Alien Gun Law, Alienage, How Proven. Evidence, That Defendent Is Alien. Burden of Proof, Exceptions Named in Law.

It is not necessary for the state to prove or allege the exception named in the law, unless the same is a substantial part of the law, and named in the title.

If alienage of defendant is shown to have existed at any time, the burden is on him to prove that he was not an alien at the time of the offense.

Chapter 38, Laws of 1913, known as "Alien Gun Law," is constitutional.

July 1, 1914.

Hon. J. L. DeHart,
State Game and Fish Warden,
Helena, Montana.

Dear Sir:

I am in receipt of your letter making certain inquiries, and from the statement of facts therefrom adduced the following propositions:

"1. Is Chapter 38 of the Laws of 1913, known as the 'Alien Gun Law,' in derogation of the constitution, either of the state or of the United States?

"2. In a prosecution under this law, is it necessary for the state to prove affirmatively that the accused was an alien at the time of the alleged commission of the offense?

"3. In such a case is it necessary for the state to prove

affirmatively that the accused was not at the date of the alleged commission of the offense:

"a. In possession of the twenty-five dollar hunting license named in the act?

"b. A bona-fide resident of the state and the owner of not less than one hundred and sixty acres of land?

"c. A settler on the public lands of the state and in process of acquiring title thereto under the land laws of the United States?

"d. Engaged in herding animals held in herd?"

The title of said Chapter 38, in so far as it has relation here-to, reads:

"An Act to provide that aliens shall pay a gun license."

None of the exceptions contained in the body of the act are in any manner named or referred to in the title. The title is to the effect that an alien must obtain a license before he is permitted to be in possession of fire arms.

"Where defendant who relies as a matter of defense on an exception in a statute, which is not in the enacting clause by which the offense is described and forbidden, he has the burden of proving that he is within the exception."

12 Cyc. 382.

State vs. Blackley, 138 W. C. 620, 50 S. E. 311.

This doctrine has several times received the endorsement of the Supreme Court of this state.

Territory vs. Burns, 6 Mont. 72;

State vs. Williams, 9 Mont. 179;

State vs. Tully, 31 Mont. 365.

All the matters referred to in the third question are clearly exceptions "stated in the statute." Neither are the exceptions or any of them "ingredients of the offense declared by the statute." Hence, it is not necessary for the state either to plead or prove them.

Territory v. Burns, 6 Mont. 72.

It is also a rule, almost if not entirely universal, that:

"Where the particular facts are peculiarly within the knowledge of the accused, the offense may be averred generally."

22 Cyc. 306.

"Where the subject matter of an negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse relates to him personally or otherwise, lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him."

12 Cyc. 381-2.

State vs. Casto, 231 Mo., 398, 132 S. W. 1115;

State vs. Wilson, 62 Kansas, 621, 64 Pac. 23.

In California it has been held:

"In a prosecution for illegally practicing medicine, the burden is on accused to show that he had a license to practice as required by law, since it is a matter peculiarly within his own knowledge.

People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402.

It is also a statutory provision that:

"A thing once proved to exist is presumed to continue as long as is usual with things of that nature."

Where, therefore, it has been shown that the accused was at any time an alien, that condition is presumed to continue until the contrary is made to appear, for there is not any presumption of law or of fact that an alien became naturalized; nor is there any presumption of law that an alien obtained the license mentioned in said Chapter 38; or that he is a bona-fide resident of the state, and the owner of land therein; or that he is a settler on the public lands of the state; or that he is engaged in herding animals of any kind. All these matters are clearly matters of defense, and the burden of proof rests with the defendant. The prosecution must undoubtedly prove that the accused was at one time an alien, and that he had fire arms in his possession. That is the gravamen of the charge, and it is against that which the statute is specifically directed, but when the state has once proven that the accused was an alien, and that he had possession of these fire arms, the offense is complete. All else is a matter of defense. This alienage of the accused may be proven in any manner by which any other fact may be shown, that is by any evidence which establishes the fact. The testimony of witnesses who know of the defendant's place of birth, or of the admission of the defendant, or the race to which he belongs, or his language or any other incident or facts, which would tend to show that he was at any time an alien would be admissable. The Act is constitutional.

Patsone v. Penn. 232 U. S. 138.

Yours very truly,

D. M. KELLY,
Attorney General.