

CONE v. CONE.

Actual imprisonment in the state prison under a sentence for more than a year is a cause of divorce, not suspended by a bill of exceptions on which the conviction may be reversed.

LIBEL, for divorce. The cause alleged and proved was the defendant's actual imprisonment in the state prison, under a sentence for more than a year, for manslaughter. A bill of exceptions, for the reversal of the judgment, is pending. A divorce was decreed, and the defendant excepted.

Copeland and *Quarles*, for the defendant.

Hill, for the plaintiff.

DOE, C. J. The defendant's actual imprisonment under the judgment is a cause of divorce. The statute does not recognize the reversible character of such judgments as a reason for suspending their operation in proceedings for divorce. Gen. St., c. 163, s. 3.

Exception overruled.

BINGHAM, J., did not sit.

STATE v. TAPPAN.

An indictment, upon Gen. St., c. 259, s. 3, for attempting "to procure another to commit perjury," should, expressly or otherwise, allege the materiality of the testimony which the defendant solicited. The allegation of facts which show that the testimony probably was material, is not sufficient.

INDICTMENT, upon Gen. St., c. 259, s. 3, for attempting to procure certain persons to commit perjury. The indictment sets forth the testimony which the defendant is accused of attempting to procure, but does not expressly aver that it was material. The facts alleged show that it probably was, but not that it must have been, material. The defendant demurred.

Copeland, for the defendant, cited 8 Gratt. 629; *People v. Collier*, 1 Mich. 137; *State v. Norris*, 9 N. H. 96; *State v. Dodd*, 3 Murph. 226; *State v. Wall*, 9 Yerg. 347; *Hinch v. State*, 2 Mo. 158; *State v. Hayward*, 1 N. & McCord 546; *Weathers v. State*, 2 Blackf. 278;

Com. v. Knight, 12 Mass. 277; *Com. v. Pollard*, 12 Met. 229; *Com. v. Byron*, 14 Gray 31; Wharton Cr. L., s. 2263; 2 Russell on Crimes (7th Am. ed.) 639, 642.

Carter, solicitor, for the state, cited *State v. Holding*, 1 McCord 31; 2 Arch. Cr. L. & Pl. 1749, 1750, notes; *State v. Keyes*, 8 Vt. 57; *State v. Carpenter*, 20 Vt. 9.

DOE, C. J. The statute might be violated by an attempt to procure the commission of perjury, without a specification of the desired testimony. If the defendant did not know what particular evidence he wanted, its materiality might be proved. It would not be presumed that he wanted, and intended and was understood to solicit, proof of something immaterial. But, whether the evidence solicited is known or unknown, and whether it is or is not set forth in the indictment, its materiality must be proved, and must be alleged expressly, or otherwise. The allegation of facts which show that the testimony probably was material, is not sufficient.

Demurrer sustained.

BINGHAM, J., did not sit.

KELLEY v. WOODWARD.

58	153
69	230

Whether a verdict is against the evidence is a question of fact, to be decided at the trial term.

TRESPASS. The defendant excepted to the refusal of the judge at the trial term to set aside a verdict for the plaintiff, as being against the evidence.

Copeland and Eaton (of Maine), for the plaintiff.

Hastings, F. Hobbs, and Eastman, for the defendant.

FOSTER, J. The question whether a verdict is contrary to the evidence is a question of fact, to be decided by the judge presiding at the trial. *Fuller v. Bailey*, ante, p. 71; *Lefavor v. Smith*, ante, p. 125; *Hill v. New Haven*, 37 Vt. 501, 512; *Clark v. Congregational Society*, 45 N. H. 333, 334.

Exception overruled.

ALLEN, J., did not sit.