public morals by an open profession of prostitution, but it likewise endangers the public peace and good order, by drawing together profligate and disorderly persons. It is, therefore, an indictable offence at common law to keep such a house. And not only may the keeper of the house be indicted for the nuisance, but the owner of the property, letting it with knowledge that it is to be used for the purposes of prostitution. 3 Pick. 26; 4 Denio, 129; Whart. Cr. Law, 2d ed., 703.

In this view, the general power of a corporation to adopt such police regulations as are not incompatible with the Constitution and general laws of the state would suffice to give validity to the ordinance in question.

2. It is insisted that the judgment is erroneous, because it is on a ground not described in the ordinance. Two things, only, it is said, are prohibited by the ordinance: First, keeping a house of *ill fame;* and, secondly, permitting one's house *to be kept in a disorderly manner.* It is argued that, as "a house of ill fame" [**358**] is, in law, a thing very different from a "disorderly house;" and that, although the charge made against the defendant in the warrant is, in effect, for suffering his house to be kept as a "disorderly house," yet, by the charge of the court, he is made liable for a different offence, and one not created by, or defined in, the ordinance — namely, permitting his house to be used for the purposes of a *bawdy-house.*

This reasoning is more ingenious than sound. The ordinance defines what is intended to be understood by permitting a house to be kept *in a disorderly manner* — namely, "a house to which men resort for the purpose of criminal intercourse with lewd women," and not a "*disorderly house,*" in the technical sense of the law. In this view, the charge of the court is correct, and the judgment proper.

3. The supposed matter in abatement was waived by the omission of the defendant to avail himself of it at the proper time, and in the proper manner. Agee *v.* Dement, 1 Humph, 332, 335.

4. There was no error in allowing the amendment. By the act of 1852, ch. 152, sec. 6, amendments in *penal actions* and civil suits are placed upon the same footing.

Judgment affirmed.

L. G. WILLIAMS *v.* R. T. ADAMS.

Nashville, December, 1855.

CONTRACT — DELIVERY. In a contract for the sale of goods, to be delivered in a particular town or city, the law is satisfied if the vendor adopt the most usual and convenient mode in the kind of trade in question, for delivery. Thus, in a contract by which a vendor sells a number of hogsheads of tobacco, at a specific price per cwt., to be delivered

in a designated town, it is not necessary that the delivery shall be made to the vendee personally; but it is sufficient if delivery be made, in the absence of the vendee, at a warehouse where the vendee was in the habit of receiving tobacco purchased by him. If the contract be in other respects complied with, the risk becomes that of the vendee from the moment the tobacco is so delivered; and the mere fact that the net weight is unascertained, does not vitiate such delivery. [Cited, on the last point about the net weight, in Fitzpatrick *v.* Fain, 3 Coldw. 19.]

FROM MONTGOMERY.

[359] This suit was instituted by Adams against Williams, in the circuit court of Montgomery, to recover the value of eight hogsheads of tobacco, sold by the former to the latter, at a specified price per cwt., to be delivered in Clarksville. The tobacco was delivered in good order at a certain warehouse in Clarksville, where the defendant, as a tobacco merchant, was in the habit of receiving tobacco purchased by him. The tobacco was weighed by the warehouseman, and the receipts thereof handed over to the plaintiff. It seems, however, that the defendant was not present at the delivery, and did not see the plaintiff from the time of [360] the purchase until after the loss of the tobacco by fire, which occurred in the destruction of the warehouse, a short time after the delivery. At the September term, 1855, before Judge Pepper, there was verdict and judgment for the plaintiff. The defendant appealed in error.

Shackleford, *Robb*, and *Bailey*, for the plaintiff in error; *Hornberger* and *House*, for the defendant in error.

CARUTHERS, J., delivered the opinion of the court.

This suit was brought to recover the value of eight hogsheads of tobacco, destroyed by fire, in a warehouse in Clarksville, on the night of the 18th of June, 1855, at which it had just before been delivered by Adams, under a written contract of sale to Williams.

The contract was as follows: "An agreement between L. G. Williams and R. T. Adams. I have this day sold to said Williams nine hogsheads of tobacco, more or less, to be delivered in Clarksville in good order and condition. For said tobacco, when delivered, the said Williams is to pay said Adams six dollars per hundred, and two dollars for each hogshead, in current Tennessee bank-notes; as witness our hands and seals. April 18th, 1854."

In compliance with this agreement, Adams delivered, on the 1st, 6th, 12th, and 14th of June, eight hogsheads of tobacco, two on each day, for which he took the receipts of the keepers of the warehouse, Barker [361] & Diffenderffer in which the number and gross weight of each were set forth. These receipts were in favor of Adams, and were never delivered to Williams, nor had he paid for the tobacco, or performed any act in relation to it, the parties having never met after the delivery and before the fire.

On the 16th of June, two days after the delivery, and two days before the fire, Williams addressed the following letter to Adams:

"*Clarksville, June 16, 1854.*

"*Mr. Adams.*

"DEAR SIR: I regret I did not see you the other day. I was confined at home by sickness. I must beg you to wait a little while for the money for your crop of tobacco. For some time past, our banks have been doing nothing, so that it is out of the question now to get money. I think by the 1st July this state of things will become bettered, if not wholly obviated, when, as usual, money can be had. I will write you again at what time to come down. I will cheerfully pay you interest until a settlement is had, starting from this day. Please let me hear from you."

It appears from the post-mark on this letter that it did not reach Adams till after the fire, and nothing further appears in relation to it, except that it reached Adams, and is by him produced for the purpose of showing that Williams considered the tobacco delivered, and that he was bound to pay for it.

Under this state of facts, the question is, Upon whom shall the loss fall? This, as is conceded by [**362**] the argument on both sides, depends upon the question of delivery — whether that was complete in fact and in law. There is no controversy as to the order and condition of the tobacco. That is well established, by the proof, to have been as required in the contract.

His honor the circuit judge charged to the effect that the delivery was complete, and the title passed to the purchaser; and there was a verdict and judgment for the plaintiff for $823.60, the value of the tobacco at the price agreed upon in the contract.

Adams was, by the contract, to deliver the tobacco "in Clarksville." No particular place was designated, either in the writing or verbally. In such cases the law is satisfied if the most usual and convenient mode, in the kind of trade in question, is adopted by the vendor having a due regard to the security, interest, and presumed expectations and probable wishes of the vendee. Story on Sales, sec. 305. It is not necessary, to constitute a good delivery of articles of this description, that it shall be made to the vendee personally. If the agreement be that the articles shall be delivered in a town or city generally, the place must depend very much upon the usages of that particular trade; or, rather, the understanding and intention of the parties, nothing appearing to the contrary will be construed to have been in conformity to such general usage. If, then, all men, or men generally, engaged in the tobacco traffic, have the article delivered at a warehouse, and, more particularly, if it appears, as it does in this case, that this particular dealer had the tobacco purchased by him thus delivered, and mostly

[363] at this particular warehouse, then, so far as the place is concerned, this delivery will be considered in conformity to the contract of parties. Any place in Clarksville would be a literal compliance with the writing; but its fair interpretation would require it to be at some warehouse, if such was the usual course in that kind of trade. It is also proved that Williams and his agents were in the habit of directing the delivery of tobacco purchased for him at this warehouse. There can be no question as to this point of the case.

But it is, secondly, insisted that although there may be no objections to the place of deposit or the question of delivery, yet the right of property had not been so transferred as to place it at the risk of the vendee in the warehouse, because the delivery was not complete, as something still remained to be done by the vendor. What else had he to do, under the contract? It was delivered at the proper place, as we have seen, "in good order and condition," weighed, and stored away, ready for the buyer, where he was in the habit of ordering tobacco purchased by him to be deposited; at which it was his custom, as well as that of others engaged in the trade, to receive their purchases. But it is said, before his duties closed and his right to the money accrued, the net weight of the tobacco must have been ascertained; and, until that time, the risk was not changed.

We do not concur in this position as applicable to the state of facts in this case. There was nothing remaining to be done but the deduction of the weight of the hogsheads from the gross weight; and this was [364] too small a matter to prevent the transfer of the risk. It was the duty of the purchaser to be there, by himself or agent, to receive and pay for the tobacco; and his failure to do so will not have the effect to continue the risk of the vendor, who had done all in his power to pass the property, under and in compliance with his contract. Under the circumstances of this case, the warehousemen may be regarded as his agents to receive for him; and such is the finding of the jury, under the charge of the court, on that point.

But all difficulty that might have existed in this case, as to the delivery, is cleared away by the acknowledgment of the defendant in his letter. By that it is made manifest that he considered the delivery complete, and that he was then liable for the price agreed upon.

The judgment is affirmed.