sup> *Lewis v. Alcock*, 3 M. & W. 190.

facts constituting the offence, and those which must be averred by way of inducement. In the former case, the circumstances must be set out with particularity; in the latter, a more general allegation is allowed. "Inducement to an offence does not require so much certainty."<sup>1</sup> As in an indictment for escape "debito modo commissus" is enough, without showing by what authority, and even "commissus" is sufficient.<sup>2</sup>

Unless, indeed, some general allegations were allowed, embracing both fact and law in such cases, it would tend greatly to the prolixity of indictments and pleadings. Thus, in an indictment for disobedience to an order of justices for payment of a church rate, made under the statute, an averment, by way of inducement, that a rate was *duly made* as by law required, and afterwards duly allowed, and that the defendant was by it duly rated, was held sufficient, without setting out the facts which constituted the alleged due rating &c., although in the statement of the offence itself it would not have been sufficient.<sup>3</sup> Parke, B.: "The *offence* for which the defendant is indicted is the disobedience of *the order*; the introductory facts are alleged only to show that the justices had jurisdiction to make that order, and that the order was therefore obligatory, and they fall within the description of *inducement*."

<sup>1</sup> Com. Dig. Indictment, G. 5. *Regina v. Wyatt*, 2 Ld. Raym. 1191. *Commonwealth v. Reynolds*, 14 Gray, 90. *Regina v. Westley*, Bell C. C. 193.

<sup>2</sup> *Rex v. Wright*, 1 Vent. 170.

<sup>3</sup> *Regina v. Bidwell*, 1 Denison C. C. 222; 2 C. & K. 564. An averment that an act is "duly" done is pleading a conclusion of law rather than a fact. *Braun v. Sauerwein*, 10 Wall. 219, 223.

In pleading in civil actions it is laid down that, in general, traverse is not to be taken on matter of inducement, that is, matter brought forward only by way of explanatory introduction to the main allegations; but this is open to many exceptions, — for it often happens that introductory matter is in itself essential and of the substance of the case, and in such instances, though in the nature of inducement, it may nevertheless be traversed.<sup>1</sup> And the same principle applies in criminal pleading. The plea of not guilty traverses every material allegation in the indictment, whether that allegation is pleaded by way of inducement or otherwise.

<sup>1</sup> Stephen Pl. 222, 223, 7th ed.

## CHAPTER XI.

## ARGUMENTATIVENESS.

"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." 2 Hawk. P. C. ch. 25, § 60.<sup>1</sup>

"THE matter of the indictment ought to be full, express, and certain, and shall not be maintained by argument or implication."<sup>2</sup> In a recent case, Chief Justice Bigelow said: "We cannot support a complaint or indictment by connecting together its different parts, so as to eke out an essential allegation argumentatively and by inference."<sup>3</sup> And Mr. Justice Ashhurst, in delivering the opinion of the Twelve Judges: "The law in criminal cases 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."<sup>4</sup>

<sup>1</sup> *Rex v. Higgins*, 2 East, 20. *Rex v. Cheere*, 7 D. & R. 461, 464; 4 B. & C. 902, 905. *Commonwealth v. Shaw*, 7 Met. 57. *Moore v. Commonwealth*, 6 Met. 243, 244.

<sup>2</sup> *Vaux's Case*, 4 Rep. 44 b. *Rex v. Knight*, 1 Salk. 375. *Commonwealth v. Dudley*, 6 Leigh, 613. *State v. Perry*, 2 Bailey, 17. *Commonwealth v. Lannan*, 1 Allen, 590. *Commonwealth v. Shaw*, 7 Met. 52, 56. *Commonwealth v. Whitney*, 5 Gray, 85.

<sup>3</sup> *Commonwealth v. O'Donnell*, 1 Allen, 594.

<sup>4</sup> *Rex v. Williams*, 1 Leach C. C. 534.

But an allegation, by implication, does sometimes supply the omission of a direct averment. Thus, in an indictment on a statute which makes it felony to aid and assist any prisoner in an attempt to make his escape, it is not necessary to state at all, by direct averment, that the prisoner attempted to escape; an allegation that the defendant assisted him to do so is sufficient.<sup>1</sup> The indictment in a case reported in Keilway<sup>2</sup> was for felony, in breaking the prison, and *abetting* and *commanding* the prisoner to go at large, but it did not state that the prisoner actually did go at large, and it was decided that as there was no escape expressly stated in the indictment, there could be no felony; for that the *abetting* and *commanding* did not import that there was an actual escape; but upon this case it is to be observed, that *abetting* and *commanding* to do an act are very different from *aiding* and assisting in the act: a man may command another to do an act which is never done; when the act is done, the command precedes the act; and therefore the averment of a command does not imply a subsequent execution of that command; but no man can aid or assist another in an act unless the act be done; and therefore the averment that the prisoner aided and assisted in the attempt necessarily implies that the attempt was made.

“Instances of this kind,” says Hawkins, “are so very frequent, that there is scarce any case which mentions exceptions taken to indictments, without being grounded on this rule: ‘That in an indict-

<sup>1</sup> Rex v. Tilley, 2 Leach C. C. 662. Per Lord Campbell, C. J., in Holloway v. The Queen, 17 Q. B. 325; 2 Denison C. C. 293.

<sup>2</sup> Keil. p. 87. Judgment in Rex v. Tilley, 2 Leach C. C. 669.

ment nothing material shall be taken by intendment or implication.' Yet the law will not admit of too great a nicety of this kind. But I cannot find any certain general rule whereby it may be known in what cases an exception of this kind shall be taken to be so over-nice that the court will not regard it. All therefore that I shall add on this head is this, that as on the one hand the law will not suffer a man to be condemned of any crime whereof the jury have not expressly found him guilty, by any argument or implication from what they have so found; so on the other hand it will not suffer a criminal to escape on so trifling an exception, which it would be absurd and ridiculous to take notice of; for nimia subtilitas in jure reprobatur. But the judgment hereof cannot but be in a great measure left to the discretion of the judges, who from the circumstances of each particular case, the comparison of precedents, and the plain reason of the thing, seem always to have endeavored to go within these rules as nearly as possible." <sup>1</sup>

And again: "It being the strict rule of law in these cases to have the substance of the fact expressed with precise certainty, the judges will suffer no argumentative certainty whatsoever to induce them to dispense with it. For if they should once be prevailed with to do it in one case, the like indulgence would be expected from them in others nearly resembling it, and then in others resembling those; and no one could say where this might end, which could not but endanger the subverting of one of the most funda-

<sup>1</sup> 2 Hawk. P. C. ch. 25, §§ 60, 61.

mental principles of the law, by giving room to judges, by arguments from what the jury have found, to convict a man of a fact which they have not found.”<sup>1</sup>

<sup>1</sup> 2 Hawk. P. C. ch. 23, § 82. Per Coleridge, J., in *Regina v. Botfield*, C. & Marsh. 153. 154.

## CHAPTER XII.

## DISJUNCTIVE ALLEGATIONS.

**In an indictment the fact is never laid in the disjunctive. 2 Roll. Ab. 81.**

IT may be deduced as a corollary from the rule which requires the charge to be direct and positive, that an indictment charging a party *disjunctively* is void; for, where different offences are thus included in the charge, it does not appear, either directly or with certainty, of which of them the grand jury have accused the defendant.<sup>1</sup> The objection to the alternative is that there is no charge at all. The defendant did one thing or the other. But there is no specific offence charged.<sup>2</sup> An indictment stating that the defendant "murdered *or* caused to be murdered" is a sufficient example; these are distinct crimes, and an indictment is clearly bad, from the uncertainty whether the defendant was intended to be charged as a principal, or as an accessory before the fact.<sup>3</sup> An indictment which alleges a sale of "spirituous *or* intoxicating liquor" is bad for uncertainty.<sup>4</sup> So is

<sup>1</sup> 2 Hawk. P. C. ch. 25, § 58. 2 Gabbett Crim. Law, 200, 237.

<sup>2</sup> Per Gurney, B., in *Regina v. Bowen*, 1 Denison C. C. 28.

<sup>3</sup> 2 Hawk. P. C. ch. 25, § 58. 2 Gabbett Crim. Law, 200, 237.

<sup>4</sup> *Commonwealth v. Grey*, 2 Gray, 501. *Rex v. North*, 6 D. & R. 143. So, *levavit vel levavi causavit*, *Rex v. Stoughton*, 2 Strange, 900; *conveyed or caused to be conveyed*, *Rex v. Flint*, Cas. Temp. Hardw. 370; *forged or caused to be forged*, *Rex v. Stocker*, 5 Mod.

an information stating that the defendant imported *or* caused to be imported foreign silks.<sup>1</sup> An indictment which averred that S. made a forcible entry into two closes of meadow *or* pasture is bad.<sup>2</sup> And the same rule applies if an indictment charges the defendant in two different characters, in the disjunctive; as, quod A., existens servus *sive* deputatus, took &c.<sup>3</sup>

In Hale's Pleas of the Crown it is said that an indictment for robbery "in *or* near the highway" is good, because, "though the indictment ought to be certain, yet this is not the substance of the indictment, nor that which makes the crime."<sup>4</sup> The robbery is the same felony wherever committed. The allegation, "in *or* near the highway," may be rejected as surplusage.<sup>5</sup>

When the word "or" in a statute is used in the sense of "to wit," that is, in explanation of what 137, and 1 Salk. 342, 371; wrote and published *or* caused to be written and published, a certain libel, *Rex v. Brereton*, 8 Mod. 330; did take *or* cause to be taken, *State v. O'Bannon*, 1 Bailey, 144.

<sup>1</sup> *Rex v. Morley*, 1 Y. & Jerv. 221. It was urged that to arrest the judgment in this case would be attended with the most inconvenient consequences. "I will observe," said Garrow, B., "that 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 future, the pleader should attend to the language of the statute upon which the proceeding is adopted, instead of copying a faulty precedent."

<sup>2</sup> *Speart's Case*, 2 Roll. Ab. 81. See also *Rex v. Sadler*, 2 Chit. 519. *Davy v. Baker*, 4 Burr. 2471. *Ex parte Pain*, 7 D. & R. 678; 5 B. & C. 251.

<sup>3</sup> 2 Roll. 263. 1 Stark. Crim. Pl. 245.

<sup>4</sup> Vol. i. p. 535. *Ex parte Pain*, 5 B. & C. 254.

<sup>5</sup> *Rex v. Wardle*, 2 East P. C. 785; *Russell & Ryan C. C.* 9.

precedes, and making it signify the same thing, a complaint or indictment which adopts the words of the statute is well framed.<sup>1</sup> Thus it was held that an indictment was sufficient which alleged that the defendant had in his custody and possession ten counterfeit bank-bills *or* promissory notes, payable to the bearer thereof, and purporting to be signed in behalf of the president and directors of the Union Bank, knowing them to be counterfeit, and with intent to utter and pass them, and thereby to injure and defraud the said president and directors; it being manifest from the statute on which the indictment was framed that "promissory note" was used merely as explanatory of bank-bills, and meant the same thing.<sup>2</sup> So an information was held sufficient which alleged that the defendant feloniously stole, took and carried away a mare "of a bay *or* brown color;" the court saying that the colors named in the information were the same.<sup>3</sup> The St. 5 Eliz. ch. 4, enacts, "That it shall not be lawful to exercise a trade, except he shall be apprentice seven years, under the penalty of forty shillings per month;" and a man was indicted on this statute, for that he did exercise *artem sive mysterium &c.*; and this was held good, for the reason that "sive" is only an explanation of what precedes and makes it signify the same thing.<sup>4</sup>

It is, however, the usual practice to allege offences cumulatively, both at common law and under the de-

<sup>1</sup> Commonwealth v. Grey, 2 Gray, 502; S. C. 2 Lead. Crim. Cas. 150.

<sup>2</sup> Brown v. Commonwealth, 8 Mass. 59. State v. Ellis, 4 Missouri, 474.

<sup>3</sup> State v. Gilbert, 13 Vt. 647.

<sup>4</sup> Anon., cited in the argument in Rex v. Stocker, 5 Mod. 137.

scription contained in the statutes.<sup>1</sup> The rule was thus stated by Mr. Justice Gaston: "If an offence be cumulative with respect to the acts done, although any one of the acts be sufficient to constitute the crime, the cumulative offence may be charged."<sup>2</sup> And then the rule applies, that it is sufficient to prove so much of the indictment as shows the defendant to have been guilty of a substantive crime therein stated, without proving the whole extent of the charge.<sup>3</sup>

<sup>1</sup> 1 Stark. Crim. Pl. 246.

<sup>2</sup> *State v. Haney*, 2 Dev. & Bat. 403. *Commonwealth v. Curtis*, 9 Allen, 269. *Regina v. Bowen*, 1 Denison C. C. 22; 1 C. & K. 501. There are numerous instances where, the statute being in the disjunctive, a conjunctive statement is used in an indictment.

<sup>3</sup> This is a general rule which runs through the whole criminal law. The cases are collected in *Leading Crim. Cases*, vol. ii. p. 38, 2d ed. See also *Commonwealth v. O'Brien*, 107 Mass. 208. 1 Taylor Ev. § 225, 7th ed.

## CHAPTER XIII.

## DUPLICITY.

**Pleadings must not be double.**

IN pleading in civil actions, the rule against double-ness, or (as it is technically called) duplicity, applies both to the declaration and to subsequent pleadings. Its meaning with respect to the former is, that the declaration must not, in support of a single demand or complaint, allege several distinct matters, by any one of which that demand or complaint is sufficiently supported. With respect to the subsequent pleadings, its meaning is, that none of them shall contain several distinct answers to that which preceded it; and the reason of the rule in each case is, that such pleading tends to several issues in respect of a single claim.<sup>1</sup> *Mutatis mutandis*, the principle applies to the pleadings in criminal actions.

Duplicity is not at common law an objection to a count upon the ground of including several demands (witness the common counts), but only when the count claimed the same thing upon several independent grounds, each sufficient, as in the case of *quare impedit* setting up several presentations, or in an action upon a bond at the common law, with several breaches of condition assigned. The objection that a count is double for containing several causes of ac-

<sup>1</sup> Stephen Pl. 313, 7th ed.

tion, did not hold good. Thus, the allegation, in one count of an indictment for treason felony, of several overt acts of distinct characters, and constituting with the alleged compassings and imaginations different species of felony, is not objectionable on the ground of duplicity.<sup>1</sup>

The general rule is, that two or more crimes cannot be joined in the same count of an indictment. This rule is not only convenient in practice, but essential to the rights of the accused and important to the due administration of criminal law. But there are various exceptions which are as well settled as the rule itself. Where two crimes are of the same nature and necessarily so connected that they may, and when both are committed must, constitute but one legal offence, they should be included in one charge. Familiar examples of these are assault and battery, and burglary. An assault and battery is really but one crime. The latter includes the former. A person may be convicted of the former and acquitted of the latter, but not vice versa. They therefore must be charged as one offence. So in burglary, where the indictment charges a breaking and entry with an intent to steal, and an actual stealing, which is the common form. There is, first, the burglary; secondly, the larceny; thirdly, the compound or simple larceny; fourthly, the stealing in a dwelling-house.<sup>2</sup>

<sup>1</sup> *Shepherd v. Shepherd*, 1 C. B. 849. *Mulcahy v. The Queen*, L. R. 3 H. L. 322, per Willes, J., delivering the opinion of the judges.

<sup>2</sup> Per Parke, B., in *Regina v. Bowen*, 1 Denison C. C. 28. *Commonwealth v. Tuck*, 20 Pick. 356. *Commonwealth v. Hope*, 22 Pick. 1. *Kite v. Commonwealth*, 11 Met. 581. *Jennings v. Commonwealth*, 105 Mass. 586. *Rex v. Withal*, 1 Leach C. C. 88. *Rex v. Compton*, 3 C. & P. 418.

It is, however, the usual practice to allege offences cumulatively, both at common law and under the description contained in the statutes. The rule was thus stated by that able judge, Mr. Justice Gaston: "If an offence be cumulative with respect to the acts done, although any one of the acts be sufficient to constitute the crime, the cumulative offence may be charged."<sup>1</sup>

An indictment, which alleges that the defendant "did unlawfully offer for sale and did unlawfully sell" a lottery ticket, upon a statute prohibiting each of those acts as a separate offence, is sufficient, on demurrer. A sale, *ex vi termini*, includes an offer to sell.<sup>2</sup> An allegation that the defendant "did set up and promote" an exhibition does not make the indictment objectionable for duplicity.<sup>3</sup> So an indictment which avers that the defendant "did write and publish and cause to be written and published" a malicious libel, is not bad for duplicity, for they are the same offence.<sup>4</sup> Laying several overt acts in a count for high-treason is not duplicity, because the charge consists of compassing &c., and the overt acts are merely evidences of it;<sup>5</sup> and the same rule applies to indictments for conspiracy.<sup>6</sup>

<sup>1</sup> *State v. Haney*, 2 Dev. & Bat. 403. *Commonwealth v. Curtis*, 9 Allen, 269.

<sup>2</sup> *Commonwealth v. Eaton*, 15 Pick. 273. *Commonwealth v. Nichols*, 10 Allen, 199. *Commonwealth v. Curran*, 119 Mass. 206.

<sup>3</sup> *Commonwealth v. Twitchell*, 4 Cush. 74. *Commonwealth v. Harris*, 13 Allen, 534.

<sup>4</sup> *Rex v. Horne*, 2 Cowp. 672. 2 Gabbett Crim. Law, 234, cited in *Commonwealth v. Twitchell*, 4 Cush. 74.

<sup>5</sup> 4th Res. Kel. 8, and Appendix to the 3d ed. pp. 68, 69.

<sup>6</sup> *Rex v. Brisac*, 4 East, 171. *Mulcahy v. The Queen*, L. R. 3 H. L. 317.

Under a statute prescribing a punishment for any person who should "wilfully destroy, deface or injure" a register of baptisms &c., it was decided that a single offence only was charged in an indictment which alleged that the defendant wilfully destroyed, defaced and injured such a register. "This is one set of facts," said Tindal, C. J.; "it is all one transaction."<sup>1</sup> In a case hardly distinguishable from this it was contended that there is duplicity in the allegation that the defendant permitted swine "to go upon *and injure* the sidewalks;" that two distinct offences are thereby charged, because the by-law forbids any person to permit swine &c., under his care, "to go upon any sidewalk in the city, or otherwise occupy, obstruct, injure or encumber any such sidewalk." But the court were of opinion that only one offence was charged.<sup>2</sup> A statute prescribing the punishment of "every person who shall buy, receive or aid in the concealment of any stolen goods, knowing the same to have been stolen," describes only one offence, which may be committed either by buying, receiving or aiding in the concealment of such stolen goods. And an indictment which charges a defendant with receiving *and* aiding in the concealment of such goods charges only one offence.<sup>3</sup>

The introduction of some of the terms by which an offence is designated, into a count which charges a different and distinct offence, will not render the indictment vicious for duplicity. An indictment which alleges that the defendant did "*embezzle, steal, take*

<sup>1</sup> *Regina v. Bowen*, 1 Denison C. C. 22; 1 C. & K. 501.

<sup>2</sup> *Commonwealth v. Curtis*, 9 Allen, 266.

<sup>3</sup> *Stevens v. Commonwealth*, 6 Met. 242. *State v. Nelson*, 29 Maine, 329. *Contra State v. Murphy*, 6 Alabama, 845.

and carry away," certain goods, is not bad for duplicity as charging the two offences of embezzlement and larceny. The word "embezzle" may be rejected as surplusage, and the indictment be regarded as charging a larceny only.<sup>1</sup>

It is now well settled, though it was once held otherwise, that a man who assaults two persons at the same time may be charged in a single count with the assault upon both, and a conviction thereon is supported by proof of an assault upon either.<sup>2</sup> In felonies, also, the indictment may charge the defendant, in the same count, with felonious acts with respect to several persons, as, in robbery with having assaulted A. and B., and stolen from A. one shilling, and from B. two shillings, if it was all one act and one entire transaction; and the counsel for the prosecution will not be put to elect.<sup>3</sup>

It is a rule of pleading in civil actions that no matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition or entire point.<sup>4</sup> The same rule prevails in criminal pleading.<sup>5</sup> But care must be taken to distinguish between what is a statement of a distinct offence, and a merely redundant statement of the same offence.<sup>6</sup>

<sup>1</sup> *Commonwealth v. Simpson*, 9 Met. 138. *Jillard v. Commonwealth*, 2 Casey, 169.

<sup>2</sup> *Rex v. Benfield*, 2 Burr. 980, 983, 984. *Anon. Lofft*, 271. *Commonwealth v. O'Brien*, 107 Mass. 208. *Commonwealth v. McLaughlin*, 12 Cush. 615.

<sup>3</sup> *Regina v. Giddins, C. & Marsh.* 634, Tindal, C. J.

<sup>4</sup> *Stephen Pl.* 321, 7th ed.

<sup>5</sup> *Barnes v. State*, 20 Conn. 232, 235. *Francisco v. State*, 4 Zab. 30, 32.

<sup>6</sup> *State v. Palmer*, 35 Maine, 9. *Jillard v. Commonwealth*, 2 Casey, 169.

It is a principle in the law of criminal pleading, that, when a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offence, those which are actually done in the course and progress of its commission may be coupled in one count. On this principle, an indictment, on a statute which inhibits the use of "any means whatever," which charges one of the defendants with using instruments, and the same defendant with other defendants, with administering drugs to procure a miscarriage, and that by both of said means the woman died, is not bad for duplicity; and proof of the use of either one of the means alleged is sufficient to warrant a conviction.<sup>1</sup>

In civil actions, the only mode of objecting to pleadings for duplicity is by special demurrer; it is cured by general demurrer, or by the defendant's pleading over. In criminal cases, the defendant may, as special demurrers are not necessary in criminal cases, object to it on general demurrer, or the court in general, upon application, will quash the indictment; but it seems that duplicity cannot be made the subject of a motion in arrest of judgment, or of a writ of error; <sup>2</sup> of course, it is cured by a verdict of guilty as to one of the offences, and not guilty as to the other.<sup>3</sup>

When one count in an indictment charges two

<sup>1</sup> *Commonwealth v. Brown*, 14 Gray, 419, 430. *Commonwealth v. Thompson*, 116 Mass. 348.

<sup>2</sup> *Nash v. The Queen*, 4 B. & S. 935. *Regina v. O'Connell*, 7 Irish Law Rep. 338. *Contrà per Pollock, C. B.*, in *Regina v. Bowen*, 1 Denison C. C. 29; *Reed v. People*, 1 Parker C. C. 481.

<sup>3</sup> *Regina v. Guthrie*, L. R. 1 C. C. 241. *State v. Miller*, 24 Conn. 522. *State v. Merrill*, 44 N. H. 624.

offences, distinct in kind, and requiring distinct punishments, the objection of duplicity has been allowed in arrest of judgment.<sup>1</sup> But when the two offences are precisely alike, the only reason against joining them in one count is, that it subjects the accused to confusion and embarrassment in his defence. The objection is not open after a verdict of guilty of one offence only, but must be taken by demurrer, motion to quash or to compel the prosecutor to confine himself to one of the charges; and the fault is cured by his electing to proceed upon one charge only, and entering a *nolle prosequi* as to the others.<sup>2</sup>

<sup>1</sup> *State v. Nelson*, 8 N. H. 163. *State v. Fowler*, 8 Foster, 184, 194. *People v. Wright*, 9 Wend. 193. *State v. Howe*, 1 Rich. 260. *State v. Fant*, 2 Brev. 487. *Commonwealth v. Holmes*, 119 Mass. 198. *Commonwealth v. Symonds*, 2 Mass. 163. It may well be doubted whether any offence was properly charged in this last case.

<sup>2</sup> Per Blackburn and Mellor, J. J., in *Nash v. The Queen*, 4 B. & S. 944, 945. *Commonwealth v. Holmes*, 119 Mass. 195, 198, 199. *Commonwealth v. Tuck*, 20 Pick. 356, 361, 362. *Commonwealth v. Cain*, Mass. 487. *State v. Merrill*, 44 N. H. 624.

## CHAPTER XIV.

## REPUGNANCY.

“It is a certain rule, that where one material part of an indictment is repugnant to another, the whole is void.”

2 Hawk. P. C. ch. 25, § 62.

IF an indictment charge the defendant with having forged a certain writing, whereby one person was *bound* to another, the whole will be vicious; for no one can be bound by a forgery.<sup>1</sup> A. B., a bankrupt, was indicted for not discovering all his real estate &c., before the commission of bankruptcy. The charge in the indictment was, that the said A. B. “surrendered himself &c., and was then and there duly sworn &c., and at the time of his said examination, to wit, on the day and year last aforesaid, he was possessed of a certain real estate, to wit &c., and that at the time of his said examination, and being so sworn as aforesaid, he then and there feloniously did not discover when he disposed of, assigned and transferred the real estate” &c. It was held that the indictment was bad for repugnancy, because it charged the prisoner with not discovering, *at the time* of his examination, *when* he disposed of an estate, which was averred to be in his possession at the time of his examination.<sup>2</sup>

<sup>1</sup> 2 Hawk. P. C. ch. 25, § 62.

<sup>2</sup> Regina v. Harris, 1 Denison C. C. 461; Temple & Mew C. C. 177.

The difference between a written instrument and the description given to it in the indictment constitutes a repugnancy which is fatal.<sup>1</sup> Allegations that an offence was committed "at B. and at said W.," where W. has not before been mentioned, are repugnant.<sup>2</sup>

It is a general rule, that an allegation in pleading, which is sensible and consistent in the place where it occurred, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a videlicet, however inconsistent it may be with an allegation subsequent.<sup>3</sup>

An indictment in the first count charged A. with stealing a promissory note from the person of B. ; in the second count with stealing a bank-note from the person of B. ; in the third count with receiving the aforesaid goods "*so as aforesaid feloniously stolen.*" A. was acquitted on the first two counts, and convicted on the last. *Held*, on application to arrest the judgment, that after verdict the indictment was not bad on the ground of repugnancy : because, first, the words of reference in the third count did not necessarily import a stealing of the goods by A. ; secondly, if they did, that count did not thereby become intrinsically repugnant, but was conceivably capable of proof ; and after verdict the court would resort to

<sup>1</sup> Commonwealth v. Lawless, 101 Mass. 32.

<sup>2</sup> 2 Hawk. P. C. ch. 25, § 83. Commonwealth v. Pray, 13 Pick. 359.

<sup>3</sup> Rex v. Stevens, 5 East, 244. Lord Holt thus stated the rule : "Where matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected." Wyat v. Aland, 1 Salk. 324.

any possible construction which would uphold the indictment against a purely technical objection.<sup>1</sup>

The general rule is, it is a fault if a pleading be inconsistent with itself, or repugnant. But there is this exception, that if the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading, without materially altering the general sense and effect, it shall in that case be rejected as surplusage, especially after verdict.<sup>2</sup>

<sup>1</sup> *Regina v. Craddock*, 2 Denison C. C. 31; *Temple & Mew* C. C. 361. See *Regina v. Huntley*, Bell C. C. 238.

<sup>2</sup> Stephen Pl. 335, 336, 7th ed. *Shepherd v. Shepherd*, 1 C. B. 849. *Commonwealth v. Pray*, 13 Pick. 359.

## CHAPTER XV.

## SURPLUSAGE.

Surplusage is to be avoided.<sup>1</sup> Surplusage shall never make the plea vicious, but where it is contrariant to the matter before. Co. Litt. 303 b.

SURPLUSAGE is here taken in its large sense, as including *unnecessary matter* of whatever description.<sup>2</sup> To combine with the requisite certainty and precision the greatest possible *brevity*, is justly considered as the perfection of pleading.<sup>3</sup>

The rule prescribes generally the cultivation of *brevity*, or avoidance of unnecessary prolixity in the *manner of statement*. A terse style of allegation, involving a strict retrenchment of unnecessary words, is the aim of the best practitioners in pleading, and is considered as indicative of a good school.<sup>4</sup>

It often happens that when material matter is alleged with an unnecessary detail of circumstances, the essential and non-essential parts of the statement are in their nature so connected as to be incapable of separation; and the defendant, of course, includes under his traverse or plea of not guilty, the whole

<sup>1</sup> "Although surplusage doth seldom hurt the pleading, yet imperfect pleading is always dangerous." Heath Maxims, 47, ed. 1771.

<sup>2</sup> In its more strict and confined meaning, it imports matter wholly foreign and irrelevant.

<sup>3</sup> Stephen Pl. 374, 7th ed.

<sup>4</sup> Stephen Pl. 376, 7th ed.

matter alleged. The consequence evidently is, that the party who has pleaded with such unnecessary particularity has to sustain an increased burden of proof, and incurs greater danger of failure, at the trial.<sup>1</sup>

The rule of pleading respecting surplusage is, that if the matter alleged be wholly foreign and impertinent, so that no allegation whatever on the subject is necessary, or though not wholly foreign and impertinent does not require to be stated, such matter may be rejected as surplusage; and the allegation which is material is not vitiated by that which is immaterial.<sup>2</sup> This, it is true, is a loose, and, therefore, an unsatisfactory rule: it is difficult, not to say impossible, to find one more distinct and practical. Each case must, in a great measure, depend on its own peculiar circumstances; and the best means of ascertaining what will, or will not, amount to surplusage, is by examining the decisions on the subject.

The principle is concisely stated in the following language of Mr. Justice Coleridge: "The distinction is between an averment the whole of which can be got rid of without injury to the plea, and an averment of circumstances essential to the defence, which are stated with needless particularity. In the latter case, the whole averment must be proved as pleaded. In the former case, in civil or criminal pleadings, the whole may be considered as struck out, and therefore need

<sup>1</sup> Stephen Pl. 377, 7th ed.

<sup>2</sup> "If a man robs his fellow-traveller, and is indicted for so doing, the allegation that he became the companion of his victim, with a preconceived design to rob him, is wholly immaterial." *Moxon v. Payne*, L. R. 8 Ch. 881, James, L. J. *Commonwealth v. Jeffries*, 7 Allen, 571.

not be proved.”<sup>1</sup> And it is said by Mr. Justice Story 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.”<sup>2</sup> The authorities are numerous, and there are many instances of the application of the rule. Some of the principal cases are cited in the margin.<sup>3</sup>

The rule is 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 main-

<sup>1</sup> *Shearm v. Burnard*, 10 A. & E. 593, 596; 2 P. & D. 565, 569.

<sup>2</sup> *United States v. Howard*, 3 Sumner, 15. *United States v. Foye*, 1 Curtis C. C. 364, 368.

<sup>3</sup> *Stevens v. Bigelow*, 12 Mass. 438. *Shepherd v. Shepherd*, 1 C. B. 849. *Aldis v. Mason*, 11 C. B. 139, per Maule, J. *Noden v. Johnson*, 16 Q. B. 218, 226, 227, per Patteson, J. *Regina v. Parker*, L. R. 1 C. C. 225. *Regina v. Huntley*, Bell C. C. 238. *Regina v. Burrell, Leigh & Cave* C. C. 354. *Regina v. Otway*, 1 Irish Law Rep. N. S. 69. *Commonwealth v. Pray*, 13 Pick. 359. *Commonwealth v. Hart*, 11 Cush. 130. *Commonwealth v. Simpson*, 9 Met. 138. *Commonwealth v. Bryden*, 9 Met. 137. *Commonwealth v. Baker*, 10 Cush. 405. *Commonwealth v. Jeffries*, 7 Allen, 572. *Commonwealth v. Gavin*, 121 Mass. 54. *State v. Noble*, 15 Maine, 476. *Alkenbrack v. People*, 1 Denio, 80. *State v. Barley*, 11 Foster, 521. *State v. Corrigan*, 24 Conn. 286.

tained.<sup>1</sup> Thus, if an indictment for wrongfully desecrating and disfiguring a public burying-ground contains an accurate description of it by metes and bounds, the evidence must correspond with the description. It was of course absolutely necessary that the indictment should mention the burying-ground, for the offence charged against the defendant consisted in its desecration; but it was not essential that it should be described by metes and bounds. But it having been so described, and it being impossible to strike out the whole averment without taking from the indictment the part essential to the allegation of the offence intended to be charged, it was necessary that the whole description should be proved exactly as it was set forth.<sup>2</sup>

The case of *The King v. Jones*<sup>3</sup> well illustrates this subject. The St. 9 Geo. IV. ch. 41, provided in § 29, that no person, not a parish patient, should be taken into a lunatic asylum without a certificate of two medical men, containing certain particulars. Section 30 enacted that any person who should *knowingly, and with intention to deceive*, sign such certificate, untruly setting forth such particulars, should be guilty of a misdemeanor; while a second clause made it a substantive offence for any physician, surgeon, or apothecary to sign such certificate, without having visited the patient. The indictment stated that the defend-

<sup>1</sup> *Bristow v. Wright*, 2 Dougl. 665; S. C. 1 Smith L. C. 570, explained and confirmed by Buller, J., in *Peppin v. Solomons*, 5 T. R. 497, 498; and by Lord Ellenborough in *Williamson v. Allison*, 2 East, 450. *Savage v. Smith*, 2 W. Bl. 1101. *Hoar v. Mill*, 4 M. & Sel. 470. *Earle v. Kingsbury*, 3 Cush. 209, 210.

<sup>2</sup> *Commonwealth v. Wellington*, 7 Allen, 299, 302.

<sup>3</sup> 2 B. & Adol. 611.

ant, being a surgeon, *knowingly, and with intention to deceive, signed the certificate without having visited the patient*, thus blending in one charge two distinct offences. The jury negatived any intent to deceive, but found the defendant guilty; and the court held that the conviction was right, since the averment of intention was mere surplusage.

So, where an indictment charged the defendants with conspiring to indict the prosecutor *falsely*, with intent to extort money, they were held to be rightly convicted, though the jury, in finding them guilty of conspiring to indict with the intent alleged, expressly negatived any conspiracy to make a false charge; for the court observed that a conspiracy to prefer an indictment for purposes of extortion was doubtless a misdemeanor, whether the charge were true or false.<sup>1</sup> So, where a parish was indicted for non-repair of a highway, an allegation that the road in question was an immemorial highway has been rejected as surplusage.<sup>2</sup> If a common-law offence be laid as committed "against the form of the statute," the allegation may be rejected as surplusage.<sup>3</sup>

If money or bank-notes, in an indictment for larceny, be described as "of the *goods and chattels*" of the owner, these words may be rejected as surplusage, and the indictment will be sufficient.<sup>4</sup> So, in an indictment which charged that the defendant by

<sup>1</sup> *Rex v. Hollingberry*, 4 B. & C. 329; 6 D. & R. 345; S. C. 2 Lead. Crim. Cas. 34.

<sup>2</sup> *Regina v. Turweston*, 16 Q. B. 109.

<sup>3</sup> *Rex v. Mathews*, 5 T. R. 162. *Commonwealth v. Hoxey*, 16 Mass. 385. *Commonwealth v. Reynolds*, 14 Gray, 87.

<sup>4</sup> *Regina v. Radley*, 1 Denison C. C. 450. *Eastman v. Commonwealth*, 4 Gray, 416. *Commonwealth v. Bennett*, 118 Mass. 452.

false pretences obtained from A. "a check for the sum of 8*l.* 14*s.* 6*d.* of the moneys of B." this was held a sufficient allegation that the check was the property of B., the words "of the moneys" being rejected as surplusage.<sup>1</sup> If a day certain is laid in an indictment, and another day is ill laid, it will not vitiate the indictment, but may be rejected as surplusage.<sup>2</sup> Where an indictment alleged that the defendant on *Henry B.* did make an assault, and him the said *William B.* did beat &c., it was held good in arrest of judgment.<sup>3</sup>

Where an indictment for bigamy described the second wife as a *widow*, when in fact she had never been married, the misdescription was held fatal, though it was unnecessary to have stated more than her name.<sup>4</sup> And where a crime was alleged to have taken place at "A., in the county of B., within five hundred yards of the boundary of the county of D., to wit, at C., in the county of D.," Mr. Justice Crampton held that the words, "at A., in the county of B., within five hundred yards of the boundary of the county of D.," were surplusage, but that, having been stated, they became material to be proved. "If you choose to go out of your way to make a special averment," said that acute judge, "and to allege a particular place in the indictment,

<sup>1</sup> *Regina v. Godfrey, Dearsly & Bell* C. C. 426.

<sup>2</sup> *Wells v. Commonwealth*, 12 Gray, 326.

<sup>3</sup> *Regina v. Crespin*, 11 Q. B. 913. *Rex v. Morris*, 1 Leach C. C. 109. *Commonwealth v. Randall*, 4 Gray, 36. *Commonwealth v. Hunt*, 4 Pick. 252. *Greeson v. State*, 5 How. Missis. 33, 42. *State v. Wall*, 39 Missouri, 532.

<sup>4</sup> *Rex v. Deeley*, 1 Moody C. C. 303. Note to *Regina v. Lyon*, Irish Circ. Rep. 363, 364.

the question is whether you are bound to prove it. I think you are.”<sup>1</sup> In these cases, the essential and non-essential parts of the allegation were so connected as to be incapable of separation, and therefore both were considered as alike material.

The allegation usually inserted in indictments for perjury, “that so the defendant did commit wilful and corrupt perjury,” may be rejected as surplusage. The perjury is sufficiently alleged by the preceding part of the count; and as “perjury” is not a word of art like “murder,” the concluding part of the count is immaterial.<sup>2</sup> Upon an indictment charging the defendant with taking a false oath in a non-judicial proceeding, which is not perjury, but a misdemeanor, at common law, and which indictment contains an allegation “that so the defendant did commit wilful and corrupt perjury,” such allegation may be rejected as surplusage, and need not be proved, and the defendant may be convicted of the common-law misdemeanor.<sup>3</sup>

This rule rejects any insensible ungrammatical or useless words which obstruct the sense, if thereby the indictment is made intelligible.<sup>4</sup>

The rule also prescribes the omission of matter, which, though not wholly foreign, *does not require to be stated*. Any matters will fall within this description, which under the various rules enumerated in other

<sup>1</sup> Regina v. M’Kenna, Irish Circ. Rep. 416.

<sup>2</sup> Ryalls v. The Queen, 11 Q. B. 781. United States v. Elliot, 3 Mason, 156.

<sup>3</sup> Regina v. Hodgkiss, L. R. 1 C. C. 212.

<sup>4</sup> Rex v. Redman, 1 Leach C. C. 477. White v. Commonwealth, 6 Binn. 179. Turns v. Commonwealth, 6 Met. 225, 234. Commonwealth v. Penniman, 8 Met. 519, 521.

chapters, as tending to limit or qualify the degree of certainty, it is unnecessary to allege; — for example, matter of mere evidence, — matter of law, — or other things which the court officially notices, — matter coming more properly from the other side, — matter necessarily implied &c.<sup>1</sup>

Surplusage, it should be observed, is not a subject of demurrer;<sup>2</sup> the maxim being that *Utile per inutile non vitiatur*. But allegations which are altogether superfluous and immaterial, and which are not descriptive of the identity of the offence charged, may be rejected as surplusage, either on trial, motion in arrest of judgment, or on error, if the indictment can be supported without those allegations.<sup>3</sup>

It is usual in criminal, as well as in civil pleadings, to allege circumstances of time, place, quantity, magnitude &c., under a *videlicet*. The precise and legal use of a *videlicet* in every species of pleading is to enable the pleader to isolate, to identify, 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.<sup>4</sup> In discussing the effect of the *videlicet*, Mr. Justice Patteson observed, that it could not make that immaterial which was in its nature mate-

<sup>1</sup> Stephen Pl. 375, 7th ed.

<sup>2</sup> Stephen Pl. 376, 7th ed.

<sup>3</sup> *Commonwealth v. Keefe*, 7 Gray, 336. *Commonwealth v. Jeffries*, 7 Allen, 572. *Attorney-General v. Macpherson*, L. R. 3 P. C. 268; 11 Cox C. C. 604. *Turns v. Commonwealth*, 6 Met. 225. *Lord v. Tyler*, 14 Pick. 156, 165. *Hampshire Manufacturers Bank v. Billings*, 17 Pick. 87, 90.

<sup>4</sup> 1 Stark. Crim. Pl. 251. 2 Gabbett Crim. Law, 225. 1 Chit. Crim. Law, 226. *Commonwealth v. Hart*, 10 Gray, 468.

rial, though its omission might render that material which would not otherwise be so.<sup>1</sup>

With reference to the real utility of a videlicet before matters of description, it is said in Smith's *Leading Cases*<sup>2</sup> that it depends on the doctrine of the rejection of averments as surplusage. The learned author continues: "It is a precaution which is totally useless where the statement placed after the videlicet is material, but which, in other cases, prevents the danger of a variance by separating the description from the material averment, so that the former, if not proved, may be rejected, without mutilating the sentence which contains the latter."<sup>3</sup>

<sup>1</sup> *Cooper v. Blick*, 2 Q. B. 915, 918; 2 G. & D. 295. 1 Taylor Ev. § 600, 1st ed. *Ryalls v. The Queen*, 11 Q. B. 781, 797.

<sup>2</sup> Vol. i. p. 502, 6th Eng. ed.

<sup>3</sup> 2 Wms. Notes to Saund. 687.

## CHAPTER XVI.

CONCLUSIONS OF LAW.—PRESUMPTIONS OF LAW.—  
FACTS WITHIN THE KNOWLEDGE OF THE  
DEFENDANT.

## 1. Conclusions of Law.

CONCLUSIONS of law resulting from the facts of the case need not be stated.<sup>1</sup>

It is a general principle, that though it is necessary to state the facts which constitute the crime, yet it is not necessary to state a conclusion of law resulting from these facts. Thus in the case of *The King v. Smith*,<sup>2</sup> who was indicted for uttering counterfeit money having at the same time other counterfeit money in his possession knowing the same to be counterfeit; it was contended, that as the statute had declared that a person under these circumstances should be deemed a common utterer of false money, the indictment ought to have charged him with being so in the very words of the statute: but it was answered that this was a conclusion of law, which necessarily resulted from the facts set forth, and which it was therefore unnecessary to aver; and of this opinion were the Twelve Judges. On the same principle, an

<sup>1</sup> *Rex v. Michael*, 2 Leach C. C. 938; *Russell & Ryan* C. C. 29. *Brady v. The Queen*, 2 Jebb & Symes, 657; 4 Irish Law Rep. 21. *M'Gee v. Barber*, 14 Pick. 212.

<sup>2</sup> 2 B. & P. 127; *Russell & Ryan* C. C. 5; 1 East P. C. 183; 2 Leach C. C. 856. *Rex v. Booth*, *Russell & Ryan* C. C. 7.

indictment which alleges that the defendant kept and maintained a building used as a house of ill-fame, to the common nuisance of all good citizens &c., need not expressly allege that the defendant kept a common nuisance.<sup>1</sup> In some indictments for bigamy the conclusion of law, that the parties formerly married have continued so, is expressly stated. But if that results from all the facts of the case, it is enough to state these.<sup>2</sup>

In an indictment, though it is unnecessary to aver a mere conclusion of law with either time or place, yet if it be averred with time and place, and improperly, the indictment will be defective. If, therefore, the stroke be laid at A. and the death at B., the indictment averring, in conclusion, that the defendant feloniously murdered the said C. D. at A., is vicious, for the murder was completed at B. by the death of the party there.<sup>3</sup>

## 2. Presumptions of Law.

Presumptions of law need not be stated.<sup>4</sup> Besides points of law, there are also some facts of such a public or general nature that the courts, *ex officio*, take notice of them, and with respect to which it is consequently unnecessary to make allegation in pleading.<sup>5</sup>

<sup>1</sup> *Wells v. Commonwealth*, 12 Gray, 326, 330.

<sup>2</sup> *Murray v. The Queen*, 7 Q. B. 700, 706.

<sup>3</sup> 1 Stark. Crim. Pl. 65.

<sup>4</sup> *Purcell Crim. Pl.* 46. *Stephen Pl.* 399, 2d ed.

<sup>5</sup> *Co. Litt.* 303 b. 1 *Greenl. Ev. ch.* 2. 1 *Taylor Ev. ch.* 2. *Stephen Pl.* 286, 7th ed. "Judges are entitled and bound to take judicial notice of that which is the common knowledge of the great majority of mankind and of the great majority of men of business." *Per Brett, J. A., in Regina v. Aspinall*, 2 Q. B. D. 61, 62.

**3. Facts within the Knowledge of the Defendant.**

It is a rule of pleading that a party may allege generally what is more peculiarly within the knowledge of the other party.<sup>1</sup> Thus where a public officer is charged with a breach of duty in certain acts within the limits of his office, it is not necessary to state that they were within his knowledge; for this will be inferred from the nature of the trust reposed in him.<sup>2</sup>

<sup>1</sup> *Rex v. Dixon*, 3 M. & Sel. 14, per Bayley, J.

<sup>2</sup> *Rex v. Holland*, 5 T. R. 607.

## CHAPTER XVII.

## ALLEGATION OF INTENT.

Where any general intent is essential to the offence, it may be alleged generally, in the terms of the definition of the offence that the act was wilfully, maliciously or unlawfully done or omitted, according to the description of the offence.

Where some special intent in reference to defined facts is essential to an offence, the particulars to which the intent relates must be specified.

“To render a party criminally responsible, a vicious will must concur with a wrongful act,” says Starkie.<sup>1</sup> “But though it be universally true, that a man cannot become a criminal unless his mind be in fault, it is not so general a rule that the guilty intention must be averred upon the face of the indictment.”

When by the common law, or by the provision of a statute, a particular intention is essential to an offence,<sup>2</sup> or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. On the other hand, if the offence does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed, and

<sup>1</sup> 1 Stark. Crim. Pl. 177.

<sup>2</sup> United States v. Buzzo, 18 Wall. 125.

need not be alleged nor proved. In such case, the intent is nothing more than the result which the law draws from the act, and requires no proof beyond that which the act itself supplies.<sup>1</sup> To illustrate the application of the rule, take the case of an indictment for an assault with an intent to commit a rape. The act not being consummated, the gist of the offence consists in the intent with which the assault was committed. It must, therefore, be distinctly alleged and proved. But in an indictment for the crime of rape no such averment is necessary. It is sufficient to allege the assault, and that the defendant had carnal knowledge of a woman by force and against her will. The averment of the act includes the intent, and proof of the commission of the offence draws with it the necessary inference of the criminal intent. The same is true of indictments for assault with intent to kill and murder. In the former, the intent must be alleged and proved. In the latter, it is only necessary to allege and prove the act.<sup>2</sup>

This principle was applied to the case of an indictment for murder by poisoning, in which it was held that it is not necessary to allege in the indictment that the poison was administered with an 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.<sup>3</sup>

The intent may be laid either in the introductory

<sup>1</sup> The distinction taken in the text runs through all the cases.

<sup>2</sup> Judgment in *Commonwealth v. Hersey*, 2 Allen, 180.

<sup>3</sup> *Commonwealth v. Hersey*, 2 Allen, 173.

part of the indictment, or in the conclusion, or in both. In the leading case of *The King v. Philipps*,<sup>1</sup> the indictment began by charging that the defendant, intending to do great bodily harm to R. G. T., and to break the peace &c., sent a letter to R. G. T., in which he was said to have behaved like a blackguard, with intent to incite R. G. T. to challenge the defendant; and it was held that the intent was sufficiently alleged in the prefatory averment, and that the indictment might be supported either by the intent there laid, or by the intent laid at the conclusion.

And it is a familiar rule of criminal pleading, that wherever the intention of a party is necessary to constitute an offence, such intent must be alleged in every material part of the description where it so constitutes it.<sup>2</sup> Thus, where a forged order was presented and money obtained thereby, and the indictment alleged that the defendant, with intent to cheat, knowingly pretended it to be genuine, but did not aver the obtaining money thereby to have been done knowingly, it was held bad.<sup>3</sup>

In some cases, the law has adopted certain technical expressions to indicate the intention with which an offence is committed; and in such cases the intention must be expressed by the technical word prescribed, and no other. Thus, treason must be laid to have been done "traitorously;" all felonies, whether at

<sup>1</sup> 6 East, 464, 473, A. D. 1805. *Commonwealth v. Doherty*, 10 Cush. 54. *Commonwealth v. Haynes*, 2 Gray, 72.

<sup>2</sup> *Commonwealth v. Boynton*, 12 Cush. 500. *Commonwealth v. Slack*, 19 Pick. 307. *Commonwealth v. Bakeman*, 105 Mass. 53.

<sup>3</sup> *Rex v. Rushworth*, Russell & Ryan C. C. 317. *Commonwealth v. Dean*, 110 Mass. 64.

common law or created by statute, to have been done "feloniously;"<sup>1</sup> burglary is laid to have been done "feloniously and burglariously," and with intent to commit a particular felony; murder, "feloniously and of his malice aforethought;" forgery, "feloniously," if made felony by statute, and "with intent to defraud" &c.<sup>2</sup>

In an indictment on the statute for obtaining goods by false pretences, the intent to defraud is an essential element of the crime intended to be charged, and must be distinctly averred by a proper affirmative allegation, and not by way of inference or argument merely.<sup>3</sup> An indictment for this offence is bad, if it contains no allegation of the intent to defraud, other than in the usual form in the concluding clause, "And so the jurors aforesaid, upon their oath aforesaid, do say that" &c. The conclusion does not follow from the premises. The only allegation of an intent to defraud is made argumentatively, and as a legal inference from facts stated, and that inference is unsound.<sup>4</sup>

In indictments for malicious mischief, the intention of the defendant is sufficiently alleged by charging in the words of the statute, that his acts were "wilfully and maliciously" done. The word "wilfully" means "intentionally," and the word "maliciously" imports a criminal motive, intent or

<sup>1</sup> *Regina v. Gray*, Leigh & Cave C. C. 365.

<sup>2</sup> Archb. Crim. Pl. 61, 62, 18th ed. 4 Stephen Comm. 370, 7th ed.

<sup>3</sup> *Commonwealth v. Lannan*, 1 Allen, 590. *Regina v. James*, 12 Cox C. C. 127, Lush, J.

<sup>4</sup> *Commonwealth v. Dean*, 110 Mass. 64. *Rex v. Rushworth*, Russell & Ryan C. C. 317.

purpose.<sup>1</sup> The word "wilfully" denotes *evil intention*; and such is the common use of the word in the English language. Thus Milton: "Thou to me Art all things under Heaven, all places thou, Who for my *wilful* crime art banished hence;"<sup>2</sup> and Hooker says: "So full of *wilfulness* and self-liking is our nature."<sup>3</sup>

At common law, the intent to defraud, when it is essential to constitute the crime, must be alleged, and the particular person named.<sup>4</sup> By various statutes, it is now sufficient to allege generally an intent to defraud, without alleging the intent to defraud any particular person.<sup>5</sup> These statutes alter and affect the forms of pleadings only, and do not alter the character of the offence charged.

Where an intent is necessary to constitute an act a crime, and must necessarily have had its existence when and where the act was done, and time and place have once been stated, it is not necessary to repeat the allegation in connection with the intent. Thus, in an indictment under the Act of Congress

<sup>1</sup> *Commonwealth v. Walden*, 3 Cush. 558. *Commonwealth v. Williams*, 110 Mass. 401, 402. *Commonwealth v. Brooks*, 9 Gray, 299, 303. *Commonwealth v. Hicks*, 7 Allen, 573. *Commonwealth v. McLaughlin*, 105 Mass. 460.

<sup>2</sup> *Paradise Lost*, bk. xii. 617.

<sup>3</sup> Preface to *Eccl. Polity*, ch. vi. § 3, quoted by Lord Campbell, C. J., in *Regina v. Badger*, 6 El. & Bl. 171.

<sup>4</sup> At common law an indictment for forgery must either have alleged an intent to defraud a person named, or have shown that that was unnecessary on account of the public nature of the instrument forged. Per Jervis, C. J., in *Regina v. Hodgson*, Dearsly & Bell C. C. 9.

<sup>5</sup> But if a special intent to defraud is alleged, the allegation is a material one, and must be established by proof. *Commonwealth v. Harley*, 7 Met. 506, 509. *Commonwealth v. Kellogg*, 7 Cush. 473, 476.

which makes it an offence to open a letter which had been in a post-office, before delivery to the person to whom it was directed, with intent to obstruct his correspondence or pry into his business or secrets, if venue and time are laid to the act of opening, it is not necessary to lay them to the intent, which it is averred accompanied the act of opening, and so must necessarily have had its existence when and where the act was done.<sup>1</sup>

The precedents usually allege the intent "then and there" to commit the crime set forth in the indictment, although there are many exceptions in the books of precedents, as in indictments for assault with intent to maim; an assault with intent carnally to know a female child under the age of ten years; an assault with intent to rob; and an assault with intent to steal from the person; with no averments of "then and there" as to the intent. And it has been decided that in an indictment for burglary, it is not necessary to allege the intent "then and there" to commit the felony.<sup>2</sup>

<sup>1</sup> *United States v. Pond*, 2 Curtis C. C. 265.

<sup>2</sup> *Commonwealth v. Doherty*, 10 Cush. 52, 53. *Jeffries v. Commonwealth*, 12 Allen, 152.

## CHAPTER XVIII.

## ALLEGATION OF KNOWLEDGE.

WHERE a particular knowledge on the part of the defendant renders his acts criminal, the fact of his knowledge must be expressly averred. And the averment of knowledge must extend to each part of the description of the offence in which it is an essential element. An indictment for selling unwholesome provisions, "without making fully known to the vendee that the same were diseased," is insufficient, without an averment that the defendant knew at the time of the sale the corrupt and unwholesome condition of the articles sold.<sup>1</sup>

Whenever a statute makes a guilty knowledge part of the definition of an offence, the knowledge is a material fact which must be expressly averred. But where a statute prohibits generally, and is silent as to intention, it is clear that the pleader need not aver knowledge.<sup>2</sup> When the terms "knowingly," or "the defendant well knowing," are introduced into an indictment, although alleged as an ingredient in the imputed crime, if introduced when the knowledge alleged is unnecessary to be shown in evidence in

<sup>1</sup> 1 Stark. Crim. Pl. 164. *Commonwealth v. Boynton*, 12 Cush. 499. *Commonwealth v. Merriam*, 7 Allen, 357.

<sup>2</sup> 1 Stark. Crim. Pl. 164, 166, 2d ed. *United States v. Smith*, 2 Mason, 143, 150.

order to constitute the crime, these allegations may always be rejected as surplusage.<sup>1</sup>

In Massachusetts a statute enacts that when the crime of adultery is committed between a married woman and an unmarried man, the man shall be deemed guilty of adultery.<sup>2</sup> Under this statute, an unmarried man having sexual intercourse with a married woman is guilty of adultery, although he did not know that she was married, and therefore such knowledge need not be averred, nor proved at the trial.<sup>3</sup> No principle is better established than that ignorance of the law is no excuse for its violation.<sup>4</sup> On the other hand, there is a class of cases in which the ignorance of facts was held to be a complete defence.<sup>5</sup>

No express form of words is essential to this averment. An allegation that the defendant did "unlawfully, knowingly and designedly" hinder and oppose an officer while in the discharge of his office, is a sufficient allegation that the defendant knew that the person assaulted was an officer.<sup>6</sup>

<sup>1</sup> *Commonwealth v. Squire*, 1 Met. 261, per Dewey, J.

<sup>2</sup> Gen. Sts. ch. 165, § 3.

<sup>3</sup> *Commonwealth v. Elwell*, 2 Met. 190.

<sup>4</sup> *Commonwealth v. Mash*, 7 Met. 472. *Commonwealth v. Boynton*, 2 Allen, 160. *White v. White*, 105 Mass. 326, 327. *Commonwealth v. Wentworth*, 118 Mass. 441.

<sup>5</sup> *Regina v. Hibbert*, 1 L. R. C. C. 184. *Herne v. Garton*, 2 El. & El. 66. *Taylor v. Newman*, 4 B. & S. 89. *Buckmaster v. Reynolds*, 13 C. B. N. S. 62. *Regina v. Green*, 3 F. & F. 274. Judgment of Brett, J., in *Regina v. Prince*, L. R. 2 C. C. 164-168.

<sup>6</sup> *Commonwealth v. Kirby*, 2 Cush. 577.

## CHAPTER XIX.

## TECHNICAL TERMS.

"No periphrasis or circumlocution whatsoever will supply those words of art which the law hath appropriated for the description of the offence, as *murdravit*, in an indictment of murder; *cepit*, in an indictment of larceny; *mayhemlavit*, in an indictment of maim; *felonice*, in an indictment of any felony whatever; *burglariter*, in an indictment of burglary; *proditorie*, in any indictment of treason." 2 Hawk. P. C. ch. 25, § 55.<sup>1</sup>

THERE are certain consecrated words of art, such as "feloniously," "burglariously," "murder," "ravish" &c., for which equivalent expressions cannot be used.<sup>2</sup>

Every indictment for felony, whether it be a felony at common law or by statute,<sup>3</sup> must allege that the act which forms the subject-matter of the indictment was done "feloniously," the word "feloniously" being a term of art for which no equivalent expression can

<sup>1</sup> *Gouglemann v. People*, 3 Parker C. C. 19, 20.

<sup>2</sup> Per Parke, B., in *Holford v. Bailey*, 13 Q. B. 446. Per Willes, J., in *Regina v. Harvey*, 40 L. J. M. C. 66. Per Shaw, C. J., in *Commonwealth v. Davis*, 11 Pick. 438. 2 Hawk. P. C. ch. 25, § 56.  
<sup>4</sup> Stephen Comm. 370, 7th ed.

<sup>3</sup> "In the one case the common law says that a certain state of facts shall amount to a felony; in the other the statute law does the same." Per Cockburn, C. J., in *Regina v. Gray*, Leigh & Cave C. C. 370.

be substituted.<sup>1</sup> The omission of the word “feloniously” is a departure from rules and precedents, and calculated to encourage vagueness and uncertainty in criminal pleading.<sup>2</sup>

But where a statute describes the several acts which make up the offence, 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 offence is complete without it; and an indictment under the statute need not charge that the alleged acts were done “feloniously.” Felony is the conclusion of law from the acts done with the intent described and makes part of the punishment. It would be otherwise if the felonious intent was descriptive of the offence, and not simply of the punishment.<sup>3</sup>

The introduction of the word “feloniously” into an indictment charging facts constituting no higher offence than a misdemeanor, does not make it a charge of felony. The word “feloniously” in such case is repugnant to the legal import of the offence charged, and must be rejected as surplusage.<sup>4</sup>

In the case of *Tully v. Commonwealth*,<sup>5</sup> it was decided that the statute definition of house-breaking

<sup>1</sup> *Regina v. Gray*, Leigh & Cave C. C. 365. *Douglas v. The Queen*, 13 Q. B. 82. *Commonwealth v. Scannel*, 11 Cush. 543. *Jane v. State*, 3 Missouri, 61. *State v. Murdock*, 9 Missouri, 730. *Mears v. Commonwealth*, 2 Grant, 385. *State v. Jesse*, 2 Dev. & Bat. 297. *Williams v. State*, 8 Humph. 585. *Bowler v. State*, 41 Missis. 570. *State v. Rucker*, 68 N. C. 211. See *State v. Felch*, 58 N. H. 1.

<sup>2</sup> *Regina v. Horne*, 4 Cox C. C. 263, per Patteson, J.

<sup>3</sup> *United States v. Staats*, 8 How. 41, citing *Rex v. Liddle*, 2 Deacon Crim. Law, 1652, 1681. *State v. Eldridge*, 7 Eng. 608, 612.

<sup>4</sup> *Commonwealth v. Squire*, 1 Met. 258.

<sup>5</sup> 4 Met. 357.

had done away with the common-law requisitions of the offence, so that "burglariously" no longer makes a part of the *quo modo* of the crime. The distinction to be observed in describing statutory offences and offences at common law was stated in this case by Chief Justice Shaw, as follows: "When the statute punishes an offence, by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offence named at common law. As, for instance, a statute 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. In such cases, the forms and technical terms used at common law to describe and define the murder must be used. But this is not necessary when the statute describes the whole offence, and the indictment charges the crime in the words of the statute."<sup>1</sup>

In an indictment for murder it is necessary to allege that the act by which the death was occasioned was done "feloniously," and especially that it was done of "malice aforethought," which is the great characteristic of the crime of murder;<sup>2</sup> it must also be alleged, as a conclusion from the facts averred, that the defendant, "in manner and form aforesaid, feloniously and of his malice aforethought, did kill and murder" the deceased; for without the words "malice aforethought," and also the appropriate term "murder,"

<sup>1</sup> *United States v. McAvoy*, 4 Blatch. C. C. 418.

<sup>2</sup> Where the assault was not laid to have been committed "feloniously, wilfully and of malice aforethought," it was held that the omission did not vitiate the indictment. *Commonwealth v. Chapman*, 11 Cush. 422.

the indictment will be taken to charge manslaughter only.<sup>1</sup>

In larcenies, the words "feloniously took and carried away" are necessary to every indictment; for these only can express the very offence.<sup>2</sup> "The uniform course of the indictments for larceny from the earliest times has been to allege that the defendant 'feloniously stole, took *and carried away*' the goods of a named person."<sup>3</sup> "To constitute larceny, there must be a taking and a carrying away of personal property, with an intent to steal it. Such intent, in all cases at common law, renders the taking and carrying away felonious. A taking, without a carrying away, or a carrying away, without a taking, is not larceny. For this reason, it has always been held necessary that an indictment for larceny should allege both these acts. And this is not an arbitrary formula; for, unless both acts are alleged, the offence of larceny is not sufficiently alleged. Those words of art, which the law has appropriated for the description of an offence, cannot be dispensed with in an indictment for the offence."<sup>4</sup> An indictment is therefore bad which does not allege a carrying away by the thief. An allegation that he "feloniously did

<sup>1</sup> 2 Hale P. C. 187. 1 East P. C. ch. 5, § 116, p. 345. 1 Russell on Crimes, 767, 768, 4th ed. 3 Greenl. Ev. § 120.

<sup>2</sup> 4 Stephen Comm. 370. *Green v. Commonwealth*, 111 Mass. 118. The word "feloniously" being explained to mean that there is no color of right to excuse the act; and the "intent" being to deprive the owner, not temporarily, but permanently of his property. *Regina v. Thurborn*, 1 Denison C. C. 388; S. C. 2 Lead. Crim. Cas. 409. *Regina v. Guernsey*, 1 F. & F. 394.

<sup>3</sup> *Regina v. Middleton*, L. R. 2 C. C. 41; 42 L. J. M. C. 75, per Bovill, C. J.

<sup>4</sup> Judgment in *Commonwealth v. Adams*, 7 Gray, 44.

steal, take and carry" the property, is not sufficient. The word "carry" has not the same meaning as the words "carry away." To allege a mere carrying is not to allege a carrying away, any more than to allege a mere running is to allege a running away.<sup>1</sup>

<sup>1</sup> *Commonwealth v. Adams*, 7 Gray, 43. In *Green v. Commonwealth*, 111 Mass. 417, the allegation, "did feloniously take and steal" certain property, was held to be sufficient. Chapman, C. J.: "The only question open on the complaint is whether the defect alleged is of form or of substance. The complaint charges that the defendant, at the time and place alleged, 'did feloniously take and steal' the articles mentioned, 'against the peace of said Commonwealth and the form of the statute in such case made and provided.' But the language of the Gen. Sts. ch. 161, is 'whoever steals,' and this phrase is sufficient for all practical purposes. No one misunderstands it. In order to find a defendant guilty under it, a taking and carrying away must be proved. So under this complaint it was no less necessary to prove a taking and carrying away, than if these words had been inserted in the complaint. And the burden of proof was not changed in any particular. The defect in the complaint therefore was formal but not substantial."

It is clear beyond a doubt that this decision is erroneous. The complaint charged no offence. A substantial allegation was omitted. In the language in the text, "A taking, without a carrying away is not larceny." Nor is the decision aided by the suggestion that "the language of the Gen. Sts. ch. 161, is 'whoever steals,' and this phrase is sufficient for all practical purposes. No one misunderstands it." "It is perfectly clear," said Mr. Justice Erle, "that an indictment must be construed by the rules of pleading; and nothing differs more from the sense from which words are used in pleading than their ordinary sense." *Regina v. Thompson*, 16 Q. B. 846. "An indictment may have a certainty in common parlance," observed Mr. Justice Patteson, "and yet want legal certainty." *Regina v. Rowed*, 2 Gale & Dav. 522. Now the word "steal" is not a word of art; it has no technical meaning. In *Commonwealth v. Kelly*, 12 Gray, 176, Mr. Justice Metcalf expressly says that "It is very clear that an indictment for larceny, under the Rev. Sts. ch. 126, § 17, would be held insufficient, which should merely allege, in the words of that section, that A. committed the offence of larceny, by *stealing* a horse, the property of B."

The word "extort" has a certain technical meaning, and when a person is charged with "extorsively" taking, the very import of the word shows that he is not acquiring possession of his own.<sup>1</sup> The word "intimidation" is not *vocabulum artis* having a necessary meaning in a bad sense; in order to give it any force, it ought to appear from the context what species of fear was intended, or upon whom such fear was intended to operate.<sup>2</sup> The word "assault" is technical and carries with it an allegation of illegality.<sup>3</sup> The verb "to forge" is always taken in an evil sense in the law.<sup>4</sup> The word "pass," as applied to bank-notes, is technical, and means, to deliver them as money, or as a known and conventional substitute for money.<sup>5</sup>

There are some words which have a well-defined meaning in the criminal law, which are not words of art, and which are not indispensably requisite in an indictment. The word "larceny" is not *vocabulum artis*, and as a substitute for which no synonymous word, and no description or definition is admissible.<sup>6</sup> The word "robbery" is not a word of art which includes the intent.<sup>7</sup> And since "perjury" is not a word of art, the whole formal conclusion in an indictment for that offence, "And so the jurors aforesaid

<sup>1</sup> *Regina v. Tiddeman*, 4 Cox C. C. 387, 389, Platt, B.

<sup>2</sup> Per Tindal, C. J., in *O'Connell v. The Queen*, 11 Clark & Finnelly, 162.

<sup>3</sup> *United States v. Lunt*, 1 Sprague, 311.

<sup>4</sup> 2 East P. C. 985. 1 Gabbett Crim. Law, 375.

<sup>5</sup> Per Shaw, C. J., in *Hopkins v. Commonwealth*, 3 Met. 464.

<sup>6</sup> *Josslyn v. Commonwealth*, 6 Met. 239.

<sup>7</sup> Per Jervis, C. J., in *Regina v. Reid*, 2 Denison C. C. 93. The words "carnal knowledge" of a woman by a man imply sexual bodily connection. *Commonwealth v. Squires*, 97 Mass. 59.

upon their oath aforesaid do say" &c., is immaterial and may be rejected.<sup>1</sup>

The word "unlawfully" is not often of much value in an indictment: it only asserts a conclusion of law, which, if it arises out of the facts set forth, is unnecessary, and, if it does not, is insufficient.<sup>2</sup> But if a statute, in describing an offence which it creates, uses that word, an indictment framed on the statute is bad, if that word be omitted;<sup>3</sup> and it is in general best to insert it, especially as it precludes all legal excuse for the crime.<sup>4</sup>

In an indictment for murder, it is not necessary to aver that the defendant, "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," committed the murder, nor is it necessary to aver that the deceased at the time of the murder was "in the peace of the Commonwealth."<sup>5</sup> The words "with force and arms" &c., although usual in indictments for offences which consist of acts of violence, or amount to an actual disturbance of the public peace, are not, it would seem,

<sup>1</sup> *Ryalls v. The Queen*, 11 Q. B. 781. *Regina v. Hodgkiss*, L. R. 1 C. C. 212.

<sup>2</sup> *United States v. Driscoll*, 1 Lowell, 305, 306. *Commonwealth v. Byrnes*, 126 Mass. not yet published. It was adjudged in *Warbell's Case*, 2 Rol. Ab. 82, that where a fact laid in the indictment appears plainly to be unlawful, there is no need to say *illicitè*. 2 East P. C. 985.

<sup>3</sup> 2 Hawk. P. C. ch. 25, § 96. *Commonwealth v. Twitchell*, 4 Cush. 76. *Rex v. Turner*, 1 Moody C. C. 239. *Rex v. Ryan*, 2 Moody C. C. 15. *Regina v. Prince*, L. R. 2 C. C. 154, 177, per Denman, J.

<sup>4</sup> *Purcell Crim. Pl.* 87. *Commonwealth v. Sholes*, 13 Allen, 554, 558. *Commonwealth v. Thompson*, 108 Mass. 461.

<sup>5</sup> *Heydon's Case*, 4 Rep. 41. 2 Hawk. P. C. ch. 25, § 73. *Commonwealth v. Murphy*, 11 Cush. 472.

absolutely essential, at common law.<sup>1</sup> The words "wickedly, maliciously of his own wicked and corrupt nature, being a person of evil disposition" &c., are in general mere matter of aggravation, and not material. The word "wickedly" which is commonly used in indictments for conspiracy &c. is useless.

<sup>1</sup> 2 Hawk. P. C. ch. 25, §§ 90, 91. *Rex v. Burks*, 7 T. R. 4. *Commonwealth v. Scannel*, 11 Cush. 547. In indictments for forcible entry and detainer, the words "with a strong hand" are technical, and imply that the entry was accompanied with that terror and violence which constitute the offence. *Rex v. Wilson*, 8 T. R. 357, 363. *Commonwealth v. Shattuck*, 4 Cush. 141, 145.

## CHAPTER XX.

INDICTMENTS ON STATUTES.<sup>1</sup>

"It is a general rule, 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 whereof the offence consists, within all the material words of the statute." 2 Hawk. P. C. ch. 25, § 110.<sup>2</sup>

"Neither doth it seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly, and expressly allege the fact, in the doing or not doing whereof the offence consists, without any the least uncertainty or ambiguity." 2 Hawk. P. C. ch. 25, § 111.<sup>3</sup>

<sup>1</sup> There is a material distinction, not always observed by writers on Pleading, between pleading, counting upon, and reciting a statute. *Pleading* a statute, is merely stating the facts which bring a case within it, without making mention or taking any notice of the statute itself. *Counting upon* a statute, consists in making express reference to it, as by the words "against the form of the statute" (or, "by force of the statute") "in such case made and provided." *Reciting* a statute, is quoting or stating its contents. A statute may, therefore, be *pleaded* without either reciting or counting upon it; and may be *counted upon* without being *recited*. Gould Pl. ch. iii. § 16 note.

<sup>2</sup> *Brown v. Commonwealth*, 8 Mass. 65.

<sup>3</sup> *Commonwealth v. Clifford*, 8 Cush. 217. *Commonwealth v. Bean*, 11 Cush. 415. *Commonwealth v. Ashley*, 2 Gray, 356. *Commonwealth v. Welsh*, 7 Gray, 327. *Commonwealth v. Harris*, 13 Allen, 539. *State v. Drake*, 1 Vroom, 422. *State v. Lockbaum*, 38 Conn. 400. *State v. Jackson*, 39 Conn. 229.

It may be premised, that the same rules which have been already laid down concerning indictments at common law, are generally applicable to indictments on statutes.<sup>1</sup>

Every offence, whether at common law or created by statute, consists in the commission or omission of certain acts, under certain circumstances, and in some cases with a particular intent. And it is therefore a settled rule of pleading, applicable to both classes of offences, that an indictment must with certainty and precision charge the defendant with having committed or omitted those acts under those circumstances, and with the particular intent. If a statute fully and entirely describes the precise facts and circumstances which constitute the offence, with no implied exceptions or qualifications including or excluding certain persons or facts, then an indictment which pursues the very words of the statute is, in general, sufficient. But if any one of the ingredients above mentioned be omitted or misstated, it is ground for demurrer, motion in arrest of judgment, or writ of error.<sup>2</sup> The defect is not aided by verdict, nor supplied by the general conclusion *contra formam statuti*.<sup>3</sup>

It is obvious that there are many instances in which, if merely the statutory form were followed,

<sup>1</sup> 2 Hawk. P. C. ch. 25, § 99.

<sup>2</sup> *United States v. Gooding*, 12 Wheat. 460, 474, 475. *United States v. Mills*, 7 Peters, 138. *United States v. Cook*, 17 Wall. 168. *United States v. Reese*, 92 U. S. 225, 234 et seq. dissenting opinion of Mr. Justice Clifford. *United States v. Cruikshank*, 92 U. S. 564, dissenting opinion of Mr. Justice Clifford. *United States v. Simmons*, 96 U. S. 360. *Robinson v. Commonwealth*, 101 Mass. 27.

<sup>3</sup> 2 Hale P. C. 192. *Rook's Case*, Hardres, 20.

no offence would be charged ; because a statute must often use general terms and comprehensive descriptions ; whereas an indictment requires certainty in charging the offence so specifically as to give the party notice of what he is to meet, and enable him to traverse the facts averred. And when a statute describes an offence in general terms, the enactment assumes that the words shall be so employed as to show that some offence has been committed.

When an indictment follows the words of a statute, it does not necessarily follow that those words have the same meaning in the indictment which they have in the statute. If there is nothing in the context or in the 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 offence is defined, then it may be presumed that the terms in the indictment are used in the same sense with those in the statute, and whatever that prohibits the indictment charges. In such case, the offence may be described and charged in the words of the statute. Otherwise, it may be necessary to frame the indictment in such terms as to designate the offence intended with precision.<sup>1</sup>

Mr. Justice Curtis thus tersely states the rule and exception : “ This is an indictment for a misdemeanor created by statute. This indictment follows the words of the statute. It is sufficient, therefore, unless the

<sup>1</sup> *Commonwealth v. Bean*, 14 Gray, 53 ; S. C. 2 Lead. Crim. Cas. 172. *Commonwealth v. Bean*, 11 Cush. 414. *Commonwealth v. McCarron*, 2 Allen, 157. *United States v. Reed*, 1 Lowell, 233. *United States v. Cruikshank*, 92 U. S. 564, dissenting opinion of Clifford, J. *Commonwealth v. Barrett*, 108 Mass. 303. *Commonwealth v. Stout*, 7 B. Monroe, 248. *State v. Goulding*, 44 N. H. 284, 287. *Whiting v. State*, 14 Conn. 487. *State v. Bierce*, 27 Conn. 319.

words of the statute embrace cases which it was not the intention of the Legislature to include within the law. If they do, the indictment should show that this is not one of the cases thus excluded. Speaking of an information Chief Justice Marshall said: 'If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the Legislature;'<sup>1</sup> and this is only another mode of expressing the same rule which I have stated above."<sup>2</sup>

But the rule and the exception amount only to this: In all cases the offence, whether at common law or created by statute, must be set forth with clearness and all necessary certainty,<sup>3</sup> in order to apprise the defendant of the crime with which he is charged. The technical nicety required in criminal pleading, which has been adopted and sanctioned by long practice, was devised simply as the means to accomplish this purpose. And there is danger that every departure from that technical nicety may be a deprivation, to that extent, of the constitutional rights which are guaranteed to every citizen.

It is often said that whenever a case occurs in which all the facts charged against the defendant by the indictment may be admitted as proved, and yet

<sup>1</sup> *The Mary Ann*, 8 Wheat. 389.

<sup>2</sup> *United States v. Pond*, 2 Curtis C. C. 268. Dissenting opinion of Mr. Justice Clifford in *United States v. Reese*, 92 U. S. 233.

<sup>3</sup> "The art, or dexterity of pleading is only to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty." *Hale Hist. Com. Law*, p. 212, 6th ed.

the defendant be innocent, in every such case the indictment is bad.<sup>1</sup> "But I deny the justness of the proposed test," said Mr. Justice Crampton. "It would prove to be 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 defence of his life or of his possession. Thus this test is quite too wide. In many cases it will be applicable; it may be a general rule, but it certainly is not an universal one; in many cases it would mislead, and to many it is quite inapplicable."<sup>2</sup>

In numerous cases it is said that it is a well settled rule of the common law, that, in setting out a statutory offence, it is generally sufficient to follow the words of the statute. But there is no such rule of law. No distinction is made by the common law as respects the degree of particularity and precision essential to the description of an offence between statutory and common-law offences. All indictments must specify the criminal nature and degree of the offence, and the particular facts and circumstances which render the defendant guilty of that offence.

<sup>1</sup> "If every allegation may be taken to be true, and yet the defendant be guilty of no offence, then it is insufficient, although in the very words of the statute." *Commonwealth v. Harris*, 13 Allen, 539. *Commonwealth v. Collins*, 2 Cush. 558. Per Williams, J., in *Turner's Case*, 9 Q. B. 80. Per Pollock, C. B., in *Regina v. Harris*, 1 Denison C. C. 466. Lord Campbell, C. J.: "If it is laid down that where it is consistent with the allegations in the indictment that no indictable offence has been committed, the indictment is insufficient, that is a useful rule." *Regina v. Rowlands*, 2 Denison C. C. 377.

<sup>2</sup> *Jones v. The Queen, Jebb & Bourke*, 161.

If the statute sets out fully and precisely the necessary ingredients of the offence, then an indictment is generally sufficient which follows the words of the statute. But such an indictment is good, not because it satisfies the common-law rules of pleading. It is undoubtedly true, as a matter of fact, that where a statute creates an offence, it is generally sufficient to follow the words of the statute. But this is true, not because there is any rule of law to that effect, but because, when the Legislature creates a new offence, the statute generally specifies the facts necessary to constitute the offence.

These rules are very wide in their application; it will therefore be necessary to illustrate them by a variety of cases. In considering the English cases, it must be observed that the St. Geo. IV. ch. 64, § 21, enacts, that where the offence charged has been created by any statute, or subjected to any greater degree of punishment, the indictment shall after verdict be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute. And therefore, although a defendant may demur, if the indictment does not describe the offence with sufficient certainty, he cannot move in arrest of judgment or bring a writ of error. By that enactment, the Legislature intended to cure objections for want of certainty which affect, not the merits of the cause, but only the rules of pleading.<sup>1</sup>

From the canons of interpretation of the criminal law, it will appear that in ancient and modern times

<sup>1</sup> Per Mellor, J., in *Nash v. The Queen*, 4 B. & S. 945. Per Pollock, C. B., in *Regina v. Brown*, 3 Cox C. C. 133.

the greatest exactness has been required in the correspondence of the words of the statute with those of the indictment. That the words of the statute "are to be pursued strictly, and in terminis, according to the purview of the act,"<sup>1</sup> is a safe and certain rule ; an inquiry whether other words have the same meaning must be precarious and uncertain. An observance of the rule prevents the time of the court from being occupied with unnecessary and useless speculations as to the meaning of the words substituted for the words used in the statute. A case decided in the Supreme Court of the United States illustrates the necessity of avoiding a departure from a strict observance of the rule. An allegation of an intent that a vessel "should be employed" in the slave-trade is bad ; it must be in the words of the statute, "with intent to employ." Mr. Justice Story, in delivering the judgment of the court on this point, said : "There is a clear distinction between causing a vessel to sail, or to be sent away, with intent to employ her in the slave-trade, and with intent that she should be employed in that trade. The former applies to an intent of the party causing the act, the latter to the employment of the vessel, whether by himself or a stranger. The evidence may fully support these counts, and yet may not constitute an offence within the Act of Congress ; for, the employment by a mere stranger would not justify the conviction of the party charged with causing her to sail, or to be sent away, with intent to employ her in the slave-trade, as owner. There is no reason, in criminal cases, why the court

<sup>1</sup> Foster's Case, 11 Rep. 53 a.

should help any such defective allegations. The words of the statute should be pursued."<sup>1</sup>

It has been held that an indictment for perjury on the St. 5 Eliz. ch. 9, must exactly pursue the statutory words, which are, if any person shall "wilfully and corruptly" commit wilful perjury he shall be punished &c. An indictment alleged that the defendant "falsely and corruptly" deposed a certain matter, omitting the word "wilfully." The indictment was held bad, and that the conclusion, *et sic voluntarium et corruptum commisit perjurium*, did not help it.<sup>2</sup>

Where the words in the statute were "command, hire or counsel," and in the indictment "excite, move and procure," the indictment was held good, because the words were of the same legal import.<sup>3</sup> Where the words of the statute were "shall falsely make, forge or counterfeit," and in the indictment, "did *alter* by falsely making, forging and *adding*," the judges all held that the indictment was good.<sup>4</sup> It will be observed that the word "alter" was not in the statute on which this indictment was founded. If the forgery consists of the alteration of a true instrument, the alteration may either be specially alleged, and this mode is advisable, at least in one set of counts, even where the word "alter" is not in the statute; or, a count may charge the forgery of the entire instrument. Where the words of the statute were "lawful authority or excuse," and the in-

<sup>1</sup> *United States v. Gooding*, 12 Wheat. 460.

<sup>2</sup> *Regina v. Lembro & Hamper*, Cro. Eliz. 147; 2 Leon. 211.

<sup>3</sup> *Regina v. Grevil*, 1 And. 194.

<sup>4</sup> *Rex v. Elsworth*, 2 East P. C. 986, 988.

dictment "without lawful excuse," nothing being said of "authority," it was held that the word "excuse" includes authority and that the indictment was sufficient.<sup>1</sup>

An indictment on a statute which made it felony "*wilfully* and maliciously" to shoot at any person, was held bad, because the pleader omitted the word "*wilfully*," and charged that the offence was committed "*unlawfully*, maliciously and feloniously." Some of the judges thought that the word "wilful" was implied in the word "malicious"; but a great majority were clearly of opinion, that as the Legislature had, by the special penning of the Act, used both the words "wilfully" and "maliciously," they must be understood as a description of the offence; and that the omission was fatal.<sup>2</sup>

The case of *Commonwealth v. Slack*<sup>3</sup> was an indictment on a statute, the operative words of which were "That if any person shall knowingly or wilfully remove or convey away any human body," such person shall, on conviction, be adjudged guilty of felony. This statute was broad enough in its literal terms to forbid the removal of a dead body under any circumstances — for interment, even — without license &c. The indictment merely followed the words of the statute, without alleging with what intent the body was removed. "We are of opinion," said Mr.

<sup>1</sup> *Regina v. Harvey*, L. R. 1 C. C. 284; 40 L. J. M. C. 63.

<sup>2</sup> *Rex v. Davis*, 1 Leach C. C. 493. In a note to this case others are referred to, which are to the like effect. See also *Regina v. Bent*, 1 Denison C. C. 157; 2 C. & K. 179; *State v. Hussey*, 60 Maine, 410; *Commonwealth v. Turner*, 8 Bush, 1; *State v. Gove*, 34 N. H. 51; *Regina v. Jope*, 3 Allen, 161, New Brunswick.

<sup>3</sup> 19 Pick. 304. *State v. Beckman*, 57 N. H. 174, 180.

Justice Wilde, "that the removal of a dead body is not an offence within the true meaning of the statute, unless it is removed with the intent to use it or dispose of it for the purpose of dissection. This being the meaning of the prohibitory clause, the indictment ought to have averred that the defendants removed the dead body with the intention to use it or dispose of it for the purpose of dissection. *The criminal nature of an offence is a conclusion of law from the facts and circumstances of the case.* The indictment, therefore, should set out precisely all the facts and circumstances which render the defendant guilty of the offence charged. As there is no averment in this indictment, that the defendants removed the dead body with the intent to dispose of it for the purpose of dissection, and as we consider such intent as the essence of the crime, the indictment is defective, and that judgment must be arrested."

A statute enacts in very general terms that "Whoever keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity," on the Lord's day, shall be punished &c. Literally, "whoever keeps open his shop" subjects himself to the penalty; but it is obvious that more than this is meant to constitute the offence. The intent of the statute was to prohibit the opening of shops, warehouses and workhouses, for the purpose of work or the transaction of business; but not to prohibit the opening of them for any lawful purpose. An indictment, therefore, must allege that the defendant kept open his shop for the purpose of transacting business, or for some other

unlawful purpose.<sup>1</sup> And as the purpose to do unlawful business is not of necessity limited to any particular kind of business, and may exist before any business is actually done, the general allegation of the purpose is sufficient.<sup>2</sup>

The rule that an indictment must state all the facts necessary to bring the defendant precisely within the statute is well illustrated by the case of *Morse v. State*.<sup>3</sup> A statute made it an offence to "give credit to any student of Yale College, being a minor, without the consent, in writing, of his parent or guardian, or of such officer or officers of the college as may be authorized by the government thereof, to act in such cases." An omission to allege in an information, that such an officer or officers had been appointed or existed, is fatal.

There is a class of statute offences which are sufficiently described in an indictment by being set forth in the words of the statute, without more, because those words, *ex vi terminorum*, import all that is necessary to a legal description of the offence. By statute to "keep a house of ill-fame, resorted to for the purpose of prostitution or lewdness," is made a distinct offence, and an indictment is sufficient which follows the words of the statute, without alleging that the house was resorted to by divers persons, men as well as women, or that the defendant kept it for lucre.<sup>4</sup> So an indictment is sufficient which charges,

<sup>1</sup> *Commonwealth v. Collins*, 2 Cush. 556. *Commonwealth v. Lynch*, 8 Gray, 384.

<sup>2</sup> *Commonwealth v. Wright*, 12 Allen, 187.

<sup>3</sup> 6 Conn. 9. A similar decision was made in the case of *Sloper v. Harvard College*, 1 Pick. 177.

<sup>4</sup> *Commonwealth v. Ashley*, 2 Gray, 357.

in the words of the statute, that the defendant "did keep and maintain a common nuisance, to wit, a building used for the illegal sale and illegal keeping of intoxicating liquors," without more particularly charging the illegal sale or illegal keeping of intoxicating liquors.<sup>1</sup> An indictment which charges the defendant, in the words of the statute, with "wilfully and maliciously administering a certain poison to the horse" of another person, is sufficient, without further averment of any criminal intent, or of any injury to the horse.<sup>2</sup> So an indictment, in the words of the statute, that the defendant "did cruelly beat a certain horse," is a sufficient description of the offence and of the horse.<sup>3</sup>

Where a statute punishes an offence, by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms in the indictment which technically charge the offence, at common law.<sup>4</sup> "Wherever a statute describes an act by merely giving its legal character, it is not enough to frame an averment in the words of the statute: that places the jury in the situation of having to decide whether the act proved does or does not bear the legal character."<sup>5</sup> Thus, a statute enacts that

<sup>1</sup> *Commonwealth v. Kelly*, 12 Gray, 175. *Commonwealth v. Far- rand*, 12 Gray, 177.

<sup>2</sup> *Commonwealth v. Brooks*, 9 Gray, 299.

<sup>3</sup> *Commonwealth v. McClellan*, 101 Mass. 34. Chapman, C. J., observed that "the brevity of the indictment raised a question as to its sufficiency." *Commonwealth v. Brigham*, 108 Mass. 457. *Commonwealth v. Sowle*, 9 Gray, 304. *Commonwealth v. Falvey*, 108 Mass. 304.

<sup>4</sup> *Tully v. Commonwealth*, 4 Met. 357. *State v. Absence*, 4 Port. 397. *State v. Stedman*, 7 Port. 495.

<sup>5</sup> Judgment of Coleridge, J., in *Regina v. Nott*, 4 Q. B. 783.

“Whosoever shall forge or fraudulently alter any process of any court shall be guilty of felony.” The common-law definition of forgery must be imported into this section, and an indictment must allege an intent to defraud.<sup>1</sup>

Where a statute constitutes a new species of offence, and does not refer certain acts to a known species of crime, it is sufficient to use the words of the statute. An indictment charged in the words of the statute<sup>2</sup> in one count, that the defendant did “feloniously steal and feloniously take from and out of a certain bag in which letters were then and there sent by the post &c., a certain letter,” and in another count, that he “feloniously did steal and feloniously take from and out of a certain mail sent by post &c., a certain bag of letters” &c. It was held on a case reserved, that this was a larceny created by statute, and that it was sufficient to charge the offence in the words of the statute, without charging an asportation;<sup>3</sup> and that in this respect it differed from the description of the crime of larceny at common law.

Where the *corpus delicti* charged is an act in violation of a statute, it is not sufficient to state, as the offence, that which is only the legal result of the facts; but the facts themselves must be specified, that the court may judge whether they amount in law to the offence. But where the *corpus delicti* is a conspiracy at common law, to effect objects prohib-

<sup>1</sup> *Regina v. Powner*, 12 Cox C. C. 235, Quain, J. *Regina v. Hodgson*, Dearsly & Bell C. C. 3. *Commonwealth v. Dean*, 110 Mass. 64.

<sup>2</sup> 23 & 24 Geo. III. ch. 17, § 37, vol. xii. *Irish Statutes*, p. 568.

<sup>3</sup> *Rex v. Rossiter*, Jebb C. C. 50. See *Douglas v. The Queen*, 13 Q. B. 74; *Regina v. Wynn*, 1 Denison C. C. 365; 2 C. & K. 859.

ited by a statute, it is sufficient to pursue the words of the statute. These words are not employed as describing the substantive offence for which the indictment is preferred, which offence consists in the conspiracy, but to disclose the nature of the acts by which the conspiracy is to take effect. Therefore, an indictment which charged a conspiracy to force workmen to depart from their employment, to raise the rate of wages &c., by "molesting," by "threats," by "intimidating," by "obstructing" &c., in violation of the statute, was held sufficient, without setting out the *means* used to molest, intimidate, or obstruct, or the threats held out.<sup>1</sup>

By the settled rules of pleading, a party charged with an offence is entitled to a statement in the indictment of the facts which constitute the offence; and if any offence 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 offence by a different mode is offered, such evidence is incompetent by reason of variance.<sup>2</sup>

It is not necessary in an indictment upon a statute, to indicate the particular section or even the particular statute upon which it is founded. It is only necessary to set out in the indictment such facts as bring the case within the provisions of some statute which was in force when the act was done, and also

<sup>1</sup> *Regina v. Rowlands*, 17 Q. B. 671; 2 Denison C. C. 364.

<sup>2</sup> *Commonwealth v. Richardson*, 126 Mass., not yet published. This was a case of polygamy which, under the statutes, may be committed under entirely different circumstances.

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 statute, it is sufficient to warrant the court in rendering a judgment. If, therefore, certain acts are, by force of the statutes, 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 offence, unaccompanied by any averment that the aggravating circumstances did not exist.<sup>1</sup> Thus, under a statute, of which one section provides a punishment for the burning of a barn, and another section provides a more severe punishment for the burning of a barn within the curtilage of a dwelling-house, an indictment for the burning of a barn which does not allege that the barn was, or was not, within the curtilage of a dwelling-house is a good indictment on the former section.<sup>2</sup>

In England the rule is at variance with the principles stated in the preceding section in reference to statutes creating a gradation of offences. It is there held that an indictment which may apply to either of two different definite offences, and does not specify which, is bad.<sup>3</sup>

It is not necessary, as has already been stated, in an indictment on a public statute, to recite it or specially refer to it; but it is sufficient to conclude

<sup>1</sup> Commonwealth *v.* Griffin, 21 Pick. 523. Commonwealth *v.* Squire, 1 Met. 258. Larned *v.* Commonwealth, 12 Met. 240. Commonwealth *v.* Wood, 11 Gray, 85, 93. Commonwealth *v.* Cox, 7 Allen, 577, 578. Commonwealth *v.* Thompson, 108 Mass. 461.

<sup>2</sup> Commonwealth *v.* Hamilton, 15 Gray, 480.

<sup>3</sup> Rex *v.* Marshall, 1 Moody C. C. 158.

“against the form of the statute in such case made and provided.” The court is bound to take notice of all public statutes, and to refer the acts, which are charged in an indictment, to such statute as makes them punishable.<sup>1</sup>

A variance between the recited and the true title of a statute is fatal to an indictment;<sup>2</sup> unless the variance is immaterial, and does not alter the sense.<sup>3</sup> In delivering the judgment in a recent crown case reserved, Pollock, C. B., said:<sup>4</sup> “What I am about to state is no part of the judgment which I have given, but my own opinion, though I believe it to be the opinion of every member of the court also. In a case where the title of an Act of Parliament is not accurately stated, but is stated with so much clearness and accuracy as to enable the judges, who know the titles of all the acts that have ever been passed, to know the act referred to, and to leave no possible doubt on their minds upon the matter, I must say I, for one, notwithstanding the cases that were cited,<sup>5</sup> sitting in this court, am prepared to hold

<sup>1</sup> *Commonwealth v. Hoyer*, 11 Gray, 462, 463. *United States v. Nickerson*, 17 How. 204. *Rex v. Sutton*, 4 M. & S. 542. 2 Gabbett *Crim. Law*, 239. 1 Taylor *Ev.* § 5, 6th ed. Stephen *Pl.* 287, 7th ed.

<sup>2</sup> 1 Stark. *Crim. Pl.* 215, 216, 2d ed. 1 Gabbett *Crim. Law*, 47, 48

<sup>3</sup> *Commonwealth v. Burke*, 15 Gray, 408. *People v. Walbridge*, 6 Cowen, 512. It has been ruled, in an action on a penal statute, that a misrecital of the title of an act would not vitiate the declaration. *Chance v. Adams*, 1 Ld. Raym. 77. *Nixon v. Nanney*, 1 Q. B. 747; 1 Gale & Dav. 370, 373 note. *Yelv.* 127 a, note, ed. Metcalf.

<sup>4</sup> *Regina v. Westley*, Bell C. C. 193, 207.

<sup>5</sup> *Boyce v. Whitaker*, 1 Dougl. 94. *King v. Marsack*, 6 T. R. 771. *Beck v. Beverley*, 11 M. & W. 845. In this last-named case it was decided that in reciting a statute in pleading, the whole of the title must be stated, though it comprises several other subject-matters besides that to which the pleading refers.

that a variation so small and insignificant furnishes no ground of objection. And I am not prepared to apply the doctrine that has been laid down in the cases that have been cited."

The time when a statute was enacted and became a law is wholly immaterial, provided it was in force when the offence charged in the indictment was committed. It is unnecessary and unprecedented to set forth the date of a statute or otherwise describe it.<sup>1</sup> The court will take notice of the day on which a statute was passed.<sup>2</sup>

The misrecital of a public statute, so as to make it senseless, in a complaint charging an act to have been done in violation thereof, and not otherwise showing that the act was illegal, is a fatal defect.<sup>3</sup>

It is not necessary to state on the face of an indictment to whom the penalty is to go; that is no part of the judgment. It is sufficient to adjust it to the person or persons entitled to it after it is received.<sup>4</sup> In such a case, the court render a judgment that will secure the disposal of the penalty according to the statute on which the indictment is founded.<sup>5</sup>

It is a well-established rule of the construction of statutes that a statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first;<sup>6</sup> and the implication is equally strong in rela-

<sup>1</sup> *Commonwealth v. Keefe*, 7 Gray, 332, 335.

<sup>2</sup> *Regina v. Westley*, Bell C. C. 193. *People v. Reed*, 47 Barb. 235. See *Rex v. Biers*, 1 Ad. & El. 327.

<sup>3</sup> *Commonwealth v. Unknown*, 6 Gray, 489.

<sup>4</sup> *Commonwealth v. Tuttle*, 12 Cush. 502, 504. *Commonwealth v. Burding*, 12 Cush. 506.

<sup>5</sup> *Levy v. Gowdy*, 2 Allen, 323.

<sup>6</sup> If a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the pro-

tion to a revision of the common law.<sup>1</sup> The statutory remedy alone is then to be pursued. But it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where, or so far as, the statute is plainly intended to alter the course of the common law.<sup>2</sup> It is a direct and necessary consequence from this principle, that a statute may be in affirmance of the common law, adding new regulations and supplying additional remedies, but leaving in full force those which might before have been resorted to for the redress of public or private grievances.<sup>3</sup>

cedure &c., giving an appeal where there was no appeal before, the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as by making it a misdemeanor instead of a felony or a felony instead of a misdemeanor, the offence could not be proceeded for under the earlier statute: and the same consequence follows from altering the procedure and the punishment. The later enactment operates by way of substitution, and not cumulatively giving an option to the prosecutor. *Michell v. Brown*, 1 El. & El. 267.

<sup>1</sup> *Commonwealth v. Cooley*, 10 Pick. 37. *Commonwealth v. Wyman*, 12 Cush. 237, 239. *Commonwealth v. Dennis*, 105 Mass. 162.

<sup>2</sup> *Regina v. Morris*, L. R. 1 C. C. 94, per Byles, J. *Commonwealth v. Knapp*, 9 Pick. 514.

<sup>3</sup> *Commonwealth v. Rumford Chemical Works*, 16 Gray, 231, 232.

## CHAPTER XXI.

THE PLEADING OF EXCEPTIONS AND PROVISOS IN STATUTES.<sup>1</sup>

If there be an exception contained in the clause of a statute which defines the offence, or, as it is commonly called, the enacting clause, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception.

But if the exception or proviso be in a subsequent clause or statute, or, although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defence for the other party, and need not be negatived in the indictment.<sup>2</sup>

<sup>1</sup> There is a technical distinction between a proviso and an exception, which is well understood. "Logically speaking," said Lord Campbell, "the *exception* ought to be of that which would otherwise be included in the category from which it is excepted; but there are a great many examples to the contrary; and there is one which probably will strike every one, in the second book of Paradise Lost: 'God and his Son excepted, created beings.' It is not supposed that God and his Son were part of the created beings; it merely means that they were not included in the description of created beings. This is a common mode of expression, both in legal instruments and in common parlance; and it is used not to exclude that which would otherwise be included in that from which it is supposed to be excepted, but

<sup>2</sup> These rules of pleading are fully stated in the case of *Commonwealth v. Hart*, 11 Cush. 130; *S. C. 2 Lead. Crim. Cas. 1*, and notes; in the case of *United States v. Cook*, 17 Wall. 168; and in *Commonwealth v. Jennings*, 121 Mass. 47.

WHERE a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, the rules of pleading require that an indictment founded upon the statute must allege enough to show that the defendant is not within the exception; but if the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined, without any such reference to the exception, the pleader may omit any such reference, as the matter contained in the exception is matter of defence, and must be shown by the defendant.<sup>1</sup>

It has been said, that, if the exception is in the enacting clause, the party pleading must show that the defendant 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 defence, and must be shown by the defendant. 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 offence may be

to intimate that it is not included." *Gurly v. Gurly*, 8 Clark & Finnelly, 764.

The office of a *proviso*, generally, is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the Legislature to be brought within its purview. *Minis v. United States*, 15 Peters, 445.

<sup>1</sup> *United States v. Cook*, 17 Wall. 173.

so entirely separable from the exception, that all the ingredients constituting the offence may be accurately and clearly alleged, without any reference to the exception.<sup>1</sup>

There is a class of cases 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 offence, 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 defendant 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 the want of clearness and certainty.<sup>2</sup>

Some writers and judges have sometimes been led into error by supposing that the words "enacting clause," as frequently employed, mean the section of a statute defining the offence, 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 offence as to constitute a material part of the description of the acts, omission or other ingredients which constitute the offence. Such an offence must be accurately and clearly described; and if the exception is so incorporated with the clause describing the

<sup>1</sup> *United States v. Cook*, 17 Wall. 174.

<sup>2</sup> *United States v. Cook*, 17 Wall. 175.

offence 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 offence as to become a material part of the definition of the offence, then it is matter of defence, and must be shown by the other party, though it be in the same section, or even in the succeeding sentence.<sup>1</sup>

In the leading case of *Steel v. Smith*,<sup>2</sup> which was a suit for a penalty, Mr. Justice Bayley stated the rule thus: "When there is an exception so incorporated with the enacting clause, that the one cannot be read without the other, then the exception must be negatived." The statute of Massachusetts<sup>3</sup> concerning the observance of the Lord's day furnishes as plain an example of this rule of pleading as can be found. By § 1, "No person shall do any manner of labor, business or work, except only works of necessity or charity, on the Lord's day." By § 2, "No person shall travel on the Lord's day, except from necessity or charity." 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 travelling merely is not forbidden, but unnecessary labor and travelling, and labor and travelling not required by charity. The absence of necessity and charity is a constituent part of the description of the acts prohibited, precisely as if the statute had,

<sup>1</sup> *United States v. Cook*, 17 Wall. 176. <sup>2</sup> *Lead. Crim. Cas.* 12, 2d ed.

<sup>2</sup> 1 B. & Ald. 94, 99, A.D. 1817.

<sup>3</sup> *Rev. Sts.* ch. 50. *Gen. Sts.* ch. 84.

in totidem verbis, prohibited unnecessary labor and travelling, and travelling and labor not demanded by charity. All the cases in which this rule of pleading has been rightly applied are found, when examined accurately, to be the same in principle.<sup>1</sup>

Under the St. 22 Geo. III. ch. 84, the enacting clause of which prohibited other persons than the scavenger from carrying away dust in a certain parish, "except in the places hereinafter mentioned," which were specified in subsequent sections of the act, it was held that, in an action for a violation of the statute, these exceptions need not be negatived.<sup>2</sup> So it was held that, in an action for a penalty under a section which prohibited the exportation of slaves, "except as hereinafter provided," the plaintiff need not negative the proviso of a succeeding section, which allowed persons travelling through or removing from the State to take their slaves with them.<sup>3</sup>

The St. 1875, ch. 99, § 1, enacts, that "No person shall sell, or expose, or keep for sale, spirituous or intoxicating liquors, except as authorized in this act: *provided*" &c. It is unnecessary to negative in a complaint the specific exceptions afterwards enumerated in the proviso to this section and in the subsequent sections of the statute. But the exception in the enacting clause of the first section should be negatived by the words "not having then and there any license appointment or authority according to law," or by other equivalent words; and the want

<sup>1</sup> Commonwealth v. Hart, 11 Cush. 135; S. C. 2 Lead. Crim. Cas. 5. State v. Barker, 18 Vt. 195. Commonwealth v. Maxwell, 2 Pick. 139.

<sup>2</sup> Ward v. Bird, 2 Chit. 582.

<sup>3</sup> Hart v. Cleis, 8 Johns. 41.

of any such negative allegation renders a complaint fatally defective.<sup>1</sup>

On a crown case reserved, it was determined that the general rule of pleading is the same, although the statute casts upon the defendant the burden of proving that he comes within the exception. The statute only alters the rules of evidence, it does not alter the rule as to the description of the offence in an indictment.<sup>2</sup> On the contrary Chief Justice Shaw said in a similar case: "The law expressly makes this matter of defence, and places the burden of proof on the defendant, to prove these facts, if he can. This, of course, exonerates the prosecutor from negating in his averments, such facts as, if they exist, are mere matter of defence."<sup>3</sup>

"There is a middle class of cases," said Mr. Justice Metcalf,<sup>4</sup> "namely, where the exception is not, in express terms, introduced into the enacting clause, but only by reference to some subsequent or prior clause, or to some other statute. As when the words 'except as hereinafter mentioned,' or other words referring to matter out of the enacting clause, are used. The rule in these cases is, that all circumstances of exemption and modification, whether applying to the offence or to the person, which are incorporated by reference with the enacting clause, must be distinctly negated. *Verba relata in esse videntur.*"<sup>5</sup>

<sup>1</sup> *Commonwealth v. Byrnes*, 126 Mass., not yet published.

<sup>2</sup> *Regina v. Harvey*, L. R. 1 C. C. 284; 40 L. J. M. C. 63.

<sup>3</sup> *Commonwealth v. Edwards*, 12 Cush. 187, 189.

<sup>4</sup> *Commonwealth v. Hart*, 11 Cush. 137; S. C. 2 Lead. Crim. Cas. 7.

<sup>5</sup> Citing *Rex v. Pratten*, 6 T. R. 559; *Vavasour v. Ormrod*, 9 D. & R. 597, 599; 6 B. & C. 430, 432.

But in a very recent case it was said that this statement of Mr. Justice Metcalf is inconsistent with a subsequent adjudication, in which he concurred,<sup>1</sup> and that it is "established, by a great preponderance of authority, that, when an exception is not stated in the enacting clause otherwise than by merely referring to other provisions of the statute, it need not be negated, unless necessary to a complete definition of the offence."<sup>2</sup>

The St. 1852, ch. 322, § 1, enacted that no person should be allowed to sell any spirituous or intoxicating liquors, "except as is hereinafter provided." Section 7 provided that if any person should sell any spirituous or intoxicating liquors, "in violation of the provisions of this act," he should be punished by fine or imprisonment. In prosecuting for this penalty, it was held to be unnecessary to negative the exceptions which were stated in subsequent sections of the statute.<sup>3</sup>

It was determined in the case of *Commonwealth v. Jennings*,<sup>4</sup> that, in an indictment on § 4 of the Gen. Sts. ch. 165, which enacts that "Whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife, in this State, shall (except in the cases

<sup>1</sup> *Commonwealth v. Tuttle*, 12 Cush. 502.

<sup>2</sup> *Commonwealth v. Jennings*, 121 Mass. 50, 51.

<sup>3</sup> *Commonwealth v. Tuttle*, 12 Cush. 502. Like decisions were made in *Commonwealth v. Hill*, 5 Grat. 682, and in *State v. Miller*, 24 Conn. 522; 121 Mass. 152.

<sup>4</sup> *Commonwealth v. Jennings*, 121 Mass. 47. Similar decisions under enactments not distinguishable in their terms from these statutes were made in the cases of *State v. Abbey*, 29 Vt. 60, and *Fleming v. People*, 27 N. Y. 329.

mentioned in the following section) be deemed guilty of polygamy," the exception, stated in § 5, of a person whose husband or wife has been absent for seven years and not known to be living, need not be negatived. Gray, C. J.: "The offence of polygamy is fully defined by the Gen. Sts. ch. 165, § 4, as consisting in the defendant's, while having a former husband or wife living, marrying or continuing to cohabit with another person in this State. The words, 'except in the cases mentioned in the following section,' are not so incorporated with the enacting clause that the one cannot be read without the other, but are inclosed in a parenthesis, inserted, after completing the enumeration of the elements necessary to constitute the crime, in the midst of the conclusion which declares its denomination. That the former husband or wife has been absent for seven years and unheard from is a matter of defence or excuse, rather than a limit of the definition of the crime."

In *Commonwealth v. Jennings*,<sup>1</sup> the court were of opinion that that case fell within the principle stated by Mr. Justice Metcalf in the closing paragraph of the judgment in *Commonwealth v. Hart*: "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 other side; that is, it is not necessary to anticipate the adverse party's answer, and forestall his defence or reply."<sup>2</sup> It is only when the matter is

<sup>1</sup> 121 Mass. 47.

<sup>2</sup> "An indictment rightly framed, never negatives matter of defence." Per Metcalf, J., in *Commonwealth v. Murphy*, 2 Gray, 514. "'Tis like leaping," as Hale, C. J., said, "before one come to the stile." 1 Vent. 217. 3 T. R. 297. *Commonwealth v. Sheffield*, 11 Cush. 178.

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.”

On a crown case reserved, the judges were unanimously of opinion that an indictment which may apply to either of two different definite offences, and does not specify which, is bad.<sup>1</sup>

But there is a class of cases which maintain the general principle, that where, by statute or statutes, there is a gradation of offences of the same species, — as in the various degrees of punishment annexed to the offence of malicious burning of buildings, or in the various grades of the offence of larceny, — it is not necessary to set forth a negative allegation, alleging that the case is not embraced in some other section than that which, upon the evidence, may be found to apply in the case on trial, and by virtue of which the punishment is to be awarded. If, therefore, certain acts are, by force of the statutes, 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 offence, unaccompanied by any averment that the aggravating circumstances did not exist. In such cases the offence charged is to be deemed the minor offence, and punishable as such.<sup>2</sup>

The word “except” is not necessary in order to

<sup>1</sup> *Rex v. Marshall*, 1 Moody C. C. 158.

<sup>2</sup> This principle was fully stated in the case of *Commonwealth v. Squire*, 1 Met. 258. *Larned v. Commonwealth*, 12 Met. 240, 241. *Commonwealth v. Wood*, 11 Gray, 86, 93. *Commonwealth v. Hamilton*, 15 Gray, 480, 482.

constitute an exception within the rule. The words "unless," "other than," "not being," "not having" &c., have the same legal effect, and require the same form of pleading.<sup>1</sup>

"Not being then and there" &c., is the usual form of negative allegation.<sup>2</sup> The word "without" is a word of sufficiently positive negation.<sup>3</sup> Where a statute makes the doing of an act "without lawful authority or excuse" criminal, it is sufficient if the indictment negatives "lawful excuse," without also negating "lawful authority;" as there can be no "lawful authority" which would not also be a "lawful excuse," and, therefore, to negative "lawful excuse" is also to negative "lawful authority."<sup>4</sup>

<sup>1</sup> *Commonwealth v. Hart*, 11 Cush. 136; S. C. 2 Lead. Crim. Cas. 6, citing *Gill v. Scrivens*, 7 T. R. 27. *Spieres v. Parker*, 1 T. R. 141. *Rex v. Palmer*, 1 Leach C. C. 102, 4th ed. *Wells v. Iggulden*, 5 D. & R. 19. *Commonwealth v. Maxwell*, 2 Pick. 139. *State v. Butler*, 17 Vt. 145. 1 East P. C. 166, 167.

<sup>2</sup> *Commonwealth v. Roland*, 12 Gray, 132. *Commonwealth v. Fredericks*, 119 Mass. 199. *Commonwealth v. Davis*, 121 Mass. 352.

<sup>3</sup> *Commonwealth v. Thompson*, 2 Allen, 507.

<sup>4</sup> *Regina v. Harvey*, L. R. 1 C. C. 284; 40 L. J. M. C. 63.

## CHAPTER XXII.

## DESCRIPTION OF REAL AND PERSONAL PROPERTY.

**When property is the subject of an offence, it must be described with accuracy and certainty.**

**In this statement, certainty to a common intent is sufficient.**

THE objects of the rule of criminal pleading, which requires property whether real<sup>1</sup> or personal, in reference to which an offence is alleged to have been committed to be definitely described in the indictment, are to identify the offence, to give the defendant full notice of the nature of the charge, to inform the court what sentence should be passed if the defendant is convicted, and to enable him to plead his acquittal or conviction to a subsequent indictment for the same cause.<sup>2</sup>

When, as in larceny, embezzlement, receiving stolen goods &c., personal property is the subject of an offence, it must be described specifically by the name usually appropriated to it, and the number and value of each species or particular kind of property stated.

<sup>1</sup> *Commonwealth v. Brown*, 15 Gray, 189. *State v. Malloy*, 5 Vroom, 410. The approved forms of indictments for common nuisances describe the place thereof as a certain building, tenement, a certain disorderly house, a certain shop, a certain common gaming-house &c., without further description. *Commonwealth v. Skelley*, 10 Gray, 464. *State v. Nixon*, 18 Vt. 70.

<sup>2</sup> *Commonwealth v. Strangford*, 112 Mass. 291, 292.

When a statute uses the word "dwelling-house," no other building can be the subject of arson or burglary. *Commonwealth v. Buzzell*, 16 Pick. 153. *Commonwealth v. Barney*, 10 Cush. 478, 479.

In this respect difficulties will sometimes occur. In this statement, certainty, to a common intent, as it is technically termed, is generally sufficient, which means such certainty as will enable the jury to decide, in cases of larceny, whether the property proved to have been stolen is the very same with that upon which the indictment is founded, and show judicially to the court that it could have been the subject-matter of the offence charged, and thus secure the defendant from any subsequent proceedings for the same cause, after a conviction or acquittal;<sup>1</sup> and therefore to charge A. with having feloniously taken and carried away the goods of B. will not be sufficient.<sup>2</sup>

The *description* of the property must be stated with accuracy and certainty.<sup>3</sup> The common and ordinary acceptation governs the description, and it is sufficient if it be one that is usual or well known.<sup>4</sup> Thus, in an indictment for stealing a handkerchief, it is not necessary to describe it as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality.<sup>5</sup> A set of new handkerchiefs in a piece may be described as so many handkerchiefs, though they are not separated one from another, if the pattern designates each, and they are described in the trade as so many handker-

<sup>1</sup> 1 Stark. Crim. Pl. 193. 2 Russell on Crimes, 260, 5th ed. Commonwealth v. Lavery, 101 Mass. 207, 209.

<sup>2</sup> 2 Hale P. C. 182. Per Metcalf, J., in Commonwealth v. Kelly, 12 Gray, 176. Commonwealth v. Gavin, 121 Mass. 55.

<sup>3</sup> See Regina v. Bonner, 7 Cox C. C. 13; 2 Russell on Crimes, 314 note, 4th ed.

<sup>4</sup> Commonwealth v. James, 1 Pick. 375; S. C. 2 Lead. Crim. Cas. 181. Commonwealth v. Campbell, 103 Mass. 436. Rex v. Johnson, 3 M. & S. 539.

<sup>5</sup> Per Le Blanc, J., in Rex v. Johnson, 3 M. & S. 552.

chiefs.<sup>1</sup> In an indictment for stealing printed books, it is not necessary to do more than to name so many printed books of the value &c. If the charge be generally that the defendant stole divers, to wit, twenty printed books, that would be sufficient. The title of the books need not be stated.<sup>2</sup> It is sufficient to describe the property stolen as "one hide of the value" &c.<sup>3</sup> So a charge of stealing "a parcel of oats" is sufficiently certain.<sup>4</sup>

In general, as great a degree of certainty is required in an indictment respecting personal property as in a declaration in an action of trespass.<sup>5</sup> In 2 Wms. Saund. 74 *a*,<sup>6</sup> it is said, "The law does not now require so much precision and certainty in the description of the goods as formerly; for if they are described according to common acceptance, it is sufficient." This is said of declarations, and it is undoubtedly true of indictments.<sup>7</sup> Many cases are there collected to show how little of certainty is required in a declaration; but they all specify clearly and precisely the article taken. They leave no doubt as to the nature and kind of the goods in question, although some of them omit the quality and the precise quantity of the goods; such as "two pieces of

<sup>1</sup> *Rex v. Nibbs*, 1 Moody C. C. 25.

<sup>2</sup> Per Lord Ellenborough, C. J., and Bailey, J., in *Rex v. Johnson*, 3 M. & S. 548, 555. *State v. Logan*, 1 Missouri, 377.

<sup>3</sup> *State v. Dowell*, 3 Gill & Johns. 310.

<sup>4</sup> *State v. Brown*, 1 Dev. 137.

<sup>5</sup> Purcell Crim. Pl. 84. See 2 Hale, P. C. 183; 1 Stark. Crim. Pl. 192.

<sup>6</sup> And 2 Wms. Notes to Saund. 267.

<sup>7</sup> *Regina v. Spicer*, 1 Denison C. C. 82; 1 C. & K. 699. Reporter's note to *Regina v. Bond*, 1 Denison C. C. 528.

cloth," "a parcel of thread," "divers quantities of earthen-ware, china-ware, and linen."<sup>1</sup>

If an article has obtained in common parlance a particular name, it is erroneous to describe it by the name of the material of which it is composed.<sup>2</sup> If in an indictment for the larceny of several articles, some of them are insufficiently described, and there is a general verdict of guilty, judgment will not be arrested, but will be entered for the larceny of the articles which are sufficiently described.<sup>3</sup>

In indictments for larceny or embezzlement, particular descriptions of the property have never been considered necessary, and the description given in the statute which creates the offence has in general been deemed sufficient.<sup>4</sup> This doctrine is founded partly on the fact that the prosecutor is not considered in possession of the property stolen, and is not, therefore, enabled to give a minute description; and principally because, notwithstanding the general description, it is made certain to the court, from the face of the indictment, that the property taken is such whereof larceny may be committed.

<sup>1</sup> *Oystead v. Shed*, 12 Mass. 505, 513. See also the cases cited in *Commonwealth v. Maxwell*, 2 Pick. 143.

<sup>2</sup> *Commonwealth v. Clair*, 7 Allen, 525. *Regina v. Mansfield*, C. & Marsh. 140.

<sup>3</sup> *Commonwealth v. Eastman*, 2 Gray, 76. *Eastman v. Commonwealth*, 4 Gray, 416. *Commonwealth v. Hathaway*, 14 Gray, 392.

<sup>4</sup> *Rex v. Johnson*, 3 M. & S. 539, 547. *Commonwealth v. Concanon*, 5 Allen, 502. *Commonwealth v. Brettun*, 100 Mass. 206. *Commonwealth v. Boyer*, 1 Binn. 201, 205. Where the subject-matter is defined by statute, the descriptive words contained in the statute should be used in the indictment. Where the statute uses several descriptive terms, one of which being general includes the more specific term, an indictment is bad, which uses the more general instead of the more special description. 1 Stark. Crim. Pl. 193.

An indictment for a larceny or an embezzlement of bank-bills, which states the amount and value of the whole, need not describe their number or denomination, nor allege that the grand jurors could not more particularly describe them. The same rule of pleading applies to indictments for stealing or embezzling coin. Where all the articles alleged to have been stolen are of one kind, the allegation may be "divers," "divers and sundry," or "a quantity," without stating any specific number, with an averment of the aggregate value of the whole.<sup>1</sup>

A statute enacts that "Whoever commits larceny, by stealing, of the property of another, any money, goods or chattels, or any bank-note, bond, promissory note, bill of exchange," shall be punished &c.<sup>2</sup> An indictment on this statute for the larceny of "divers promissory notes of the amount and of the value in all of five thousand dollars, a more particular description of which is to the jurors unknown," charges the offence with sufficient definiteness, and is sustained by proof that the notes stolen were bank-notes.<sup>3</sup> A bank-bill is a promissory note, as is manifest from the fact that it is the promise of the banking corporation to pay the bearer of the instrument a certain sum of money on demand. And it has been

<sup>1</sup> *Commonwealth v. Sawtelle*, 11 Cush. 144. *Commonwealth v. Duffy*, 11 Cush. 145. *Commonwealth v. Stebbins*, 8 Gray, 492. *Commonwealth v. Grimes*, 10 Gray, 470, 471. *Commonwealth v. Cannon*, 5 Allen, 506. *Commonwealth v. O'Connell*, 12 Allen, 451. *Commonwealth v. Butterick*, 100 Mass. 1, 8. *Commonwealth v. Hussey*, 111 Mass. 432. *Commonwealth v. Green*, 122 Mass. 333. *Commonwealth v. Butts*, 124 Mass. 449. *Low v. People*, 2 Parker C. C. 37.

<sup>2</sup> Gen. Sts. of Mass. ch. 161, § 18.

<sup>3</sup> *Commonwealth v. Butts*, 124 Mass. 449.

repeatedly decided that, under statutes for counterfeiting or for uttering forged promissory notes, indictments are sustained by proof of counterfeiting or of uttering forged bank-bills.<sup>1</sup> The notes may be described in an indictment either as bank-notes or as promissory notes. The latter description is the more general, and includes the former.<sup>2</sup>

It is said in *Termes de la Ley*, a work of high reputation, that "coin is a word collective, which contains in it all manner of the several stamps and portraitures of money." As the word "coin," without any prefix, means metallic money generally, so "copper coin," without any further description, means copper money generally, and not a single coin, nor any specific number or kind of coins. The words "copper coin" have the same meaning as copper coins.<sup>3</sup> In the case of larceny of coins it is sufficient to allege the collective value of the whole, without specifying the value and denomination of each, nor that they are current as money in the Commonwealth; for coins not current here are doubtless the subject of larceny.<sup>4</sup> And it has been decided that an indictment for larceny of "one silver coin of the value of fifty cents" is sufficiently certain, and that it is not necessary to allege its value in the current money of the United States or of any other country.<sup>5</sup>

<sup>1</sup> *Commonwealth v. Simonds*, 14 Gray, 59. *Commonwealth v. Woods*, 10 Gray, 477. *Commonwealth v. Carey*, 2 Pick. 47.

<sup>2</sup> *Commonwealth v. Hussey*, 111 Mass. 432. *Commonwealth v. Green*, 122 Mass. 333. *Commonwealth v. Butts*, 124 Mass. 449, 452.

<sup>3</sup> *Commonwealth v. Gallagher*, 16 Gray, 240.

<sup>4</sup> *Commonwealth v. Sawtelle*, 11 Cush. 144. *Commonwealth v. Gallagher*, 16 Gray, 240.

<sup>5</sup> *United States v. Rigsby*, 2 Cranch C. C. 364.

An indictment for stealing chattels which are the subject of larceny only in particular cases, or under certain circumstances, must show that they fall within the requisite description. And it is so clearly established that those creatures which are *feræ naturæ* can only become the subject of property by being dead, reclaimed, or confined, that it has been held to be necessary that they should be so described in an indictment for stealing them. The prisoner, having been convicted on an indictment for stealing a pheasant of the value of forty shillings of the goods and chattels of H. S., upon a case reserved, the judges all agreed that the conviction was bad; that in cases of larceny of animals *feræ naturæ* the indictment must show that they were either dead, tame, or confined; otherwise, they must be presumed to be in their original state, and that the allegation "of the goods and chattels" did not supply the deficiency.<sup>1</sup>

Where the larceny of live animals is charged, it is not necessary to state them to be alive; because the law will presume them to be so, unless the contrary be stated. But if when stolen the animals were dead, that fact must be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal.<sup>2</sup> "The doctrine respecting the description of

<sup>1</sup> *Rough's Case*, 2 East P. C. 607. 2 Russell on Crimes, 236, 5th ed.

<sup>2</sup> *Rex v. Edwards*, Russell & Ryan C. C. 497. *Rex v. Holloway*, 1 C. & P. 128. *Commonwealth v. Beaman*, 8 Gray, 497, denying *Rex v. Puckering*, 1 Moody C. C. 242, and 1 Lewin C. C. 302. The decision in *Rex v. Edwards*, *ubi supra*, must have been the same, if the word "live" had not been inserted in the indictment, the word "turkeys" having the legal meaning of "live turkeys;" and so *Holroyd, J.*, stated the law.

animals in an indictment," says Patteson, J., in a modern case,<sup>1</sup> "applies only to live animals, not to dead animals or parts of the carcasses of animals, such as a boar's head. Do you find in works on natural history that there is any living animal called a ham?" In this case, the indictment stated that the defendant stole "one ham of the value of ten shillings of the goods and chattels of one T. H." This was held a sufficient description, without stating the name of the animal of which the ham had formed a part.

In regard to the description in an indictment of animals which are the subjects of larceny by statute, the result of the authorities is thus well stated: "Generally we may state the rule to be that when a statute uses a nomen generalissimum, *as such* (e. g. *cattle*), then a particular species can be proved; but that when the statute enumerates certain species, leaving out others, then the latter cannot be proved under the nomen generalissimum, unless it appears to have been the intention of the Legislature to use it as such."<sup>2</sup>

Substances *mechanically* mixed should not be described in an indictment as "a certain mixture consisting of" &c., but by the names applicable to them before such mixture, though it is otherwise with regard to substances *chemically* mixed.<sup>3</sup>

In an indictment for larceny it is necessary to state

<sup>1</sup> *Regina v. Gallears*, 1 Denison C. C. 501; 2 C. & K. 981; Temple & Mew C. C. 196.

<sup>2</sup> 1 Wharton Crim. Law, § 377, 7th ed.

<sup>3</sup> Per Alderson, B., in *Regina v. Bond*, 1 Denison C. C. 521; Temple & Mew C. C. 247, questioning the ruling in *Rex v. Kettle*, 3 Chit. Crim. Law, 947 a, 2d ed.

the separate and distinct *value* of each article stolen.<sup>1</sup> The reasons for requiring this allegation and finding of value may have been, originally, that a distinction might appear between the offences of grand and petit larceny, in reference to the extent of punishment; that being graduated, in some measure, by the value of the article stolen. The statutes prescribe the punishment 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 value of the property alleged to have been stolen must be set forth in the indictment.<sup>2</sup> An indictment cannot be sustained for stealing a thing of no intrinsic or artificial value. If a written instrument be for any reason void in law, the defendant may be convicted on a count charging him with a larceny of a piece of paper, alleging its value, without any further description.<sup>3</sup>

In general, it is not necessary to prove the precise value as stated, provided the value proved is sufficient to constitute the offence. Thus, if on an indictment for embezzling one-pound notes, and other moneys &c., describing them, though the evidence be that other property than that described was embezzled, yet if it be proved that one-pound notes

<sup>1</sup> *Commonwealth v. Smith*, 1 Mass. 244. *Regina v. Murtagh*, 1 Crawford & Dix, 355. Although, to make a thing the subject of larceny, it must be of some value, yet it need not be of the value of some coin known to the law, i. e. of a farthing at the least. *Regina v. Morris*, 9 C. & P. 349, Parke, B.

<sup>2</sup> *Hope v. Commonwealth*, 9 Met. 136, 137. *Commonwealth v. McKenney*, 9 Gray, 114.

<sup>3</sup> *Regina v. Perry*, 1 Denison C. C. 69; 1 C. & K. 725. *Commonwealth v. Brettun*, 100 Mass. 206.

were embezzled, it will suffice.<sup>1</sup> But where value is essential to constitute an offence, and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles, and if the jury find the defendant guilty of stealing only a part of them, he must be acquitted. Because, where many articles are described as of a collective value, the entire value might be attached to those articles as to which the jury acquitted the party, and thus the remainder be really without value.<sup>2</sup> Therefore, where one count in the indictment charged the stealing of "one set of steelyards, one block-tin teapot and one lot of cut nails all of the value of three dollars," and the jury found the defendant guilty of stealing the steelyards, and not guilty of stealing the other articles charged, it was held that no judgment could be legally rendered against him.<sup>3</sup> And on an indictment for larceny of "twelve handkerchiefs of the value of six dollars," it is not sufficient to prove a larceny of a less number of handkerchiefs of some value.<sup>4</sup>

<sup>1</sup> *Rex v. Carson*, Russell & Ryan C. C. 303.

<sup>2</sup> *Rex v. Forsyth*, Russell & Ryan C. C. 274.

<sup>3</sup> *Hope v. Commonwealth*, 9 Met. 134. *O'Connell v. Commonwealth*, 7 Met. 460. *Commonwealth v. Cahill*, 12 Allen, 540. *Commonwealth v. Falvey*, 108 Mass. 304.

<sup>4</sup> *Commonwealth v. Lavery*, 101 Mass. 207.

## CHAPTER XXIII.

## OWNERSHIP OF REAL AND PERSONAL PROPERTY.

IN indictments for arson, burglary, larceny in a building and for malicious injuries to real property &c., it is the uniform practice of criminal pleaders to insert an allegation of ownership of the building; "and so are the precedents."

The St. 24 & 25 Vict. ch. 97, § 3, enacts that "Whosoever shall unlawfully and maliciously set fire to any house, shop . . . whether the same shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony." Two prisoners were indicted for feloniously setting fire to a shop "of and belonging to" one of the prisoners. Held, that the averment of property in the prisoner was an immaterial averment and might be struck out; and that an intent to injure another person as owner might be proved in support of the indictment. Cockburn, C. J.: "The statement of ownership was necessary at common law, because it was not arson for a man to set fire to his own house. But under the statute it is otherwise; and therefore the averment of ownership is an immaterial averment; so that there is nothing to prevent the jury under this indictment finding an intent to injure the landlady, the real owner."<sup>1</sup>

<sup>1</sup> Regina v. Newbould, L. R. 1 C. C. 344; 41 L. J. M. C. 63.

In Massachusetts Gen. Sts. ch. 161, § 12 enacts that "Whoever breaks and enters, in the night-time, a building, ship, or vessel, with intent to commit any felony, shall be punished" &c. In an indictment under this section it is necessary to allege that the building broken and entered was the building of a person other than the defendant.<sup>1</sup> This decision proceeded upon the ground that the statute did not extend to a larceny by a person in his own house, nor to a stealing by a wife in her husband's house, which is the same as her own.<sup>2</sup>

The word "of" sufficiently alleges the ownership of property, both real or personal.<sup>3</sup> If money, or bank-notes or bills be described as "of the *goods and chattels*" of a person named, these words may be rejected as surplusage, and the indictment will be sufficient.<sup>4</sup> So, in an indictment which charged that the defendant by false pretences obtained from A. "a check for the sum of 8*l.* 14*s.* 6*d.* of the *moneys* of B.," this was held a sufficient allegation that the check was the property of B., the words "of the moneys" being rejected as surplusage.<sup>5</sup> An indictment which avers that the defendant did burn a barn "belonging to one J. S." sufficiently alleges the ownership of the property, although not in the more usual and more technical language. That would be for the burning

<sup>1</sup> Commonwealth v. Perris, 108 Mass. 1.

<sup>2</sup> Commonwealth v. Hartnett, 3 Gray, 450.

<sup>3</sup> Commonwealth v. Williams, 2 Cush. 582. Regina v. Radley, 1 Denison C. C. 450; 2 C. & K. 974; Temple & Mew C. C. 144.

<sup>4</sup> Rex v. Guy, 1 Leach C. C. 241. Rex v. Morris, 1 Leach C. C. 468. Regina v. Radley, ubi supra. Eastman v. Commonwealth, 4 Gray, 416. See State v. Calvin, 2 Zab. 207.

<sup>5</sup> Regina v. Godfrey, Dearsly & Bell C. C. 426.

of a certain barn "of one C. G." or "being the property of C. G." One of the approved definitions of the word "belong" is "to be the property of," and "belonging" is "being the property of."<sup>1</sup>

In designating the owner of the property, great care must be taken, as any variance in this respect will be fatal.<sup>2</sup> In all cases of this description, if there be any the slightest doubt in which of several persons the property vests, it should be differently described in different counts, in order to obviate any objection on the score of variance.

<sup>1</sup> *Commonwealth v. Hamilton*, 15 Gray, 480, 482.

<sup>2</sup> *Commonwealth v. Wade*, 17 Pick. 395. *People v. Van Blarcum*, 2 Johns. 105. *Rex v. Glandfield*, 2 East P. C. 1034. *Rex v. Rickman*, 2 East P. C. 1034. *Rex v. Scofield*, Cald. 397. *Rex v. Pedley*, 1 Leach C. C. 242. *Rex v. Ball*, 1 Moody C. C. 30. 1 Gabbett Crim. Law, 79, 80. 3 Greenl. Ev. § 54. This rule of the common law has in some of the States been changed by statute. Gen. Sts. of Mass. ch. 172, § 12. *Commonwealth v. Harney*, 10 Met. 422. *Commonwealth v. Arrance*, 5 Allen, 517. *Commonwealth v. Goldstein*, 114 Mass. 272.

## CHAPTER XXIV.

## WRITTEN INSTRUMENTS.

It is a general principle that wherever the offence consists of words written or spoken, those words must be stated in the indictment; if they are not, it will be defective upon demurrer, in arrest of judgment or upon error.<sup>1</sup>

It is a general rule of pleading, at common law, in civil as well as in criminal cases, that written instruments, wherever they form a part of the gist of the action, must be set out in the declaration or indictment verbatim; and where part only thereof is included in the offence, that part alone is necessary to be set out. This rule was thus stated by Ten Judges: "By the law of England, and constant practice, in all prosecutions by indictment or information for crimes or misdemeanors by writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information."<sup>2</sup>

Where a charge, either civil or criminal, is brought against a defendant, arising out of the publication of

<sup>1</sup> Judgment of Bramwell, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 616, 617.

<sup>2</sup> *Dr. Sacheverell's Case*, 5 Hargrave State Trials, 828; S. C. 15 Howell State Trials, 466, 467, quoted with approval by Lord Ellenborough in *Cook v. Cox*, 3 M. & S. 116, and by Lord Justice Cotton in *Bradlaugh v. The Queen*, 3 Q. B. D. 639.

a written instrument, the invariable rule is, that the instrument itself must be set out in the declaration or indictment. When a rule is so well established as this, it is almost unnecessary to consider what the reason of it is; but certainly one reason is apparent, namely, that a defendant is entitled to take the opinion of the court before which he is indicted by demurrer, or by motion in arrest of judgment, or the opinion of a court of error by writ of error, on the sufficiency of the statements in the indictment. It follows from this principle that wherever the offence consists of words written or spoken, those words must be stated in the indictment; if they are not, it will be defective upon demurrer, in arrest of judgment or upon writ of error.<sup>1</sup>

This rule applies to indictments for offences which consist in words, either written or spoken, such as seditious, blasphemous, obscene,<sup>2</sup> and defamatory libels, perjury, false pretences, forgery, uttering or passing counterfeit bank-notes,<sup>3</sup> letters demanding money with threats,<sup>4</sup> the administration of unlawful oaths &c.<sup>5</sup> Indictments for committing any of these offences are all within the principle that inasmuch as the crime

<sup>1</sup> *Bradlaugh v. The Queen*, 3 Q. B. D. 607.

<sup>2</sup> The publication of obscene words comes also under another class of offences, namely, the class of offences against morality.

<sup>3</sup> And for having blank counterfeit bank-notes with intent to fill up and pass them. *Stephens v. State*, *Wright*, 73.

<sup>4</sup> *Rex v. Lloyd*, 2 East P. C. 1122.

<sup>5</sup> An indictment for a contempt in not executing a warrant ought to show the nature and tenor of the warrant. *Rex v. Burrough*, 1 Vent. 305. Com. Dig. Indictment G. 3. In an indictment for resisting, obstructing or assaulting an officer, it is not necessary to set out, in hæc verba, the process under which he was acting. *State v. Roberts*, 52 N. H. 492. *State v. Copp*, 15 N. H. 212. *McQuoid v. People*, 3 Gilman, 76.

consists in the words, the words must be stated; and in every one of those cases there is authority for saying that the words must be set out unless the necessity for setting them out is excused by statute; and it seems that each of the statutes which have been passed to excuse the necessity of setting out the words, is an authority that without the statute, by the common law, the words must have been set out.<sup>1</sup> To the general rule several exceptions have also existed at common law as well as those which have from time to time been made by statute. The rule and the exceptions will be considered.

The declaration or indictment must not only contain, but it must profess to set out, the written instrument. Marks of quotation, by themselves, are not sufficient.<sup>2</sup> If one of the original printed papers, in an indictment for printing and publishing an obscene paper, is attached to the indictment, it is not a sufficient indication that the paper is set out in the very words.<sup>3</sup> The instrument is usually introduced by the words "of the tenor following," or "in the words and figures following." "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."<sup>4</sup>

<sup>1</sup> In *Bradlaugh v. The Queen*, 3 Q. B. D. 607 in the Court of Appeal, reversing the judgment of the Queen's Bench Division, 2 Q. B. D. 569, the cases are reviewed.

<sup>2</sup> *Commonwealth v. Wright*, 1 Cush. 46.

<sup>3</sup> *Commonwealth v. Tarbox*, 1 Cush. 66.

<sup>4</sup> 2 *Gabbett Crim. Law*, 201, quoted in *Commonwealth v. Wright*, 1 Cush. 65. *Commonwealth v. Sweney*, 10 S. & R. 173. *Dana v. State*, 2 Ohio State, 91. *State v. Bonney*, 34 Maine, 383. *State v. Witham*, 47 Maine, 165. *State v. Brownlow*, 7 Humph. 63. *State v. Gustin*, 2 South. 744. In *Rex v. Wilkes*, 4 Burr. 2527, 2528, an in-

When the instrument is set out according to its tenor, no technical form of words is necessary for expressing that it is so set forth. And therefore the words "as follows, that is to say," or, "in the words and figures following, that is to say," are as certain as the words "according to the tenor following, that is to say."<sup>1</sup> If the matter is introduced by words which imply that the substance only, and not the very words of the instrument, is set out, as for instance, by the words, "in substance as follows,"<sup>2</sup> or, "to the effect following,"<sup>3</sup> or, "according to the purport and effect and in substance,"<sup>4</sup> or, "in manner and form following,"<sup>5</sup> or, "purporting,"<sup>6</sup> and the like, the pleading is insufficient.

A declaration or indictment for publishing a libel must not only contain, but it must profess to set out a transcript of that part of the libel upon which the pleader relies. And where a declaration sets out a publication, which refers to a previous publication, but unless by reference to the language of the pre-

formation was exhibited in the Court of King's Bench for the publication of an obscene and impious libel. The words were set out; yet, because they were introduced by the words "to the purport and effect following," instead of "to the tenor and effect following," the Attorney-General, Sir Fletcher Norton, considered it unsafe to go on even after plea pleaded and issue joined, and thought it advisable to amend the record.

<sup>1</sup> *Rex v. Powell*, 1 Leach C. C. 77; 2 East P. C. 976; 2 Wm. Bl. 787.

<sup>2</sup> *Wright v. Clements*, 3 B. & Ald. 503; S. C. 2 Lead. Crim. Cas. 94. *Commonwealth v. Sweney*, 10 S. & R. 173.

<sup>3</sup> *Rex v. Bear*, 2 Salk. 417.

<sup>4</sup> *Commonwealth v. Wright*, 1 Cush. 46.

<sup>5</sup> *Rex v. May*, 1 Dougl. 193; 1 Leach C. C. 192.

<sup>6</sup> *Wood v. Brown*, 6 Taunt. 169. So a count which charged that the defendant "asserted and accused the plaintiff of" &c. *Cook v. Cox*, 3 M. & S. 110. *Whiting v. Smith*, 13 Pick. 369, 370.

vious publication, contains no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear, in the declaration or indictment, to be set out verbatim.<sup>1</sup> The author is not aware that any judicial opinion has been pronounced whether, in the particular case of libel, it is sufficient to state the substance (as opposed to the tenor) of any writing, though introductory only.<sup>2</sup>

It is not necessary to set forth the whole of the paper in which the libellous matter is contained; where a part only is included in the offence, that part alone is necessary to be set out. It is no variance, though the libel read in evidence contain matter in addition to that set out, provided the additional part does not, by its context or connection, alter the sense of that which is recited. A date, or memorandum of time and place, appended to a publication, when used in such a way that it has no tendency to vary, modify or affect the sense of the language which precedes it, is immaterial, in reference to the question of its defamatory character, and need not be set out.<sup>3</sup> Although the mere misspelling of a single word is not material, provided it is not altered into another word of a different meaning; yet any variance, either from omission or addition, which affects the meaning, is fatal.<sup>4</sup>

<sup>1</sup> *Solomon v. Lawson*, 8 Q. B. 823. Judgment of Bramwell, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 618.

<sup>2</sup> See *Solomon v. Lawson*, 8 Q. B. 840.

<sup>3</sup> *Commonwealth v. Harmon*, 2 Gray, 289.

<sup>4</sup> *Bell v. Byrne*, 13 East, 554. *Cartwright v. Wright*, 5 B. & Ald. 615; 1 D. & R. 230. *Rainy v. Bravo*, L. R. 4 P. C. 287. *Folkard on Slander and Libel*, 346, 4th ed.

The indictment must charge the defendant with *publishing* the libel. It appears that the composing or writing a libel merely, without any kind of publication, is not an offence.<sup>1</sup> And it should be alleged to have been published *of and concerning* the prosecutor or person libelled, unless it sufficiently appears from the libel itself that he was the person referred to. If the indictment state merely that the libel was published to defame and vilify the complainant, and to bring him into disgrace, it will not be sufficient. And so where the usual allegation, that the libel was published of and concerning the complainant, was omitted in the indictment, and it did not sufficiently appear that the libellous matter referred to the complainant, the judgment was, on account of such omission, arrested.<sup>2</sup>

The correct mode of pleading is to state that the defendant published "a certain false, malicious and defamatory libel of and concerning the said C. D.; containing therein the false, malicious and defamatory matter following of and concerning the said C. D., that is to say," and then set out the libel with proper innuendoes. And if different parts of the same publication be selected which are not consecutive, the words should be, "in one part of which said libel is contained the false, malicious and defamatory matter following of and concerning the said C. D.," then the first extract should be set out, and afterwards the declaration or indictment should proceed,

<sup>1</sup> *Rex v. Burdett*, 4 B. & Ald. 95.

<sup>2</sup> *Rex v. Marsden*, 4 M. & S. 164. *Clement v. Fisher*, 7 B. & C. 459; 1 M. & R. 281. *Folkard on Slander and Libel*, 699, 4th ed. Heard on Libel and Slander, § 214.

“and in another part of which said libel is contained” &c., &c.<sup>1</sup>

Besides setting out the libellous passages of the publication, the indictment must also contain such averments and innuendoes as may be necessary to render it intelligible, and its application to the party libelled, evident. When the statement of an extrinsic fact is necessary in order to render the libel intelligible, or to show its libellous quality, such extrinsic fact must be averred in the introductory part of the indictment; but where it is necessary merely to explain a word by reference to something which has preceded it, this is done by an innuendo. And an innuendo can explain only in cases where something has already appeared upon the record to found the explanation; it cannot, of itself, change, add to or enlarge the sense of expressions beyond their usual acceptance and meaning.<sup>2</sup>

This rule of pleading may be thus stated: In an indictment, as well as in a declaration, the averment of extrinsic facts is unnecessary, where the criminal quality of the publication may be collected from the contents. Such averments are essential where the terms of the libel are, independently of particular extrinsic facts, innocent or unmeaning, but are in reality noxious and illegal in connection with the facts to which they relate. The principle is, that when the words are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable or indictable, it must not only be predicated that such matter existed, but

<sup>1</sup> 1 Saund. 121, 6th ed. 1 Wms. Notes to Saund. 139.

<sup>2</sup> Commonwealth v. Snelling, 15 Pick. 321, 335.

also that the words were spoken of and concerning that matter.<sup>1</sup>

With respect to the manner of putting upon the record those facts and circumstances which render the publication indictable, it must be by averments in opposition to argument and inference, by way of introduction if it is *new* matter, and by way of innuendo if it is only matter of *explanation*. For an innuendo is only explanatory of some matter already expressed; it serves to point out where there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add, or enlarge or change the sense of the previous words.<sup>2</sup>

An indictment for printing an obscene paper must set it out in the very words of which it is composed; and the indictment must undertake or profess so to do, by the use of appropriate language, unless the publication is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but in this case, a reason for the omission must appear in the indictment, by proper averments.<sup>3</sup>

<sup>1</sup> Heard on Libel and Slander, § 351.

<sup>2</sup> Heard on Libel and Slander, § 219. *Le Fanu v. Malcolmson*, 1 House of Lords Cases, 637. *Barrett v. Long*, 3 House of Lords Cases, 395. *Solomon v. Lawson*, 8 Q. B. 825. *Goodrich v. Hooper*, 97 Mass. 1, 7. *Griffiths v. Lewis*, 8 Q. B. 851.

<sup>3</sup> The case of *Commonwealth v. Holmes*, 17 Mass. 336, furnishes both an authority and a precedent for this mode of pleading. *Commonwealth v. Tarbox*, 1 Cush. 66. *People v. Girardin*, 1 Manning, 90. "A vigorous and forcible judgment." Per Bramwell, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 621. *State v. Brown*, 27 Vt. 619. *Commonwealth v. Sharpless*, 2 S. & R. 91. See *Barker v. Commonwealth*, 19 Penn. State, 412.

This is the doctrine of the American cases. It is to be observed that in those cases the judges recognize the general rule of pleading hereinbefore enunciated; but as against that general rule they rely upon another, namely, that it is necessary to keep the records of the court pure; but it was only upon an allegation that the book or libel in question was so gross that no records ought to be defiled by it, that they held the indictment to be sufficient without setting out the actual words relied upon. In the recent celebrated case of *Bradlaugh v. The Queen*, in which the indictment contained no such allegation, the Court of Appeal<sup>1</sup> treated the reason that the records of the court should not be defiled by any indecency of that kind, as fanciful and imaginary. Bramwell, L. J., observed that "the records of the court of justice are not read with a view to entertainment or amusement."<sup>2</sup> And Cotton, L. J.: "It is perfectly true that the English courts do require their records to be kept pure in this sense, that they will not allow their records to be the means of propagating defamation or obscenity under the pretence of its being part of a judicial proceeding. They will require anything impure or scandalous to be removed from their records when it is irrelevant to the matter to be tried, but if the matters on the records of the court or in an affidavit are really relevant to the matter to be tried, they are not scandalous, and no principle recognized by the English courts requires any statement to be removed from their records, if

<sup>1</sup> 3 Q. B. D. 607, reversing the judgment of the Queen's Bench Division 2 Q. B. D. 569, and reviewing and dissenting from the American cases above cited.

<sup>2</sup> 3 Q. B. D. 620.

relevant to the issue to be tried, simply because it is impure. Does the principle that the records must be kept pure justify the absence of what would otherwise be a necessary averment in the indictment, on the ground that it is gross and impure? In my opinion it does not, and for this reason, the duty of the court is to administer justice, either as between party and party, or as between the Crown and those who are accused; and for the purpose of doing so it ought not to consider its records as defiled by the introduction upon them of any matter, which is necessary in order to enable the court to do justice according to the rules laid down for its guidance; a defendant has a right to say that he shall have fair notice, in order that he may not be prejudiced in defending himself against proceedings, whether civil or criminal, and therefore, in my opinion, the principle upon which those American cases are decided does not avail in this case. Those cases can be no guide or assistance to us. If it is desirable that in cases of this sort there should be an exception to the rule as to the statement of words, it is not the duty of the court to make an exception; it must be for Parliament to interfere, as it has done in other cases.”<sup>1</sup>

In an indictment for *forgery* it must be stated what the instrument is in respect of which the forgery was committed.<sup>2</sup> And the instrument must be correctly described.<sup>3</sup> An inconsistency between the instrument set out and the description given to it con-

<sup>1</sup> 3 Q. B. D. 641.

<sup>2</sup> *Rex v. Wilcox*, Russell & Ryan C. C. 50.

<sup>3</sup> *Rex v. Hunter*, Russell & Ryan C. C. 511. *Rex v. Birkett*, Russell & Ryan C. C. 251. *Commonwealth v. Clancy*, 7 Allen, 537. *State v. Farrand*, 3 Halst. 333.

stitutes a repugnancy which is fatal to the indictment.<sup>1</sup>

When the indictment is founded upon a statute, it must, in general, according to the rule of pleading which is applicable to all offences, set forth the charge in the very words of the statute describing the offence; equivalent words not being sufficient.<sup>2</sup> But in a crown case reserved it has been decided that if the instrument be set out in *hæc verba*, a misdescription of it in the indictment will be immaterial, at least if any of the terms used to describe it be applicable. In this case, Parke, B., said: "The question may be very different if the indictment sets out the instrument, from what it would be if it merely described it in the terms of the statute. In the former case, the matter which it is contended is descriptive may be mere surplusage; for when the instrument is set out on the record, the court are enabled to determine its character, and so a description is needless."<sup>3</sup> The principle of this decision seems to be that where an instrument is described in an indictment by several designations, and then set out according to its tenor, either with or

<sup>1</sup> *Commonwealth v. Lawless*, 101 Mass. 32. *Commonwealth v. Talbot*, 2 Allen, 161.

<sup>2</sup> 1 Gabbett *Crim. Law*, 376.

<sup>3</sup> *Regina v. Williams*, 2 Denison C. C. 61; *Temple & Mew C. C.* 382; 4 Cox C. C. 356. In this case, the indictment charged the defendant with having forged "a certain warrant, order and request, in the words and figures following" &c. It was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order and request. But it was held that there was no variance, as the document being set out in full in the indictment, the description of its legal character became immaterial. Parke, B., suggested that the correct course would have been to have alleged the uttering of one warrant, one order and one request.

without a *videlicet*, the court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material only such designations as the tenor of the indictment shows to be really applicable. And where the indictment is so drawn as to enable the court to treat as material only the tenor of the indictment itself, all the descriptive averments may be treated as surplusage.<sup>1</sup>

Mr. Greaves thus criticises the case stated in the preceding section: "An indictment for forgery must allege what the forged instrument is, in order that the case may be brought within the terms of the act. It is easy to put a case where a document is of so ambiguous a character that the judges may differ in opinion as to what it is, and in such a case on one trial it might be held to be of one character, and on a subsequent trial of another; and so the prisoner might, under different forms of indictment, be punished twice for the same offence. Again, an indictment must distinctly allege the offence the prisoner committed, and merely to allege that he forged a certain instrument set out in the indictment is clearly insufficient. It cannot be doubted that an averment that the prisoner forged a bill of exchange would not be supported by proof of a promissory note, and this shows that the averment is descriptive, and the character of the averment cannot depend on whether the instrument is set out or not."<sup>2</sup>

In an indictment for forgery, the instrument which is the subject of the forgery must be set out in words

<sup>1</sup> The case of *Commonwealth v. Castles*, 9 Gray, 123, was decided on a principle similar to that of *Regina v. Williams*, *ubi supra*.

<sup>2</sup> 2 Russell on Crimes, 811 note, 4th ed.

and figures.<sup>1</sup> The word "tenor" imports an exact copy and that it is set forth in words and figures.<sup>2</sup> But in setting forth the tenor of the instrument, a mere literal variance will not vitiate the indictment.<sup>3</sup> *De minimis non curat lex.* Thus where the prisoner was charged with forging an order for the payment of money, which, as set out in the indictment, appeared to be signed by "John McNicole and Co.," with intent to defraud John McNicole, and the name was really McNicoll, it was held that this was no variance, as the substituting the letter *e* for *l* did not make it a different name.<sup>4</sup> But if, by addition, omission or alteration, the word is so changed as to become another word of a different signification, the variance will be fatal.<sup>5</sup> The tendency of modern decisions is to class objections of this kind as among the *apices juris*.<sup>6</sup> It is "an excellent and a profitable law, concurring with the wisdom and judgment of ancient and latter times, that have disallowed curious and nice exceptions tending to the overthrow or delay of justice. *Apices juris non sunt jura.*"<sup>7</sup> "Yet,"

<sup>1</sup> *Rex v. Lyon*, 2 Leach C. C. 597, 608. *Commonwealth v. Houghton*, 8 Mass. 110.

<sup>2</sup> *Ante*, p. 204.

<sup>3</sup> *Rex v. Hart*, 1 Leach C. C. 145; 2 East P. C. 977. *Rex v. Oldfield*, 2 Russell on Crimes, 800, 4th ed.

<sup>4</sup> *Regina v. Wilson*, 1 Denison C. C. 284; 2 C. & K. 527. *Commonwealth v. Desmarteau*, 16 Gray, 1, 15.

<sup>5</sup> *Rex v. Bear*, Carth. 407. *Regina v. Drake*, 2 Salk. 660. *Rex v. Beach*, 1 Cowp. 229; 1 Leach C. C. 133. *United States v. Hinman*, Baldwin, 292. *State v. Bean*, 19 Vt. 530. *State v. Molier*, 1 Dev. 263. *State v. Weaver*, 13 Ired. 491. *Commonwealth v. Gillespie*, 7 S. & R. 469, 479. *People v. Warner*, 5 Wend. 271.

<sup>6</sup> *State v. Jay*, 34 N. J. 368, 369.

<sup>7</sup> Co. Litt. 304 b. In 1 Taylor Ev. § 234 a, 6th ed., it is said: "On

continues this acute and cautious writer, — “yet it is good for a learned professor to make all things plain and perfect, and not to trust to after aid or amendment by force of any statute.”

The instrument which the defendant is charged with forging &c. is sometimes described as the instrument, and sometimes as “purporting” to be the instrument, the counterfeiting of which is prohibited by the statute on which the indictment is framed; and the latter mode of describing it has been held to be equally good as the former. And it has been said that, in strictness of language, there may be more propriety in so laying it, considering that the purpose of the indictment is to disaffirm the reality of the instrument.<sup>1</sup> The use of the words “false, forged and counterfeit” in the statute, imply, when applied to any of the instruments therein mentioned, that it purports to be such an instrument, but is not genuine or valid.<sup>2</sup> Where the defendants were indicted and convicted of publishing, as a true will, a certain false, forged and counterfeited paper writing *purporting* to be the last will of Sir A. C. &c., the tenor of which was set out, it was objected that it should have been

prosecutions for forgery under the old law, great nicety used to be required in describing the instrument forged; and while that offence continued to be a capital crime, many a forger had reason to rejoice that an excessive minuteness of description afforded an opportunity of escape from the gallows by causing a variance between the allegations and the proofs. The law, however, is now happily amended, and the punishment for forgery has become less severe but more certain. The forger is no longer sentenced to death on conviction, but he seldom can claim an acquittal on the ground of some senseless technicality.”

<sup>1</sup> 2 East P. C. 980. 1 Gabbett Crim. Law, 371.

<sup>2</sup> United States v. Howell, 11 Wall. 432, 437.

laid that they forged a certain will, and not a paper writing *purporting* &c., the words of the statute being "shall forge a will." The question was argued before all the judges; and they unanimously agreed that the indictment was right, and that it would be good either way.<sup>1</sup>

If an indictment describe a written instrument as "purporting" to be &c., the instrument when produced in evidence must appear upon the face of it to be what it is described as purporting to be, otherwise the defendant may be acquitted for the variance.<sup>2</sup> As for instance if the instrument be described as a "certain paper writing purporting to be a bank-note," and the note produced, though made to resemble, vary materially in its form from a real bank-note;<sup>3</sup> or, if described as a bill of exchange, "purporting to be directed to one J. King, by the name and description of J. Ring;" for if it were really directed to J. Ring, it could not purport (that is, appear upon the face of it) to be directed to J. King.<sup>4</sup> This blunder made the indictment absurd and repugnant to itself.

Where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to

<sup>1</sup> *Rex v. Birch*, 1 Leach C. C. 79; 2 East P. C. 980; 2 Wm. Bl. 790. See the indictment, 2 Stark. Crim. Pl. 503.

<sup>2</sup> *Commonwealth v. Ray*, 3 Gray, 441.

<sup>3</sup> *Rex v. Jones*, 1 Dougl. 300; 1 Leach C. C. 204; 2 East P. C. 883, 952.

<sup>4</sup> *Rex v. Reading*, 2 Leach C. C. 590; 2 East P. C. 981. *Rex v. Gilchrist*, 2 Leach C. C. 657; 2 East P. C. 982. *Rex v. Edsall*, 2 East P. C. 984. *Dowing v. State*, 4 Missouri, 572, 575.

aver such facts and circumstances as may be necessary to bring the matter within the meaning of it.<sup>1</sup> As, for instance, the statute for the punishment of forgeries includes "indorsement" as a subject of forgery; but it does not thereby authorize the pleader simply to charge that an indorsement has been forged. It is necessary to show affirmatively that the words written, as written, became a part of an instrument which is a subject of forgery. An indictment for the forgery of an indorsement upon a promissory note, must set forth that which is necessary to show that the words alleged to be forged bore such relation to it as to be the subject of forgery.<sup>2</sup> So an indictment for forging an instrument of the tenor following: "Boston, Aug. 6, 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 by contract. J. P. M. Stetson, Proprietor," without any averment of extrinsic matter to show that the instrument is adapted to be used for the purpose of fraud otherwise than appears on its face, is insufficient. If the fraudulent character of the instrument is not manifest on its face, this deficiency should be supplied by such averments as to extrinsic matter as would enable the court judicially to see that it has such a tendency.<sup>3</sup>

<sup>1</sup> *Rex v. Hunter*, 2 Leach C. C. 624; 2 East P. C. 928. Judgment of Brett, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 630. *Rex v. Testick*, 2 East P. C. 925. *Rex v. Martin*, 1 Moody C. C. 483; 7 C. & P. 549. *Regina v. Boardman*, 2 M. & Rob. 147. 1 Gabbett Crim. Law, 374.

<sup>2</sup> *Commonwealth v. Spilman*, 124 Mass. 327.

<sup>3</sup> *Commonwealth v. Hinds*, 101 Mass. 209. *Commonwealth v. Ray*, 3 Gray, 441. *Commonwealth v. Coe*, 115 Mass. 481, 500. *Commonwealth v. Costello*, 120 Mass. 359, 369.

Another general rule as to the manner in which the crime of forgery is to be laid in the indictment is, that if any material part of a true instrument be altered, the indictment may lay it to be a forgery of the whole instrument; although it is more usual, and indeed advisable, to charge forgeries of this sort by stating the particular alteration, at least in one set of counts.<sup>1</sup> But where the forgery is of something which is a mere addition or collateral to the instrument, and does not alter it, as when the indorsement or acceptance of a genuine bill of exchange is forged, then such forgery must be specially alleged, and must be proved as laid; whereas, if the signature of the drawer, which is a part of the bill itself, be forged, it may be laid as a forgery of the entire bill.<sup>2</sup>

The word "indorsement" has not a definite technical meaning in law or in fact other than "upon the back;"<sup>3</sup> and its meaning is always determined by the context, if in writing, and its connection, if by spoken words. It is, therefore, necessary in an indictment for the forgery of an indorsement on a promissory note to allege that the words written, as written, bear such a relation to the note as to be the subject of forgery; and the necessity of such an allegation is not obviated by an allegation that the note is lost.<sup>4</sup>

<sup>1</sup> *Rex v. Elsworth*, 2 East P. C. 986, 988. *Rex v. Teague*, Russell & Ryan C. C. 33; 2 East P. C. 979. *Rex v. Atkinson*, 7 C. & P. 669. *Commonwealth v. Butterick*, 100 Mass. 12, 18. *Commonwealth v. Woods*, 10 Gray, 477.

<sup>2</sup> 1 Gabbett Crim. Law, 375. *Commonwealth v. Woods*, 10 Gray, 480, 481.

<sup>3</sup> See *Commonwealth v. Butterick*, 100 Mass. 12, 16; *Rex v. Biggs*, 1 Strange, 18.

<sup>4</sup> *Commonwealth v. Spilman*, 124 Mass. 327.

In an indictment for forging a promissory note, the indorsement need not be set out, though it be forged. It is no part of the note. It is evidence of the transfer of the note which is a new contract.<sup>1</sup>

It is usual to charge that the party "falsely" forged and counterfeited &c. But it is enough to allege only that he "forged" or "counterfeited," without adding "falsely," which is sufficiently implied in either of those terms; but more particularly in the verb "to forge," which is always taken in an evil sense, in the law.<sup>2</sup> Where an exception was taken to the indictment as being repugnant, for stating that the party *falsely* counterfeited a *false* writing, the indictment was held good.<sup>3</sup>

In indictments for forging, uttering or passing counterfeit bank-bills, the number and check-letter, the words and figures in the margin, the ornamental parts, and the devices, mottoes, and vignettes need not be set out, because the contract is complete without them.<sup>4</sup> But the entire contract must be truly and precisely set out. Thus, it is a fatal variance in an indictment for uttering and publishing as true, a

<sup>1</sup> Commonwealth v. Ward, 2 Mass. 397. Perkins v. Commonwealth, 7 Gratt. 651. Commonwealth v. Adams, 7 Met. 50, distinguishing State v. Handy, 20 Maine, 81.

<sup>2</sup> 2 East P. C. 985. 1 Stark. Crim. Pl. 98. 1 Gabbett Crim. Law, 375.

<sup>3</sup> Rex v. Goate, 1 Ld. Raym. 737.

<sup>4</sup> "It might as well be required that the *water marks* and a *fac-simile* of all the engraved ornaments used in a bank-bill, for the more easy detection of forgeries, should be inserted in an indictment." People v. Franklin, 3 Johns. Cas. 299. Commonwealth v. Bailey, 1 Mass. 62. Commonwealth v. Stevens, 1 Mass. 324. Commonwealth v. Taylor, 5 Cush. 605. Commonwealth v. Searle, 2 Binn. 332. State v. Carr, 5 N. H. 367. Griffin v. State, 14 Ohio State, 55.

forged bank-bill, to omit the name of the State in the upper margin of the bill, if it is not repeated in the body thereof. It is part of the evidence of the contract. It fixes the *situs* of the bank, the place where the contract is made and to be performed, and the law by which it is to be interpreted.<sup>1</sup>

In an indictment for larceny of written instruments made the subject of larceny by statute, it is not necessary that they should be set out in the indictment verbatim. They may be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel.<sup>2</sup> Thus, an allegation that the defendant stole "one bank-note of the value of one hundred dollars of the property of one C. D." is sufficient without a more particular description of the note.<sup>3</sup> This rule applies to all instruments which are the subject of larceny; but the indictment must follow some of the descriptions given in the statute. Where an indictment upon a statute which applied to bank-notes, bills of exchange and promissory notes &c., described the instrument stolen as "a certain note commonly called a bank-note," it was held insufficient.<sup>4</sup> So, where an indictment described the instrument stolen as "a bank post-bill," it was held bad, because it did not fall within any of the descriptions in

<sup>1</sup> Commonwealth v. Wilson, 2 Gray, 70.

<sup>2</sup> Per Lord Ellenborough, C. J., in Rex v. Johnson, 3 M. & S. 547. Archb. Crim. Pl. 59, 19th ed.

<sup>3</sup> Commonwealth v. Brettun, 100 Mass. 206. Rex v. Johnson, 3 M. & S. 539. Rex v. Milnes, 2 East P. C. 602. Commonwealth v. Richards, 1 Mass. 337. State v. Stevens, 62 Maine, 284. State v. Williams, 19 Alabama, 15. Baldwin v. State, 1 Sneed, 411.

<sup>4</sup> Rex v. Craven, Russell & Ryan C. C. 14.

that statute.<sup>1</sup> The words "bank-note" and "bank-bill" are used indifferently in the statutes, and have the same meaning.<sup>2</sup>

But it is not necessary to set out instruments of any kind in an indictment, except where it is material for the court to see that the thing described is described rightly. It is needless to set out instruments which are not affected in any way by the terms applied to them in the indictment. In cases of forgery, for instance, at common law and by statute, certain classes of things are the subject of forgery, and they must be set out in the indictment in order that the court may see that the instrument in question falls within the class alleged. The cases show that this is the true criterion.

In a crown case reserved,<sup>3</sup> which was an indictment for obtaining property by false pretences, it was alleged that the defendant pretended that a certain paper produced by him was a good and valid promissory note for the payment of five pounds, but did not set out the instrument, which was a Bank of Elegance note; it was contended that the instrument should have been set out in the indictment. But the court were of opinion that the objection was insufficient. Wilde, C. J.: "It is unnecessary to set out the instrument in those cases where it cannot be of any use to the court, in order that they may arrive at the conclusion, whether it is or is not a valid docu-

<sup>1</sup> *Rex v. Chard, Russell & Ryan* C. C. 488. *Damewood v. State*, 1 How. Missis. 262.

<sup>2</sup> *Eastman v. Commonwealth*, 4 Gray, 416.

<sup>3</sup> *Regina v. Coulson, Temple & Mew* C. C. 332, 335; 1 *Denison* C. C. 592; 4 *Cox* C. C. 227. *Commonwealth v. Coe*, 115 Mass. 481, 500.

ment. Had it been stated in the indictment as a certain paper purporting to be a good and valid promissory note, and that it was not a good and valid promissory note, it might have been necessary to set it out, in order that the court might have seen whether it was or was not. In this case the court could not have derived any assistance whatever from setting the paper out; for all that appears upon the indictment, it might have been nothing but hieroglyphics. The indictment states that it was a certain paper produced by the prisoners, which they falsely pretended was a good and valid promissory note, whereas it was not. Where the note is required to be set out, something has turned upon the nature of the note, rendering it necessary that the court should see it."

In the cases which have been discussed in the preceding sections, the writing constituted the gist of the offence. But it is not so where the defendant is charged with the sale of a lottery ticket. This is more like a larceny of a written instrument. A general description is sufficient. And besides, a lottery ticket need not be in the form of a written contract. It may be any sign, symbol, or memorandum of the holder's interest in the lottery.<sup>1</sup> But it is to be observed that a statute may be so framed, that it will be necessary to set out the ticket in order that the court may see that it falls within the class which the Legislature has prohibited.

There are cases which form just and necessary exceptions to the general rule that a written instrument must be set out in the indictment. Where the instru-

<sup>1</sup> *People v. Taylor*, 3 Denio, 99.

ment on which the indictment is founded is in the defendant's possession, or cannot be produced, and there is no laches on the part of the government, it is necessary to aver in the indictment such facts as are sufficient to excuse the nondescription of the instrument, and then to proceed, either by stating its substance, or by describing it as an instrument which cannot be set forth by reason of its loss, destruction, or detention, as the case may be.<sup>1</sup>

The original of an instrument in a foreign language must be set out in the indictment accompanied with a translation. The reason for this decision appears to have been, that the judges considered that the court ought to have the instrument before them in a language which they understand, to give them the means of deciding whether it be that which it is alleged to be, and whether it is within the statute.<sup>2</sup> The form of pleading is to set out the original as "of the tenor following," and then to aver the translation in English to be "as follows."

<sup>1</sup> *Commonwealth v. Houghton*, 8 Mass. 107. *People v. Kingsley*, 2 Cowen, 522. *People v. Badgley*, 16 Wend. 53. *Hooper v. State*, 8 Humph. 93. *State v. Potts*, 4 Halst. 26. *United States v. Britton*, 2 Mason, 464. See *Commonwealth v. Clancy*, 7 Allen, 537; *Commonwealth v. Spilman*, 124 Mass. 327.

<sup>2</sup> *Rex v. Goldstein*, Russell & Ryan C. C. 473; 7 Moore, 1; 3 B. & B. 201; 10 Price, 88. This case was extremely well argued, both for the prisoner and the prosecution. *Zenobio v. Axtell*, 6 T. R. 162. Judgment of Brett, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 631; *Wormouth v. Cramer*, 3 Wend. 394. 1 Wms. Saund. 242, 242 a, 6th ed. 1 Wms. Notes to Saund. 312.

## CHAPTER XXV.

## WORDS SPOKEN.

WHERE words are the gist of the offence, they must be set forth in the indictment with particularity; as, for instance, in an indictment for scandalous or contemptuous words spoken to a magistrate in the execution of his office, or for blasphemous or seditious words. If there be any material variance between the words proved and those laid, even if laid as spoken in the third person, and proved to have been spoken in the second, the defendant must be acquitted. But if some of the words be proved as laid, and the words so proved amount to an indictable offence, it will be sufficient.<sup>1</sup>

In an indictment for an attempt to extort money by threats of a criminal accusation, the gist of the offence is the attempt to extort money; the words used do not alone constitute the crime, which is distinguishable from those where words alone are the gist of the offence. In such cases the words must be set out with particularity. It is enough to charge the defendant with verbally threatening to accuse of a specified crime, and the charge will be supported by proof of such a threat in words used by the defendant. In *Commonwealth v. Moulton*,<sup>2</sup> the allega-

<sup>1</sup> Archb. Crim. Pl. 61, 19th ed. *Commonwealth v. Moulton*, 108 Mass. 308.

<sup>2</sup> 108 Mass. 307.

tion was of a verbal threat "to accuse one of having committed the crime of adultery with" a person named, and it was held sufficient, although the language was not set forth. It is not necessary to set forth the facts constituting the crime of which accusation is threatened, with the particularity required in an indictment for the crime itself.<sup>1</sup>

A statute makes an offence to consist in threatening, "either verbally or by any written or printed communication," to accuse &c. These words are part of the description of the offence; and an indictment which contains no averment that the threats charged were made in either form charges no offence.<sup>2</sup>

<sup>1</sup> *Commonwealth v. Murphy*, 12 Allen, 449. *Commonwealth v. Dorus*, 108 Mass. 488. *Commonwealth v. Goodwin*, 122 Mass. 19, 33.

<sup>2</sup> *Robinson v. Commonwealth*, 101 Mass. 27.

## CHAPTER XXVI.

## JOINDER OF DEFENDANTS.

The general rule is that where several join in the commission of an offence, the offence is several as to each and they may be indicted jointly or separately.

Conspiracy, riot, perjury, and words when they are the gist of the offence &c. are exceptions.

It is a well-established principle, in all cases, civil as well as criminal, that a charge in tort against two 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.<sup>1</sup>

In Hawkins Pleas of the Crown, ch. 25, § 89, it is said that "Notwithstanding the offence of several persons cannot but in all cases be several, because the offence of one man cannot be the offence 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 &c., the indictment 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

<sup>1</sup> Commonwealth v. Brown, 12 Gray, 135.

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 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 offence 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 offence, as the following a joint trade without having served a seven years’ 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 must charge them severally and not jointly; for it is absurd to charge them jointly, because the offence 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.”<sup>1</sup>

Where several persons join in the commission of an offence, all or any number of them may be jointly indicted for it, or each of them may be indicted separately. In law they are several offences in relation to the several offenders. Thus, if several commit a robbery, burglary, or murder, they may be indicted for it jointly,<sup>2</sup> or separately; and the same where

<sup>1</sup> In addition to this lucid statement of the law by Mr. Serjeant Hawkins, the reader is referred to 1 Stark. Crim. Pl. ch. 2, p. 31.

<sup>2</sup> 2 Hale P. C. 173.

two or more commit a battery, or are guilty of extortion or the like.<sup>1</sup> And though they have acted separately, yet if the grievance is the result of the acts of all jointly, all may be indicted jointly for the offence.<sup>2</sup> Where money has been obtained under false pretences, and the false pretences were conveyed by words spoken by one defendant in the presence of the others, all of whom acted in concert together, it was held that they might all be indicted jointly.<sup>3</sup> So, where two persons joined in singing a libellous song, it was held that they might be indicted jointly;<sup>4</sup> and the same where two or more persons join in any other kind of publication of a libel. But if the publication of each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately.<sup>5</sup> So, several defendants cannot be joined in an indictment for perjury, because the assignment must be of the very words spoken, and the words uttered by one cannot possibly be applied to those which proceed from another;<sup>6</sup> or for words when they are the gist of the offence, because such offences are in their nature several.

The law relating to principal and accessory is confined to cases of felony. There are no accessories

<sup>1</sup> *Regina v. Atkinson*, 1 Salk. 382.

<sup>2</sup> *Rex v. Trafford*, 1 B. & Adol. 874. The jury also found that the acts creating the nuisance were done by the defendants severally, and it was held that as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated the acts to have been several.

<sup>3</sup> *Young v. The King*, 3 T. R. 98.

<sup>4</sup> *Rex v. Benfield*, 2 Burr. 980.

<sup>5</sup> Archb. Crim. Pl. 73, 19th ed.

<sup>6</sup> *Rex v. Philips*, 2 Strange, 921.

in treason, because of the extreme gravity of the crime, and none in misdemeanor, because it is not worth while in misdemeanors to draw the distinction. Therefore in an indictment against several for a misdemeanor all are principals, and may be charged in the indictment as such.<sup>1</sup>

Although, where several are guilty of different felonies in respect of the same transaction, the act cannot, unless they were all present actually or constructively, be jointly charged, yet principals in the first and second degree, and accessories before and after the fact may be all joined in the same indictment;<sup>2</sup> or the principals may be indicted first, and the accessories after the conviction of the principals, or before, for a substantive offence.<sup>3</sup>

A husband and wife may be jointly indicted for misdemeanors. Whether she can be convicted separately or jointly with him, is a question to be deter-

<sup>1</sup> *Regina v. Moland*, 2 Moody C. C. 276. *Regina v. Greenwood*, 2 Denison C. C. 453. *Regina v. Clayton*, 1 C. & K. 128. Per Williams, J., in *Howells v. Wynne*, 15 C. B. N. S. 15. *Commonwealth v. Drew*, 3 Cush. 284. *Commonwealth v. Ray*, 3 Gray, 448. *Commonwealth v. Gannett*, 1 Allen, 7. *Commonwealth v. Felton*, 101 Mass. 204. *Commonwealth v. Wallace*, 108 Mass. 14.

<sup>2</sup> "Several offenders may be joined in one indictment, though the offences are of several degrees, but dependent one upon another, as the principal in the first degree, and the principal in the second degree, viz. present, aiding and abetting the principal, and accessory before or after." 2 Hale P. C. 173.

<sup>3</sup> *Regina v. Crisham*, C. & Marsh. 187. *Regina v. Downing*, 1 Denison C. C. 52; 2 C. & K. 382. *Coal-Heaver's Case*, 1 Leach C. C. 64. *Commonwealth v. Knapp*, 9 Pick. 496. *Commonwealth v. Chapman*, 11 Cush. 422. *Commonwealth v. Lucas*, 2 Allen, 170. *Commonwealth v. Fortune*, 105 Mass. 592. *Commonwealth v. Roberts*, 108 Mass. 296. Archb. Crim. Pl. 13, 15, 73, 19th ed. Purcell Crim. Pl. 35.

mined by direct evidence, or by legal presumptions concerning the freedom of her action or the coercion of her husband.<sup>1</sup> They may be jointly convicted of the crime of larceny;<sup>2</sup> of an assault;<sup>3</sup> for keeping a bawdy-house;<sup>4</sup> or a common gaming-house;<sup>5</sup> or a liquor nuisance.<sup>6</sup> In Massachusetts at common law and under the Gen. Sts. ch. 87, § 7, ch. 165, § 13, a married woman may be indicted, and upon appropriate evidence convicted, either separately or jointly with her husband, of keeping a house of ill-fame, even if he resides with her in the house.<sup>7</sup>

If a married woman, indicted jointly with her husband, be described in the indictment as his wife, she need not prove her marriage, but will be entitled to protection if it appear that she acted under his coercion;<sup>8</sup> but the mere description will be no ground for dismissing the indictment as to the wife, for the indictment is joint and several, according to the facts as they may appear.<sup>9</sup> If she be described as a single woman, she must prove her marriage;<sup>10</sup> and such evidence must be given as will satisfy the jury of her marriage, although it is not

<sup>1</sup> *Commonwealth v. Murphy*, 2 Gray, 512. *Commonwealth v. Tryon*, 99 Mass. 442.

<sup>2</sup> *Regina v. Cohen*, 11 Cox C. C. 99.

<sup>3</sup> *Regina v. Ingram*, 1 Salk. 384. *Regina v. Cruse*, 8 C. & P. 541, 557; 2 Moody C. C. 53.

<sup>4</sup> *Regina v. Williams*, 1 Salk. 384; 10 Mod. 63.

<sup>5</sup> *Rex v. Dixon*, 10 Mod. 335.

<sup>6</sup> *Commonwealth v. Tryon*, 99 Mass. 442.

<sup>7</sup> *Commonwealth v. Lewis*, 1 Met. 151. *Commonwealth v. Cheney*, 114 Mass. 281. 4 Stephen Comm. 33, 7th ed.

<sup>8</sup> *Rex v. Knight*, 1 C. & P. 116.

<sup>9</sup> 1 Hale P. C. 46.

<sup>10</sup> *Rex v. Jones*, Kel. 37; 57, 3d ed.

absolutely necessary that the actual marriage should be proved.<sup>1</sup>

Upon an indictment against two for a joint and single offence, as stealing in the dwelling-house, both or either may be found guilty; but they cannot be found guilty of separate parts of the charge, or upon proof of two distinct felonies. In the former case, a *nolle prosequi* must be entered, as to the one who stands second upon the indictment, before judgment can be given against the other; in the latter case, judgment may be given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted.<sup>2</sup> The principle and the extent to which it is to be carried in the matter of charging a joint felony in receiving stolen goods is this: To sustain a joint charge against two for one and the same offence, 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

<sup>1</sup> *Rex v. Hassall*, 2 C. & P. 434. *Regina v. Woodward*, 8 C. & P. 561. *Regina v. McGinnes*, 11 Cox C. C. 391.

<sup>2</sup> *Rex v. Hempstead*, Russell & Ryan C. C. 344. So where three persons were joined in an indictment for robbery, it was held that one could not be found guilty of robbery, and the rest of larceny. *Rex v. Quail*, 1 Crawford & Dix, 191. But where several are indicted for burglary and larceny, one may be found guilty of the burglary and larceny and the others of the larceny only. *Rex v. Butterworth*, Russell & Ryan C. C. 520. The seven judges thought that there might be cases in which, upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking.

the joint charge,<sup>1</sup> but will authorize the conviction of the party who first received them.<sup>2</sup>

Parties to the crime of adultery may be jointly indicted.<sup>3</sup> A thief and a receiver of the stolen goods may be jointly indicted.<sup>4</sup> But in all such cases, with the exception of conspiracy, riot &c., though several defendants are jointly indicted, yet each might have been severally charged; and the rule is the same where a duty is thrown upon a body of persons, for each is severally liable for omissions as well as acts,<sup>5</sup> and consequently though several are charged jointly in the same indictment, some may be convicted and the rest acquitted, for the law looks upon the charge as several against each.<sup>6</sup>

In *Commonwealth v. Sampson*,<sup>7</sup> the defendants were convicted of doing work, labor and business on the Lord's day, the same not being works of necessity or charity in violation of Gen. Sts. ch. 84, § 1. It was objected that they could not be jointly con-

<sup>1</sup> The indictment charges that the two defendants "then and there," i. e. at the same time and place received the goods; and in this case the averment is not proved. Per Bramwell, B., in *Regina v. Reardon*, L. R. 1 C. C. 32.

<sup>2</sup> *Rex v. Messingham*, 1 Moody C. C. 257. *Regina v. Dovey*, 2 Denison C. C. 86. *Regina v. Matthews*, 1 Denison C. C. 596. *Regina v. Reardon*, L. R. 1 C. C. 31. *Commonwealth v. Slate*, 11 Gray, 60, 63. *State v. Smith*, 37 Missouri, 58.

<sup>3</sup> *Commonwealth v. Elwell*, 2 Met. 190.

<sup>4</sup> *Commonwealth v. Adams*, 7 Gray, 43.

<sup>5</sup> *Rex v. Hollond*, 5 T. R. 607.

<sup>6</sup> 1 Stark. Crim. Pl. 34.

<sup>7</sup> 97 Mass. 407. Two persons who were unlawfully fishing, at the same time from the same boat, may be joined as defendants in a complaint for so fishing, although each was fishing on his own account. *Commonwealth v. Weatherhead*, 110 Mass. 175.

victed, the offence being in its nature a distinct offence in each. "We are of opinion that this objection cannot prevail," said Mr. Justice Hoar. "The act which the statute makes an offence, and which is prohibited as a disturbance of the quiet of the Lord's day, and from its evil effect and example, is one which may be in its nature, and appeared upon the proof to be in this case, a joint act. It is more analogous to the creating or maintaining of a public nuisance than to the case of perjury or blasphemy, which is necessarily the separate act of a single person."

The general rule is, that in every indictment against two or more, the charge is several as well as joint; in effect, that each is guilty of the offence charged; so that, if one is found guilty, judgment may be passed on him, although one or more may be acquitted. There are well-known exceptions, as in case of conspiracy,<sup>1</sup> riot, and others, when the agency of two or more is of the essence of the offence. Violations of the license law are not within the reason of these exceptions, but are governed by the general rule.<sup>2</sup>

Misjoinder of defendants may be made the subject of a demurrer, motion in arrest of judgment, or writ of error; or the court will in general quash the indictment. But where there are different counts against different persons in the same indictment, this,

<sup>1</sup> Where two persons are indicted for a conspiracy, and one of them dies before the trial, and it proceeds against both, it is no mistrial, and entry of a suggestion of the death on the record is unnecessary. *Regina v. Kenrick*, 12 L. J. M. C. 135; 5 Q. B. 49.

<sup>2</sup> *Commonwealth v. Tower*, 8 Met. 528. *Commonwealth v. Griffin*, 8 Cush. 523. *Commonwealth v. Sloan*, 4 Cush. 52.

though it may be a ground for moving to quash the indictment, is no cause of demurrer, provided the counts be otherwise such in substance as may be joined.<sup>1</sup>

<sup>1</sup> *Rex v. Kingston*, 8 East, 41. Archb. Crim. Pl. 73, 19th ed.

## CHAPTER XXVII.

## JOINDER OF COUNTS. — THE DOCTRINE OF ELECTION.

The same offence may be charged, as committed by different means or in different modes, in various distinct counts of an indictment.

In point of law, no objection can be taken, either on demurrer or in arrest of judgment, though the defendant is charged in different counts of an indictment with different offences of the same kind.

## 1. Joinder of Counts.

ALTHOUGH a pleader is not, in general, permitted to charge a defendant with different felonies in different counts, yet he may charge the same felony in different ways in several counts, in order to meet the facts of the case ; as, for instance, if there is a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, is the goods or house of A. or B., they may be stated in one count as the goods or house of A., and in another as the goods or house of B. And the verdict may be taken generally on the whole indictment. And the reason is, that all the counts charge one and the same offence in point of law, and that the same evidence proves both counts. In *Regina v. O'Brian*,<sup>1</sup> a defendant was found guilty of manslaughter generally, on two counts of an indictment which described a murder, in one count, as done

<sup>1</sup> 1 Denison C. C. 9 ; 2 C. & K. 115.

by striking with a stick, in the other, by striking with a stone ; and the judges held that there was no ground for arresting the judgment, the mode of death being substantially the same according to each charge. This assumes that proof of one offence may support a verdict on two counts.<sup>1</sup>

And although on the face of an indictment every count imports to charge a different offence, whether founded on the same or different facts ; yet in practice the use made of the legal right to join several charges, is commonly no other than the charging the same offence in different counts of the same indictment in different ways, to meet the several aspects which it is apprehended the case may assume in evidence, or in which it may be regarded in point of law by the court. And the introduction of several counts for this purpose cannot be made the subject of objection in arrest of judgment.

Each count in an indictment is in fact and theory a separate indictment.<sup>2</sup> And the rights of the defendant are in no respect different from what they would have been if the charge had been set out in a separate indictment.<sup>3</sup> In ancient times there is no doubt that only one count was ever used in any indictment.<sup>4</sup> This appears by reference to the books of entries.

<sup>1</sup> *Regina v. Downing*, 1 Denison C. C. 52 ; 2 C. & K. 382. *Commonwealth v. Desmarteau*, 16 Gray, 1, 13, 14.

<sup>2</sup> *Latham v. The Queen*, 5 B. & S. 642, 643. *Regina v. O'Brien*, Irish Rep. 1 Com. Law, 174, 175. *United States v. Furlong*, 5 Wheat. 185, 201.

<sup>3</sup> *Commonwealth v. Burke*, 16 Gray, 33. *Commonwealth v. Carey*, 103 Mass. 215.

<sup>4</sup> Per Lord Denman in *O'Connell v. The Queen*, 11 Clark & Finnelly, 375.

The practice has grown up, and much increased in modern times, of introducing many counts into one indictment;<sup>1</sup> and though we know practically that these are most frequently descriptions, only in different words, of the same offence, they are allowable only on the presumption that they are different offences, and every count so imports on the face of the record.<sup>2</sup>

We proceed to make a few observations on the inconvenience which has resulted from the practice of multiplying counts. The charge presented by a grand jury, in their mere statement on oath, is to be drawn by the prosecuting officer, but is more usually, in cases of difficulty, drawn by a skilful pleader. The legal practice of including several different charges in the same indictment gave rise to the admission

<sup>1</sup> Lord Campbell, C. J. : "I deprecate most strongly the number of counts. I disapprove of the practice of multiplying counts in indictments, and I will use all my influence against it." *Regina v. Rowlands*, 2 Denison C. C. 381. In the course of his judgment in the case of *O'Connell v. The Queen*, 11 Clark & Fennelly, 374, Lord Denman animadverted with becoming severity on the cumbrous length and formality of indictments, especially those for conspiracy and kindred offences. "I must take the liberty," he said, "of throwing in the observation that in my opinion, there cannot be a much greater grievance or oppression than these endless, voluminous, and unintelligible indictments. An indictment which fills fifty-seven close folio pages is an abuse to be put down, not a practice to be encouraged." And on another occasion the Lord Chief Justice observed: "It is an important principle that persons accused ought to be distinctly warned of the offence imputed; but the extreme care employed to obtain legal accuracy has sometimes the opposite effect of bewildering, which is constantly produced by the multiplicity of counts introduced from the same motive." Paper on the Court of Criminal Appeal, printed in the "Memoir of Lord Denman," vol. ii. p. 448.

<sup>2</sup> Per Buller, J., in *Young v. The Queen*, 3 T. R. 106. Per Parke, B., in *O'Connell v. The Queen*, 11 Clark & Fennelly, at p. 295. Per Lord Campbell, at p. 415.

of several charges apparently distinct, but in reality founded on the same transaction; and the practice, although, perhaps, not strictly warranted by the ancient and simple principles of criminal law, or quite consonant with the duty of jurors, was sanctioned, no doubt, for the sake of its utility in excluding failures from variance in the evidence. The pleader, in making the most skilful use of his materials, with a view to conviction, has two main objects to attend to, the law which governs the case and the facts which are to be alleged. Supposing the law to be clear, he endeavors to satisfy it, in the allegation of facts necessary to show a violation of the law. The less he alleges, the less danger is there of variance;<sup>1</sup> he has therefore one or more counts, exceedingly sparing in allegation; but in order to avoid the danger of too strict an economy, other counts contain more liberal statements, oftentimes at the risk of inability to prove them. But, again, it often happens that there may be a doubt as to some material fact, in which case also, for the avoiding of variance, it may be necessary to state it in various modes. Counts then are multiplied, even when the law is clear, for the sake of avoiding any variance in fact. But the law itself may be uncertain; counts then are advisable, adapted to the simplest possible hypothesis in point of law, so as not to risk the necessity of having to prove too much; but this hypothesis may be erroneous, and therefore

<sup>1</sup> An indictment only states the legal character of the offence, and does not profess to furnish the details and particulars. To make the indictment more particular, would only encourage formal objections upon the ground of variance, which have of late been justly discouraged by the Legislature. *Mulcahy v. The Queen*, L. R. 3 H. L. 321, per Willes, J., in delivering the opinion of the Judges.

counts are also advisable to meet one, or more than one, of greater complexity. The course not unfrequently adopted by the pleader to meet such difficulties in a complicated case is this,—to frame one count containing all the facts which can possibly be material, another exceedingly general and economical in the statement of fact; these being accomplished, intermediate counts are framed, varying as to the extent and manner of allegations, so as to suit the objects to which we have adverted. Such being the artificial manner in which indictments are constructed, it may sometimes be a matter of difficulty to determine on which counts the verdict ought to be entered when a general verdict is returned.<sup>1</sup>

There was this distinction, at common law, between civil and criminal cases, that if a general verdict is found on several counts, any one of which is good, judgment may be given on that count in a criminal case; but if any count is bad, judgment must be arrested in a civil case.<sup>2</sup> But in England since the decision of the House of Lords in the case of *O'Connell v. The Queen*, A.D. 1844,<sup>3</sup> that rule is applied in criminal cases as well as in civil. The law in England, therefore, is general, that there can be no judgment on a verdict so taken, either in a civil or criminal case.<sup>4</sup> Since that decision the judges have adopted the precaution of passing a distinct sentence on each several count of the indictment, but so as not, in

<sup>1</sup> Eighth Rep. of the English Crim. Law Comm. 13.

<sup>2</sup> *Regina v. Ingram*, 1 Salk. 384. *Peake v. Oldham*, 1 Cowp. 276, per Lord Mansfield.

<sup>3</sup> 11 Clark & Finnely, 155.

<sup>4</sup> *Irvine v. Kirkpatrick*, 7 Bell Appeal Cases, 216. *State v. Pace*, 9 Rich. 365.

reality, to subject the party convicted to more than one penalty for the same actual offence. By this means, the danger of a total reversal of the judgment upon a writ of error, in case any count turned out to be insufficient, is avoided. But a different doctrine prevailed in England, prior to the decision in O'Connell's Case, for nearly two centuries; and when our ancestors immigrated here, they brought that rule with them as part of the common law.<sup>1</sup> And that is the settled rule in the courts of the United States, and in all except one of the State courts.<sup>2</sup>

It has been decided that it is no ground of objection to an indictment, that it contains several counts for distinct felonies of the same degree, though committed at different times, against the same offender. But although the indictment is good in point of law, yet it must be understood that the courts do not sanction any departure from the practice of either putting the prosecuting officer to elect, or quashing the indictment, where there is reason to apprehend that the joinder of several counts may embarrass the defendant. Such joinder, not being contrary to law, is no ground either for demurrer, motion in arrest of judgment, or error; for on the face of an indictment, every distinct count imports to be for a different offence.<sup>3</sup>

<sup>1</sup> *United States v. Plumer*, 3 Clifford, 67, 68.

<sup>2</sup> *United States v. Plumer*, 3 Clifford, 29, 68. *United States v. Furlong*, 5 Wheat. 201. *People v. Curling*, 1 Johns. 322. *Commonwealth v. Hawkins*, 3 Gray, 463. *Jennings v. Commonwealth*, 17 Pick. 80.

<sup>3</sup> *Regina v. Heywood*, Leigh & Cave C. C. 451. *Young v. The King*, 3 T. R. 106. Archb. Crim. Pl. 74, 75, 19th ed. *Dickinson Q. S.* 189, 6th ed. 1 Stark. Crim. Pl. 39.

And it may be stated generally, as the result of the English cases, that in point of law, several offences, which may be tried by the same rules, and which in point of law have the same legal class and character ; that is, several felonies, or several misdemeanors, may be charged in several counts in one indictment. Thus, counts for felony at common law may be joined with counts for felony by statute ; counts for a felony with aggravations which render it capital, with counts for a felony which is not capital ; counts for forging an instrument and counts for uttering it as true knowing it to be false. But a charge of felony should not be joined with a charge of misdemeanor, because, not only the degree, but the legal character of the offence is different, and the modes and incidents of trial are different. The test whether different offences may or may not be charged in an indictment, seems not always to be whether the judgments or punishments consequent on conviction differ or not, but whether the nature and quality of the offences charged is the same, or different ; or in other words, as it seems whether one is a felony and the other a misdemeanor.<sup>1</sup>

In England this legal division of offences occasions several differences in the incidents of trial which are not known in the criminal practice in this country. The principal reasons why a count for a felony should not be joined with a count for a misdemeanor do not obtain here. It is true, that, in general, offences differing in their natures, one being a felony, and the other a misdemeanor, ought not to be joined. The

<sup>1</sup> Per Lord Ellenborough, C. J., in *Rex v. Johnson*, 3 M. & Sel. 550. Dickinson Q. S. 189, 190, note, 6th ed.

distinction so far as our practice is concerned is by no means satisfactory, and is not based on any sound principle. Accordingly, the practice in some of the States has fully sustained the joinder of such counts where the offences are of a similar character.<sup>1</sup>

In Massachusetts it is well settled that several distinct, substantive offences may be charged in separate counts of the same indictment, if they are of the same general description, and *the mode of trial*<sup>2</sup> and the nature of the punishment are the same; and this whether they are felonies or misdemeanors.<sup>3</sup> And the court has declared that it "sees no objection to this course, because it is always competent for the court to order, where there are several counts which might tend to perplex the defendant in his defence, that the prosecutor shall elect on which of the counts he will bring the defendant to trial, so as to exempt him from the

<sup>1</sup> *Commonwealth v. Hills*, 10 Cush. 533, 534. *Commonwealth v. McLaughlin*, 12 Cush. 614. *Henwood v. Commonwealth*, 52 Penn. State, 424. On a crown case reserved, it was held that where counts for felony and misdemeanor were improperly joined, a verdict might be taken on the count for felony, and the count for misdemeanor disregarded. *Regina v. Jones*, 8 C. & P. 776; 2 *Moody C. C.* 94.

<sup>2</sup> This is the language of the decided cases; but it has no meaning. In that Commonwealth there is no difference in the mode and incidents of a trial, between a felony and a misdemeanor.

<sup>3</sup> *Carlton v. Commonwealth*, 5 Met. 532, 534. *Booth v. Commonwealth*, 5 Met. 535. *Josslyn v. Commonwealth*, 6 Met. 236. *Crowley v. Commonwealth*, 11 Met. 578. *Commonwealth v. Hills*, 10 Cush. 534. *Commonwealth v. Moorhouse*, 1 Gray, 471. *Commonwealth v. Costello*, 120 Mass. 358, 366. *Commonwealth v. Brown*, 121 Mass. 70. The law relating to the joinder of offences which are distinct and separate in their character stands exactly as it did before the St. 1861, ch. 181, was enacted. *Commonwealth v. Cain*, 102 Mass. 487, 488. *Commonwealth v. Costello*, 120 Mass. 367.

vexation of meeting multifarious charges at one and the same time.”<sup>1</sup>

It has long been the practice to charge several *misdemeanors* in different counts of the same indictment, and to enter verdicts and judgments upon the several counts, in the same manner and with the same effect as if a separate indictment had been returned upon each charge.<sup>2</sup> Still it is unusual in practice to charge in the same indictment misdemeanors of a different nature and legal character. And the court in the exercise of its discretion will, when it appears that a defendant will be embarrassed by a variety of charges, require the prosecuting officer to elect upon which charge he will proceed.

As one offence, whether felonious or not, cannot be properly charged twice over, whether in one indictment or in two, it is usual to lay a different *time* in each count, by the word “afterwards,” and to insert the word “other” in a second count to obviate the difficulty, through the fiction that the cause of action thus stated is new and distinct.<sup>3</sup> But it has been decided, on error, that assuming several counts in an indictment, to aver substantially the same state of facts, without distinguishing one narrative from another by the term “afterwards,” or some similar expression, the indictment is not bad for duplicity,

<sup>1</sup> *Carlton v. Commonwealth*, 5 Met. 534. *Commonwealth v. Cain*, 102 Mass. 488, 489. *Commonwealth v. McCluskey*, 123 Mass. 496.

<sup>2</sup> *O'Connell v. The Queen*, 11 Clark & Finnelly, 415, per Lord Campbell. *Young v. The Queen*, per Buller, J., 3 T. R. 195, 196. *Commonwealth v. Fitchburg Railroad*, 120 Mass. 372, 380. 2 Russell on Crimes, 677 note, 4th ed.; 594 note, 5th ed. Archb. Crim. Pl. 77, 19th ed. *Kane v. People*, 8 Wend. 203, 211.

<sup>3</sup> *Campbell v. The Queen*, 11 Q. B. 759, 810, 811.

as the court will not assume that the same offence is repeatedly charged.<sup>1</sup>

It has been determined that any qualities or adjuncts averred to belong to any subject in one count of an indictment, if they are separable from it, shall not 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."<sup>2</sup> And the uncertainty of one count of an indictment cannot be aided by reference to the description of the offence in another count.<sup>3</sup> In the case of *Regina v. Martin*,<sup>4</sup> the first count of the indictment charged the defendant with assaulting "E. R., *an infant*" &c. with intent carnally to know and abuse her, and the second count charged him with doing things (not termed an assault) to "the said E. R." with the same intent; and Patteson, J., held that the words "the said E. R." did not import into the second count the description of E. R. as to her age, but that the second count should have averred that she was *an infant* &c. But, after verdict, defective averments in a second count may be aided by reference to sufficient averments in the first count.<sup>5</sup>

From the principle that each count in an indictment is in fact and theory a separate indictment, it necessarily follows that the jury must pass upon each count

<sup>1</sup> *Holloway v. The Queen*, 17 Q. B. 318, 324.

<sup>2</sup> *Regina v. Waverton*, 17 Q. B. 562; 2 Denison C. C. 339; S. C. 2 Lead. Crim. Cas. 157.

<sup>3</sup> *Regina v. Waters*, 1 Denison C. C. 356; Temple & Mew C. C. 57; 2 C. & K. 866; S. C. 2 Lead. Crim. Cas. 152.

<sup>4</sup> 9 C. & P. 215. *Commonwealth v. Sullivan*, 6 Gray, 478.

<sup>5</sup> *Regina v. Waverton*, 17 Q. B. 562; 2 Denison C. C. 339; S. C. 2 Lead. Crim. Cas. 157.

separately, and apply to it the evidence bearing upon the defendant's guilt of the offence therein charged. And if they fail to do so, their verdict cannot be sustained. If, on the trial of an indictment, charging distinct offences in separate counts, the jury return a general verdict of guilty, and, in answer to an inquiry of the court, reply that they did not pass upon the counts separately, and the verdict is thereupon ordered to be affirmed and recorded, the defendant has good ground of exception, even if the case was submitted to the jury with suitable instructions as to the several counts.<sup>1</sup>

## 2. The Doctrine of Election.

In immediate connection with this subject, may be noticed the *doctrine of election*. In point of law, no objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind.<sup>2</sup> Indeed, on the face of the record, every count purports to be for a separate offence, and in misdemeanors it is the daily practice to receive evidence of several different offences charged in different counts in the same indictment. In cases of felony, however, this rule has, from motives of humanity, been considerably modified; for, as an indictment containing several distinct charges is calculated to embarrass a prisoner in his defence, the judges, in the exercise of a sound discretion, are accustomed to quash indictments so framed, when it appears, before the prisoner has pleaded or

<sup>1</sup> Commonwealth v. Carey, 103 Mass. 214.

<sup>2</sup> Rex v. Kingston, 8 East, 41. Regina v. Heywood, Leigh & Cave C. C. 451. Anon. Irish Circ. Rep. 165, Crampton, J.

the jury charged, that the inquiry is to include separate crimes.<sup>1</sup> When this circumstance is discovered during the progress of the trial, the prosecuting officer is usually called upon to elect one felony, and to confine himself to that, unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction. Here such a course will not be pursued, as its adoption would defeat the ends of justice.<sup>2</sup>

Thus, if a prisoner is charged with receiving several articles, knowing them to have been stolen, and it be proved that they were received at separate times, the prosecutor may be put to his election, but if it be possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of his accusation.<sup>3</sup> So, where several prisoners were charged in different counts of the same indictment with committing successive rapes upon the prosecutrix, and aiding each other in turn, she was not put to her election, but the court heard the history of the whole transaction; <sup>4</sup> and a similar course was adopted, where an indictment contained five counts for setting fire to five houses belonging to different owners, and it appeared that the houses were in a row, and that one fire burnt them all.<sup>5</sup> So where an indictment in the same count charged four prisoners with assaulting and robbing two persons, who, it appeared, were

<sup>1</sup> *Regina v. Heywood*, Leigh & Cave C. C. 451.

<sup>2</sup> 1 Taylor Ev. § 329, 7th ed. Archb. Crim. Pl. 74, 75, 19th ed.

<sup>3</sup> *Rex v. Dunn*, 1 Moody C. C. 146. *Regina v. Hinley*, 2 M. & Rob. 524, per Maule, J.

<sup>4</sup> *Rex v. Folkes*, 1 Moody C. C. 354. *Rex v. Gray*, 7 C. & P. 164.

<sup>5</sup> *Rex v. Trueman*, 8 C. & P. 727.

walking together at the time when they were attacked, Chief Justice Tindal refused to put the prosecutors to elect upon which felony they would rely, and evidence being given as to the entire transaction, the prisoners were convicted.<sup>1</sup> In another case, the defendant was charged in a single count with uttering *twenty-two* forged receipts, which were severally set out and purported to be signed by different persons, with intent to defraud the Crown. His counsel contended that the prosecutor ought to elect upon which of these receipts he would proceed, as, amidst such a variety, it would be almost impossible for the prisoner to conduct his defence. As, however, the indictment alleged that they were all uttered at one and the same time, and the proof corresponded with this allegation, the court refused to interfere, and all the judges subsequently held that a proper discretion had been exercised.<sup>2</sup>

In a recent crown case reserved,<sup>3</sup> the indictment charged the prisoner with stealing 1000 cubic feet of gas on a particular day. The evidence connected the prisoner with the abstraction for several years of gas from the main of the prosecutors by a pipe which had been used for the purpose of partly lighting a factory by gas without its passing through the meter. It was held that the circumstances attending the abstraction of gas by that means for the whole of that time were rightly given in evidence, and that the prosecutors were not called upon to elect to proceed on one

<sup>1</sup> *Regina v. Giddins, C. & Marsh.* 634. *Commonwealth v. Sullivan*, 104 Mass. 552.

<sup>2</sup> *Rex v. Thomas*, 2 Leach C. C. 877; 2 East P. C. 934. 1 Taylor Ev. § 330, 7th ed.

<sup>3</sup> *Regina v. Firth*, L. R. 1 C. C. 172.

particular act of taking, for the whole of the acts constituted one continuous taking, and did not show separate takings at different times. And it seems that if the facts had amounted to proof of separate and distinct takings from time to time, though the prosecution might have been called upon to elect upon which taking or takings they would proceed, the evidence would have been equally admissible as tending to show the felonious nature of the one taking selected.

Where an indictment charged the prisoner in three several counts with three several felonies in sending three separate threatening letters, Mr. Justice Byles compelled the prosecutor to elect upon which count he would proceed.<sup>1</sup>

The *time* for putting the counsel for the prosecution to his election is, when it shall appear by the *evidence* that the two or more supposed occurrences took place at different periods, and it is not sufficient for this purpose that the counsel for the government, in his opening address, has stated that the fact was so, because the witnesses, on being examined, may put the matter in a different light.<sup>2</sup>

Misjoinder of counts is cured by a verdict for the defendant on the count improperly joined; or by the entry of a *nolle prosequi* of that count. In either case it is the same thing as if it had never been inserted in the indictment.<sup>3</sup>

<sup>1</sup> *Regina v. Ward*, 10 Cox C. C. 42.

<sup>2</sup> *Regina v. Smart*, Irish Circ. Rep. 15, Bushe, C. J. 1 Taylor Ev. § 313, 6th ed.

<sup>3</sup> *Kightly v. Birch*, 2 M. & Sel. 533. *Commonwealth v. Packard*, 5 Gray, 101. *Regina v. Ferguson*, Dearsly C. C. 427. *Commonwealth v. McLaughlin*, 12 Cush. 612, 615.

## CHAPTER XXVIII.

## PREVIOUS CONVICTION.

Where the penalty is aggravated by a previous conviction, such previous conviction must be alleged.<sup>1</sup>

A STATEMENT of a previous conviction does not charge an offence. It is only the averment of a fact which may affect the punishment. The jury do not find the person guilty of the previous offence; they only find that he was previously convicted of it as an historical fact. Any number of previous convictions may be laid and proved. They do not vary the offence; they only affect the quantum of punishment.<sup>2</sup> The court cannot notice a previous conviction, unless it is laid in the indictment, because the defendant is entitled to have his identity tried by the jury, which cannot be done unless the previous conviction is on the record.<sup>3</sup> And in order to prove the identity, it is not essential to call a witness who was present at the former trial: it is sufficient to prove that the defendant is the person who underwent the sentence mentioned in the former conviction.<sup>4</sup>

<sup>1</sup> Tuttle v. Commonwealth, 2 Gray, 505. Haynes v. Commonwealth, 107 Mass. 198.

<sup>2</sup> Regina v. Clark, Dearsly C. C. 198.

<sup>3</sup> Regina v. Willis, L. R. 1 C. C. 363; 12 Cox C. C. 192. Regina v. Summers, L. R. 1 C. C. 182. Regina v. Deane, L. R. 2 Q. B. D. 305. Cureton v. The Queen, 1 B. & S. 208. Commonwealth v. Briggs, 5 Pick. 429.

<sup>4</sup> Regina v. Crofts, 9 C. & P. 219. Regina v. Leng, 1 F. & F. 77; S. C. as Regina v. Levy, 8 Cox C. C. 73.

A sentence to an increased penalty, imposed by statute upon a second conviction, cannot be rendered, except upon allegation in the indictment, and upon proof, of a prior conviction; and a sentence to such a penalty on the second of two counts in the same indictment, upon the conviction of the defendant upon both counts, will be reversed on error.<sup>1</sup> And even if, besides imposing a higher penalty upon a second conviction than upon the first, a statute provides that any person, convicted of two offences upon the same indictment, shall be subject to the same punishment as if he had been successively convicted on two indictments, still the second offence must be alleged in the indictment to be a second offence in order to warrant the increased punishment.<sup>2</sup> "When the statute imposes a higher penalty upon a second and a third conviction, respectively," said Chief Justice Shaw,<sup>3</sup> "it makes the prior conviction of a similar offence a part of the description and character of the offence 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 offence intended to be punished should be averred. This is required by a rule of the common law, and by our own Declaration of Rights, art. 12. It is not enough for the judge, when proceeding to pass sentence on the second count, to know, from the record before him, that the party has just been convicted on a prior count; he

<sup>1</sup> Tuttle v. Commonwealth, 2 Gray, 505.

<sup>2</sup> Garvey v. Commonwealth, 8 Gray, 382. Flaherty v. Thomas, 12 Allen, 432.

<sup>3</sup> Tuttle v. Commonwealth, 2 Gray, 506.

knows equally that this was not true, and could not have been truly averred, when the indictment was found.”

It is no objection to an indictment for felony that a previous conviction is stated at the beginning and not, as is more usual, at the end of the indictment; and the proper course when an indictment is so framed is to state the new charge to the jury in the first instance, and then, if they return a verdict of guilty, to charge them to inquire as to the fact of the previous conviction.<sup>1</sup>

But such prior conviction is a collateral fact, which can only be proved by record, and therefore, in whatever form it is alluded to or mentioned in the indictment, it must be made certain by the record, when produced. There is no danger, therefore, that a party can be injured by an amendment of a former conviction; because it must conform to the record; otherwise, the record will not prove it, or sustain the averment of a former conviction. It is a part of the indictment, which derives no increased weight from the finding of the grand jury, and one upon which they pass no judgment, but merely report the prior conviction, to be verified and identified wholly by the production of the record. Such an amendment, even of an indictment, as found by the grand jury, is not a violation either of the letter or spirit of the salutary provision of the Declaration of Rights.<sup>2</sup>

The record must state that *judgment* was given for the previous offence; it is not sufficient for it to state

<sup>1</sup> *Regina v. Hilton and M'Evin*, Bell C. C. 20; 28 L. J. M. C. 28.

<sup>2</sup> *Commonwealth v. Holley*, 3 Gray, 458. *Commonwealth v. Hall*, 97 Mass. 573.

a *conviction*. The judgment may have been arrested.<sup>1</sup> On the same principle, if there is no judgment in the former trial on the record there can be no plea of *autrefois acquit* or *convict*.<sup>2</sup>

<sup>1</sup> *Regina v. Ackroyd*, 1 C. & K. 158. *Regina v. Stonnell*, 1 Cox C. C. 142.

<sup>2</sup> Per Jervis, C. J., in *Regina v. Reid*, 20 L. J. M. C. 67. *Commonwealth v. Lahy*, 8 Gray, 459. *Commonwealth v. Fraher*, 126 Mass. not yet published.

## CHAPTER XXIX.

## CONCLUSION OF AN INDICTMENT.

**An Indictment should have a formal conclusion.**

AN indictment for an offence at common law concludes thus: "Against the peace of said State *or* Commonwealth." The words "against the peace" are essential in all cases,<sup>1</sup> excepting in indictments for nonfeasance;<sup>2</sup> but there is no sufficient reason for the exception,<sup>3</sup> and in these cases they are uniformly used.

An indictment for an offence created by statute concludes thus: "Contrary to the form of the statute *or* statutes in such case made and provided." According to some decisions, great care is necessary in ascertaining whether the conclusion should be *contra formam statuti* or *contra formam statutorum*.<sup>4</sup>

<sup>1</sup> 2 Hale P. C. 188. 2 Hawk. P. C. ch. 25, § 92. *Rex v. Lookup*, 3 Burr. 1901. *Rex v. Cook*, Russell & Ryan C. C. 176. *Regina v. Lane*, 6 Mod. 128. In *Rex v. Taylor*, 5 D. & R. 422, Bayley and Holroyd, JJ., were of this opinion, but it was not necessary to decide the question. *Commonwealth v. Carney*, 4 Gratt. 546.

<sup>2</sup> In *Regina v. Wyat*, 1 Salk. 380, 381, it was held, "that *contra pacem* was surplusage, and could do neither good nor harm, because it was a nonfeasance."

<sup>3</sup> "The distinction between a nonfeasance and a misfeasance is often one more of form than of substance." *Commonwealth v. New Bedford Bridge*, 2 Gray, 346.

<sup>4</sup> *Mutatis mutandis*, the observation of Martin, B., in a recent case, is applicable to this rule of pleading: "I do not consider whether

But the difference is unimportant. An indictment founded on a single statute is not vitiated by concluding *contra formam statutorum*.<sup>1</sup> Neither is an indictment founded on more than one statute vitiated by concluding *contra formam statuti*. In this case all the statutes in relation to the same offence are taken and construed as if they were one statute.<sup>2</sup>

With regard to the cases in which the indictment should conclude "against the form of the statute," in addition to "against the peace," the following rules have been laid down:<sup>3</sup> —

1. If a statute makes that to be an offence which was not so at common law, or alters the nature of an offence at common law, as by making a misdemeanor to become a felony, the indictment must conclude "against the form of the statute," otherwise it will be insufficient.<sup>4</sup>

2. But such a conclusion will not make good an indictment which does not bring the act prohibited or commanded within the material words of the statute.<sup>5</sup>

3. Where the common law upon a particular subject

this is money had and received *ad damnum ipsius* or *ipsorum*; such technicalities are mere nonsense." *Jones v. Cuthbertson*, 42 L. J. Q. B. 223.

<sup>1</sup> *Commonwealth v. Hooper*, 5 Pick. 42. *Kenrick v. United States*, 1 Gallis. 268. *United States v. Gibert*, 2 Sumner, 89.

<sup>2</sup> *United States v. Furlong*, 5 Wheat. 184. *United States v. Gibert*, 2 Sumner, 21, 89. *State v. Wilbor*, 1 R. I. 199. *Butman's Case*, 8 Greenl. 113. *State v. Berry*, 4 Halst. 374. *State v. Dayton*, 3 Zab. 49. *Rex v. Browne*, *Jebb C. C.* 21.

<sup>3</sup> 1 Wms. Saund. 135, 6th ed. 1 Wms. Notes to Saund. 152.

<sup>4</sup> *Rex v. Faulkner*, 1 Saund. 249. *Rex v. Pearson*, 1 Moody C. C. 313. *Regina v. Radcliffe*, 2 Moody C. C. 68.

<sup>5</sup> 2 Hawk. P. C. ch. 25, § 110.

is impliedly repealed by a statute revising the whole subject, then an indictment must conclude *contra formam statuti*.<sup>1</sup>

4. Where a statute merely increases the punishment of an offence, sentence may be passed for the increased punishment, although the indictment does not conclude *contra formam statuti*; for that conclusion is only necessary when a statute creates an offence, not when it merely regulates the punishment.<sup>2</sup> In the language of Lord Denman, C. J., "It is the offence which is the subject of the indictment, and not the punishment."<sup>3</sup>

5. An indictment for a felony, whether at common law or by statute, as well as for a misdemeanor, must conclude "against the peace;" and the laying the offence *contra formam statuti* will not supply the omission of these words, which in an indictment founded on a statute, besides the words *contra formam statuti*, are absolutely necessary.<sup>4</sup>

6. It follows, that if a statute adds a new penalty to an offence at common law, and the indictment concludes against the form of the statute, but does not bring the offence within it, it is good, at common law, and the words "against the form of the statute" shall be rejected.<sup>5</sup>

<sup>1</sup> *Commonwealth v. Cooley*, 10 Pick. 37. *Commonwealth v. Ayer*, 3 Cush. 152. *Commonwealth v. Wyman*, 12 Cush. 237, 239. *Commonwealth v. Dennis*, 105 Mass. 162.

<sup>2</sup> *Rex v. Chatburn*, 1 Moody C. C. 403. *Rex v. Berry*, 1 M. & Rob. 463. *Williams v. The Queen*, 7 Q. B. 250, overruling a dictum of Lord Hale, 2 Hale P. C. 191, 192.

<sup>3</sup> *Williams v. The Queen*, 14 L. J. M. C. 164. *Regina v. Wise*, 1 Cox C. C. 80.

<sup>4</sup> *Rex v. Cook*, Russell & Ryan C. C. 176. 1 Wms. Saund. 135 a.

<sup>5</sup> *Page & Harwood's Case*, Aley, 43, 44.

7. An indictment for an offence created by statute ought not to recite it. If, however, it be recited and misrecited in a substantial part of the purview of the statute, such variance is fatal, notwithstanding the indictment concludes *contra formam statuti*.<sup>1</sup>

8. If a statute refers to a former statute, and adopts and continues its provisions, the indictment must conclude against the form of the *statute*.<sup>2</sup>

9. If one statute subjects an act to a pecuniary penalty, and a subsequent statute makes it a felony, an indictment for the felony, concluding against the form of the *statute*, is right.<sup>3</sup>

When the indictment is founded upon some act or omission, which is punishable as a nuisance to the public in general, it is usually averred to have been done or omitted, *ad commune nocumentum* of the citizens of the Commonwealth; but these words are not essential, for they neither describe the crime itself nor the facts which constitute it; and if the facts charged must, from their very nature, have been a nuisance to society, it is unnecessary to aver that which the court cannot but infer.<sup>4</sup> And in an

<sup>1</sup> 2 Hawk. P. C. ch. 25, §§ 100, 101. 1 Wms. Saund. 135 a.

<sup>2</sup> Ridley v. Bell, 1 Lutw. 215. 2 Hawk. P. C. ch. 25, § 117. Regina v. Houston, 3 Irish Law Rep. 445; 2 Jebb & Symes, 690.

<sup>3</sup> Rex v. Pim, Russell & Ryan C. C. 425. 1 Wms. Saund. 135 b. Contra Regina v. Adams, C. & Marsh. 299, Coleridge, J.

<sup>4</sup> 1 Stark. Crim. Pl. 208. Archb. Crim. Pl. 71, 19th ed. Per Metcalf, J., in Commonwealth v. Reynolds, 14 Gray, 91. The cases are not uniform on this point. Commonwealth v. Haynes, 2 Gray, 72. Regina v. Holmes, Dearsly C. C. 207; 6 Cox C. C. 216; 3 C. & K. 360. Commonwealth v. Boon, 2 Gray, 74, 75. Commonwealth v. Parker, 4 Allen, 313. Commonwealth v. Smith, 6 Cush. 80. Commonwealth v. Harris, 101 Mass. 29. Commonwealth v. Oaks, 113 Mass. 8. Commonwealth v. Buxton, 10 Gray, 9. Commonwealth v. Faris, 5 Rand. 691.

indictment under a statute which alleges, in the words of the statute, that the defendant "did keep and maintain a common nuisance, to wit, a certain tenement," used for purposes which by the statute make it a common nuisance, it is unnecessary to conclude *ad commune nocumentum*. Such conclusion is superfluous repetition, when the offence is set out in the words by which it is created and described.<sup>1</sup>

An indictment at common law, for dissuading, hindering and preventing a witness from appearing before a court, which alleges facts showing an obstruction and hindrance of the due course of proceedings in the administration of justice, need not conclude "to the obstruction and hindrance of public justice."<sup>2</sup>

The conclusion usually inserted in an indictment for perjury, "that so the defendant did commit wilful and corrupt perjury," may be rejected as surplusage, if the perjury is sufficiently alleged in the preceding part of the indictment. "Perjury" is not a word of art like murder.<sup>3</sup> And an indictment on a statute for a felonious assault, which sets forth all the facts necessary to constitute the offence made the subject of punishment by the statute, need not conclude in the words of the statute that the defendant "is deemed a felonious assaulter."<sup>4</sup> This class of cases differs from those of indictments for murder and other like offences, made punishable solely under a description of the offence by its technical term.

<sup>1</sup> *Wells v. Commonwealth*, 12 Gray, 326. *State v. Stevens*, 40 Maine, 559. *Commonwealth v. Howe*, 13 Gray, 26.

<sup>2</sup> *Commonwealth v. Reynolds*, 14 Gray, 87.

<sup>3</sup> *Ryalls v. The Queen*, 11 Q. B. 781; 17 L. J. M. C. 92. *Regina v. Hodgkiss*, L. R. 1 C. C. 212. *United States v. Elliot*, 3 Mason, 156.

<sup>4</sup> *Commonwealth v. Sanborn*, 14 Gray, 393.

It is remarkable, that, while it is made imperative by the Constitutions of some of the States that an indictment should conclude "against the peace &c.," by the statutes of others the introduction of any conclusion is rendered unnecessary and immaterial.

It may be observed that, in civil actions, though it is in general unnecessary to allege matter of law, yet there is sometimes occasion to make mention of it, for the convenience or intelligibility of the statement of fact. Thus, it is sometimes necessary to refer to a public statute in general terms, to show that the case is intended to be brought within the statute; as, for example, to allege that the defendant committed a certain act "against the form of the statute in such case made and provided;" but the reference is made in this general way only, and there is no need to set the statute forth.<sup>1</sup> In penal actions this conclusion is absolutely necessary,<sup>2</sup> and must be strictly pleaded.<sup>3</sup> In such actions, the omission to allege *contra formam statuti* is fatal on motion in arrest of judgment.<sup>4</sup>

It is settled law that if an indictment conclude *contra formam statuti*, when it should conclude as at common law, the mistake is not material, and the words *contra formam statuti* may be rejected as surplusage.

<sup>1</sup> Stephen Pl. 288, 7th ed.

<sup>2</sup> *Lee v. Clarke*, 2 East, 338. *Lord Clanricarde v. Stokes*, 7 East, 516, is the same in principle; but it was there considered that the declaration did, in effect, contain such an allegation.

<sup>3</sup> *Lee v. Clarke*, 2 East, 338. *Commonwealth v. Stockbridge*, 11 Mass. 279, 280. It will not suffice to conclude, "whereby and by force of the statute, the defendant has forfeited for his said offence &c." *Wells v. Iggulden*, 3 B. & C. 186; 5 D. & R. 13.

<sup>4</sup> *Fife v. Bousfield*, 6 Q. B. 100.

<sup>5</sup> *Page & Harwood's Case*, Aley, 44. *Rex v. Mathews*, 5 T. R.

Finally, it is to be observed that the tendency of modern jurisprudence and legislation is to render the whole of the learning relating to the conclusion of indictments obsolete.<sup>1</sup>

162. *Rex v. Bathurst*, Sayer, 225. *Commonwealth v. Hoxey*, 16 Mass. 385. *Commonwealth v. Reynolds*, 14 Gray, 87. *Commonwealth v. Squire*, 1 Met. 261. *Commonwealth v. Shattuck*, 4 Cush. 141.

<sup>1</sup> *State v. Dayton*, 3 Zab. 49, 61.

## CHAPTER XXX.

## MOTION TO QUASH.

A MOTION to quash an indictment is, at common law, addressed to the discretion of the court, and no exception lies as to the mode of its exercise.<sup>1</sup> Where an indictment is so defective on the face of it that no judgment can be given upon it, even should the defendant be convicted, the court, on application,<sup>2</sup> will in general quash it.<sup>3</sup>

When it is made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the court will quash it on motion by the defendant *after* plea pleaded; although

<sup>1</sup> Commonwealth *v.* Eastman, 1 Cush. 189, 214. Commonwealth *v.* Hawkins, 3 Gray, 464. Commonwealth *v.* Davis, 11 Gray, 457. Commonwealth *v.* Gorman, 16 Gray, 601. In Massachusetts the St. 1864, ch. 250, § 2, peremptorily requires that any objection to a complaint, indictment, or other criminal process, for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash. It is therefore no longer within the discretion of the magistrate or court to refuse to hear a legal objection upon a motion to quash; and, if heard, it must be decided according to fixed rules of law. Commonwealth *v.* McGovern, 10 Allen, 193.

<sup>2</sup> The court may also quash the indictment on its own view. Regina *v.* Wilson, 6 Q. B. 620. Rex *v.* Roysted, 1 Keny. 255. Rex *v.* Tremaine. Ry. & M. N. P. C. 147. Regina *v.* James, 12 Cox C. C. 127, Lush, J. Regina *v.* Norton, 8 C. & P. 196, 198.

<sup>3</sup> A defect only pleadable in abatement, and which is cured by pleading over, is not ground for quashing an indictment. United States *v.* Pond, 2 Curtis C. C. 265.

in a doubtful case it will exercise its discretion and leave him to his remedy by motion in arrest of judgment or writ of error.<sup>1</sup>

<sup>1</sup> *Regina v. Heane*, 4 B. & S. 947. *Regina v. Wilson*, 6 Q. B. 620. In *Regina v. James*, 12 Cox C. C. 127, the indictment was quashed after plea pleaded, and indeed after the case for the prosecution had closed, for a substantial defect apparent on the face of it.

## CHAPTER XXXI.

## PLEAS.

1. Order and Time of Pleading.
2. Guilty.
3. Nolo Contendere.
4. Plea to the Jurisdiction.
5. Plea in Abatement.

1. Order and Time of Pleading.

WHEN brought to the bar and arraigned, the prisoner either confesses the charge, stands mute of malice, or does not answer directly to the charge,<sup>1</sup> which, by statutory enactment, may be entered as a plea of not guilty;<sup>2</sup> or pleads to the jurisdiction or in abatement—or demurs—or pleads specially in bar—or generally, that he is not guilty. When he has any special matter to plead in abatement or in bar, or if the indictment is demurrable, he should plead it, or demur at the time of arraignment, before the plea of not guilty.

2. Guilty.

The plea of guilty, or confession of the defendant, may be either express or implied. An express con-

<sup>1</sup> "He who answers impertinently, or ineffectually, or refuses to put himself upon his trial in such manner as the law directs, may as properly be said to stand mute as he who makes no answer at all."

<sup>2</sup> Hawk. P. C. ch. 30, § 1. *Commonwealth v. Lannan*, 13 Allen, 568.

<sup>2</sup> *Ellenwood v. Commonwealth*, 10 Met. 222. *Commonwealth v. McKenna*, 125 Mass. 397.

fession of the indictment is where a person directly confesses, in open court, the crime with which he is charged, which is the highest conviction that can be,<sup>1</sup> and may be received after the plea of "not guilty" recorded.<sup>2</sup> The plea of guilty is a confession of all the facts duly charged in the indictment. It is a waiver also of all merely technical and formal objections of which the defendant could have availed himself by any other plea or motion.<sup>3</sup> If it appears to the satisfaction of the court that the defendant rightly comprehends the effect of his plea, the plea of guilty is recorded, even in a capital case,<sup>4</sup> and nothing further is done unless a motion in arrest of judgment is interposed, till sentence is awarded.

### 3. Nolo Contendere.

An *implied confession* or plea of nolo contendere, as it is technically termed, like a demurrer, admits for the purposes of the case all the facts which are well pleaded, but is not to be used as an admission elsewhere. It is discretionary with the court to receive it, or not.<sup>5</sup>

"An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty,

<sup>1</sup> Green v. Commonwealth, 12 Allen, 172.

<sup>2</sup> 2 Hawk. P. C. ch. 31, § 1.

<sup>3</sup> Commonwealth v. Hinds, 101 Mass. 210.

<sup>4</sup> 1 Greenl. Ev. § 216. Green v. Commonwealth, 12 Allen, 155, 172. The courts, however, are usually backward in receiving and recording such a confession, at least in highly penal cases, and will generally advise the defendant to retract it and plead to the indictment. 2 Hale P. C. 225. 4 Stephen Comm. 394, 7th ed. Commonwealth v. Battis, 1 Mass. 95.

<sup>5</sup> Commonwealth v. Tower, 8 Met. 527. Commonwealth v. Horton, 9 Pick. 207.

but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis*, without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum*." <sup>1</sup>

The advantage which a party obtains by such an answer properly pleaded, is, that he is not estopped to plead not guilty to an action for the same facts, as he would be upon a plea of guilty. For in the latter case the entry is *quod cognovit indictamentum*, but in the former, *non vult contendere cum domina regina et ponit se in gratiam curiæ*.<sup>2</sup>

In our practice, the court will allow a party to offer evidence in mitigation of the sentence, after the plea of guilty, and a *fortiori*, after a plea of *nolo contendere*. It is only where the party is sued in a civil action for doing the thing for which he was indicted, that the distinction between these pleas is material. The plea of *nolo contendere* pleaded with a protestation that the party was not guilty, would clearly not conclude the party in his defence to the civil action.

But so far as the Commonwealth is concerned, the judgment of conviction follows as well the one plea as the other. And it is not necessary that the court should adjudge that the party was guilty, for that follows by necessary legal inference from the express

<sup>1</sup> 2 Hawk. P. C. ch. 31, § 3.

<sup>2</sup> 2 Hawk. P. C. ch. 31, § 3. *Regina v. Templeman*, 1 Salk. 55.

or implied confession. And the court thereupon proceeds to pass the sentence of the law affixed to the crime.<sup>1</sup>

Where a party pleads "not guilty" to any matter cognizable before a magistrate, no conviction can be had without an adjudication that the party is guilty. His judgment in such case stands for the verdict of a jury. And after the verdict of the jury that the party is guilty is recorded, the court does not further adjudge that the party is guilty, for that sufficiently appears from the verdict. But the court then proceeds (even in capital cases) to pass the sentence, unless some legal reason should be given for the staying of the proceedings.<sup>2</sup>

"I take it for granted," says Mr. Serjeant Hawkins,<sup>3</sup> "that no confession whatever shall, before final judgment, deprive the defendant of the privilege of taking exceptions in arrest of judgment to faults apparent in the record; for the judges must *ex officio* take notice of all such faults, and any one, as *amicus curiæ*, may inform them of them."

#### 4. Plea to the Jurisdiction.

That any given court should have power to correct and punish a particular offence in a particular person, it is necessary that the offence itself should be of a nature to fall within its jurisdiction, that the person should be subject to its jurisdiction, and that the punishment awarded to him should be one which the

<sup>1</sup> *Green v. Commonwealth*, 12 Allen, 165. *Commonwealth v. Horton*, 9 Pick. 208. In England the form of making up the record includes a formal adjudication of guilt.

<sup>2</sup> Judgment in *Commonwealth v. Horton*, 9 Pick. 207, 208.

<sup>3</sup> 2 Hawk. P. C. ch. 31, § 4.

court is competent to inflict for that offence. These things constitute "jurisdiction." But where they exist, the method of bringing the defendant into court, the form in which the offence is charged against him, the particular forms in which facilities are provided for his defence, the specific rules under which each step in the suit is taken — these things which are but the machinery by which justice is administered, lie widely apart from the right and "jurisdiction" to administer it, and to confound them together in the common use of the word "jurisdiction" is a misapplication of terms sufficiently obvious.<sup>1</sup>

A plea to the jurisdiction is where an indictment is returned before a court which has no cognizance of the offence. In such cases, the defendant may except to the jurisdiction, without answering at all to the crime alleged. If it is made apparent, either on the face of the record or by extrinsic evidence, that there is a want of jurisdiction, the court will quash an indictment after plea pleaded: for at the time of pleading a party might not be aware of the defect of jurisdiction; also, the application *may* be made upon affidavit, though there may be no analogous or similar case in which that has been done. In ordinary cases, the defect of jurisdiction would appear on the face of the indictment; but it is not necessary to allege in the indictment that certain preliminaries required by a particular statute have been complied with, and therefore in such case the defect *must* be brought to the knowledge of the court by affidavit.<sup>2</sup>

<sup>1</sup> Per Lord Penzance in *Combe v. Pitt*, 3 P. D. 130, 131.

<sup>2</sup> *Regina v. Heane*, 4 B. & S. 947.

There are but few instances in which a defendant is obliged to have recourse to a plea to the jurisdiction. If the offence were committed out of the jurisdiction of the court, the defendant may take advantage of this matter under the general issue.<sup>1</sup> Or, if the objection appears on the face of the record, he may demur, or move in arrest of judgment, or bring a writ of error.<sup>2</sup>

### 5. Plea in Abatement.

A plea in abatement is principally for a misnomer of the defendant, and an error in this respect can be taken advantage of in no other way. If, on his arraignment, he does not plead in abatement, he admits himself rightly designated by the name stated. The issue for the jury of trials is, not what is the individual's name, but whether the person who has pleaded in chief on his arraignment is guilty of the offence charged upon him. The conviction, therefore, must follow the indictment. The exception can be taken only in abatement.<sup>3</sup> If the defendant plead a misnomer of his name, the prosecutor may reply that he is known as well by one name as the other;<sup>4</sup> though in some cases it is best to allow the plea as the defendant must set forth his right name therein, and a new complaint may be immediately preferred against him and he will be concluded by his own averment.

<sup>1</sup> *Rex v. Johnson*, 6 East, 583.

<sup>2</sup> *Rex v. Hewitt, Russell & Ryan* C. C. 158. Archb. Crim. Pl. 134, 19th ed.

<sup>3</sup> *Scott v. Soans*, 3 East, 111. *Commonwealth v. Dedham*, 16 Mass. 141. *Turns v. Commonwealth*, 6 Met. 224, 235. *Commonwealth v. Darcey*, 12 Allen, 539. *Commonwealth v. Fredericks*, 119 Mass. 199.

<sup>4</sup> *Commonwealth v. Gale*, 11 Gray, 320.

The law requires a plea in abatement, which is a dilatory plea, to be pleaded with certainty, or, as it is expressed, "with precise and strict exactness," or, as it is laid down, "it ought to be certain to every intent;" and as this is the rule in a civil action, at least the same degree of precision and strict exactness is necessary in a plea in abatement to any proceeding at the suit of the Crown.<sup>1</sup>

It is a well-settled rule of law, that the pendency of one indictment is no ground for a plea in abatement or in bar to another indictment in the same court, for the same cause.<sup>2</sup>

All the authorities agree that if one indicted for a misdemeanor pleads misnomer in abatement, and an issue of fact is joined thereon, and found against him, he cannot, as matter of right, plead over.<sup>3</sup> If his plea in abatement is demurred to, and overruled in matter of law, it is otherwise.<sup>4</sup> The rule in cases of misdemeanors is the same as in civil actions.<sup>5</sup>

This distinction between the result of a verdict against the defendant on his plea in abatement, and

<sup>1</sup> Per Tindal, C. J., in delivering the opinion of the Judges in *O'Connell v. The Queen*, 11 Clark & Finnelly, 245, 246. No strictness can be regarded as too great with regard to such pleading. *Regina v. O'Connell, Armstrong & Trevor*, 92.

<sup>2</sup> *Withipole's Case*, Cro. Car. 147. 2 Hawk. P. C. ch. 34, § 1. *Commonwealth v. Drew*, 3 Cush. 279. *Commonwealth v. Murphy*, 11 Cush. 472. *Commonwealth v. Berry*, 5 Gray, 93. *Commonwealth v. Harris*, 8 Gray, 470. *Commonwealth v. Gould*, 12 Gray, 171, 173. *Commonwealth v. Golding*, 14 Gray, 49.

<sup>3</sup> *Rex v. Gibson*, 8 East, 107; S. C. 1 Lead. Crim. Cas. 272, 288. *Commonwealth v. Carr*, 114 Mass. 280. *Barge v. Commonwealth*, 3 Penn. 262, 264. *Guess v. State*, 1 Eng. 147.

<sup>4</sup> *Commonwealth v. Golding*, 14 Gray, 49.

<sup>5</sup> *Young v. Gilles*, 113 Mass. 34.

a judgment against him on a demurrer by the prosecution to such plea, is founded upon the principle that whenever a man pleads a fact which he knows, or ought to know, is false, and the verdict is against him, the judgment ought to be final; for every man must be presumed to know whether his plea is true or false, as a matter of fact; but if his plea in abatement is adjudged insufficient in law, there shall be an opportunity to answer further; for every man is not presumed to know the matter of law which he leaves to the judgment of the court.<sup>1</sup>

The judgment *for* the defendant is that the indictment be quashed.

The court may refuse to receive this or any other dilatory plea, until the truth thereof shall be proved by affidavit or other evidence. But there is little advantage accruing to the party from a plea in abatement; because if the plea is allowed, a new complaint may be made, and another process thereupon issued against him; which ought always to be made ready immediately and even before he is discharged upon the defective process, in order to prevent his escape from punishment.

<sup>1</sup> Note to *Regina v. Duffy*, 1 Lead. Crim. Cas. 289.

## CHAPTER XXXII.

## DEMURRER.

**A Demurrer admits such matters of fact as are well pleaded.**

A DEMURRER is not regarded as strictly a plea of any class, but rather as an excuse for not pleading; since it neither asserts nor denies any matter of *fact*, but merely advances a legal proposition, namely, that the pleading demurred to is insufficient in law to maintain the case shown by the adverse party. It may be taken by either party, and to any part of the pleadings, until issue joined.<sup>1</sup>

Demurrers are of two kinds, general and special; the latter being called "special" because they assign some special cause of demurrer,<sup>2</sup> while the former assign none.<sup>3</sup> But at common law the distinction between the one and the other consisted in the mere form of demurring, since the office and effect of both were the same; faults in mere *form* being reached, at common law, as well by a general as by a special demurrer.<sup>4</sup>

In criminal pleading there is no distinction be-

<sup>1</sup> Gould Pl. ch. ii. § 43; ch. ix. § 2.

<sup>2</sup> Lord Hobart remarked that special demurrers "exist that the law may be an art."

<sup>3</sup> Reasonable, not necessary, intendment, is all that is required on general demurrer. Per Archibald, J., in *Redway v. McAndrew*, L. R. 9 Q. B. 76.

<sup>4</sup> Gould Pl. ch. ix. § 8 and note.

tween a general and a special demurrer.<sup>1</sup> The Sts. 27 Eliz. ch. 5, § 1, and 4 & 5 Anne, ch. 16, relate to pleadings in civil actions only. Formal defects in indictments and other criminal prosecutions remain proper subjects of general demurrer, as at common law.<sup>2</sup>

By a demurrer the defendant refers it to the court, to pronounce whether, admitting the matters of fact alleged against him to be true, they do in point of law, constitute him guilty of an offence sufficiently charged against him.<sup>3</sup>

“A demurrer regularly admits no other facts than those which are *well pleaded*; and by the common law, which does not distinguish between the offices of a demurrer assigning a special cause, and one assigning none, a demurrer of either kind confesses no other allegations, in general, than such as are sufficient, both in substance and in form. For facts insufficient in substance, cannot affect the right of the cause; and material facts if ill pleaded and demurred to, even generally are by the common law as unavailing as if they were altogether immaterial.”<sup>4</sup>

A demurrer must be to the entire count or plea, and not to part of it; and if it is good upon the whole, anything else which it contains which, by itself, would be insufficient is mere surplusage. Thus, overt acts alleged in a single count cannot be separately demurred to, though some of the matters alleged as

<sup>1</sup> Per Pollock, C. B., in *Regina v. Brown*, 3 Cox C. C. 133. Per Lord Denman, C. J., in *Campbell v. The Queen*, 11 Q. B. 811.

<sup>2</sup> Gould Pl. ch. ix. § 11.

<sup>3</sup> 1 Stark. Crim. Pl. 315. Per Alderson, B., in *Regina v. Faderman*, 4 Cox C. C. 375.

<sup>4</sup> Gould Pl. ch. ix. § 5.

overt acts may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficient and are sufficiently alleged.<sup>1</sup>

Demurrers are seldom resorted to in practice, because in the majority of cases it is better for the defendant to take his chance of acquittal by the jury on the plea of "not guilty," and reserve any objection to which the indictment may be open for a motion in arrest of judgment, or, after judgment, for a writ of error, should a verdict of guilty or the passing of sentence have made either course necessary for him.<sup>2</sup> Judges have often cautioned counsel that if a demurrer was persevered with, and it should be overruled, they should proceed to pass sentence at once, leaving the defendant to bring his writ of error. And the reason is this, that if the defendant pleads not guilty, he may take advantage afterwards of any substantial legal objection in arrest of judgment. By demurrer he chooses to avail himself of mere technical defects, and if he takes his stand on this ground, he must incur all the risk of failure.<sup>3</sup>

Where a defendant, in a case of felony, had, in the absence of his counsel, pleaded to an indictment which was objectionable on demurrer, he was allowed

<sup>1</sup> *Mulcahy v. The Queen*, L. R. 3 H. L. 306, 323, 329.

<sup>2</sup> In considering the English cases, it must be borne in mind that since the passing of the St. 9 Geo. IV. ch. 54, §§ 30, 31, certain defects in indictments therein enumerated, which formerly might have been taken advantage of in this manner are no longer open to objection after verdict, and must therefore be demurred to if the defendant intends to take advantage of them, as by pleading over all these objections are waived. They are still, however, equally fatal if taken by demurrer.

<sup>3</sup> Per Alderson, B., in *Regina v. Faderman*, 4 Cox C. C. 371. Per Erle, J., in *Regina v. Hendy*, 4 Cox C. C. 244.

to demur, on counsel's application, before the evidence was gone into.<sup>1</sup> It is, however, clearly in the discretion of the judge whether a defendant should be allowed to withdraw his plea ; and for the purposes of substantial justice such withdrawal should be allowed, but not for the purpose of allowing the defendant to take advantage of a mere technical objection.<sup>2</sup> Such a course seems to be in the nature of an amendment, and to be regulated by the same principles which are applied to amendments in penal actions, which are allowed only in furtherance of justice. Such discretion must be exercised according to law ; the courts cannot take up and act upon an individual discretion.<sup>3</sup>

The rule of taking a demurrer distributively is reasonable. It is a settled practice in civil cases ; and it is extended to criminal cases also, where it can be properly applied. Thus, where there are several counts in the indictment, and a demurrer is taken to the whole, it is incumbent on the court to give judgment on the several counts distributively, according as they are good or bad. But there is a material distinction between an indictment consisting of one count sufficiently charging an indictable offence, with some irrelevant matter in it; and an indictment con-

<sup>1</sup> *Regina v. Purchase, C. & Marsh.* 617, per Patteson, J., after consulting with Cresswell, J. In *Commonwealth v. Chapman*, 11 Cush. 422, which was an indictment for murder, the court refused to allow the prisoner to withdraw his plea, but consented to hear the objections on a motion to quash.

<sup>2</sup> *Regina v. Brown*, 3 Cox C. C. 127, 133 ; 1 Denison C. C. 293, per Pollock, C. B., and Coltman, J. *Regina v. Odgers*, 2 M. & Rob. 479, per Cresswell, J. *Regina v. Sheals*, 3 Crawford & Dix, 330, per Crampton, J.

<sup>3</sup> *Mulcahy v. The Queen*, L. R. 3 H. L. 323. *Matthews v. Swift*, 1 Bing. N. C. 736, per Tindal, C. J.

taining two counts charging separate offences, one being good, and the other bad. A distributive judgment is proper in the latter case, but not in the former. The irrelevant matter in the good count is to be wholly disregarded, and no advantage can be taken of it; *utile per inutile non vitiatur*: but the separate count is considered a separate indictment. There may be one plea to the one count, and another plea to the other. There may be a demurrer to the bad count, and in that case the opinion of a court of error may be taken on its validity. After verdict there may be a motion in arrest of judgment on the bad count, and sentence may be passed on the good count.<sup>1</sup>

If, on demurrer to an indictment, the point of law be adjudged *for* the defendant, and the objection be on matter of substance, the judgment is that he be dismissed and discharged: if the objection be merely formal, then that the indictment be quashed.<sup>2</sup> On the other hand, a *general* demurrer confesses the facts charged, and, if it is overruled, judgment is to be rendered and sentence awarded against the defendant, both in cases of felony and of misdemeanors, unless the court, in the exercise of its discretion, allows the defendant to withdraw his demurrer, and plead to the indictment. And the exercise of this discretion is not subject to revision.<sup>3</sup> But where the

<sup>1</sup> Per Lord Campbell, Lord Denman, and Mr. Justice Coltman in *O'Connell v. The Queen*, 11 Clark & Finnelly, 270, 378, 380, 413. Per Whiteside, C. J., in *Mulcahy v. The Queen*, Irish Rep. 1 Com. Law, 39, 40.

<sup>2</sup> 4 Stephen Comm. 399, 7th ed.

<sup>3</sup> *Regina v. Smith*, 4 Cox C. C. 42, 44, Platt, B. *Regina v. Brown*, 17 L. J. M. C. 145; 1 Denison C. C. 293; 2 C. & K. 509, 510.

demurrer is of a special nature, which is usually called a demurrer in abatement, there the judgment is not final.<sup>1</sup>

The principles applicable to this subject are these: Any plea in confession and avoidance of a felony, if decided against a prisoner, subjects him at once to all the consequences of a confession. This is according to every rule and principle of pleading. There is a great number of instances in which guilt is neither confessed nor avoided; <sup>2</sup> among them those of *autrefois* convict and *autrefois* acquit, and many other dilatory pleas.<sup>3</sup> It seems to have been the practice in olden times to plead the plea of not guilty with the dilatory plea. In 2 Hale P. C. 255, it is said: "Regularly, where a man pleads any plea to an indictment that doth not confess the felony, he shall yet plead over to the felony in *favorem vitæ*, and that pleading over to the felony is neither a waiving of his special plea,

<sup>1</sup> *Regina v. Faderman*, 1 Denison C. C. 565; 4 Cox C. C. 360, 370; *Temple & Mew* C. C. 286, 290 note; 3 C. & K. 359; 19 L. J. M. C. 147, in the Central Criminal Court by Alderson, B., Cresswell, J., and V. Williams, J., A.D. 1850. This decision overrules *Regina v. Duffy*, 4 Cox C. C. 24; S. C. 1 Lead. Crim. Cas. 276; and various dicta of the English judges. *Mulcahy v. The Queen*, L. R. 3 H. L. 323. *State v. Dresser*, 54 Maine, 570. 1 Lead. Crim. Cas. 284-288. *Commonwealth v. McGovern*, 10 Allen, 194. *Commonwealth v. Gloucester*, 110 Mass. 491. *Rex v. Taylor*, 5 D. & R. 422; 3 B. & C. 502, 512. *Regina v. Birmingham & Gloucester Railway Co.*, 3 Q. B. 223; 1 G. & D. 457; S. C. 1 Lead. Crim. Cas. 158.

<sup>2</sup> Alderson, B.: "Every demurrer does not involve a confession, as, for instance, where it is with respect to the name." 4 Cox C. C. 379.

<sup>3</sup> Alderson, B.: "The plea of sanctuary was called a declinatory plea. The prisoner there said the Crown had no right to make him plead at all, so that the very nature of the judgment against him was that he should answer over. He said he would not plead, and the court said he must." 4 Cox C. C. 376, 377.

nor makes his plea insufficient for doubleness." That shows distinctly that the two were pleaded together, and they well might stand together but for the objection of doubleness, and in *favorem vitæ* the courts would not allow this to prevail. But this practice was always confined to those cases where the plea, together with which that of not guilty was pleaded, did not confess the felony; for if it did, then the pleading would not only be double, it would be contradictory. This will be found to be the solution of the difficulty that has arisen on the subject.

Even in those cases where a plea is pleaded that does not confess the matter at issue, — in misdemeanors and in civil suits, — the judgment against the defendant on such a plea is final. But in felonies it is said the indulgence of the common law was applied to mitigate the ordinary and general rules of pleading, in *favorem vitæ*, and in all capital cases, therefore, the defendant was allowed to plead over, but he was never allowed to plead a plea in confession and avoidance, at the same time with a plea of not guilty. This was a mere indulgence, and a party, in order to avail himself of it, was obliged, according to strictness, to plead not guilty at the same time with his dilatory plea, or any special one which did not confess and avoid the felony. That being the case, there are authorities distinctly to show that, on pleading a plea in confession and avoidance, which was determined against a defendant, the judgment was final, and he was not allowed to plead over. So it was in the case of a general demurrer.

Now, the rule which is applied to pleas generally

applies to demurrer also. Where a plea is a plea in confession and avoidance, the party has final judgment upon his plea being adjudged against him, but where it is dilatory, and might well be pleaded with not guilty, he has only judgment against him upon that plea, and he has a right to be tried upon the plea of not guilty, where he had pleaded it with that plea.<sup>1</sup> Even where he had not, it seems to have been the practice of the judges, as a mere indulgence, to give him the same advantage, and to permit him, in all cases of felony, to take his trial upon the merits.

This doctrine is subject to the same rules as are applicable to the case of a special plea, and where the demurrer really confesses and avoids the charge, judgment upon it against the defendant is to be considered final; but where the demurrer is what is called a demurrer in abatement, there judgment is not final. Some demurrers are to the jurisdiction of the court. A demurrer to the jurisdiction may well stand with a plea of not guilty, and then, after demurrer adjudged against the party, he has an opportunity of pleading not guilty, because he might plead that plea with a demurrer. So, again, some pleas are called by Hawkins demurrers in abatement.<sup>2</sup> Now to these the indulgence which Lord Hale speaks of applies, and the prisoner was allowed to plead over after demurrer adjudged against him. The strict rule of law was that the judgment was final, and that

<sup>1</sup> Alderson, B.: "Where there is a demurrer and a plea of not guilty at the same time, we cannot give judgment of respondeas ouster, because the prisoner has pleaded already; and we cannot give final judgment, because we have already allowed him to plead a plea which remains undisposed of on the record." 4 Cox C. C. 376.

<sup>2</sup> 2 Hawk. P. C. ch. 31, § 7.

it was only by the indulgence of the court that the party was allowed to come in and plead not guilty in those particular cases to which the indulgence was applicable. If he had lost the opportunity by not pleading not guilty with the demurrer, in that case there was nothing on the record but the demurrer, and the strict judgment (although it was in certain cases relaxed) was a final one. The permission to plead not guilty afterwards is an indulgence granted by the court only in those cases in which the demurrer is what is called a demurrer in abatement.<sup>1</sup>

In the United States the law on this subject is not well settled. Many cases consider it discretionary with the court to allow a prisoner in all cases, felonies and misdemeanors, to plead over after he has taken the chance of his demurrer, and this although the demurrer contains a confession.<sup>2</sup> In these cases, it seems a mere question of form whether the plea be *after* or *at the same time with* the demurrer.

<sup>1</sup> Judgment in *Regina v. Faderman*, 4 Cox C. C. 381, 385.

<sup>2</sup> Note to *Regina v. Duffy*, 1 Lead. Crim. Cas. 284, and cases cited.

In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be respondeat ouster. U. S. Rev. Sts. ch. 18, § 1026.

## CHAPTER XXXIII.

## SPECIAL PLEAS IN BAR.

1. **Autrefois Acquit.**
2. **Autrefois Convict.**
3. **Pardon.**

PLEAS in bar are general or special. Special pleas in bar are such as preclude the court from discussing the merits of the indictment, either on account of a former acquittal or conviction, or of some subsequent matter, operating in discharge of the defendant. At common law, there was but one rule which applied alike to civil and criminal cases, that the defendant must rely upon one ground of defence, and that pleading double was never admitted. This rule was changed, as to civil cases, by the statute of Anne. Criminal pleadings, therefore, remain under the same restriction which existed at common law, and no more than one plea can be pleaded to any complaint or indictment.<sup>1</sup>

In criminal cases, special pleas in bar are also defective for duplicity in another sense; that is, if they are not *single*. If a plea contains allegations of two distinct matters, either of which would form a good defence to an indictment, and each of which requires a separate answer, it will be subject to a demurrer for duplicity.<sup>2</sup>

<sup>1</sup> *Regina v. Charlesworth*, 1 B. & S. 460. *Commonwealth v. Blake*, 12 Allen, 189. *Re Strahan*, 7 Cox C. C. 85.

<sup>2</sup> *Stephen Pl.* 265, 1st ed. *Nauer v. Thomas*, 13 Allen, 573, 579, 580.

But to this general rule there is an exception. Where a defendant alleges that some matters have occurred since he pleaded, which exempt him from further liability upon the charge made against him on the indictment, he has a right to plead *puis darrein continuance*.<sup>1</sup>

As all matters of excuse and justification may be given in evidence under the general issue, a special plea in bar seldom occurs in practice. But there are three kinds which do occur; namely, a former acquittal, a former conviction, and a pardon.

#### 1. *Autrefois Acquit.*

*Nemo debet bis vexari pro eadem causâ.* 5 Rep. 61.<sup>2</sup>

The plea of a former conviction, like that of a former acquittal, is founded upon that great principle

<sup>1</sup> *Regina v. Charlesworth*, 1 B. & S. 460.

<sup>2</sup> "A sacred maxim," said Lord Campbell, C. J. "It is only the ignorant and the presumptuous who would propose that a man should be liable to be again accused after a judgment regularly given, pronouncing him to be innocent. According to this novel doctrine, the Crown might a second time prosecute for high treason a person who had been acquitted of the charge by a jury of his country, and there would be no end to prosecutions for felony or misdemeanor prompted by private malevolence." *Regina v. Bird*, 2 Denison C. C. 216, 222.

"We must apply this great fundamental maxim of the criminal law according to its true meaning. It means this, a man shall not twice be put in peril, after a verdict has been returned by the jury; that verdict being given on a good indictment, and one on which the prisoner could be legally convicted and sentenced. It does not, however, follow if, from any particular circumstance, a trial has proved abortive, that then the case shall not be again submitted to the consideration of a jury, and determined as right and justice may require." Per Cockburn, C. J., in *Winsor v. The Queen*, L. R. 1 Q. B. 311; 6 B. & S. 177.

and fundamental maxim of criminal jurisprudence, that no man shall be twice put in jeopardy for the same offence. This is one of the ancient and well-established principles of the common law, sanctioned and enforced, in different forms of words, in most of the Constitutions of the several States, and in that of the United States. In the latter it is thus expressed: "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb." This clause in the Constitution may be considered equivalent to a declaration of the common-law principle, that no person shall be twice tried for the same offence.<sup>1</sup>

A person is "put in jeopardy" in the constitutional sense, when he is put to trial before a court of competent jurisdiction on a sufficient indictment, and has been legally convicted or acquitted by the verdict of a jury, as appears by the record thereof remaining in the court where the verdict was returned.<sup>2</sup>

Pleas of this kind must allege that the former trial was in a court having jurisdiction of the case, and that the person and the offence are the same, and must set forth the former record in full, in order that the court may see whether the defendant was *legitimo modo acquietatus*, that is, acquitted by verdict. It must appear that there had been a good indictment, issue well joined, a trial completely had, and a lawful verdict found.<sup>3</sup> And the record must be set out in

<sup>1</sup> *Commonwealth v. Roby*, 12 Pick. 501, 502. Dissenting opinion of Mr. Justice Clifford, in *Coleman v. State*, 97 U. S. 520.

<sup>2</sup> Dissenting opinion of Mr. Justice Clifford in *Coleman v. State*, 97 U. S. 520.

<sup>3</sup> *Rex v. Wildey*, 1 M. & S. 183, 188. *Rex v. Vandercomb*, 2 Leach C. C. 714; S. C. 2 Lead. Crim. Cas. 516. In *Regina v. Drury*,

full, whether it remains in the same, or a different court.<sup>1</sup>

The court must have been competent, and the proceedings regular. Thus, a conviction of a breach of the peace before a magistrate, on the confession or information of the offender himself, is no bar to an indictment for the same offence.<sup>2</sup> So again, an acquittal by a jury in a court of the United States, of a defendant who is there indicted for an offence of which that court has no jurisdiction, is no bar to an indictment against him for the same offence in a State court.<sup>3</sup>

Where the jurisdiction of a magistrate, for the trial and punishment of an offence, depends upon its not being a high crime or misdemeanor, without any definite provision by law as to what shall constitute such high and aggravated nature, or such high crime or misdemeanor, the assuming such jurisdiction is not conclusive of the offence not being of a high and aggravated nature, or a high crime or misdemeanor. Accordingly, a conviction or acquittal of a crime of an aggravated nature, or a high crime or misdemeanor, on a trial before a magistrate not having jurisdiction for the trial and punishment of such a

3 C. & K. 190, Mr. Justice Coleridge delivered an elaborate opinion. *Coleman v. State*, 97 U. S. 526, dissenting opinion of Mr. Justice Clifford.

<sup>1</sup> 1 Deacon Crim. Law, 90, 91.

<sup>2</sup> *Commonwealth v. Alderman*, 4 Mass. 477. *Commonwealth v. Dascom*, 111 Mass. 404. Like decisions have been made in other States. *State v. Little*, 1 N. H. 257. *Commonwealth v. Jackson*, 2 Va. Cas. 501. *State v. Epps*, 4 Sneed, 552. *State v. Green*, 16 Iowa, 239.

<sup>3</sup> *Commonwealth v. Peters*, 12 Met. 387.

crime, cannot be pleaded in bar of a subsequent indictment for such crime.<sup>1</sup>

If the defendant is acquitted from any insufficiency in the indictment, such an acquittal cannot be pleaded in bar to a second indictment; because the defendant in this instance was never placed in jeopardy, and therefore the reason for the plea entirely fails.<sup>2</sup> But where the defendant excepts to the insufficiency of the indictment, or the court doth it, *ex officio*, then the judgment of acquittal is special, *quod indictamentum ob insufficientiam cassetur, et quod eat inde ad præsens sine die*.<sup>3</sup>

An acquittal in fact is available by way of plea, without regard to any mistake or error on the part of the jury or of the court in which the verdict was given. And, therefore, though a judge should direct the jury to acquit the prisoner because the offence was not proved to have been committed on the precise day named in the indictment, the acquittal would nevertheless be a good plea to an indictment charging the offence to have been committed on a different day, since, technically speaking, the mistake lies not in averment.<sup>4</sup>

A difficult question often arises in the application of the principle to particular cases, from the consideration whether the offence for which the party stands charged, is the *same offence* of which he has before been acquitted or convicted. That offence must

<sup>1</sup> *Commonwealth v. Goddard*, 13 Mass. 456. *Commonwealth v. Cunningham*, 13 Mass. 245. *Commonwealth v. Curtis*, 11 Pick. 134.

<sup>2</sup> *Regina v. Vaux*, 4 Rep. 44; S. C. 1 Lead. Crim. Cas. 513, and note 530. *People v. Casborus*, 13 Johns. 351.

<sup>3</sup> 2 Hale P. C. 395.

<sup>4</sup> 1 Stark. Crim. Pl. 319.

be identical with that with which he now stands charged.

In considering the identity of the offence, it must appear by the plea, that the offence charged in both cases was the same *in law* and *in fact*. The plea will be vicious, if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact. As if one is charged as accessory before the fact and acquitted, this is no bar to an indictment against him as principal.<sup>1</sup> But it is not necessary that the charges in the two indictments should be precisely the same: it is sufficient if an acquittal from the offence charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and e converso, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder;<sup>2</sup> for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offence upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder.<sup>3</sup> So if he be indicted for a murder, as committed on a certain day, and be afterwards indicted again for the murder of the same person on a

<sup>1</sup> *Rex v. Birchenough*, 1 Moody C. C. 477.

<sup>2</sup> For the two cases differ only in the degree of guilt, and the fact is the same. 2 Hale P. C. 246.

<sup>3</sup> *Commonwealth v. Roby*, 12 Pick. 496.

different day, he may plead autrefois acquit, and aver it to be the same felony; for the day is not material.<sup>1</sup>

On the other hand, if a man be indicted as accessory and acquitted, that acquittal will be no bar to an indictment as principal, nor e converso. For though the offence may in some respects be considered as the same, the prisoner may be convicted under the second indictment, upon facts which would not have warranted his conviction under the first.<sup>2</sup>

The true test, to determine whether a conviction or acquittal upon one indictment is a good bar to another, is well expressed in a leading case: "that unless the first indictment were such as 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."<sup>3</sup> And it was decided that a plea of autrefois acquit of a burglary where the felony is laid as actually committed, cannot be pleaded to an indictment for the same burglary laid with intent to commit the felony; for they are two distinct and different offences.<sup>4</sup> And in another leading case, which is one of the best to be found in the books, it was determined that a conviction upon an indictment for an assault with intent to

<sup>1</sup> 4 Stephen Comm. 402, 7th ed.

<sup>2</sup> 4 Stephen Comm. 403, 7th ed.

<sup>3</sup> *Rex v. Vandercomb*, 2 Leach C. C. 716, 720; S. C. 1 Lead. Crim. Cas. 516, 527. *Commonwealth v. Roby*, 12 Pick. 504, 505. *Commonwealth v. Bubser*, 14 Gray, 83. *Regina v. Morris*, L. R. 1 C. C. 90. *Ex parte Lange*, 18 Wall. 163. *Coleman v. State*, 97 U. S. 520, et seq., and cases cited. *Commonwealth v. Clair*, 7 Allen, 525. *Commonwealth v. Evans*, 101 Mass. 26. *Commonwealth v. Tenney*, 97 Mass. 50, 58.

<sup>4</sup> *Rex v. Vandercomb*, 2 Leach C. C. 716; S. C. 1 Lead. Crim. Cas. 516.

murder, which is a misdemeanor, cannot be pleaded in bar to an indictment for murder. The offences are distinct in their nature, of a distinct legal character, and in no case could a party on trial for the one be convicted of the other.<sup>1</sup>

The case of *Commonwealth v. Wade*<sup>2</sup> affords an apt illustration of the practical application of the rule. The defendant was indicted for burning a dwelling-house by setting fire to the barn of A. and B. The evidence showed that it was the barn of A. and C. This variance in the description of the offence was held to be fatal, and the defendant was acquitted. He was subsequently indicted for burning the same house by setting fire to the barn of A. and C. On a plea of *autrefois acquit*, it was held that the previous acquittal on the first indictment was no bar. The facts offered in support of the two indictments were the same, but different offences were charged in them.

A single act may be an offence against two statutes; and, if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.<sup>3</sup>

Where the same act constitutes two or more diverse and distinct offences, different in their nature and character, one not being merged in the other, the offender may be proceeded against for each, and

<sup>1</sup> *Commonwealth v. Roby*, 12 Pick. 496. *Regina v. Bird*, 2 Denison C. C. 94; *Temple & Mew* C. C. 437.

<sup>2</sup> 17 Pick. 400, 401. *Regina v. Green, Dearsly & Bell* C. C. 113.

<sup>3</sup> *Morey v. Commonwealth*, 108 Mass. 433.

cannot plead a conviction or acquittal for one, in bar of proceedings against him for the other. Thus, a person may be indicted for an assault committed in view of the court, though previously fined for the contempt.<sup>1</sup> It has been repeatedly held that the offences of keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors, of illegally selling such liquors, and of doing secular business on the Lord's day, are distinct offences; and a conviction of the one is no bar to a conviction of either of the others, although the same acts of sale are relied on in proof of each.<sup>2</sup> On the same principle, a conviction upon an indictment for lewd and lascivious cohabitation is no bar to an indictment for adultery, although proof of the same acts of unlawful intercourse is introduced on the trial of both indictments.<sup>3</sup> And there is a great variety of cases in which the same evidence may tend to prove that a person has committed several distinct offences.

Where an inferior court has jurisdiction of an offence relating to property, if the value of the property does not exceed a specified sum, a plea of a former acquittal of such offence in the inferior court is a good bar to an indictment for it in the superior court, although the value of the property is alleged in the indictment to be a sum exceeding the jurisdiction of the inferior court. Under this plea, it is open to the

<sup>1</sup> *State v. Yancy*, 1 Car. Law Rep. 519.

<sup>2</sup> *Commonwealth v. Bubser*, 14 Gray, 83. *Commonwealth v. Shea*, 14 Gray, 386. *Commonwealth v. Cutler*, 9 Allen, 486. *Commonwealth v. Trickey*, 13 Allen, 559. *Commonwealth v. Hogan*, 97 Mass. 122.

<sup>3</sup> *Morey v. Commonwealth*, 108 Mass. 433.

defendant to prove that the property was in fact of less value than alleged in the indictment, and that the two offences successively charged against him were identical.<sup>1</sup>

If there is no judgment in the former trial on the record, there can be no plea of *autrefois acquit*. A judgment arrested or reversed on error is the same as no judgment. Upon a record without any judgment, no punishment can be suffered.<sup>2</sup>

In its most common use, "conviction" signifies the finding of the jury that the prisoner is guilty.<sup>3</sup> When indeed the word "conviction" is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; as, for instance, in speaking of the plea of *autrefois convict*, or of the effect of guilt judicially ascertained, as a disqualification of the convict.<sup>4</sup> The ordinary legal meaning of "conviction," when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while "judgment" or "sentence" is the appropriate

<sup>1</sup> *Commonwealth v. Bosworth*, 113 Mass. 200.

<sup>2</sup> Per Jervis, C. J., in *Regina v. Reid*, 20 L. J. M. C. 70. *Commonwealth v. Lahy*, 8 Gray, 459, 460. *Commonwealth v. Fraher*, 126 Mass. not yet published. *Coleman v. State*, 97 U. S. 530. *People v. Casborus*, 13 Johns. 351. *Regina v. Drury*, 3 C. & K. 193. See *Commonwealth v. Lockwood*, 109 Mass. 329, 330.

<sup>3</sup> *Commonwealth v. Gorham*, 99 Mass. 422.

<sup>4</sup> *Commonwealth v. Lockwood*, 109 Mass. 329.

word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained.<sup>1</sup> In general, the legal meaning of "conviction" is, that legal proceeding of record which ascertains the guilt of the party, upon which the sentence is founded. A conviction may accrue in two ways; either by the verdict of a jury, or by the confession of the offence by the party charged by a plea of guilty, "which is the highest conviction that can be."<sup>2</sup>

Formal acquittal or conviction must be specially pleaded, and is not admissible under the general issue of not guilty.<sup>3</sup> And issue should be taken on such plea, either in law or to the country, and be regularly tried by the court or by the jury, and the decision thereon be made a matter of record.<sup>4</sup> And such has been the practice in this country. The two issues of former conviction or former acquittal and not guilty are distinct, and both cannot rightly be submitted to a jury at the same time. "Charging them with both issues at once," said the English judges, "would lead to this absurdity, that they would be obliged to find upon both; and yet, if the first finding was for the prisoner, they could not go to the second, because that finding would be a bar."<sup>5</sup> If the defendant plead specially in bar, he may,<sup>6</sup> and should in

<sup>1</sup> *Commonwealth v. Lockwood*, 109 Mass. 329.

<sup>2</sup> 2 Hawk. P. C. ch. 31, § 1. *Green v. Commonwealth*, 12 Allen, 172. *Commonwealth v. Richards*, 17 Pick. 295. Ante, p. 263.

<sup>3</sup> *Commonwealth v. Chesley*, 107 Mass. 223. *State v. Barnes*, 32 Maine, 534.

<sup>4</sup> *Commonwealth v. Merrill*, 8 Allen, 547.

<sup>5</sup> *Rex v. Roche*, 1 Leach C. C. 135.

<sup>6</sup> *Regina v. Charlesworth*, 1 B. & S. 460.

strictness also, *at the same time*, plead over to the felony.<sup>1</sup>

If in a plea of *autrefois acquit*, the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity.<sup>2</sup>

The mode of procedure upon a plea of a former acquittal is as follows: The proper question is, whether the prisoner could have been lawfully convicted on the first indictment of the crime charged in the second, and whether he was charged by that indictment with that crime. The first branch of this question is matter of law for the judge, and the second a question of fact for the jury.

In order to support the plea of *autrefois acquit* in all cases, both these circumstances must occur. It is not enough that the prisoner could have been lawfully convicted on the first indictment for the offence charged in the second; for if so, as the language of an indictment describing any offence is in general not material as to the date or place, or many other circumstances, if in the same county, the indictment would be equally descriptive of many offences of a similar character; and an acquittal of the offence charged on one indictment describing it in proper terms sufficient in point of law, would be an acquittal of every offence of the same sort in the same county against the same person. But in order to constitute a good plea of *autrefois acquit*, the plea must state, and it must be proved that the offence charged in the former indictment was the same iden-

<sup>1</sup> Archb. Crim. Pl. 133, 144, 19th ed. *Regina v. Drury*, 3 C. & K. 200. *Yelv.* 205 *a*, note, ed. Metcalf.

<sup>2</sup> *Rex v. Sheen*, 2 C. & P. 634.

tical offence, with that charged in the indictment pleaded to.

This being clearly the rule, there would not be much difficulty in applying it to an ordinary charge of felony, larceny, for instance, of the goods of A. B., or an ordinary charge of assault upon A. B. The prisoner charged on such an indictment would have to satisfy the court, — first, that the former indictment on which an acquittal took place, was sufficient in point of law, so that he was in jeopardy upon it; and secondly, that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To prove the identity of the offence may not always be easy. If more or less evidence is gone into on the first trial, the difficulty is little; if none is offered and the acquittal takes place, it is still an acquittal, entitling the prisoner to an exemption from any subsequent trial for the same identical offence. In such a case there is more difficulty in showing what the offence charged was, but it may be proved by the testimony of witnesses who were subpoenaed to go, and did go, before the grand jury, by the proof of what they then swore, or perhaps by a grand jurymen himself, or by the evidence of the prosecutor, or by proof how the case was opened by the counsel for him; in short, by any evidence which would show what crime was the subject of the inquiry, and would identify the charge and limit and confine the generality of the indictment to a particular case. If the indictment were in a more precise form, and could be made to identify the offence charged on the face of the indictment itself, and distinguish it from all others, (as Scotch indict-

ments do,) no such evidence would be required; but where the form is general, and may apply to a great variety of charges, parol evidence is necessarily admitted to show what the charge was; and if that evidence identifies the charge, and shows what it was, its office is ended for this purpose; and whether the evidence given on the former trial was true or false, whether the jury believed or disbelieved it, and what inference they drew from it, is immaterial, provided the prisoner was acquitted. The sole use of such evidence on a plea of *autrefois acquit* is to show what the charge in the indictment really was, and that being done, the effect of the indictment in the general form is just the same as if the offence were particularly described in it in minute terms to the exclusion of all others, and then the maxim *Nemo debet bis vexari pro eadem causâ* applies.

No doubt the generality of the terms of the indictment leads to some inconvenience and difficulty, but it is compensated by the great advantage to the administration of justice from the greater latitude allowed to the evidence on the trial, which rarely, indeed never, operates to the prejudice of the prisoner, who generally knows the precise charges on his commitment.<sup>1</sup>

To avail himself of this plea, the defendant should produce an exemplification of the record of his acquittal, under the seal of the court where he has been tried and acquitted. It is not sufficient merely to put in the record of the first indictment and acquittal. It is always necessary to give verbal evidence as to

<sup>1</sup> Judgment of Parke, B., in *Regina v. Bird*, 2 Denison C. C. 198-200; Temple & Mew C. C. 530; 20 L. J. M. C. 94.

the identity of the accused and of the crime.<sup>1</sup> Some evidence must also be given to show that the offences charged in the former and present indictment are the same, and this may be done by showing, by some person present at the former trial, what was the offence actually investigated there; and, if that is consistent with the charge in the second indictment, it will be a presumptive case, which must be met by the prosecution by proof that the offence charged in the second indictment was not the same as that charged in the first. The counsel in the case may be examined to show from his notes, taken at the former trial, what was the evidence then given.<sup>2</sup> The burden of proof is on the defendant throughout, and it is not changed merely by prima facie evidence of the identity of the two offences.<sup>3</sup>

The plea of former acquittal or former conviction is allowed and sustained on a maxim of the common law, that no one shall be brought into jeopardy more than once for the same offence. But when an original indictment is quashed, abated or adjudged bad on demurrer, or when judgment thereon is arrested or reversed for a defect therein, it is held that the accused has not thereby been in jeopardy, within the meaning of that maxim.<sup>4</sup>

And generally it may be laid down, that whenever, by reason of some defect in the record, either in

<sup>1</sup> Per Grove and Brett, JJ., in *Flitters v. Allfrey*, 44 L. J. C. P. 79, 80; L. R. 10 C. P. 29.

<sup>2</sup> *Regina v. Bird*, 5 Cox C. C. 11.

<sup>3</sup> *Commonwealth v. Daley*, 4 Gray, 209.

<sup>4</sup> *Commonwealth v. Roby*, 12 Pick. 502. *Commonwealth v. Gould*, 12 Gray, 173. *Rex v. Burrige*, 3 P. Wms. 500, per Lord Hardwicke. *Regina v. Drury*, 3 C. & K. 190. *State v. Redman*, 17 Iowa, 329, 333.

the indictment, or variance in the recitals, the place of trial, the process, or the like, or if from any particular circumstance a trial has proved abortive, the defendant was not lawfully liable to suffer judgment for the offences charged against him in the first indictment he has not been "in jeopardy," in the sense which entitles him to plead the former acquittal or conviction, in bar of a subsequent indictment.<sup>1</sup>

By the English law, when a demurrer to a plea in bar of an indictment for felony is sustained, the defendant is allowed to plead over and go to trial before a jury; but not when a demurrer to his plea in bar of an indictment for a misdemeanor is sustained.<sup>2</sup> In this country, however, no distinction is recognized, in this respect, between indictments for felonies and indictments for misdemeanors. In both, the defendant may plead over to the indictment, when a demurrer to his plea in bar is sustained.<sup>3</sup>

Where the plea is allowed, the judgment is quod eat sine die—that the defendant shall go without day, and he is altogether discharged from the prosecution.<sup>4</sup>

<sup>1</sup> *Regina v. Drury*, 3 C. & K. 190. *Coleman v. State*, 97 U. S. 520, 521, dissenting opinion of Clifford, J. *Winsor v. The Queen*, L. R. 1 Q. B. 311. *Commonwealth v. Sholes*, 13 Allen, 554. *Commonwealth v. Farrell*, 105 Mass. 189. <sup>2</sup> *Gabbett* *Crim. Law*, 332. *State v. Redman*, 17 Iowa, 329, 335.

<sup>2</sup> *Rex v. Taylor*, 5 D. & R. 422; 3 B. & C. 502. *Regina v. Bird*, 2 Eng. Law & Eq. 530, 531.

<sup>3</sup> *Commonwealth v. Roby*, 12 Pick. 510. *Commonwealth v. Wade*, 17 Pick. 402. *Commonwealth v. Golding*, 14 Gray, 49. Note to *Regina v. Duffy*, 1 Lead. *Crim. Cas.* 289-295. *Regina v. Bird*, 2 Eng. Law & Eq. 531.

<sup>4</sup> *Archb. Crim. Pl.* 145, 19th ed.

## 2. Autrefois Convict.

The defence of autrefois convict is a defence at common law, available in every case where a person is put in peril more than once for the same act, whether the charges are made before magistrates or tried before a jury, and it makes no difference that in either, or both cases, proceedings are taken under special enactment. It is a well-established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction upon a sufficient indictment,<sup>1</sup> transit in rem judicatam, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence. *Nemo debet bis vexari* (here we might say *puniri*) *pro eadem causâ*.<sup>2</sup>

The same rules apply generally to this plea as to the plea of autrefois acquit.

## 3. Pardon.

A pardon may be pleaded in bar to the indictment; or, after verdict, in arrest of judgment; or, after judgment, in bar of execution.<sup>3</sup> But it must be observed, that it is necessary to plead it at the first opportunity the defendant may have of so doing; if, for instance, he have obtained a pardon before arraignment, and, instead of pleading it in bar, he plead the general

<sup>1</sup> *Commonwealth v. Roby*, 12 Pick. 501.

<sup>2</sup> *Regina v. Morris*, L. R. 1 C. C. 92, per Kelly, C. B.

<sup>3</sup> <sup>4</sup> *Stephen Comm.* 404, 7th ed. *Commonwealth v. Lockwood*, 109 Mass. 323.

issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment.<sup>1</sup>

<sup>1</sup> *United States v. Wilson*, 7 Peters, 150. *Commonwealth v. Lockwood*, 109 Mass. 339. Archb. Crim. Pl. 148, 19th ed.

As to the effect of a pardon see *Leyman v. Latimer*, 3 Exch. D. 352; 14 Cox C. C. 51; *Ex parte Garland*, 4 Wall. 333, 380; 1 Kent Comm. 284 note, 12th ed.

## CHAPTER XXXIV.

## GENERAL ISSUE.

PLEAS in bar are general or special. The general issue is "not guilty;" upon which the defendant is not merely confined to evidence in negation of the charge, but may offer any matter in justification or excuse. In short, the general issue goes to say that the defendant, under the circumstances, has not been guilty of the crime imputed to him. For this reason a special plea in bar seldom occurs in practice, except the pleas of *autrefois acquit* &c.

The Statute of Limitations need not be specially pleaded.<sup>1</sup>

The general issue makes it incumbent upon the prosecutor affirmatively to prove every fact and circumstance constituting the offence as stated in the indictment.

Where a defendant pleads "not guilty" to any matter within the jurisdiction of a magistrate, no conviction can be had without an adjudication that the party is guilty. His judgment in such case stands for the verdict of a jury.<sup>2</sup>

When the record is made up, the general issue is thus stated: "And the said C. D. being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit

<sup>1</sup> *United States v. Brown*, 2 Lowell, 267.

<sup>2</sup> *Commonwealth v. Horton*, 9 Pick. 202.

himself thereof, says, that he is not guilty thereof and puts himself on the country." And the similitur is then added thus: "And E. F., Attorney-General of said Commonwealth, who prosecutes for the said Commonwealth, doth the like."

## CHAPTER XXXV.

## VERDICT.

THE verdict of the jury must, in all cases of treason and felony, be delivered in open court, in the presence of the defendant. In cases of misdemeanor, the presence of the defendant during the trial is not essential.<sup>1</sup>

It is doubtful whether a verdict can be received and recorded on Sunday.<sup>2</sup>

The verdict is delivered by the foreman; and the assent of all the jurors to a verdict pronounced by the foreman in the presence and hearing of the rest, without their express dissent, is to be conclusively presumed.<sup>3</sup>

If the jury deliver a verdict which plainly amounts in law to an acquittal, as if on an indictment for larceny they should find the defendant "guilty of having the goods in his possession but not of stealing them," or, in an indictment for an assault, "guilty of the assault, but in self-defence," the judge should direct them to acquit; but, if the verdict is expressed in doubtful terms, the judge should explain to them

<sup>1</sup> Co. Litt. 227 b. 3 Inst. 110. Bac. Ab. Verdict B. 2 Gabbett Crim. Law, 529, 530. Commonwealth v. Tobin, 125 Mass. 205.

<sup>2</sup> Winsor v. The Queen, L. R. 1 Q. B. 317, 322; 6 B. & S. 143; 35 L. J. M. C. 121.

<sup>3</sup> Archb. Crim. Pl. 176, 19th ed.

exactly the points by which their verdict must be governed, and send them back to reconsider it.<sup>1</sup>

The verdict in a criminal case is either *general*, on the whole charge which the jury are at liberty to find in all cases, both upon the law and fact of the case; or *partial*, 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 as to the residue; or *special*, where the facts of the case alone are found by the jury, the legal inference to be derived from them being referred to the court; whether for instance on the facts stated, the crime is murder, manslaughter or no crime at all.<sup>2</sup>

In the ordinary case of a general verdict of guilty, the jury, by the very terms of their verdict, find the prisoner guilty of all the material allegations in the indictment. Not so in a special verdict, for the very object of this departure from the usual form, is presumed to be for the purpose of declaring the prisoner guilty of certain facts only, with a view of submitting the question, whether those facts authorize a general verdict of guilty, to the judgment of the court. In such a case, if the facts thus found do not include all the essential elements of the offence charged upon the prisoner, he cannot be convicted.<sup>3</sup>

Where several defendants, are included in the same indictment, the jury may find one guilty and acquit

<sup>1</sup> Dickinson Q. S. 572, 6th ed. 2 Gabbett Crim Law, 525. Purcell Crim. Pl. 208.

<sup>2</sup> Archb. Crim. Pl. 176, 19th ed. 4 Stephen Comm. 433, 7th ed. See an example of a special verdict in an indictment for a nuisance, Rex v. Tindall, 6 A. & E. 143.

<sup>3</sup> Commonwealth v. Call, 21 Pick. 514.

the others, and so vice versâ. But if several are indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it is charged in the indictment, and proved, that they committed the riot together with some other person not tried upon that indictment.<sup>1</sup> And if, upon an indictment for a conspiracy, the jury acquit all the defendants but one, they must acquit that one also, unless it be charged in the indictment, and proved that he conspired with some other person not tried upon that indictment.<sup>2</sup>

Each count in an indictment is, in fact and in theory, a separate indictment.<sup>3</sup> If several offences are charged in separate counts and if they are tried together, the cardinal principles of the criminal law apply in the same manner as if each offence was charged in a separate indictment and tried separately. The rights of the defendant are in no respect different from what they would have been if the charge had been set out in a separate indictment.<sup>4</sup> Each offence must be proved by evidence applicable thereto. It necessarily follows that the jury must pass upon each count separately, and apply to it the evidence bearing upon the defendant's guilt of the offence therein charged. And if they fail to do so, their verdict cannot be sustained.<sup>5</sup>

Felonies and misdemeanors are different crimes; and on an indictment for one there can be no convic-

<sup>1</sup> 2 Hawk. P. C. ch. 47, § 8.

<sup>2</sup> 2 Hawk. P. C. ch. 47, § 8. *Regina v. Thompson*, 16 Q. B. 832.

<sup>3</sup> *Latham v. The Queen*, 5 B. & S. 642, 643. *United States v. Furlong*, 5 Wheat. 185, 201. *Ante*, p. 236.

<sup>4</sup> *Commonwealth v. Burke*, 16 Gray, 33.

<sup>5</sup> *Commonwealth v. Carey*, 103 Mass. 215.

tion of the other except under the express provisions of some statute. At common law, upon an indictment for a felony, there may be a conviction for another and cognate felony; and so, on an indictment for a misdemeanor, a conviction of a like misdemeanor.<sup>1</sup> On an indictment for murder, a man may be found guilty of manslaughter; both are felonies.<sup>2</sup> On an indictment for perjury, a conviction for a false oath may be sustained; both are misdemeanors.<sup>3</sup> Such a verdict finding part of the indictment true, if such part is properly charged and constitutes a substantive offence, or finding a defendant guilty in general terms, excepting or negating a part, is a general and not a special verdict.<sup>4</sup> To the suggestion that these statutory provisions are unconstitutional as in conflict with the twelfth article of the Bill of Rights,

<sup>1</sup> *Regina v. Thomas*, L. R. 2 C. C. 145. In *Commonwealth v. Roby*, 12 Pick. 504, the general subject was fully examined. *Rex v. Westbeer*, 2 Strange, 1183; S. C. 1 Lead. Crim. Cas. 543, 551 note.

<sup>2</sup> A man charged with murder may be convicted of manslaughter, because murder involves the lesser charge of felonious homicide; so for the same reason, one charged as accessory to murder may be convicted as accessory to manslaughter. The one thing follows from the other. *Regina v. Richards*, 2 Q. B. D. 311.

<sup>3</sup> *Regina v. Hodgkiss*, L. R. 1 C. C. 212. *Rex v. Foster*, Russell & Ryan C. C. 459. *Regina v. Chapman*, 1 Denison C. C. 432; *Temple & Mew* C. C. 90; 2 C. & K. 846.

<sup>4</sup> *Commonwealth v. Fischblatt*, 4 Met. 355. *Commonwealth v. Herty*, 109 Mass. 348. It is an elementary and universal principle of criminal law, that it is sufficient to prove so much of the indictment as shows the defendant to have been guilty of a substantive crime therein stated, without proving the whole extent of the charge. The cases are collected in 2 Lead. Crim. Cas. 38. *Commonwealth v. O'Brien*, 107 Mass. 208. *Commonwealth v. Morgan*, 107 Mass. 199. *Jennings v. Commonwealth*, 105 Mass. 586. Archb. Crim. Pl. 229, 19th ed.

the answer is that the offence is "fully and plainly, substantially and formally" described; that the whole may include a distinct part, and the greater the less.<sup>1</sup>

The jury have a right, in all criminal cases, to find a special verdict. To warrant a judgment against a defendant, on a special verdict, all the facts which are essential to a plaintiff's claim, in a civil action, or which constitute the offence with which a defendant is charged, in criminal cases, must be expressly found in the verdict. Such verdict must state positively the facts themselves, and not merely the *evidence* adduced to prove them, and all the facts necessary to enable the court to give judgment must be found; for the court cannot supply by intendment or implication any defect in the statement. And though, generally, negatives need not be found, in special verdicts, yet they must be found when it is necessary to show that a person or thing does not come within a particular exception.<sup>2</sup>

The leading case of *The King v. Francis*<sup>3</sup> well illustrates this subject. In this case the indictment

<sup>1</sup> *Commonwealth v. Lang*, 10 Gray, 11, 14. In many cases to which the rule of the common law would otherwise apply, the statutory provision has met the difficulty. *Commonwealth v. Drum*, 19 Pick. 479. *Commonwealth v. Squire*, 1 Met. 258. *Commonwealth v. Goodhue*, 2 Met. 193. *Commonwealth v. Murphy*, 2 Allen, 163. *Commonwealth v. Squires*, 97 Mass. 59. *Commonwealth v. Dean*, 109 Mass. 349. *Commonwealth v. McGrath*, 115 Mass. 150. *Commonwealth v. Thompson*, 116 Mass. 346.

<sup>2</sup> *Commonwealth v. Dooly*, 6 Gray, 360, 361. *Commonwealth v. Call*, 21 Pick. 513. 2 Hawk. P. C. ch. 47, § 9. *Mayor &c. of Nottingham v. Lambert, Willes*, 117.

<sup>3</sup> *Cunningham*, 165; 275, 3d ed.; 2 *Strange*, 1015; *Cas. Temp. Hardw.* 113; *Comyns*, 478.

charged a robbery from the person, and the proof was a taking up of the prosecutor's money from the ground in his presence; and the special verdict, though it stated that the defendant struck the money out of his hand, and "then and there *immediately*" took it up, was held insufficient, because it did not expressly find that he was present at the taking up. The word "immediately" is one of great latitude, and is not of any determinate signification, and does not exclude all mesne times and mesne acts. But it appeared clearly from the facts stated in the special verdict, that the defendant had been guilty of a crime, though not of the degree charged upon him in the indictment, the court refused to discharge him and directed a new indictment to be preferred.<sup>1</sup>

But if the jury find all the substantial requisites of the charge, they are not bound to follow in terms the technical language of the indictment.<sup>2</sup> So, where the evidence need not correspond precisely with the statement in the indictment, the special verdict will be good, although in the same respects it vary from the statement in the indictment; as where the fact is found to have occurred, in a case of a transitory nature, at a different place within the jurisdiction of the court, or, where time is immaterial, on a day different from that stated in the indictment. The jury

<sup>1</sup> The court distinguished this case from the case of *Rex v. Burrell*, 3 P. Wms. 480, where the defendant was absolutely discharged; because on that indictment and verdict, it did not appear the defendant was guilty of *any* felony.

<sup>2</sup> In the case of *Dyer v. Commonwealth*, 23 Pick. 402, the jury did not find the defendant guilty of any of the acts charged in the indictment. They simply found him guilty of receiving stolen goods, but without finding that they were the goods mentioned in the indictment.

need not, and indeed ought not, after stating the facts, to draw any legal conclusion, for that is the province of the court: and if they do so, and the inference drawn by them is an erroneous one, the court will reject it as superfluous, and pronounce nevertheless the judgment warranted by the facts stated.<sup>1</sup>

It is clear that it must always appear that the jury have found the offence was committed within the county in which the indictment is found, or the court cannot give judgment against the prisoner.<sup>2</sup> "The finding of the jury in the present case," said Mr. Justice Dewey,<sup>3</sup> "shows the defendant guilty of acts constituting the crime of adultery, but is entirely defective as to the fact where the crime was committed. The facts found by the jury may all be truly found, and yet they may have occurred in an adjacent county, or out of the Commonwealth. We cannot judicially know that the offence was committed in the county of Suffolk, the jury not having so said either directly, or by any reference to the indictment in their verdict. The finding was altogether an imperfect and defective finding, and therefore not available either to the government as a verdict of guilty, or to the prisoner as a verdict of acquittal. It neither affirms nor denies as to the truth of any allegations in the indictment, other than as to the facts specially stated in the verdict. Had it found the prisoner not guilty except as to the matter thus specially stated, it would have been effectual to discharge the prisoner and would be tantamount to a verdict of acquittal;

<sup>1</sup> Archb. Crim. Pl. 177, 178, 19th ed.

<sup>2</sup> *Rex v. Hazel*, 1 Leach C. C. 382.

<sup>3</sup> *Commonwealth v. Call*, 21 Pick. 509, 514.

but in its present form it cannot operate as such, and the result will be, that the prisoner must be put again on his trial.”

A judge has a right, and in some cases it is his bounden duty, whether in a civil or in a criminal cause, to tell the jury to reconsider their verdict. He is not bound to receive their verdict unless they insist upon his doing so; and where they reconsider their verdict, and alter it, the second, and not the first, is really the verdict of the jury.<sup>1</sup> The jury themselves may, before the verdict is recorded or even promptly after the verdict is recorded, rectify their verdict, and it will stand as ultimately amended.<sup>2</sup> This may be done even after the defendant has been discharged in pursuance of a supposed verdict of acquittal out of the dock, if before the jury have left their seats.<sup>3</sup>

A verdict may be amended, on sufficient cause shown, where there is a judge's note or other sufficient document to show that it is incorrect.<sup>4</sup>

When a verdict of guilty has been returned upon one count of an indictment, the defendant may be lawfully sentenced thereon, although no verdict has been returned upon another count.<sup>5</sup> And the same

<sup>1</sup> *Regina v. Meany*, Leigh & Cave C. C. 213. *Regina v. Yeadon*, Leigh & Cave C. C. 81. *Commonwealth v. Munn*, 14 Gray, 366.

<sup>2</sup> *Rex v. Parkin*, 1 Moody C. C. 45. *Commonwealth v. Dowling*, 114 Mass. 259.

<sup>3</sup> *Regina v. Vodden*, Dearsly C. C. 229. *Commonwealth v. Tobin*, 125 Mass. 206, 207. *Commonwealth v. Munn*, 14 Gray, 366. *Commonwealth v. Carey*, 103 Mass. 214.

<sup>4</sup> *Regina v. Virrier*, 12 A. & E. 317; 4 Per. & Dav. 161.

<sup>5</sup> *Latham v. The Queen*, 5 B. & S. 635. *Edgerton v. Commonwealth*, 5 Allen, 514. In *Latham v. The Queen*, it was indeed said that the counts were to all intents and purposes separate indictments, and the defendant might afterwards be tried on the second count;

principle applies to a case in which a verdict of guilty is returned upon all the counts, and sentence is passed upon some of them.<sup>1</sup>

A special verdict is not amendable as to matters of fact ; but a mere error of form may be amended, even, as it seems, in capital cases, in order to fulfil the evident intention of the jury, where there is any note or minute to amend by.<sup>2</sup>

A verdict is not vitiated by surplusage.<sup>3</sup>

If the meaning of the verdict is clear, although it is not worded with absolute precision,<sup>4</sup> the court will, notwithstanding the objection of the defendant, record it in due form. "Howsoever the verdict seem to stray," says Lord Hobart, "and conclude not formally or punctually unto the issue, so as you cannot find the words of the issue in the verdict, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form, and make it serve."<sup>5</sup> Thus,

but this point was not before the court. On the other hand, in *Edger-ton v. Commonwealth*, the court was of opinion that there could be only one judgment upon the indictment, and that consequently a judgment and sentence upon one count definitively and conclusively disposed of the whole indictment, and operated as an acquittal upon, or discontinuance of, the other count. And the same view has been affirmed by decisions in other States. *Commonwealth v. Foster*, 122 Mass. 322, 323, and cases there cited.

<sup>1</sup> *Commonwealth v. Foster*, 122 Mass. 317.

<sup>2</sup> *Rex v. Hazel*, 1 Leach C. C. 383. Per Blackburn, J., in *Latham v. The Queen*, 5 B. & S. 641. Archb. Crim. Pl. 178, 19th ed. Purcell Crim. Pl. 209.

<sup>3</sup> 2 Hawk. P. C. ch. 47, § 10. *Dyer v. Commonwealth*, 23 Pick. 402. *Commonwealth v. Fischblatt*, 4 Met. 354.

<sup>4</sup> For an instance in which the form of a written verdict was absurd, see *Commonwealth v. Carrington*, 116 Mass. 37.

<sup>5</sup> *Foster v. Jackson*, Hob. 54, quoted in *Commonwealth v. Stebbins*, 8 Gray, 496.

upon an indictment for stealing bank-bills and a gold coin, the jury returned this verdict: "Guilty, but not of taking the gold-piece." Held, that the court might, against the objection of the defendant, record this verdict as a verdict of not guilty as to so much of the indictment as related to the stealing of the gold coin, and guilty as to the residue.<sup>1</sup>

Where the verdict is so imperfect that no judgment can be given upon it, a venire de novo may, in misdemeanors, be awarded; and "there is a solemn decision of the Queen's Bench, not reversed or questioned, that a venire de novo will lie in a felony on an imperfect verdict."<sup>2</sup>

Upon the delivery of the verdict, if the defendant is thereby acquitted on the merits, he is for ever free and discharged from that accusation, and is entitled to be immediately set at liberty, unless there be some other legal ground for his detention. If he is acquitted from some defect in the proceedings, so that the acquittal could not be pleaded in bar of another indictment for the same offence, he may be detained to be indicted anew. But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction, therefore, may accrue two ways, either by his confessing the offence, and pleading guilty; or by his being found so by the verdict of his country.<sup>3</sup>

If the defendant is convicted, it is thereupon de-

<sup>1</sup> Commonwealth v. Stebbins, 8 Gray, 492.

<sup>2</sup> Campbell v. The Queen, 11 Q. B. 799. Per Blackburn, J., in Winsor v. The Queen, 35 L. J. M. C. 89; 6 B. & S. 186. State v. Redman, 17 Iowa, 329, 335.

<sup>3</sup> 4 Stephen Comm. 435. Archb. Crim. Pl. 179, 19th ed. Green v. Commonwealth, 12 Allen, 172.

manded of him by the court, in cases of treason and felony, what he has to say why the court should not proceed to judgment against him; and if this (which is called the *allocutus*) do not appear on the record when made up, it will be bad on error. It is not necessary to demand of the defendant why the court should not proceed to judgment *and execution* against him.<sup>1</sup> In misdemeanors, it is not usual thus to call upon the defendant before judgment.<sup>2</sup>

<sup>1</sup> O'Brien v. The Queen, 2 House of Lords Cases, 465.

<sup>2</sup> Archb. Crim. Pl. 179, 19th ed.

## CHAPTER XXXVI.

## AIDER BY VERDICT.

"If a declaration omits that which was necessary to be proved, otherwise the plaintiff could not recover, this shall be aided by a verdict for the plaintiff." Com. Dig. Pleader, C. 87.

THIS is a general rule of pleading at common law; and there is no distinction in this respect between the pleadings in civil and in criminal cases.

It is necessary to distinguish with accuracy between such imperfections as are cured by a verdict by the common law, and those which are remedied after a verdict by the several Statutes of Jeofails.<sup>1</sup> The omission of a material and traversable averment may, indeed, be aided after verdict; but then it is at common law, where the fact omitted to be averred is a necessary part of the issue. There is no case in which the Statutes of Jeofails have been held to aid the total omission of a material averment, except such as are expressly mentioned in the statutes. Omissions aided after verdict at common law, are aided by intendment; but these must be distinguished from omissions which are aided by the Statutes of Jeofails, which do not operate by intendment, but by positive enactment, that the omission of matters of form, and certain specified matters of substance shall be aided.

<sup>1</sup> 1 Wms. Saund. 228, 6th ed. Reporter's note to *Regina v. Webb*, 1 Denison C. C. 348. Gould Pl. ch. x. § 7.

But still, if the plaintiff either states a defective title or cause of action, a verdict will not cure such defect, either by the common law, or by the Statutes of Jeofails.

“With respect to such imperfections as are aided by verdict at common law,” says Mr. Serjeant Williams, “it is to be observed, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by the common law.”<sup>1</sup> This rule thus laid down has been constantly cited and acted upon.<sup>2</sup>

The rule is thus stated in *Heymann v. The Queen*:<sup>3</sup> “Where an averment which is necessary for the support of the pleadings 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

<sup>1</sup> 1 Wms. Saund. 228, 228 c, 6th ed. 1 Wms. Notes to Saund. 260, 261. Gould Pl. ch. x. §§ 14-19.

<sup>2</sup> *Jackson v. Pesked*, 1 M. & Sel. 237, per Lord Ellenborough, C. J. *Spieres v. Parker*, 1 T. R. 141. *Davis v. Black*, 1 Q. B. 911, 912, per Lord Denman, C. J., and Patteson, J.; 1 G. & D. 432. *Harris v. Goodwyn*, 2 M. & G. 405; 2 Scott N. R. 459; 9 Dowl. 409. *Goldthorpe v. Hardman*, 13 M. & W. 377. *Smith v. Keating*, 6 C. B. 136. *Kidgill v. Moor*, 9 C. B. 364. *Mayor of Lyme Regis v. Henley*, 2 Clark & Finnelly, 353. *Delamere v. The Queen*, L. R. 2 H. L. 419. *Smith v. Cleveland*, 6 Met. 332, 334.

<sup>3</sup> L. R. 8 Q. B. 105. *Regina v. Aspinall*, 2 Q. B. D. 57. Ante, pp. 66, 97.

could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict."

Upon this it should be observed that the averment spoken of is "an averment imperfectly stated," i. e. an averment which is stated, but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment. If there be such a total omission, the verdict is no cure. And when it is said that the verdict could not have been found without proof of the averment, the meaning is, the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused. It is said that the defect is cured by the verdict, if the issue joined be such as necessarily required on the trial proof of the facts "defectively stated." What are the issues in a criminal case? The plea of not guilty is general, and denies every averment necessary to constitute the offence, in other words, every averment which is a necessary part of the indictment, and does not deny what is totally omitted therefrom. That which is totally omitted from the indictment is no part of the dispute when issue is taken upon the plea of not guilty, and the jury must find for the Crown, if everything stated on the face of the indictment is proved to be true. Therefore, it is true to say that every averment contained in an indictment, although inaccurately stated, is involved in the issue, and that the inaccurate statement of it is cured by the verdict, because after a conviction that inaccurate averment must be taken to have been proved adversely to the

prisoner; and it is immaterial that the indictment would be bad before verdict by reason of that inaccurate statement. Therefore, the rule is that an inaccurate averment is cured by verdict, but that an averment which is totally absent cannot be supplied even after verdict.<sup>1</sup>

This principle was applied in the case of an indictment for publishing an obscene book which described the book by its title only and contained no description of anything contained in the book. It was held, on error, that the total omission of the contents, or some part of the contents, which was to be relied on by the Crown, was not cured by the verdict. Cotton, L. J.: "The rule is very simple, 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. 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."<sup>2</sup>

Since the decision of the Court of Queen's Bench in *Heymann v. The Queen*, A.D. 1873,<sup>3</sup> which seems to have called attention to the state of the law on this

<sup>1</sup> Judgment of Brett, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 636, 637.

<sup>2</sup> *Bradlaugh v. The Queen*, 3 Q. B. D. 607, 642.

<sup>3</sup> L. R. 8 Q. B. 102; 12 Cox C. C. 383.

subject, the principle of *aider* by verdict in criminal cases has been frequently applied and is now firmly settled in England.<sup>1</sup>

In Starkie on Criminal Pleading it is said:<sup>2</sup> "It seems to be a general rule, 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."<sup>3</sup> And this rule has been recognized and adopted in this country. "It is a well-settled rule of law," said Chief Justice Shaw, "that the statute respecting amendments does not extend to indictments, that a defective indictment cannot be aided by a verdict, and that an indictment, bad on demurrer, must be held insufficient upon a motion in arrest of judgment. The plain rule of the

<sup>1</sup> *Regina v. Goldsmith*, L. R. 2 C. C. 74. *Regina v. Aspinall*, 2 Q. B. D. 48. *Regina v. Oliver*, 13 Cox C. C. 588. *Regina v. Knight*, 14 Cox C. C. 31. *Regina v. Kelleher*, 14 Cox C. C. 48. *Bradlaugh v. The Queen*, 3 Q. B. D. 607. *White v. The Queen*, Irish Rep. 10 C. L. 533. The doctrine that there can be *aider* by verdict in criminal cases was established by the case of *Regina v. Waters*, 1 Denison C. C. 356; 2 C. & K. 868; *Temple & Mew* C. C. 57; S. C. 2 Lead. Crim. Cas. 152. "If the count shows a crime within the terms of the statute," said Wightman, J., "though defectively, so as to be bad on demurrer, it is good after verdict. *Regina v. Waters* goes on that distinction." *Regina v. Bowen*, 13 Q. B. 795. And in *Regina v. Craddock*, 2 Denison C. C. 34, the same learned judge observed that after verdict an indictment must be construed *Ut res magis valeat quam pereat*.

<sup>2</sup> 1 Stark. Crim. Pl. 361.

<sup>3</sup> "It is a novel doctrine in criminal cases," writes Mr. Greaves, "that a defective indictment is cured by verdict. Lord Hale says, 'None of the Statutes of Jeofails extend to indictments, and therefore a defective indictment is not aided by verdict,' 2 Hale P. C. 193; and no authority is known for such a doctrine in other cases." Russell on Crimes, 676 note, 4th ed.

common law, as well as the express provision of the Declaration of Rights, is, that no man shall be held to answer for any crime or offence until the same is fully and plainly, formally and substantially made known to him, that he may have every advantage of *previous notice* in making his defence, both upon the matter of fact and law.”<sup>1</sup>

<sup>1</sup> Commonwealth v. Child, 13 Pick. 200. Commonwealth v. Morse, 2 Mass. 130. Brown v. Commonwealth, 8 Mass. 65. Commonwealth v. Collins, 2 Cush. 556. Commonwealth v. Bean, 14 Gray, 54. State v. Gove, 34 N. H. 511, 516. State v. Barrett, 42 N. H. 466.

## CHAPTER XXXVII.

## ARREST OF JUDGMENT.

THE defendant may, at any time between the conviction<sup>1</sup> and the sentence, but not afterwards, move the court in arrest of judgment. This motion can be grounded only on some objection arising on the face of the record itself; and no defect in the evidence, or irregularity at the trial, can be urged at this stage of the proceedings.

Although the defendant omits to make a motion in arrest of judgment, the court will arrest the judgment for errors apparent on the record.<sup>2</sup>

In all cases, every fact or circumstance which is a necessary ingredient in the offence, whether it be an offence at common law or one created by statute, must be accurately and clearly set forth. A defect in this respect is not cured by verdict; and consequently the defendant may take advantage of it by motion to quash, demurrer, motion in arrest of judgment, or writ of error.<sup>3</sup>

<sup>1</sup> "Conviction" may accrue two ways: by plea of guilty, or by verdict. *Commonwealth v. Richards*, 17 Pick. 296. *Commonwealth v. Lockwood*, 109 Mass. 328.

<sup>2</sup> *Rex v. Waddington*, 1 East, 146. *United States v. Plumer*, 3 Clifford, 62. "Lord Hardwicke says, in *Rex v. Burrige*, 3 P. Wms. 499, that Lord Holt himself took exceptions to the indictment in the case of *Rex v. Keite*, 1 Ld. Raym. 138, in order to avoid it." Per Parke, B., in *Campbell v. The Queen*, 11 Q. B. 839.

<sup>3</sup> It is hardly necessary to add, that, if the facts alleged in the indictment do not constitute a crime against the laws of the land, the judgment will be arrested. *Commonwealth v. Hinds*, 101 Mass. 209, 210.

There can be no legal conviction of an offence, unless the act is contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the judgment. If the law ceases to operate by its own limitation or by a repeal,<sup>1</sup> at any time before judgment, the judgment will be arrested.<sup>2</sup>

It is a settled rule of law, that the pendency of one indictment is no good plea in abatement to another indictment for the same cause. Whenever either of them—and it is immaterial which—is tried, and a judgment rendered on it, such judgment will afford a good plea *in bar* to the other, either of autrefois convict or autrefois acquit. But where it is found that

<sup>1</sup> “I take the effect of a repealing a statute to be to obliterate it as completely from the records of Parliament as if it had never existed; it must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted, and concluded while it was an existing law.” Per Tindal, C. J., in *Kay v. Godwin*, 6 Bing. 576. And Lord Tenterden says, in *Surtees v. Ellison*, 9 B. & C. 752: “It has been long established, that, when an act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.” Quoted by Huddleston, B., in *Attorney-General v. Lamplough*, 3 Ex. D. 217.

<sup>2</sup> *Rex v. M'Kenzie*, Russell & Ryan C. C. 429. *Regina v. Mawgan*, 8 A. & E. 496. *Regina v. Denton*, Dearsly C. C. 3; 18 Q. B. 761. *Commonwealth v. Marshall*, 11 Pick. 350. *Commonwealth v. Kimball*, 21 Pick. 373. *Commonwealth v. Herrick*, 6 Cush. 465, 467. *Commonwealth v. Pattee*, 12 Cush. 501. *Commonwealth v. Davis*, 11 Gray, 50. *Flaherty v. Thomas*, 12 Allen, 428, 435, 436. *Commonwealth v. Kelliher*, 12 Allen, 480. *Commonwealth v. McDonough*, 13 Allen, 581.

It is to be observed that repealing acts sometimes contain clauses for the purpose of keeping alive the statutes they repeal, so far as they relate to offences committed against them. As to the effect of such clauses, see *Regina v. Smith*, Leigh & Cave C. C. 131; *Commonwealth v. Edwards*, 4 Gray, 1; *Commonwealth v. Bennett*, 108 Mass. 30; *Commonwealth v. Desmond*, 123 Mass. 407.

there is some mistake in an indictment, as a wrong name or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is, for the grand jury to return a new indictment, avoiding the defects in the first. And it is no good ground of abatement, that the former has not been actually discontinued, when the latter is returned ;<sup>1</sup> and a fortiori, it is not a ground for arresting judgment.<sup>2</sup>

The pendency of an action to recover a penalty, at the time when an indictment is returned, will, if properly pleaded, defeat the indictment.<sup>3</sup> But the pendency of such action, or a recovery in it, is matter of defence, to be pleaded and proved, like a former conviction or acquittal.<sup>4</sup>

It is not a ground for arresting judgment, on an indictment containing several counts for the same offence, that one of the counts is insufficient.<sup>5</sup>

A *pardon* may not only be pleaded on arraignment in bar of the indictment, but it may also be pleaded after verdict in arrest of judgment. "Yet, certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible."<sup>6</sup>

<sup>1</sup> Commonwealth v. Drew, 3 Cush. 279, 282. Regina v. Goddard, 2 Ld. Raym. 920. Rex v. Stratton, 1 Doug. 239.

<sup>2</sup> Commonwealth v. Murphy, 11 Cush. 472.

<sup>3</sup> "It seems agreed, that wherever any suit on a penal statute may be said to be actually depending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence." 2 Hawk. P. C. ch. 26, § 63. Commonwealth v. Howard, 13 Mass. 222. Beadleston v. Sprague, 6 Johns. 101.

<sup>4</sup> Commonwealth v. Murphy, 2 Gray, 514.

<sup>5</sup> Commonwealth v. Hawkins, 3 Gray, 463. Commonwealth v. Howe, 13 Gray, 26. United States v. Plumer, 3 Clifford, 29, 68.

<sup>6</sup> 4 Stephen Comm. 404, 442, 7th ed.

If the judgment is arrested all the proceedings are set aside and the defendant is discharged. But such a result is not, like an acquittal by verdict, an absolute discharge from the matter of accusation, for the party may be indicted again.<sup>1</sup>

When the defendant is called and does not appear, the court is not required to decide in his absence a motion in arrest of judgment.<sup>2</sup>

Wherever it is necessary that a defendant found guilty by verdict of a jury should be present in court when judgment is pronounced against him, if he is at large and will not voluntarily attend in court, process may be issued for the purpose of bringing him in to receive judgment, in the same way as process is issued for the purpose of bringing an offender into court to answer to an indictment found and filed against him.<sup>3</sup>

<sup>1</sup> "If a man be convicted either by verdict, or by confession upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy, and the law wants its end." *Regina v. Vaux*, 4 Rep. 45 a. 4 Stephen Comm. 442, 7th ed. *Rex v. Burrige*, 3 P. Wms. 500, by Lord Hardwicke. *Commonwealth v. Roby*, 12 Pick. 502. *Commonwealth v. Gould*, 12 Gray, 173.

<sup>2</sup> *Commonwealth v. Dowdican's Bail*, 115 Mass. 133. *Commonwealth v. Austin*, 11 Gray, 330. *Commonwealth v. Andrews*, 97 Mass. 543. *Smith v. United States*, 94 U. S. 97. *Regina v. Caudwell*, 17 Q. B. 503. *Regina v. Chichester*, 17 Q. B. 504. *People v. Genet*, 59 N. Y. 80.

<sup>3</sup> Archb. Crim. Pl. 183, 184, 19th ed.

## CHAPTER XXXVIII.

## AMENDMENT.

VARIOUS statutes have from time to time, for more than 500 years, been passed, from the 14 Edw. III. ch. 6, downwards, to facilitate amendments; but these do not extend to Pleas of the Crown, nor to any proceeding upon them.<sup>1</sup> And there is no difference, at common law, as to the doctrine of amending, between civil and criminal cases.<sup>2</sup> But as an indictment is the finding of a grand jury upon oath, it cannot be amended, at common law, even with the consent of the prisoner.<sup>3</sup>

An indictment once found, presented, and filed, is unalterable. If it is found to be defective in a matter of form, as the name or addition of the defendant, in practice, it is sometimes recommitted to the grand inquest, to be amended with their concurrence, and again returned to the court. But the correct practice is for the grand inquest to return

<sup>1</sup> Blackamore's Case, 8 Rep. 162 *b.* 2 Hawk. P. C. ch. 25, § 97. Lord Mansfield in *Rex v. Wilkes*, 4 Burr. 2570. *State v. Squire*, 10 N. H. 560. *Commonwealth v. Child*, 13 Pick. 200. Ante, p. 314, 315.

<sup>2</sup> 1 Saund. 250 *d.* 1 Tidd, 711. Lord Mansfield in *Rex v. Wilkes*, 4 Burr. 2567. *Young v. State*, 6 Ohio, 435.

<sup>3</sup> *Rex v. Wilkes*, 4 Burr. 2527, 2567 et seq., where the doctrine of amendments is critically investigated. *Commonwealth v. Mahar*, 16 Pick. 120. *People v. Campbell*, 4 Parker C. C. 386. *State v. Squire*, 10 N. H. 558. *Commonwealth v. Phillipsburg*, 10 Mass. 78.

a new indictment. And this is the practice which generally obtains in this country. "Amendments are rarely made in practice," say the English Criminal Law Commissioners. "In principle they cannot be made in respect of any fact or circumstance which depends on evidence given; if the fact so required to be added were wholly immaterial, the want of it could not and ought not to make any difference, it would be but surplusage; but if material, there would be just the same reasons for requiring it to be on oath as is applicable to any other essential fact."<sup>1</sup>

An indictment cannot, except where it is otherwise expressly provided by statute, be amended in matters of substance.<sup>2</sup> The amendment of an indictment, by order of court, certainly strikes a person familiar with the practice and principles of the common law with surprise. The strange anomaly is presented, that new averments are introduced on the record as sanctioned by the oath of a grand jury, when they have in fact been inserted at the discretion of the judge. A grand jury has no more power to authorize a judge to amend an indictment than they have to authorize him to find one. A statute of Massachusetts provides that, when, on the trial of an indictment, in a certain class of cases, the descrip-

<sup>1</sup> 8th Rep. p. 74, Art. 65, A.D. 1845. The reader will find the practice at common law stated in the following authorities. Kel. 57, note, 3d ed. 2 Hawk. P. C. ch. 25, § 98. 2 Gabbett Crim. Law, 257. 1 Chit. Crim. Law, 297. 1 Stark. Crim. Pl. 259. Rex v. Evett, 6 B. & C. 251. 2 Russell on Crimes, 326 note, 327 note. Per Alderson, B., in Regina v. Law, 2 M. & Rob. 197.

<sup>2</sup> 8th Rep. of Eng. Crim. Law Comm. p. 112, Art. 85, A. D. 1845.

tion of a previous conviction shall be found to be imperfect, inexact, or in any respect variant from the record, it may be amended at any time before final judgment, so as to conform to the record, without the formality of sending the case back to the grand jury, to find a new indictment, in order to state such record fully and correctly. And it has been decided that such an amendment is not a violation either of the letter or spirit of the provision of the Declaration of Rights, which directs that no citizen shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him.<sup>1</sup>

“The object of the Declaration of Rights,” said Chief Justice Shaw, “was to secure substantial privileges and benefits to parties criminally charged ; not to require particular forms, except where they are necessary to the purposes of justice and fair dealing towards persons accused, so as to ensure a full and fair trial.” This decision proceeded on the ground that such prior conviction is a collateral fact and is a part of the indictment, which derives no increased weight from the finding of the grand jury, and one upon which they pass no judgment, but merely report the prior conviction, to be verified and identified wholly by the production of the record. They aver no fact resting on testimony, except that of identity of the person charged with the person before convicted. Sed quære. The indictment charges an offence aggravated by the fact of a prior conviction, the effect of which is to increase the punishment.

<sup>1</sup> Commonwealth v. Holley, 3 Gray, 458. Commonwealth v. Hall, 97 Mass. 570. Ante, p. 251.

The general issue of not guilty is a denial of every material allegation in the indictment. It is not merely a negation of the principal charge. It goes to say, that the defendant under the circumstances is not guilty of the aggravated offence imputed to him. The very question of his identity he is entitled to have submitted to the jury; and an omission on the part of the government to prove it, is ground for a new trial.<sup>1</sup> A general verdict of guilty finds that he is the same person.<sup>2</sup> And every essential allegation he is entitled to have "fully and plainly, substantially and formally, described to him," *before* plea pleaded, under the oath of the grand jury.

Defective criminal *informations* are amendable, at common law, at the discretion of the court at any time before the trial. There is a settled difference between amending indictments, and amending informations. Indictments are found upon the oath of a grand jury; but informations are as declarations at the suit of the government. An officer has the right of framing them originally; and may with leave amend, in like manner as any plaintiff may do. Amendments upon informations are so much a matter of course, that they are even made on an application to a judge at chambers. If the amendment can give occasion to a new defence, the defendant has leave to change his plea.<sup>3</sup>

<sup>1</sup> *Regina v. Willis*, L. R. 1 C. C. 362, 364. *Commonwealth v. Briggs*, 5 Pick. 429. Ante, p. 249.

<sup>2</sup> Per Wilde, J., in *Commonwealth v. Briggs*, 5 Pick. 430.

<sup>3</sup> *Rex v. Wilkes*, 4 Burr. 2527, 2568, 2569. *Rex v. Holland*, 4 T. R. 457. *Rex v. Charlesworth*, 2 Strange, 871. *State v. Weare*, 38 N. H. 314.

Mere clerical omissions in the records of courts, even in criminal prosecutions, can be supplied by amendment.<sup>1</sup>

<sup>1</sup> 3 Stephen Comm. 269, 7th ed. *Commonwealth v. Taylor*, 113 Mass. 2. *Commonwealth v. Hogan*, 113 Mass. 7. *State v. Maher*, 35 Maine, 225. *State v. Craton*, 6 Ired. 164. *Welch v. Damon*, 11 Gray, 383. *Commonwealth v. Phillips*, 11 Pick. 28. *Commonwealth v. Harvey*, 103 Mass. 451.

## CHAPTER XXXIX.

## CAPTION.

“THE caption is the inception of the record, both in civil and criminal suits; it is that part of it which precedes the declaration or indictment.”<sup>1</sup>

The caption is no part of the indictment; it is merely the style of the court where the indictment was found and returned, which is prefixed as a preamble to the indictment upon the record, when the record is made up, or when it is returned to an appellate court, on a writ of error, or certiorari. The following is a form of a general caption for the term:<sup>2</sup>—

<sup>1</sup> *Territory v. McFarlane*, 1 Mart. La. 221.

<sup>2</sup> In the practice in Massachusetts and in some other of the States a caption is prefixed to every indictment and returned with it by the grand jury. This is the form which is usually adopted:—Commonwealth of Massachusetts, Middlesex, To wit: At the Superior Court begun and holden at Cambridge within and for the County of Middlesex, on the first Monday of June &c. *State v. Conley*, 39 Maine, 78. *Commonwealth v. Fisher*, 7 Gray, 492. *Commonwealth v. Edwards*, 4 Gray, 1. This form of caption is so far a part of the indictment that it may be referred to in order to ascertain the county and State in and for which the indictment is found. *Commonwealth v. Edwards*, 4 Gray, 1. *Commonwealth v. Fisher*, 7 Gray, 492. But defects in the title of the court as stated in the caption may be supplied by reference to the certificate indorsed by the clerk upon the indictment at the time of its return into court. *Commonwealth v. Mullen*, 13 Allen, 551. In the matter of time, especially, the caption is not the sole evidence; for the caption is usually entitled as of the first day of the term; and yet an indictment with such a caption may

## COMMONWEALTH OF MASSACHUSETTS.

MIDDLESEX, To wit:

At the Superior Court begun and holden at Cambridge within and for the county of Middlesex, on the first Monday of June<sup>1</sup> in the year of our Lord , before A. B., Esquire, one of the Justices of said Court, by the oath of [the grand jurors naming them] good and lawful men<sup>2</sup> of the county<sup>3</sup> aforesaid, then and there sworn<sup>4</sup> and charged to inquire for the said Commonwealth, and for the body of the county aforesaid, it is presented that C. D. of &c. continuing the indictment in the present tense.

It has been usual to insert the names of twelve grand jurors at the least in the caption, and Lord Hale says that this is necessary; for it may be the presentment was by a less number than twelve, in which

be presented by a grand jury impanelled, and for an offence committed, since that day, and may be proved by referring to the clerk's certificate thereon to have been returned after the day on which it alleges the offence to have been committed. *Commonwealth v. Stone*, 3 Gray, 453. *Commonwealth v. Colton*, 11 Gray, 1. *Commonwealth v. Hines*, 101 Mass. 33.

<sup>1</sup> If the caption states the court to have been held on an impossible day, it is fatal. *Rex v. Fearnley*, 1 T. R. 316.

<sup>2</sup> The caption must state them to be probe et legales homines. 2 Hale P. C. 167.

<sup>3</sup> In the case of *Whitehead v. The Queen*, 7 Q. B. 582, Patteson, J., expressed an opinion that the caption was bad for not showing that the indictment was found by good and lawful men of the county. In *Mansell v. The Queen*, 8 E. & B. 54; *Dearsly & Bell C. C.* 375, 407, by reasonable intendment the jurors were taken to have been good and lawful men of the county of Kent.

<sup>4</sup> The omission of the words "then and there" will be fatal on motion in arrest of judgment. *People v. Guernsey*, 3 Johns. Cas. 265.

case it is not good.<sup>1</sup> But in 1786 in the House of Lords, it was decided that the caption need not contain the names of any of the jurors.<sup>2</sup>

• It seems that no objection can be sustained to the caption of an indictment for an allegation that the grand jurors were “sworn and affirmed,” without showing that those who were sworn were persons who ought to have been affirmed, or that those who were affirmed were persons who ought to have been sworn.<sup>3</sup>

<sup>1</sup> 2 Hale P. C. 167. 1 Wms. Saund. 248, 248 *a*, 6th ed. 1 Wms. Notes to Saund. 337. A grand jury cannot consist of more than twenty-three, nor of less than thirteen. *Commonwealth v. Wood*, 2 Cush. 149. *Crimm v. Commonwealth*, 119 Mass. 326. *Rex v. Marsh*, 6 Ad. & El. 236; 1 Nev. & Per. 187; S. C. 1 Lead. Crim. Cas. 260. If more than twenty-three are sworn and sit upon the grand jury, the defendant may, if that fact appears in the caption of the indictment, bring error in law. If it does not appear there, then he may bring error in fact. *Rex v. Marsh*, *ubi supra*.

<sup>2</sup> *Aylett v. The King*, 3 Bro. P. C. 529; 6 Ad. & El. 247 note.

<sup>3</sup> *Mulcahy v. The Queen*, L. R. 3 H. L. 306, 322.

## CHAPTER XL.

## WRIT OF ERROR.

“UPON judgments given in our ordinary courts of justice,” says an ancient sage, “the law doth admit and allow *writs of error* to be brought, without any touch or dishonor to the judges.” In the case of *O’Connell v. The Queen*, Lord Campbell said:<sup>1</sup> “The spirit of our jurisprudence supposes that judges are fallible, and anxiously provides the means of correcting their mistakes, by motions for new trials, bills of exception, writs of error, and appeals.” This declaration of the common law is part of the statute law of Massachusetts. The Gen. Sts. ch. 112, § 3, enacts that the Supreme Judicial Court “shall have general superintendence of all courts of inferior jurisdiction, to correct and prevent errors and abuses therein, where no other remedy is expressly provided, and may issue writs of error, and all other writs and processes to courts of inferior jurisdiction, necessary to the furtherance of justice and the regular execution of the laws.” And it is to be observed that in criminal cases it is never too late to revise what has been done; and if, at any time, it appears that a prisoner is entitled to an advantage, though the objection is made out of time, the court will always anxiously endeavor to give him the benefit

<sup>1</sup> 11 Clark & Finnely, at p. 414.

of it, and find out some way in which he may avail himself of it.<sup>1</sup>

A writ of error is a writ, issuing from an appellate court, directed to the judge or judges of an inferior court of record, proceeding according to the course of the common law, requiring him or them to send the record and proceeding with all things concerning the same, of the complaint, indictment or information in which final judgment has been rendered and in which error is alleged, to be sent to that court which is authorized to review and examine the record, and on such examination and a consideration of the errors assigned, to affirm or reverse the judgment according to law.

A writ of error is at once a certiorari to bring the transcript of the record into the court of error, and a commission to the judges of that court to examine into that record, and affirm or reverse the judgment according to law.<sup>2</sup>

At common law, a writ of error, though duly allowed and served, does not operate as a supersedeas in a criminal case in which the party was imprisoned under a sentence, or in a civil case so far as to supersede a levy of execution which had begun before the allowance of the writ of error.<sup>3</sup>

In Co. Litt. 288 a, it is said: "A writ of error lyeth when a man is grieved by an error in the foundation, proceeding, judgment, or execution, and thereupon it is called breve de errore corrigendo. But

<sup>1</sup> Per Buller, J., in *Rex v. Tilley*, 2 Leach C. C. 670.

<sup>2</sup> Per Williams, J., in *Alleyne v. The Queen*, 5 El. & Bl. 401.

<sup>3</sup> *Rex v. Wilkes*, 4 Burr. 2537 et seq. *Bryan v. Bates*, 12 Allen, 207. *Kendall v. Wilkinson*, 4 El. & Bl. 688.

without a judgment, or an award in nature of a judgment, no writ of error doth lie; for the words of the writ be, *si iudicium redditum sit*:<sup>1</sup> and that judgment must regularly be given by judges of record, and in a court of record, and not by any other inferior judges in base courts, for thereupon a writ of false judgment doth lye." The same general principle is laid down, and has been frequently recognized, in various cases. Still however it must be admitted "that the cases run into each other in no small degree; not so much from any defects in the rules of distinction, but from the indistinctness of the cases."<sup>2</sup>

A writ of error lies to reverse a judgment of a justice of the peace;<sup>3</sup> and to reverse a judgment of a judge of probate, when criminal jurisdiction of offences cognizable and punishable by proceedings strictly according to the common law is conferred on him by statute.<sup>4</sup> It does not lie from the Supreme Court of the United States to the Circuit Court in a criminal case.<sup>5</sup>

A writ of error is a writ grantable *ex debito iustitiæ*,<sup>6</sup> and may be brought at any time after judgment

<sup>1</sup> *Mansell v. The Queen*, 8 E. & B. 54; *Dearsly & Bell C. C.* 375.

<sup>2</sup> *Ex parte Cooke*, 15 Pick. 237, 238.

<sup>3</sup> *Thayer v. Commonwealth*, 12 Met. 9.

<sup>4</sup> *Fitzgerald v. Commonwealth*, 5 Allen, 509.

<sup>5</sup> *United States v. Plumer*, 3 Clifford, 1. *Ex parte Gordon*, 1 Black, 503.

<sup>6</sup> *Thayer v. Commonwealth*, 12 Met. 10. See *Ex parte Newton*, 4 El. & Bl. 869; 16 C. B. 97. There is a statutory restraint and qualification of the right of suing out a writ of error, in a capital case, which does not exist in other criminal cases. *Webster v. Commonwealth*, 5 Cush. 394. *Green v. Commonwealth*, 12 Allen, 163.

is rendered.<sup>1</sup> It does not lie for the government in a criminal case.<sup>2</sup> It is the right and privilege of the defendant to bring a writ of error, and reverse an erroneous judgment; but he may well waive the error, and submit to and perform the judgment and sentence, without danger of being subjected to another conviction and punishment for the same offence.<sup>3</sup> Where two are convicted on an indictment jointly charging them with a crime, they may join in a writ of error to reverse the judgment.<sup>4</sup>

In criminal cases error lies to reverse the judgment of an inferior court against the defendant notwithstanding he had the right of appeal, which it is contended, said Mr. Justice Wilde, "takes away the remedy by writ of error, by reasonable implication; and in civil actions it has been so decided; the remedy by appeal being considered as the easier and more beneficial remedy. But in criminal cases, so far from the remedy by appeal being an easier and more beneficial remedy for the convict, it not unfrequently happens that he is wholly unable to avail himself of that remedy, by reason of his inability to procure sureties to recognize with him for prosecuting his appeal, and abiding the order of court thereon. To decide in such cases, that the convict's

<sup>1</sup> In *Tynte v. The Queen*, 7 Q. B. 216, judgment was reversed on error, after a lapse of one hundred and sixteen years.

<sup>2</sup> *People v. Corning*, 2 Comst. 1; S. C. 1 Lead. Crim. Cas. 599. *Commonwealth v. Cummings*, 3 Cush. 212; S. C. 1 Lead. Crim. Cas. 604. *State v. Kemp*, 17 Wis. 669. The cases are collected in 1 Lead. Crim. Cas. 611, 612.

<sup>3</sup> *Commonwealth v. Loud*, 3 Met. 328. *Commonwealth v. Keith*, 8 Met. 532, 533.

<sup>4</sup> *Sumner v. Commonwealth*, 3 Cush. 521.

right to sue out a writ of error, to reverse an erroneous judgment, has been taken away by a reasonable implication, would be a hard decision, and cannot be warranted by any of the reasons given for the decisions of the court in civil suits.”<sup>1</sup>

The law is well settled that after final judgment in a court of record, proceeding according to the course of the common law, the only remedy is by writ of error. But where the court below is not a court of record, or does not proceed according to the course of the common law, error will not lie, and the proper remedy is by certiorari.<sup>2</sup>

A writ of certiorari (when not used as ancillary to any other process) is in the nature of a writ of error, addressed to an inferior court or tribunal whose procedure is not according to the course of the common law. After the writ has been issued and the record certified in obedience to it, the court is bound to determine, upon an inspection of the whole record, whether the proceedings are legal or erroneous; but the granting of the writ in the first instance is not a matter of right, and rests in the discretion of the court, and the writ will not be granted unless the petitioner satisfies the court that substantial justice requires it.<sup>3</sup>

A writ of habeas corpus is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the

<sup>1</sup> *Ex parte Cooke*, 15 Pick. 234, 239. *Thayer v. Commonwealth*, 12 Met. 9. *Barnett v. State*, 36 Maine, 198, 200, 201.

<sup>2</sup> *Ex parte Cooke*, 15 Pick. 237.

<sup>3</sup> *Farmington River Water Power Co. v. County Commissioners*, 112 Mass. 206, 212. *Tewksbury v. County Commissioners*, 117 Mass. 564. *Locke v. Lexington*, 122 Mass. 290.

course of the common law. It is only by writ of error that such judgment, according to the course of the common law, can properly be reversed.<sup>1</sup> The distinction is this: If a warrant of commitment be issued by a court of general jurisdiction, although it be erroneous and not conformable to law, it will stand good, unless examined and reversed by writ of error or otherwise; but if a court of special and limited jurisdiction exceed the authority conferred, and issue a warrant of commitment, the judgment is void, and not merely voidable, and the commitment under it is illegal, and may be inquired into on habeas corpus, and if the commitment is wrong the party may be discharged.<sup>2</sup>

The rule expressed in the maxim, *Omnia rite acta presumuntur*, is especially applicable to the action of courts of general jurisdiction, in regard to which it will always be assumed that their decisions are well founded, and their judgments regular. Nothing will be intended to be without the jurisdiction of a superior court but that which specially appears to be so; and nothing will be intended to be within the jurisdiction of an inferior court but that which is expressly alleged.<sup>3</sup>

A writ of error lies for every *substantial* defect appearing on the face of the record, for which the

<sup>1</sup> Riley's Case, 2 Pick. 172. Commonwealth v. Whitney, 10 Pick. 439. Feeley's Case, 12 Cush. 598. Adams v. Vose, 1 Gray, 56. Ex parte Watkins, 3 Peters, 193. Commonwealth v. Lecky, 1 Watts, 66. Ex parte Lees, El. Bl. & El. 828, 836. Fleming v. Clark, 12 Allen, 194, 195.

<sup>2</sup> Jones v. Robbins, 8 Gray, 330. Herrick v. Smith, 1 Gray, 49.

<sup>3</sup> Commonwealth v. Sholes, 13 Allen, 396, 397. Gosset v. Howard, 10 Q. B. 359, 452.

indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment, provided such defect is not cured by verdict. It lies for irregularity in awarding the jury process, for any material defect in the caption, for irregularity in the verdict or judgment or any manifest error on the face of the record.<sup>1</sup> It does not lie to revise exceptions which can only be taken in abatement,<sup>2</sup> nor to correct irregularities in papers which belong to the files and are collateral to, and are not strictly part of, the record.

If in an indictment for perjury on which judgment has been given, it does not appear that the oath upon which the perjury is assigned has been taken in a judicial proceeding, the judgment will be reversed.<sup>3</sup> If an indictment for obtaining property by false pretences does not allege any ownership of the property obtained the omission is a fatal defect.<sup>4</sup> An indictment charging a conspiracy to cheat and defraud was held insufficient on error, for not setting out the names or designating the class of persons intended to be defrauded. The defect on which the Court of Exchequer Chamber acted in this case was, that the indictment charged a conspiracy to cheat and defraud *certain subjects being trades-*

<sup>1</sup> 4 Stephen Comm. 464, 7th ed. Archb. Crim. Pl. 203, 204, 19th ed. The nature of the objections upon which this writ may be founded, have already been considered in treating of the several kinds of defects in the indictment, caption, and process, none of which, it seems, are cured by verdict.

<sup>2</sup> *Turns v. Commonwealth*, 6 Met. 225, 235.

<sup>3</sup> *Overton v. The Queen*, 4 Q. B. 90; 2 Moody C. C. 263. *Lavey v. The Queen*, 17 Q. B. 500, 501; 2 Denison C. C. 504.

<sup>4</sup> *Sill v. The Queen*, Dearsly C. C. 132; 1 El. & Bl. 553. *Regina v. Ward*, 7 Irish Com. Law Rep. 324.

*men*. It was held that such an allegation in such form in, pleading meant *certain definite tradesmen alleged to be known to the defendants at the time of the criminal agreement*, and, therefore, that such definite tradesmen ought, in describing the conspiracy, to be named, or an excuse be averred for not naming them.<sup>1</sup> If there had been added after the words *being tradesmen* the phrase, *who should thereafter deal with the defendants*, the indictment would have been sufficient. A statute makes an offence to consist in threatening "either verbally or by any written or printed communication," to accuse &c. An indictment which contains no averment that the threats charged were made in either form, is fatally defective on error. The words "either verbally or by any written or printed communication" are part of the description of the offence; and neither being averred in the indictment, no offence at all is charged.<sup>2</sup> In *Moore v. Commonwealth*,<sup>3</sup> which was an indictment for adultery, judgment was reversed because there was no allegation in the indictment that the woman was the wife of a person other than the party indicted for the adultery.

Where the defendant challenges a juror peremptorily, and the crown demurs, and judgment is wrongly given by the court in which the trial is proceeding against the defendant's right to a peremptory challenge, a court of error will reverse the whole pro-

<sup>1</sup> *King v. The Queen*, 7 Q. B. 798. Judgment of Brett, J. A., in *Regina v. Aspinall*, 2 Q. B. D. 62, 63. Judgment of White-side, C. J., in *White v. The Queen*, Irish Rep. 10 Com. Law, 529, 530.

<sup>2</sup> *Robinson v. Commonwealth*, 101 Mass. 27.

<sup>3</sup> 6 Met. 243.

ceedings.<sup>1</sup> So, also, where a challenge to the array is improperly overruled, it is error.<sup>2</sup> Error also may be assigned on a special verdict where judgment has been passed on the defendant;<sup>3</sup> and on the omission of the allocutus, or demand of the defendant what he has to say why judgment should not proceed against him.<sup>4</sup> And error lies to reverse a sentence of additional punishment erroneously awarded on an information.<sup>5</sup>

Duplicity in pleading is not ground for error.<sup>6</sup>

If the judge in the exercise of his discretion discharge the jury on the ground of necessity, such exercise of his discretion cannot be reviewed in a court of error.<sup>7</sup>

Where one of two counts in an indictment is bad, and the defendant is found guilty and sentenced, generally, the presumption of law is, that the court awarded sentence by the law applicable to the offence charged in that count; and error will not lie to reverse the judgment, if the sentence is warranted by the law applicable to the offence charged in that count.<sup>8</sup>

<sup>1</sup> *Gray v. The Queen*, 11 Clark & Finnelly, 427.

<sup>2</sup> *O'Connell v. The Queen*, 11 Clark & Finnelly, 155.

<sup>3</sup> Archb. Crim. Pl. 205, 19th ed. The celebrated case of *Regina v. Chadwick*, 11 Q. B. 205, 206, is an instance.

<sup>4</sup> *O'Brien v. The Queen*, 2 House of Lords Cases, 465, 494. *Safford v. People*, 1 Parker C. C. 474. See *Jeffries v. Commonwealth*, 12 Allen, 146, 154.

<sup>5</sup> *Riley's Case*, 2 Pick. 165. *Ex parte Cooke*, 15 Pick. 234. *Wilde v. Commonwealth*, 2 Met. 408.

<sup>6</sup> *Nash v. The Queen*, 4 B. & S. 935. Ante, p. 128.

<sup>7</sup> *Winsor v. The Queen*, L. R. 1 Q. B. 289; 6 B. & S. 143. *United State v. Perez*, 9 Wheat. 579; S. C. 1 Lead. Crim. Cas. 461, and note. *Coleman v. State*, 97 U. S. 521. *Commonwealth v. Purchase*, 2 Pick. 521.

<sup>8</sup> *Brown v. Commonwealth*, 8 Mass. 64. *Jennings v. Commonwealth*, 17 Pick. 80. *Josslyn v. Commonwealth*, 6 Met. 236.

Where an indictment contains several counts, it is not ground of error that no verdict has been given on some of them, provided a verdict has been found on one good count, and judgment given generally. For where an indictment consists of several counts they are to all intents and purposes several indictments, and the same as if separate juries were trying them; and the fact that one count has not been disposed of by verdict no more affects the proceedings with error than if there were two or more separate indictments.<sup>1</sup>

If the whole record be not certified, or not truly certified, by the inferior court to which the writ of error is directed, the plaintiff in error, as well in criminal as in civil cases, may allege a diminution of the record, showing that part of the record has been omitted and remains in the inferior court not certified, and a certiorari will be awarded. Thus, where it was objected, on argument of a writ of error from the Queen's Bench to the Exchequer Chamber, that mention of a motion in arrest of judgment in the court below did not appear on the face of the record, it was held that it was then too late to take the objection, and Parke, B., remarked that, in order to raise the question, the plaintiff in error should have alleged a diminution of the record.<sup>2</sup>

The plea in nullo est erratum is in the nature of a

<sup>1</sup> *Latham v. The Queen*, 5 B. & S. 635, 642, explaining *Rex v. Hayes*, 2 Ld. Raym. 1518. *Edgerton v. Commonwealth*, 5 Allen, 514, distinguishing *Baron v. People*, 1 Parker C. C. 246.

<sup>2</sup> *Dunn v. The Queen*, 12 Q. B. 1026, 1035 note. 2 Saund. 101 z, 101 aa. *Commonwealth v. Roby*, 12 Pick. 296. *Turns v. Commonwealth*, 6 Met. 227, 228. Archb. Crim. Pl. 210, 19th ed. *Crimm v. Commonwealth*, 119 Mass. 326.

demurrer and puts in issue the validity of the judgment in all matters of law. This plea "in fact amounts to a demurrer: in other words, that, even admitting the facts stated in the allegation of errors to be true, there is no error on the record."<sup>1</sup> But "In nullo est erratum is no admission of the fact assigned for error, unless it could be lawfully assigned and is well assigned, in point of form."<sup>2</sup>

New errors may be assigned *viva voce* at the hearing, taking care that the adverse party is not surprised; and if the judgment is erroneous, in the particulars thus indicated, though not in the particulars assigned for error, the judgment will be reversed.<sup>3</sup>

An affirmance of a judgment, on a writ of error to which in nullo est erratum is pleaded, is a bar to a second writ of error to reverse the same judgment for any error apparent on the record when it was brought before the court on the first writ. But where the error arises from matter subsequent to the former decision, and which did not then exist, a new writ of error may be brought, and such new matter assigned for error.<sup>4</sup>

When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, though it is erroneous in part only, it must be wholly reversed.<sup>5</sup>

Where a prisoner brings two writs of error at the same time, one to reverse an original judgment, and the other to reverse a sentence to additional punish-

<sup>1</sup> *Irwin v. Grey*, L. R. 2 H. L. 23.

<sup>2</sup> *Rex v. Carlile*, 2 B. & Adol. 362.

<sup>3</sup> *Booth v. Commonwealth*, 7 Met. 287. *Green v. Commonwealth*, 12 Allen, 164. *Wells v. Commonwealth*, 12 Gray, 330.

<sup>4</sup> *Booth v. Commonwealth*, 7 Met. 285, 286.

<sup>5</sup> *Christian v. Commonwealth*, 5 Met. 530.

ment founded on an information which sets forth such original judgment as one of the grounds of such additional punishment; if the original judgment is reversed, the sentence on the information falls with it, and will also be reversed, if the error assigned be a matter of mere law apparent on the record, although the original judgment was in full force when the writ of error was brought to reverse the sentence on the information.<sup>1</sup>

If the court below has pronounced an erroneous sentence, the court of error has no authority at common law, to pronounce the proper judgment, or to remit the record to the court below, but are bound to reverse the judgment and discharge the defendant.<sup>2</sup> And it makes no difference whether the mistake was in his favor by way of an award of sentence, less than the statute requisition, or against him by way of a greater.<sup>3</sup> And this rule applies to a case where a sentence had been awarded, to take effect after the expiration of a former sentence, and the prisoner had brought a writ of error to a hearing before the expiration of the former sentence.<sup>4</sup>

In Massachusetts the Gen. Sts. ch. 146, § 16, enacts that: "When a final judgment in a criminal case is reversed by the Supreme Judicial Court on

<sup>1</sup> *Hutchinson v. Commonwealth*, 4 Met. 359.

<sup>2</sup> *Rex v. Ellis*, 5 B. & C. 395. *Rex v. Bourne*, 7 A. & E. 58. Per Lord Campbell, C. J., in *Holloway v. The Queen*, 17 Q. B. 327, 328. *Regina v. Drury*, 3 C. & K. 192. *Shepherd v. Commonwealth*, 2 Met. 419. *Christian v. Commonwealth*, 5 Met. 530.

<sup>3</sup> *Wilde v. Commonwealth*, 2 Met. 408. *Stevens v. Commonwealth*, 4 Met. 360. *Rice v. Commonwealth*, 12 Met. 247. *Haynes v. Commonwealth*, 107 Mass. 194, 198.

<sup>4</sup> *Christian v. Commonwealth*, 5 Met. 530.

account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had.”<sup>1</sup> “The court are of the opinion,” said Chief Justice Shaw, “that this act is not *ex post facto*, or retrospective in its legislative action. It relates to future proceedings in writs of error in criminal cases, and it is not retroactive in an obnoxious sense, because it relates to writs of error on past judgments. It relates solely to remedies, and a writ of error is purely remedial. In legal effect, it directs that writs of error in criminal cases shall only be brought on certain conditions, one of which is, that, if the error is only in the award of punishment, it shall be set right. In this the law is analogous to one in civil cases, which provides that a judgment shall not be reversed for any formal error, which might have been avoided by amendment. In this there is no hardship and no departure from just principles of legislation. . . . It is argued that this statute disturbs the symmetry of the common law. That is nothing more than a figurative expression, if it mean that it does more than every other statute does. All statutes are intended to modify the common law, to affect remedies and future proceedings of various sorts. The question is, simply, whether it disturbs the fundamental principles of right, and we think it does not.”<sup>2</sup>

Upon the reversal of a judgment against any per-

<sup>1</sup> The St. 11 & 12 Vict. ch. 78, § 5, contains like provisions. See the observations of Lord Campbell, C. J., on this section of the statute, in *Holloway v. The Queen*, 17 Q. B. 317; 2 Denison C. C. 287.

<sup>2</sup> *Jacquins v. Commonwealth*, 9 Cush. 279.

son convicted of any offence, the judgment, execution, and all former proceedings become thereby absolutely null and void. If living, he (or if dead, his heir or personal representative, as the case may be)<sup>1</sup> will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him.<sup>2</sup>

It is to be observed, that if the reversal has proceeded on the ground of technical error in the indictment, or subsequent process, the defendant will remain liable to a second prosecution, as if he had succeeded upon a demurrer, or motion in arrest of judgment; because the ends of public justice have not been satisfied, either by his final conviction or acquittal; and he may, therefore, be again indicted for the same offence, and detained in custody for that purpose. Where the execution alone is erroneous, that only will be reversed, and all the previous steps of the prosecution remain valid.<sup>3</sup>

<sup>1</sup> *Tynte v. The Queen*, 7 Q. B. 216.

<sup>2</sup> *Archb. Crim. Pl.* 215, 19th ed.

<sup>3</sup> 2 *Hawk. P. C.* ch. 50, § 19. 2 *Gabbett Crim. Law*, 580. *Regina v. Drury*, 3 C. & K. 190.



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