SENATE.....No. 29.

Commonwealth of Massachusetts.

In Senate, Jan. 27, 1840.

Ordered, that the Committee on the Judiciary inquire what alterations, if any, are needed in the law of evidence, in relation to the proof of marriages, in cases of divorce, and in criminal cases.

Attest,

CHARLES CALHOUN, *Clerk.*

Commonwealth of Massachusetts.

In Senate, Feb. 21, 1840.

The Committee on the Judiciary, who were directed by an order of Jan. 27, 1840, to inquire what alterations, if any, are needed in the law of evidence, in relation to the proof of marriages, in cases of divorce and criminal cases, having considered the subject, ask leave respectfully to

REPORT.

The first object of investigation by your Committee was the present state of the law with respect to the subject above referred to them. The present rule of law, both in cases of divorce and in criminal proceedings, appears to be that marriage cannot be proved by cohabitation, nor by the direct admission of the party attempted to be charged, that he is married, nor by circumstantial evidence sufficient to satisfy the tribunal before which the trial is had, of the fact. The fact of the ceremony of marriage having been performed, must be proved either by the testimony of a witness present, or a certificate, or an authenticated copy of the record of the marriage. In addition to this, it must be proved that the officiating person was by the law of the government in which the ceremony was performed, authorized

to perform it, and that he actually sustained the office by virtue of which he assumed to act in the matter; and it must be further proved, that the person on trial is the individual described in the certificate, or proved to have been married.

It will readily be perceived that in criminal proceedings, especially where testimony by depositions on the part of the government is inadmissible, and where there is no power to compel the attendance of witnesses from another State, to say nothing of cases where the marriage was performed in another government, a compliance with these rules will very often be difficult, and frequently impracticable—and as a consequence, many guilty persons must go unpunished, and many persons entitled to a release from the marriage tie, fail of obtaining it. The difficulty is more frequently experienced when the marriage has been performed out of the limits of the Commonwealth; but it is often insuperable when the ceremony has been performed within it. It is often impracticable to discover where or by whom a person was married. Persons are frequently married by a magistrate or clergyman, who is a stranger to their persons. How, if the officiating person can be discovered, is the identity to be proved after a lapse of years? Suppose, further, that the officiating clergyman is dead, or gone to the far west, or south, how is this difficulty to be got over?

For all these reasons it seems desirable, (and this is believed to be a prevalent opinion among those whose experience in cases of this kind has been most extensive,) to provide that cohabitation, admission, or circumstantial evidence, shall be received as competent evidence of the fact of marriage; the effect of it to be

weighed by the jury or the court ; the person charged having, of course, the right to introduce any evidence in his power to produce, showing that he is not legally married. The person charged, cannot with reason, complain of this rule. He is living with a woman as his wife. He enjoys all the privileges and immunities of that relation. If he is not married, and he knows it, he is liable to the same punishment for lewd and lascivious cohabitation, as is provided for adultery. The law presumes every thing innocent and rightfully done. There is then no hardship in requiring from him a performance of all the duties growing out of that relation, and inflicting on him the proper penalties for their violation, especially as he is permitted, if he chooses, and can do so, to prove that he is not in fact married.

Nor, in the adoption of this rule, would there be any violation of general principles. The rule that the highest evidence must be produced, is qualified by the provision that it must be in the power of the party to produce it. This power does not exist in criminal prosecutions where the marriage was without the limits of the Commonwealth ; and, in other cases, the reasons which (owing to the extreme difficulty and inconvenience of complying with the rule,) have led to its relaxation in various instances, apply with equal or greater force to the evidence requisite for proof of marriage. The whole alteration contemplated by the Committee is in effect little more than an extended application of a rule of evidence which the Supreme Court sanctioned in the case of Newburyport *v.* Boothbay, 9 Mass. 414.

It may further be remarked, that, as the law now stands, the proof of marriage, when it can be had, is often very expensive. Witnesses from other States can only

be procured by agreeing to give them such a sum for their attendance, as they think to be a sufficient compensation; and, in very many cases, it is understood that the proof of the marriage costs the Commonwealth more than all the other expenses in the trial. It is believed that in practice, the proof of the marriage is generally more difficult than that of the fact charged. The moral effect of this state of things in giving frequent impunity to crime, must necessarily be very bad.

Your Committee report the annexed bill.

By order of the Committee.

GEORGE T. DAVIS.

Commonwealth of Massachusetts.

In the year One Thousand Eight Hundred and Forty.

AN ACT

Relating to the Evidence of Marriage.

BE *it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows :*

Whenever, in the trial of any criminal case, or hearing of any application for divorce, the fact of marriage is required or offered to be proved, evidence of admission of said fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, from which said fact may be inferred, shall be received as competent evidence for consideration, whether the marriage to be proved was contracted in this Commonwealth, or elsewhere.